



Province of
British Columbia

Environmental Appeal Board

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DECISION NOS. 2006-WIL-005(a) and 2006-WIL-016(a)

In the matter of two appeals under section 101.1 of the *Wildlife Act*, R.S.B.C. 1996, c. 488.

BETWEEN:	Pacific Northwest Raptors Ltd.	APPELLANT
AND:	Regional Manager and Director Ministry of Environment	RESPONDENTS
BEFORE:	A Panel of the Environmental Appeal Board Alan Andison, Chair Richard Cannings, Member David Ormerod, Member	
DATE:	October 6 and 7, 2006, concluding in writing on November 7, 2006	
PLACE:	Victoria, BC	
APPEARING:	For the Appellant: Gillian Radcliffe For the Respondents: Joseph G. McBride, Counsel	

APPEALS

Pacific Northwest Raptors Ltd. ("PNWR") appeals two decisions which impact its ability to free-fly certain owls, as well as its ability to both breed raptors and perform wildlife rehabilitation at the same facility. The Environmental Appeal Board heard these appeals together.

Appeal No. 2006-WIL-005

PNWR appeals the March 15, 2006 decision of Dick Heath, Regional Manager, Vancouver Island Region, Environmental Stewardship Division (the "Regional Manager"), Ministry of Environment (the "Ministry"). The Regional Manager refused to allow PNWR to "free-fly" a Spectacled Owl or any other non-native owls in PNWR's possession.

The Regional Manager also stated that, before issuing a permit for wildlife rehabilitation, the Ministry would be required to cancel any raptor breeding agreement that PNWR may have with the province.

Appeal No. 2006-WIL-016

PNWR also appeals the July 20, 2006 issuance of Permit VI06-22074 (the "Permit") by Al Martin, Director, Environmental Stewardship Division, Fish and Wildlife Branch of the Ministry (the "Director"). The Director incorporated into the Permit the above decisions of the Regional Manager, and imposed additional restrictions on free-flying and trafficking in regard to a number of eagles and owls in PNWR's possession.

Throughout this decision the Regional Manager and the Director will be collectively referred to as "the Respondents".

The Environmental Appeal Board has the authority to hear these appeals under section 93 of the *Environmental Management Act*, and section 101.1 of the *Wildlife Act*, R.S.B.C. 1996, c.488 (the "Act"). On an appeal, section 101.1(5) of the *Act* provides that the Board may:

- (a) send the matter back to the regional manager or director, with directions,
- (b) confirm, reverse or vary the decision being appealed, or
- (c) make any decision that the person whose decision is appealed could have made, and that the board considers appropriate in the circumstances.

PNWR requests that the Board:

- reverse the decision of the Regional Manager;
- vary the Permit to allow PNWR to possess, transport, free fly and traffic in raptors (excepting any wild origin birds) without restrictions as to their flying activities; and
- vary the Permit by removing the requirement that PNWR's raptor breeding agreement with the Ministry would have to be cancelled before it could obtain a permit for wildlife rehabilitation.

BACKGROUNDGeneral

PNWR is a Bird of Prey and Falconry Center located in Duncan, BC. It is currently owned and operated by Gillian Radcliffe, a Registered Professional Biologist. Ms. Radcliffe has a Master's degree in ecology and has worked as a wildlife ecologist for over 20 years. PNWR's current activities include bird of prey flying demonstrations, falconry courses, tours of its facilities, educational programs, children's summer camps and school programs, film and media work and nuisance bird control. PNWR is primarily an educational facility and operates under a commercial permit. Most of the birds of prey used at the centre are captive bred, not wild birds, with the exception of a small number of permanently disabled wild raptors.

PNWR started its commercial falconry operations in February 2002 conducting bird control and falconry courses with a number of legally imported captive bred birds from Ontario. It held a commercial falconry permit for Class I and Class II falconry birds that permitted free flying, although the import permits for its eagles had a

condition that they not be free flown. PNWR held education permits respecting its owls and a small number of non-releasable disabled birds.

After receiving a number of inquiries regarding the use of its owls and eagles in film, television and photographs, PNWR decided that it could expand its business if it had a permit allowing it to free fly owls and captive-bred eagles.

After considerable discussions between Ministry personnel and PNWR in 2003 and into 2004, the Ministry issued a permit in August of 2004. This permit allowed the free flying of certain birds not typically flown for falconry in BC, such as golden and bald eagles and a number of owls for educational, media-related and nuisance wildlife control purposes.

Also in August 2004, the Ministry issued PNWR an import permit for a variety of birds with no conditions on free flying. At the same time, PNWR agreed to carry \$2,000,000 in public liability insurance for its activities in free flying these raptors.

From 2004 to 2005, PNWR imported captive bred eagles and owls for commercial falconry and educational purposes. PNWR is developing specific programs for these species, based on demand from the public, especially schools, and has contractual obligations that depend on these birds. PNWR also has contracts to conduct daily raptor flying demonstrations at Grouse Mountain Wildlife Refuge in North Vancouver, and educational demonstrations at the BC Wildlife Park in Kamloops.

The two raptors of particular relevance to these appeals were imported during this period. They are a captive bred male Eurasian¹ Eagle Owl named Dante (the "Eagle Owl"), and a Spectacled Owl named Elton.

Neither owl is indigenous to BC. The Eagle Owl (*Bubo bubo*) is a large species which occupies a variety of habitats, from coniferous forests to warm deserts, and is found throughout North Africa, Europe, Asia and the Middle East. It is generally banned from live import into BC by regulation. The Spectacled Owl (*Pulsatrix perspicillata*) is a medium-sized owl found in dense tropical rainforest and dry forest, treed savanna, plantations and open areas with scattered trees in Mexico, Central America and the Northern two-thirds of South America.

THE EAGLE OWL

On March 16, 2005, PNWR was issued an import permit for a hybrid falcon and for the Eagle Owl for commercial falconry and educational purposes. No restrictions or conditions regarding free flying were included in the import permit.

PNWR imported the Eagle Owl specifically for flying demonstrations and has spent considerable time flying and working with this bird for demonstrations and falconry work since its arrival.

¹ In the permit documents, the owl is referred to as a "European Eagle Owl". However, in many of the documents, and throughout the hearing, it was called a "Eurasian Eagle Owl". Both terms appear to be acceptable for the species *Bubo Bubo*.

After it obtained the Eagle Owl, the Ministry advised PNWR that the import permit was issued in error. In a letter dated June 22, 2005, Gerad Hales of the Ministry stated:

On March 16, 2005, you were issued a permit (VI05-10246) to import one (1) captive-bred female [sic] European Eagle Owl (*Bubo bubo*) band # DG49 ...for commercial falconry and educational purposes. This permit was issued in error.

The Permit Regulation lists several species of wildlife that are prohibited from importation into the province. Due to their size and potential to displace native raptor species, African and European Eagle Owls have been placed on this list (as have eagles that are not indigenous to British Columbia).

This issue was brought forward to the Director of the Fish and Wildlife Recreation and Allocation Branch on June 21, 2005. The Director stated that:

1. the permittee should retain possession of the eagle-owl;
2. the permittee must make a reasonable effort to prevent the eagle-owl from breeding/hybridizing with other raptor species; and
3. the eagle-owl not be sold, traded, bartered, given away or exchanged with any other person without prior approval from the Fish and Wildlife Recreation and Allocation Branch.

It is understood that you are using the Eagle Owl for educational purposes. It is asked that you make a reasonable effort to prevent the Eagle Owl from escaping into the wild. Should the Eagle Owl escape from your facility, please contact the Fish and Wildlife Recreation and Allocation branch immediately.

Please understand that this permitting error was internal to the ministry, and in no way reflects on you or your facility. Future applications to import live eagle Owls or non-indigenous eagles will be rejected....

It should be noted that on July 18, 2005, the Ministry removed PNWR's captive bred eagles and owls from the commercial falconry permit and included them on an education permit along with a number of non-releasable injured wild birds. This education permit authorized PNWR to "Possess and keep in captivity for public display, raptors (see Appendix B) that are legally held captive in the Province of British Columbia, for educational purposes...". This permit did not contain any restrictions on flying the birds and PNWR continued to regularly free fly them for its various business activities.

The Spectacled Owl

In February 2006 PNWR applied for an import permit for a captive bred, 2-year-old male imprint² Spectacled Owl for “educational programs/demonstrations”. At this time, the Ministry advised PNWR that, as the Spectacled Owl was a non-native species, a permit would have a condition that once it was imported, it must be kept behind double doors or tethered, i.e., no flying outdoors on a line or otherwise.

PNWR pursued the permit which was issued on February 21, 2006. It authorized PNWR to:

Import one (1) live captive bred 2 year old male Spectacled Owl (Pulsatrix perspicillate), Band #5196232620 82, from the African Lion Safari Game Farm Ltd. in Cambridge, Ontario for educational purposes.

The permit also contained the following conditions:

2. The permit holder is not authorized to use the Spectacled Owl for falconry purposes or for free flying displays at any time.
- ...
6. The permit holder must ensure that the cage in which the Spectacled Owl is housed has double doors and the Spectacled Owl is tethered at all times if it is outside of the cage to reduce the likelihood of escape.

The raptor breeding agreement and the application for a wildlife rehabilitation permit

In a letter dated June 15, 2005, PNWR requested authorization to breed raptors for its own use and for possible future commercial sale and trade. The letter states that the “primary goal in breeding at present is thus to simply have a ready supply of good birds for use in our school and for flying demonstrations and for some hunting.”

On June 21, 2005, PNWR and the province executed a “breeding agreement” which recognized Ms. Radcliffe as a breeder of raptorial birds. The agreement also states that she may export from the province “young raptors produced by captive breeding”, provided that all legal requirements pertaining to capture, possession and export permits are met.

According to the documents entered into evidence, in 2003 and 2004, prior to the breeding agreement, the Ministry issued PNWR a permit to provide a short-term

² Imprinting is the term used in zoology to describe the rapid learning process by which, at a critical period early in life, the bird forms strong and lasting attachments. Imprinting occurs when a newborn or very young bird establishes a behaviour pattern of recognition and attraction to another bird of its own kind or to a substitute or an object identified as the parent. In this case, the Spectacled Owl is imprinted on humans, not another owl, and thus does not recognize other owls as its species.

care rehabilitation facility (these permits are valid for one year). Although not provided to the Board, it appears that PNWR applied to renew or continue with this permit in 2005.

By letter dated July 25, 2005, Mr. Hales of the Ministry responded to PNWR. He notes that PNWR had applied for a permit to perform short-term rehabilitation for injured wildlife, primarily raptors. Mr. Hales denied the application for the following reasons:

It is the policy of the wildlife program not to issue a person permits for both commercial breeding and rehabilitation, simultaneously. ... This policy is based on the potential conflict-of-interest these two activities represent.

Mr. Hales then outlined two options available to PNWR: (1) maintain its commercial breeding agreement with the province and be prohibited from rehabilitating wild raptors or (2) cancel its breeding agreement and continue the application process to obtain a rehabilitation permit.

The Regional Manager's Decision (Appeal No 2006-WIL-005)

On February 21, 2006, PNWR wrote a letter to the Regional Manager and others raising a number of issues. Regarding the Spectacled Owl, PNWR advised that the permit is, in effect, of no use to PNWR because of the condition that the "permit holder is not authorized to use the Spectacled Owl for falconry purposes or for free flying displays at any time." PNWR said that this condition had never appeared on any previous import permits and that "we have no desire to purchase a bird like this to have it sit in a cage." It asked the Regional Manager to "consider revising or removing this new import permit condition."

In a separate letter of the same date, PNWR wrote to the same people regarding two additional issues, one of which was Mr. Hales' decision denying the rehabilitation permit. PNWR states,

In 2004, we were issued with a rehabilitation permit. In 2005, we were sent a letter saying our rehabilitation permit was denied, as we had entered into a breeding agreement with the province. However, no-one pointed this out even as a possibility when we applied for a breeding agreement, and in fact it places us in an almost impossible situation in a variety of ways, which we would also like to discuss and resolve.

In response to PNWR's correspondence, the Regional Manager issued his March 15, 2006, decision. He states:

I am writing with regard to your letter of February 21st, 2006 in which you requested permission to free fly the Spectacled Owl at your facility.

The policy that guides my decision on this request was developed to facilitate the flying of traditional birds for hunting purposes. It should be noted that the majority of owls (including all non-native owl species) are not considered traditional falconry birds in British

Columbia because they are essentially nocturnal animals with no history of use for hunting. Also, with some exceptions based on long standing falconry practice, only native North American birds are permitted for falconry. Other raptors may be permitted to be possessed for educational and/or scientific purposes in British Columbia but they must not be free flown. Therefore in response to your request I am not prepared to authorize the free-flying of the Spectacled Owl or any other non-native owls in your possession.

The primary issue I have considered in my decision is the precedent that would be established if I approved your request. Any such approval would undoubtedly precipitate additional applications from other falconers to fly non-native species that pose at least some risk of establishing feral populations. We appreciate that you may feel your particular circumstances do not constitute a significant threat in that regard but the ministry must remain cognizant of a larger picture.

...

You also indicated in your correspondence a desire to obtain a permit for wildlife rehabilitation. As it is against our policy to permit both commercial breeding and rehabilitation in the same facility or property, we would be required to cancel any raptor breeding agreement you may have with the province before issuing a rehabilitation permit. The rationale for the policy rests with the potential conflicts between breeding birds and operating a rehabilitation program. ...

The Director's Decision (Appeal No. 2006-WIL-016)

On March 16, 2006, PNWR forwarded a number of permit applications to the Ministry to cover the fiscal year 2006-07 to possess and transport its raptors for public display.

It also submitted an application to allow PNWR to "capture, receive, transport, possess, euthanize and dispose of injured wildlife (specifically raptors)" – an application to provide short-term rehabilitation. To address the Ministry's concerns about conflict of interest, PNWR states "perceived potential conflicts of interest between rehabilitating wild raptors and having our own breeding program can be addressed through third party consultation. That is, PNWR will not be the party responsible for determining if a wild raptor is non-releasable".

Following numerous emails and a meeting involving PNWR and Ministry employees, the July 20, 2006 Permit was issued to PNWR by the Director. Of specific concern to PNWR are the flying and trafficking restrictions. The Permit limits trafficking, import and export to Class 1 and Class II raptors, as specified in Appendix B to the Permit. Appendix B does not include the Eagle Owl and Spectacled Owl, nor does it include PNWR's eagles.

Regarding flying, Appendix C places significant restrictions on the Spectacled Owl and the Eagle Owl, in particular. For these two raptors, the Permit restricts these birds to education/display only. In addition, the Spectacled Owl is prohibited from

free flying, and the Eagle Owl must be "caged only, unless sterilized". Appendix C is as follows:

EDUCATIONAL RAPTORS (LIVE & DEAD)

LIVE RAPTORS:

COMMON NAME	SEX	BAND NO.	FLYING STATUS RESTRICTIONS*
Bald Eagle	M	...	BC & EDFF
Bald Eagle	F	...	BC & EDNF
Barn Owl	M	...	EDFF
European Eagle Owl	M	...	EDC
Golden Eagle	F	...	BC & EDFF
Great Horned Owl	F		EDFF
Great Horned Owl	M		EDFF
Snowy Owl	M	...	EDFF
Spectacled Owl	M	...	EDNF

***FLYING STATUS RESTRICTIONS:** None of the birds in the table above are to be free flown for recreational falconry purposes, but some may be free-flown as per the definition of the codes below.

FLYING STATUS:

BC May be flown for nuisance bird control
 EDFF Free-flying for Education/Display allowed
 EDNF Education/Display; no free flying allowed
 EDC Education/Display; caged only, unless sterilized

The Permit also authorizes PNWR to possess and transport injured raptors for the purposes of short-term temporary rehabilitation, but includes condition 11 in Appendix A, which states:

Permit holder may temporarily hold or care for injured raptorial birds brought to their attention by members of the public for the purposes of rehabilitation. *Such birds are not to be kept for rehabilitation at the permit holder's facility, but must be transferred to a designated wildlife rehabilitation centre within two weeks unless otherwise authorized by the Ministry of Environment.* [emphasis added]

The Appeals

On April 21, 2006, PNWR appealed the decisions set out in the Regional Manager's letter refusing to authorize the free flying of the Spectacled Owl or any other non

native owls, and refusing to permit both commercial breeding and rehabilitation in the same facility.

On August 2, 2006, PNWR appealed certain conditions in the July 20, 2006 Permit. The notice of appeal states:

We are appealing the decisions originally made by Mr. Dick Heath with respect to the European Eagle Owl and to the Spectacled Owl. In addition we also wish to appeal a new condition (condition 11, Appendix "A") in the permit...

... we would also like to appeal the flying and trafficking restrictions imposed by the list of live raptors in appendix "C" of the permit.

As set out earlier in this decision, PNWR asks the Board to make the following orders:

- reverse the decision of the Regional Manager;
- vary the Permit to allow PNWR to possess, transport, free fly and traffic in raptors (excepting any wild origin birds) without restrictions as to their flying activities; and
- vary the Permit by removing the requirement that PNWR's raptor breeding agreement with the Ministry would have to be cancelled before it could obtain a permit for wildlife rehabilitation.

At the request of PNWR, the Respondents agreed to a voluntary stay of condition 11 in Appendix A of the Permit (the condition restricting possession for rehabilitation to a period of two weeks), and agreed that the Eagle Owl would be allowed to be flown on a training line until the resolution of the appeal.

ISSUE

The issues to be determined in these appeals are as follows:

1. Whether the restriction against free flying and the requirement that the Eagle Owl be caged only, unless sterilized, is fair and reasonable in the circumstances.
2. Whether the restriction against free flying of the Spectacled Owl is fair and reasonable in the circumstances.
3. Whether PNWR ought to be issued a permit allowing it to keep raptors captive for the purpose of rehabilitating them.
4. Whether the imposition of a general trafficking restriction and attachment of specific free flying restriction codes on the domestic bred raptors listed in Appendix C of the Permit is fair and reasonable in the circumstances.

RELEVANT LEGISLATION, LAW AND POLICY

The *Act* provides a comprehensive scheme of wildlife management for the province, including the regulation of wildlife in captivity. Section 1 establishes that raptors

are "wildlife" and section 2 provides that "Ownership in all wildlife in British Columbia is vested in the government." Accordingly, all raptors within the province (whether wild, captive bred or imported) are legally the property of the government.

The *Act* makes it illegal for a person to possess wildlife in BC, "except as authorized under a licence or permit or as provided by regulation" (section 33). Section 22 makes it illegal to traffic in live wildlife without a permit.

Permits, such as the ones issued in this appeal, may be issued in accordance with section 4 (Director's permit), or section 19. These sections provide as follows:

Director's permits

4 The director may issue a permit in accordance with this regulation on the terms and for the period he or she specifies,

(b) authorizing a person to import into British Columbia

(i) live wildlife, or

Permits

19 (1) A regional manager or a person authorized by a regional manager may, to the extent authorized by and in accordance with regulations made by the Lieutenant Governor in Council, by the issue of a permit, authorize a person

(a) to do anything that the person may do only by authority of a permit or that the person is prohibited from doing by this Act or the regulations, ...

subject to and in accordance with those conditions, limits and period or periods the regional manager may set out in the permit and, despite anything contained in this Act or the regulations, that person has that authority during the term of the permit.

(2) The form and conditions of the permit may be specified by the director.

In addition, section 100(1) of the *Act* allows the director to do "an act or thing that a regional manager is empowered to do".

The permitting authority is "fleshed out" further in section 2 of the *Wildlife Act Permit Regulation*, B.C. Reg 253/2000 (the "*Regulation*"). This section allows a regional manager to issue a permit on the terms and for the period he or she specifies, including permits to possess, rehabilitate or traffic in wildlife.

The following sections of the *Regulation* are also relevant to this appeal:

2 A regional manager may issue a permit in accordance with this regulation on the terms and for the period he or she specifies

(f) authorizing a person to traffic in

(ii) his or her possessory interest in wildlife legally held captive, ...

...

(j) authorizing a person to possess live wildlife,

...

(m) authorizing a person to transport or engage another person to transport live wildlife within British Columbia,

(n) authorizing a person to export from British Columbia

(i) wildlife,

...

(t) authorizing a person, for the purpose of rehabilitating wildlife, to do any or all of the following:

(i) keep wildlife in captivity;

(ii) capture wildlife;

(iii) transport wildlife

(A) to a rehabilitation facility, or

(B) for the purpose of releasing the wildlife;

(iv) release wildlife;

(v) perform euthanasia on wildlife;

(vi) possess dead wildlife for the purpose of disposal,

The prohibition on importing the Eagle Owl at issue in this case is found in Schedule 1 to the *Regulation*, which states:

Schedule 1

[Section 7(1)]

For the purposes of section 7(1), live import permits must not be issued for the following wildlife:

2 Birds of the following species:

...

(b) African and Eurasian Eagle-owls;

Considering the legislation as a whole, it is apparent that its general objective is to discourage possession of live wildlife: it belongs in the wild. However, it is also clear that the Legislature envisioned some circumstances where the possession of wildlife is appropriate – even beneficial. Rather than detailing those circumstances, the Legislature provided regional managers with a broad discretion to decide whether to issue a permit to possess, rehabilitate or traffic in wildlife and whether to impose terms and conditions on those activities. This is presumably meant to ensure that the Ministry is able to be flexible and responsive to the prevailing needs and goals of society, and to the welfare and protection of wildlife and its habitat. The one limitation placed on that discretion is set out in section 5(1)(b) of the *Regulation*:

Restrictions on issuing permits generally

5 (1) Before issuing a permit under section 2, 3 or 4 the regional manager or the director, as applicable, must be satisfied

...

(b) that issuing the permit is not contrary to the proper management of wildlife resources in British Columbia.

The exercise of discretion is also properly informed by any relevant policies and guidelines. As a matter of law, such policies are relevant and are properly considered, but they cannot result in fettering of the Regional Manager's discretion.

Discretion must be exercised, and policies applied, fairly and reasonably, with a view to promoting the goals and objects of the *Act*. Certain principles of law are also implicit in a grant of discretion. For example, it must be exercised on the merits of each individual case. As noted by MacCaulay and Sprague³;

When Parliament gives a decision-maker the discretion to make a decision it expects the decision-maker to make each decision on the basis of the circumstances in each individual case....The decision-maker will err, if, rather than considering the decision on a case by case basis, it simply applies or follows earlier developed procedure or policy without considering whether that policy is appropriate to the particular case.⁴

Standing in the shoes of the regional manager and the director, this Panel of the Board must consider the issues raised in these appeals within the context of the relevant legislation, policy and the fair and reasonable exercise of discretion.

³ MacCaulay & Sprague, *Hearings Before Administrative Tribunals, Second Edition* (2002)

Relevant written policies of the Ministry on the subject of keeping live wildlife in captivity are cited in the Discussion and Analysis, below.

DISCUSSION AND ANALYSIS

1. Whether the restriction against free flying and the requirement that the Eagle Owl be caged only, unless sterilized, is fair and reasonable in the circumstances.

PNWR does not dispute the fact that the permit for the Eagle Owl was issued in error; it was issued contrary to the *Regulation*. This owl is identified in Schedule 1 of the *Regulation* as a bird which is banned from import into the province.

When the error was identified by the Ministry, discussions between the Ministry and PNWR ensued. Ms. Radcliffe testified that she advised the Ministry that PNWR was flying the owl. In her mind, when the June 22, 2005 letter was sent by Mr. Hales outlining the Director's decision to allow PNWR to keep the bird but to make "reasonable efforts" to prevent it from breeding/hybridizing with other raptor species, this resolved the matter. In her view, there were no restrictions on flying the owl contained in that letter, and this reflected the Ministry's knowledge that PNWR had been free flying the Eagle Owl. Accordingly, PNWR continued to do so.

When the Regional Manager issued his decision restricting PNWR from flying the Eagle Owl, which then became part of the Permit, PNWR felt that it had to appeal both decisions as they constituted a reversal of the earlier decision.

PNWR notes that the Ministry has provided 5 main reasons for the restriction:

- 1) the owl may be invasive.
- 2) the owl may hybridize with a Great Horned Owl
- 3) the owl is potentially very dangerous
- 4) it will set a negative precedent for other falconers
- 5) the owl may introduce disease to the native population

In response to a number of these concerns, PNWR compiled information on the Eagle Owl and prepared a draft risk assessment (2005), which was tendered as evidence at the hearing. The risk assessment addressed both the Eagle Owl and the Spectacled Owl, the latter will be addressed below under Issue #2.

With respect to the Eagle Owl, the risk assessment notes that the Eagle Owl species does breed readily in captivity, has considerable longevity, occupies a similar biome and ecological niche to, and is larger than BC's somewhat similar and taxonomically related Great Horned Owl. The risk assessment further notes that while raptors, as a group, are not generally likely to be invasive (due to their relatively low reproductive rates, long term pair bonding, high juvenile mortalities and generally low densities on the landscape), there may be exceptions. The Eagle Owl is the most commonly cited exception as there have been reports of these birds establishing themselves in parts of Europe.

Ms. Radcliffe testified that the Eagle Owl in question is a male, no larger than a female Great Horned Owl. She testified that this bird is very easy to work with, more so than her Great Horned Owls.

In regard to potential invasiveness, Ms. Radcliffe testified that the Eagle Owl is a hand-reared imprint and due to its upbringing with humans, it is unlikely to recognize other owls, even members of its own species, as potential breeding partners. Therefore, she maintains that hybridization with a Great Horned Owl, or even naturally breeding with a female Eurasian Eagle Owl, is extremely unlikely.

Further, Ms. Radcliffe testified that the Eagle Owl is only flown under very controlled conditions. It is a well trained falconry bird flown with a trained and experienced falconer. Ms. Radcliffe states that this significantly reduces the risk of loss and increases the chance of recovery should the bird ever get lost. In addition, when flown the bird is equipped with a functional transmitter that is effective up to 25-30 kms. In the unlikely event that the bird got lost or escaped, Ms. Radcliffe states that this transmitter would assist in its speedy recovery.

The risk assessment, and the witnesses at the hearing, confirm that PNWR has been flying a number of owls for several years without any being lost.

In support of its assertion that there is a minimal risk to free flying the Eagle Owl, PNWR tendered a September 15, 2006, email from Jemima Parry-Jones, M.B.E. Ms. Parry-Jones was the owner and Director of the National Birds of Prey Center in England from 1982 until November 2004, and has authored numerous publications on falconry, the care, breeding and conservation of birds of prey, training of birds of prey as well as writings specifically on owls.

In response to PNWR's questions regarding the Eagle Owl, Ms. Parry-Jones writes:

The problem with the Eurasian Eagle Owls in the UK, and those that have survived to live in the wild, has not been responsibly trained and flown birds, but rather the fact that too many have been bred in captivity and so either the wrong people have obtained them and either got bored and released them or have lost them through ignorance.

If birds are imprinted and flown with good quality telemetry there is little or no danger that they are going to be lost and set up home in BC. Firstly, if your bird is an imprinted bird it is not going to breed with another owl, it will have no interest in other owls, and will tend to ignore them..... If you fly him with telemetry then you should not lose him. Owls, even if they get upset do not go very far. Eurasian Eagle Owls are not migrants, so if you lost him, he would stay locally and if tame should readily come back to you after any upset had been got over.

I certainly would not consider one imprint male to be a threat as an invasive species.

PNWR also wrote to Dr. Eugene M. McCarthy at the University of Georgia. Dr. McCarthy is a geneticist and specialist in hybridization, and author of the

"Handbook of Avian Hybrids of the World" published by Oxford University Press in the UK in March 2006.

In response to PNWR's questions about the potential for the hybridization of an Eagle Owl and a Great Horned Owl, Dr. McCarthy states in a September 27, 2006 email:

First, regarding *Bubo bubo* [Eurasian Eagle Owl] x *B. virginianus* [Great Horned Owl], even though this cross is known from captivity, the situation doesn't seem at all dangerous for native birds. Even if your Eurasian Eagle Owl escaped and hybridized with a native *B. virginianus* their hybrid offspring almost surely would either be too infertile to pass their genes on, or if they were fertile (as many bird hybrids are) they would end up being genetically swamped out of existence (because there would be so many more native birds than the hybrids). Dangerous situations only occur when a whole population of birds invades the range of another while hybridizing with it.... Actually the fact that two birds can hybridize, as in this case, make it less likely for an introduced bird to get established. This is because the introduced birds will almost surely end up mating with natives and will become swamped and disappear. The reason the house sparrow and starling got established in North America was probably their inability to hybridize with native birds...Another fact to consider is that *B. bubo* and *B. virginianus* come into natural contact not that far from you (at least from my viewpoint) in the vicinity of the Bering Strait. I haven't seen any reports of hybridization there, but I'd say there would probably be a lot more hybrids there than there would be in British Columbia if your single bird escaped.

In light of this information, PNWR submits that the Respondents' decisions are unreasonable and unwarranted in the circumstances.

The Respondents argue that their concerns are warranted. They point out that maintain that the Eagle Owl is large and powerful, suited to the local climate, without local competition in the niche of "oversized nocturnal raptor", is related to and capable of hybridizing with a Great Horned Owl and is demonstrably capable of breeding in the wild outside its normal range. Therefore, greater precautions are needed.

The Panel notes that many of the points made by the Respondents are not contradicted by PNWR. The difference between the parties' positions is primarily in the level of acceptable "risk" related to the escape of the owl. If it is allowed to free-fly, PNWR submits that the risk of loss and the consequences of any loss are minimal. Conversely, the Respondents are of the view that, as the owner and regulator of wildlife in the province, the potential consequences to the wildlife population do not justify taking any risk, even if it is just for one owl. The Respondents' position is that non-native wildlife should not be let loose in the province unless there is *certainty* that it won't be harmful.

The Respondents argue that, given the general ban on entry, it is implicitly government policy that the Eagle Owl should not be released into the open air, regardless of whether that individual bird is likely to return on command.

Michael Chutter, the Provincial Bird Specialist with the Wildlife Section of the Ministry, is a Registered Professional Biologist who has worked for the government for many years. Mr. Chutter acknowledged that PNWR is probably one of the best practitioners in this area. However, he stated that regardless of the intent and care that is exhibited, free-flying of raptors enables the possibility of escape. In his view, even though the likelihood of the Eagle Owl getting lost is low; the consequences of it getting lost are potentially serious.

First, there is an issue with invasiveness. Although Mr. Chutter ultimately acknowledges that the chances of harm from invasiveness are limited, he is concerned that they are still greater than zero.

Second, he testified that disease is a concern. Mr. Chutter states that raptors are known to be hosts for the West Nile Virus. Once there are larger numbers of birds in captivity together the chances are greater for spreading the disease. If diseased captive birds escape to the wild, they can pass the disease along to native birds in the wild. The avian flu was another example given of a disease that can be passed to a native bird population.

Another concern expressed by the Respondents relates to the potential for the Eagle Owl to hunt endangered species. Mr. Chutter testified that there are a number of species at risk on Southern Vancouver Island and other areas of the province. While he acknowledged that the likelihood of the Eagle Owl ever getting out and attacking the endangered Vancouver Island Marmot is remote, the impact of every single animal lost would be huge. Mr. Chutter also stated that he would have very significant concerns with the Eagle Owl being flown at Grouse Mountain because that is in the heart of the Spotted Owl range and there are only 14 birds of that species remaining in the province. As Eagle Owl do eat other owls, a large owl such as this would be a concern.

Another concern of the Respondents, albeit a lesser concern, is for injury to humans and their pets. The Panel heard evidence that the Eagle Owl's diet consists of mammals, which could conceivably include small pets. There was evidence that an Eagle Owl in the United Kingdom killed a number of dogs while it was at large. Mr. Chutter stated that imprinting is an excellent way to stop a bird from breeding with other birds, but that it does bring it much closer to humans. Because the owl assumes that humans are its mate and its food source, it could attempt to land on a person should it escape. In addition, Mr. Chutter noted that there have been reports of Eagle Owls attacking people in Europe. However, the Respondents accepted that these specific risks of direct harm to pets and humans are tolerable given the requirement for \$2 million liability insurance.

While the Respondents do not support free-flying of the Eagle Owl, they accept responsibility for creating the situation and have suggested three possible options that would allow some form of flying:

- 1) allow free flying if the owl is sterilized (the Ministry has offered to pay for a qualified veterinarian to be brought in from the United States, at its expense, to perform the operation);
- 2) allow flying only while the bird is attached to a line or creance; or
- 3) allow free flying of the Eagle Owl only at PNWR's Raptor Education Centre in Duncan BC.

The third option was only provided in the event that this Panel finds that free-flying without a line is justified for the unsterilized Eagle Owl. This is not a preferred option for the Respondents.

In response to these suggestions, PNWR submits as follows. It states that sterilization is not without risks. Although the Ministry maintains that this veterinarian has successfully performed this operation in the past, PNWR submits that there is no guarantee that the Eagle Owl would survive such an operation – such operations can result in the bird's death. PNWR states that if the Eagle Owl does not survive, PNWR would be precluded from replacing the bird because of the ban in the *Regulation*.

Regarding the creance, PNWR submits that this is restrictive and is not warranted in the circumstances.

Finally, PNWR submits that given that this bird has always been flown, to restrict the bird to a cage as required by the Permit, is cruel and unfair to both the bird and to PNWR.

The Panel's Findings

PNWR occupies a limited educational and commercial falconry niche in BC. There is no dispute that its business is conducted by trained, experienced, professional biologists and falconers. The Eagle Owl was trained and integrated into PNWR's business at substantial cost, and has become a valuable addition to PNWR's collection of education birds. The evidence establishes that, prior to coming to BC, the bird was regularly flown, and that it has continued to be free flown daily in BC.

There is also no dispute that the import permit was issued in error. PNWR imported the owl in good faith, and has spent considerable time and expense in training and flying the bird for use in its educational programming.

The Panel notes that no other permits can or will be issued to PNWR or any other falconry applicants to import an Eagle Owl. The issue before this Panel is what, if any, restrictions are appropriate with respect to this bird, in these unique circumstances.

At the heart of this matter is the Ministry's concern about the serious environmental and economic consequences arising from the introduction of exotic (non-indigenous) species. There is no question that an introduced species can sometimes establish itself and "out compete" native species. Once an exotic species has established itself, that species can be very difficult to eradicate. Unfortunately, it is difficult to predict which species will be invasive until it is too late – until it is difficult, expensive or virtually impossible to eradicate the species.

In 2004, the Government of BC prepared a working document to address issues associated with biodiversity in the province titled "Invasive Alien Species Framework for BC: Identifying and Addressing threats to Biodiversity", which is intended to guide future revisions to the *Act*. The Respondents provided a copy of this document to the Panel.

The introduction to that report reads in part:

Invasive alien plants and animals present a growing environmental and economic threat to British Columbia. Conservation biologists have globally ranked invasive alien species (or "exotics") as the second most serious threat to species at risk after habitat destruction. Alien species introduction are one of the most important threats to "Red Listed" (endangered or threatened) plants and animals in BC.

...

Non-invasive alien species (such as crops, many garden plants, and livestock) are part of our everyday life in British Columbia. It would be neither desirable nor possible to eradicate them from our human and natural landscapes. A measured approach must be adopted that reflects the benefits and enjoyment we receive from alien species as well as the potential economic and environmental costs when they become invasive and result in undesirable outcomes. The framework set out in the paper does not prescribe an answer to these difficult decisions, but rather suggests actions and processes that will allow us to proceed in a manner that is based on the best available scientific and socio-economic information.

The Invasive Alien Species Framework advocates prevention as the first and most cost-effective line of defense against invasive alien species. It goes on to suggest that a coherent invasive species prevention program has three components: (1) import laws and regulations – such as lists that identify species and categories of concern, and establish means for assessing and prohibiting introductions of undesirable alien species; (2) import risk analysis procedures for assessing and monitoring the risk of introduction of alien species; and (3) quarantine and border control.

PNWR does not dispute the validity or seriousness of these general concerns, but questions their applicability, based on the science and circumstances, to its activities and the individual birds and particular species it wishes to fly.

The Panel agrees that there is a need for caution in the introduction of alien species to the province due to the environmental and economic threats that invasive alien species can have on native species and their habitat. These are not matters to be taken lightly. However, in relation to the Eagle Owl, the Panel finds that these objectives were met by the conditions set out in the June 22, 2005 letter from Mr. Hales. This letter set out the Director's decision that the Eagle Owl remain in the possession of PNWR provided that it comply with two conditions. Neither of those conditions prohibited flying. The Panel accepts that PNWR had been clear with the Ministry that it was flying the Eagle Owl, that it had been imported and permitted for commercial falconry and education purposes and that, in the absence of a

specific prohibition against flying, it had permission to continue doing so for its educational demonstrations. This decision was effectively reversed by the Regional Manager in his March 15, 2006 decision, and by the condition imposed in the Director's Permit that the Eagle Owl be caged at all times, unless sterilized.

The Panel has had the benefit of a great deal of evidence regarding the Eagle Owl and the risks associated with the owl. The Panel accepts that the Eurasian Eagle Owl could establish a breeding population in BC in the unlikely circumstance that a pair of these birds were to come together and that this is at least one reason that it is banned for import into BC.

However, because of this ban, the Panel finds that there is no risk of "setting a precedent" for other falconers, and no need to guard against other birds being imported. The Eagle Owl in question is the only one in PNWR's possession, and the only other eagle owls permitted in the province are located in Smithers, and are held in cages for scientific research purposes. The owner of these birds is not a falconer and the birds are not free flown.

Furthermore, the specific characteristics of the particular bird in this appeal are such that any risk of escape and of potential harm caused by escape, such as breeding and/or hybridizing or harm to individuals, is further reduced.

Regarding the risk of harm to humans and pets, the Panel finds that the risk is very low and is adequately mitigated by PNWR's \$2 million liability insurance.

On the evidence presented, the Panel is satisfied that the measures PNWR has taken to mitigate any risk of escape, invasiveness, disease, injury or other harm (as described above) are reasonable and adequate. They effectively render the risk of escape and the consequences to the wildlife populations in the province as negligible. The Panel is satisfied that permitting this Eagle Owl to continue to free fly as an educational demonstration bird poses no unacceptable risk to biodiversity, nor is it contrary to the proper management of wildlife resources in BC.

Accordingly, the Panel finds that the requirement that the Eagle Owl be caged unless sterilized, and the general restriction against free flying are, in these circumstances, unreasonable and unfair. The Panel finds that the risk of escape is remote. More importantly, the alleged consequences of such an escape are highly improbable with one qualification.

The Panel shares the Ministry's concern about flying very large predatory raptors in the immediate vicinity of known populations of endangered species in BC where those species are potential prey. Given that the Eagle Owl is a large raptor whose prey includes other birds of prey, including the Spotted Owl, the Panel is of the view that the Eagle Owl should not be free flown in areas known to be inhabited by this endangered species. Therefore, the Eagle Owl should not be flown on the southwestern mainland of BC, including Grouse Mountain, within the known range of the Spotted Owl.

The Regional Manager's decision and the Permit condition regarding the Eagle Owl being prohibited from free-flying, and be caged or sterilized are, therefore, rescinded.

2. Whether the restriction against free flying of the Spectacled Owl is fair and reasonable in the circumstances.

Spectacled Owls are not on the restricted list in Schedule 1 of the *Regulation*. According to information obtained by PNWR from those responsible for maintaining the North American Stud Book for Spectacled Owls, there are approximately 70 individuals of this species in facilities throughout North America. In Canada there is a breeding pair at the African Lion Safari facility in Ontario. The Spectacled Owl that is the subject of these appeals is from that pair. Ms. Radcliffe testified that this particular owl is a "fantastic education owl" that is very sociable and very "safe around kids".

PNWR advised the Panel that, prior to applying for the permit to import the captive bred, 2-year-old male imprint Spectacled Owl, it conducted some background research on the potential invasiveness of the Spectacled Owl species. Once it was satisfied that the owl was not a risk, it applied for the import permit. At that time, the Ministry advised it that as a non-native species, any permit would have a condition that once it was imported, it must be kept behind double doors or tethered. PNWR pursued the permit despite this caution.

Import permit VI06-20832 was issued to PNWR, and it included the condition that the owl be caged or tethered at all times and that it not be free flown. This restriction was subsequently confirmed in the Regional Manager's decision, and then in the Permit. PNWR submits that these free flying restrictions for the Spectacled Owl are not reasonable in the circumstances.

PNWR supports the precautionary principle and using a "red flag" approach. It does not support a blanket ban on free-flying non-native raptors. PNWR submits that if a species is truly thought to be potentially invasive, then it should be identified and excluded from the province. If not, and it is not a threat to BC biodiversity, then there is no reason why it should not be free flown using responsible falconry practices.

PNWR clarifies that it does not intend to "let loose" its raptors or to give them "free run" in the province by means of its daily free flying activities. It provided uncontradicted evidence that as falconry birds, the owls are trained to return, flown under the supervision of trained personnel and wear functional transmitters when flown. These safeguards ensure that the birds are held captive and remain in PNWR's possession at all times, even while being flown.

Tina Hein was called as a witness for PNWR. She is a biologist and has worked as the head falconer with PNWR for almost five years. Ms. Hein is responsible for the husbandry, training and flying of birds of prey for teaching falconry and educational demonstrations. She testified that PNWR flies approximately 20-30 birds each day, including owls, and that PNWR has never permanently lost an owl. She testified that, on occasion, an owl may be frightened by a horse or other event and will sit in a nearby tree for an hour or so until it feels comfortable to come back down. On rare occasions, an owl has flown off when something is chasing it. However, when this has occurred, the bird is usually within sight and has always been easily recovered. She testified that owls are not easily lost.

As noted above, PNWR submitted a draft risk assessment to the Panel. This risk assessment was created by Ms. Radcliffe in an effort to address the Ministry's concerns regarding free flying of the Eagle Owl and the Spectacled Owl. Ms. Radcliffe testified that, in conducting the draft risk assessment she performed literature reviews, internet research and she personally spoke with a number of American organizations and individuals (listed in the risk assessment) in order to determine whether there were any issues or concerns with respect to the Spectacled Owl. No issues were identified through these avenues. Ultimately, the assessed rating for the Spectacled Owl was a "1 = none". This assessment was based on the following factors:

- in the wild, neotropical environment where they naturally occur, the Spectacled Owl appears to have a low reproductive rate, seldom raising more than one chick a year. They have been bred successfully in captivity in North America since the 1960's but there are only approximately 70 individuals in North American facilities.
- there are no records of any hybridization in this species and nothing in BC's native owl fauna that is close to a Spectacled Owl (phenotype or genotype). Its appearance and behaviour bear no similarity to any native owls.
- as a species of the tropics, the Spectacled Owl is intolerant of cold weather and if it became lost it would not survive the winter in the wild.
- other factors reducing this particular bird's chances of surviving in the wild, even in summer, include that he has never hunted alone and he is conspicuously colored and would be likely to fall prey to a Great Horned Owl.
- even if he were first to escape, then survive the winter and thirdly find a potential mate, as an imprinted bird, the Spectacled Owl is not going to breed with another owl – it will have no interest in other owls, and will tend to ignore them.
- the Spectacled Owl is always flown with functional telemetry so that if the bird became upset and flew away it would be easy to locate and therefore unlikely to become lost. Unlike eagles and falcons, owls do not travel far.
- if this particular bird ever did become lost, he would approach people as food providers and companions. However, he exhibits an obvious fear response to small dogs so would be unlikely to even attempt to take a domestic pet as food.
- this Spectacled Owl is hand raised and trained to return. While a caged bird may have a lower immediate risk of loss, it is still not nil. With well trained birds, as opposed to caged birds, while there is always the small chance of loss, there is an extremely high chance of recovery of the bird.

- PNWR asked African Lion Safari to conduct a test for West Nile on their Spectacled Owl during his routine veterinary check prior to his importation from Ontario.

Ms. Radcliffe testified that, as part of her research, she spoke to Mr. Steve Sarro from the Salisbury Zoo in Maryland, U.S.A. Mr. Sarro maintains the North American Stud Book for Spectacled Owls. He told her that these birds would die after a couple of nights of sub zero weather. PNWR notes that this opinion is also held by Ms. Parry-Jones. In the September 15, 2006 email regarding the Eagle Owl, Ms. Parry-Jones also answered questions about the Spectacled Owl. She states that if a Spectacled Owl was lost in BC "it would never survive the winter, it would be dead very quickly".

Because of this owl's sensitivity to cold, Ms. Radcliffe testified that PNWR brings the Spectacled Owl indoors at night "as it gets too chilly for him and he starts to shiver."

The Respondents objection to PNWR's case is based, primarily, on a general principle. That principle is that the free flying of exotic or non-native species of owls should not be permitted. In their view, "non-native wildlife should not be let loose in the province". They note that "history is full of dramatic and costly examples of what can go wrong when humans facilitate the movement of species outside of their normal ranges."

Consequently, the Ministry's general policy is that an exotic species should not be put in a position to escape until the applicant demonstrates, *with certainty*, that the escape would be benign. The onus is then on the applicant to satisfy the regional manager or director that "issuing the permit is not contrary to the proper management of wildlife resources in British Columbia." The Respondents submit that PNWR did not meet that onus. Moreover, the Respondents point out that PNWR purchased and imported the Spectacled Owl with full knowledge that the permit to possess the bird would restrict it from free flying.

In his testimony, Mr. Chutter acknowledged that there are fewer concerns with the Spectacled Owl than the Eagle Owl. For instance, the predation concerns identified for the Eagle Owl do not apply to the Spectacled Owl, a much smaller bird. In addition to its smaller size, the Spectacled Owl does not have close relatives here; it is of a tropical origin. However, Mr. Chutter states that, as an exotic species, there are still concerns with it being free flown and the possibility of its escape.

Mr. Chutter referred to a September 2005 draft discussion document by Dr. Alastair Franke, titled "Hybrid Raptors – their use for falconry". Dr. Franke has a PhD in wildlife ecology from the University of Alberta. He currently works for the Alberta Conservation Association and is a practicing falconer.

Dr. Franke's paper was prepared in response to concerns and criticisms raised regarding the accidental loss of, and failure to recover, hybrid raptors as a result of their use in falconry. In his paper, Dr. Franke points out that there has been very little research in the area of hybridization and invasiveness. After considering data on hybrid fertility, genetic theory, natural selection and hybridization in the wild, Dr. Franke considers the current strategies used to mitigate the loss of hybrids such as sterilization, imprinting, marking and training (telemetry). He also considers

additional management strategies and makes a number of suggestions for creating a formalized process for managing the use of hybrid raptors in the province. His suggestions to better manage hybrid raptors are, in part, based upon the following conclusions:

- hybrids can be fertile,
- natural selection does not always “weed out” exotic genes, and
- imprinting in hybrids does not always prevent breeding, although it does reduce the chances.

Regarding imprinting, Dr. Franke notes:

Lost hybrids have been discovered on territories and are reproducing in the wild (Table 1). We are forced to acknowledge that either imprints can revert (i.e., ‘reverse’ their human-imprinting and select bird mates) or that full human (i.e., not dual) imprinting was not conducted in those cases. Regardless, both cases are of major concern for responsible falconers flying hybrids). (p. 12)

Mr. Chutter testified that, since there is no way to monitor and conclusively prove that a bird has been imprinted properly, it is not a guarantee against hybrid breeding. Thus, the Respondent submits that the Panel should not place too much weight on the fact that the Spectacled Owl was imprinted. Further precautions are warranted.

In response to PNWR’s submissions that the cold temperatures in the province make this owl’s survival in the wild unlikely, Mr. Chutter points out that the climate on Southern Vancouver Island is the warmest in Canada and it is getting warmer. He notes that these birds are very long lived. While he doesn’t know whether this means that Spectacled Owls could survive here, he is not 100% sure that they can not. He observes that some warm climate birds have survived here and other raptors from warmer areas in the United States have survived in Europe.

Mr. Chutter also raised the concern about the precedent that would be established by allowing this owl to free fly and the risks associated with this precedent. Since the Spectacled Owl can be imported, other falconers or bird collectors could argue that their owl should also be allowed to free fly. As more of these birds are allowed into the province, Mr. Chutter noted that the chance of escapes will increase.

Tom Ethier, Assistant Director Wildlife Branch of the Ministry, also testified at the hearing. Mr. Ethier makes many of the statutory decisions that can be made by the Director. He testified that, due to concerns about invasiveness, the threshold is generally set quite high before allowing an exotic species into the province. Although the Ministry has allowed exotics into the province to be used by zoos, the animals are generally caged; therefore, the chance of escape is reduced.

Mr. Ethier noted that some non-native species of traditional falconry birds have also been allowed into the province, but that the Ministry is reconsidering that policy.

In general, Mr. Ethier’s concern about allowing the Spectacled Owl to be free flown is grounded in “lessons learned.” He states that there are numerous examples of species coming into the province, either with authority or without, that have

created problems for native species. These problems result in cost to the taxpayer, to the Ministry, and impact other species. As a result, the Ministry now has a very minimal tolerance. Mr. Ethier testified that the Ministry's main focus or priority is now on native species and species at risk. Rather than expending scarce resources on researching exotic species to determine the actual risk to native species, the Ministry takes a precautionary approach. Mr. Ethier acknowledged that the risk of escape is low for PNWR's Spectacled Owl, but he maintains that there is still some risk which needs to be addressed.

Finally, both Mr. Ethier and Mr. Chutter noted that the Ministry is in the process of reviewing the *Act* with a view to making substantial revisions. Subjects being considered for revision include "alien species" and the possibility of creating lists, as suggested in the Alien Species strategy. Both witnesses were of the view that no decision should be made about free flying the Spectacled Owl until the review has been completed and a decision is made as to whether exotic species will be allowed for falconry.

The Panel's Findings

The list of species contained in Schedule 1 to the *Regulation* is an example of the first component of a prevention program at work. Section 2 of the Schedule specifically prohibits live import of African and Eurasian Eagle-owls, the European starling and all species of eagles that are not indigenous to BC. The Spectacled Owl is not on the prohibited list and the import permit was issued.

However, the Panel notes that, as Ministry personnel were unfamiliar with this particular bird, they sought to negate any potential - as yet unidentified - risk by prohibiting the bird from being free flown. According to the evidence before the Panel, this was done to reduce the risk of its escape and to avoid interaction with the environment and society.

When the application was received by the Ministry, the permitting officer sent an email to several Ministry staff asking, "Do you have any concerns with us issuing an import permit for this bird?" The Provincial Bird Specialist, Mr. Chutter, wrote back as follows:

This is a non-native, medium-sized owl from Central and South America. Other than that, I don't know anything about it. In principle, I don't like importing non-native species. However, we allow non-native falconry birds and also allow non-native species in zoo/game farms and this species is not on our list of "do not import species", so I don't have a policy/legislation reason to deny it. If it is allowed, then from my perspective, it must be under her [Gillian Radcliffe's] zoo permit and not be permitted for free flying displays – it must be kept caged of [sic] tethered at all times. I'd also prefer that a condition be applied that its cage has double doors to reduce the likelihood of escape.

The import permit reflected those concerns and conditions.

As noted above, the Panel heard from a number of witnesses and received in evidence a number of documents relating to the general risks associated with alien

invasive species. The Respondents rely on the principle that unless the species has been proven safe, on the basis of a published, peer reviewed literature review, one must take a precautionary approach. Therefore, the Ministry issued the import permit for the Spectacled Owl, but included the conditions preventing it from free flying for demonstrations or any other purpose. They believe that this will add a necessary measure of protection against any possible risk of escape and any potential harm arising from that escape.

The Panel agrees that a precautionary approach is appropriate in order to protect the environment and to avoid, or prevent, costly mistakes. However, that approach must be applied reasonably to the circumstances.

The Spectacled Owl is not on the prohibited list. It was checked for West Nile virus prior to its import and was found to be virus free. PNWR took steps to select a bird that it felt was safe and appropriate for its intended use.

The Panel finds that this Spectacled Owl does not pose any risk of hybridization in British Columbia as there are no wild species that it could hybridize with. The Panel is satisfied that PNWR has provided sufficient evidence to establish the negligible risk of this bird being a potential invasiveness threat even if it was temporarily lost, due to its biological characteristics, its usual habitat, its relatively small numbers in Canada and the steps taken to mitigate its escape (i.e. imprinting, training, use of telemetry).

Further, the Panel is of the view that the Respondents' concerns about setting an undesirable precedent, while valid, are overstated in this case. The nature of discretion is that it allows, in fact demands, that the individual circumstances be carefully considered and weighed. The circumstances may require that a policy is not necessarily applied exactly the same way in each case.

In this case, the Panel notes that PNWR's operation is relatively unique. The Spectacled Owl was imported by PNWR for commercial falconry for "educational programs/demonstrations" and therefore does not set a precedent for recreational falconers, or even commercial falconry for nuisance pest control. In addition, PNWR is a specialized, commercial, bird of prey educational centre, staffed by biologists and trained students and volunteers. If another business exactly like PNWR's sought a permit on the same grounds, for the same use, and had taken the same precautions (i.e. trained biologists on staff who are governed by the professional code of ethics, imprinting, use of telemetry, etc), it may be that consistency and fairness would dictate a similar result.

However, for others, such as recreational falconers, allowing the Spectacled Owl to free fly will have little if any precedential value. The Panel accepts Ms. Radcliffe's explanation that "recreational falconers are generally unlikely to want to hunt with an owl, and most unlikely to want to pay a lot of money for an owl that will need special winter housing, and that is unlikely to be a good candidate for hunting....Hunting with a hawk or falcon is much better sport." This was confirmed by the Regional Manager when he acknowledged that falconers do not routinely use owls.

Finally, the Panel has carefully considered the Respondents' submission that PNWR purchased and imported the Spectacled Owl knowing that the permit would restrict

it from being free flown. Ultimately, the Panel finds that this knowledge should not prejudice PNWR's ability to bring this appeal and to argue its case. PNWR clearly believed, and still believes, that those conditions are unfair or unnecessary. As the condition was imposed as a matter of discretion, PNWR was free to challenge it as improper or unreasonable. Accordingly, the Panel has concluded that knowing the Ministry's policy in advance should not be used against PNWR, or preclude it from having a fair hearing on the terms of the Permit.

On the whole of the evidence, the Panel is satisfied that allowing PNWR's Spectacled Owl to free fly for educational displays, raptor or falconry courses and flying demonstrations or media related work is not contrary to the proper management of wildlife resources in BC. The Panel finds that the restrictions in that regard in the Regional Manager's decision, and the Permit, are unreasonable in the circumstances.

Accordingly, the Regional Manager's decision and the Permit condition regarding the Spectacled Owl being prohibited from free-flying are rescinded.

3. Whether PNWR ought to be issued a permit allowing it to keep raptors captive for the purpose of rehabilitating them.

PNWR currently holds a commercial breeding agreement with the province and wishes to retain that agreement.

The Permit authorizes PNWR to possess and transport injured raptors for the purposes of short-term rehabilitation and includes the following condition:

11. Permit holder may temporarily hold or care for injured raptorial birds brought to their attention by members of the public for the purposes of rehabilitation. Such birds *are not to be kept for rehabilitation at the permit holder's facility, but must be transferred to a designated wildlife rehabilitation center within two weeks* unless otherwise authorized by the Ministry of Environment.
[emphasis added]

The basis for this condition is a long standing policy within the Ministry not to issue a person permits for both a rehabilitation permit and a commercial breeding permit, simultaneously.

Robert Hooton, Senior Fisheries Biologist and Section Head, Fish and Wildlife Branch, Environmental Stewardship Division, Vancouver Island Region, testified that the reason for the policy is that there "is a risk that rehabbers could retain particularly valuable birds and then breed them, and that was clearly not the intent of a rehabilitation facility." Mr. Hooton further testified that while he did not necessarily have any concerns in that regard specifically with PNWR, it was not a precedent that the Ministry would like to set. Mr. Heath also testified that he believes that the policy, while not in any way questioning PNWR's operation or Ms. Radcliffe's personal approach, is sound. The concern is the inherent risk of conflict of interest around the two activities (breeding and rehabilitation).

Mr. Chutter testified that the policy is meant to be applied fairly and equitably to everyone in the province. Even if the releasability decision was made by some unbiased third party, there could still be a perception that the person or facility that has had the bird during its rehabilitation will have an unfair advantage over other

breeders or falconers when it comes to determining who should permanently receive the bird.

In addition, he stated that there are sufficient other permitted rehabilitation facilities in the area that government can adequately meet its needs for temporary care and housing of injured wild birds, including raptors.

Finally, the Respondents submit that possessing birds for rehabilitation purposes is quite different from importing birds for business purposes. In the latter case, PNWR has a strong moral claim to possessing those birds. However, a rehabilitation permit is an authorization to possess the government's own wild birds, over which no one but the government has a moral or legal claim or attachment. In these circumstances, the Respondents submit that it is government alone that should decide what is best for its birds.

PNWR submits that the 2-week time frame set out in condition 11 is unreasonable and unfair. It submits that it should be able to conduct the full range of rehabilitation activities authorized by section 2(t) of the *Regulation*, without a time limitation. In the alternative, it seeks a rehabilitation permit with a provision allowing PNWR to keep the birds for up to six months, after which time it would seek specific permission for any special, longer-term cases. PNWR notes that a full rehabilitation permit authorizes possession of each individual animal for a period of nine months.

PNWR submits that, over the last few years, it has become known to the public as a specialized raptor resource. As such, it receives numerous raptor related enquiries, including those regarding injured raptors. PNWR states that most of these calls are deflected and most birds are taken to specific rehabilitation centers. PNWR also assists in collecting and transporting injured birds to a veterinarian; however, if the birds are raptors, they are sometimes returned to PNWR.

PNWR also states that, on occasion, it finds itself with injured or orphaned raptors, which it cares for as a public service. Ms. Radcliffe testified that sometimes it is less costly to house and feed a bird that simply needs some recovery time, than to pay staff to drive it to another center over an hour away (e.g., to Sooke or Salt Spring Island). Ms. Radcliffe also testified that members of the public sometimes bring birds to PNWR that are in need of special help. It occasionally takes on such special projects which provide staff with an opportunity to further develop their knowledge and skills with raptors. The knowledge gained through these experiences is then shared through articles, workshops, community outreach and in assisting the rehabilitation community.

Ms. Radcliffe testified that she appreciates the Ministry's concerns about conflict of interest when a facility that performs rehabilitation, can also breed raptors. However, she suggests that if PNWR considers any birds non-releasable, a third party veterinarian could assess the best placement for the bird in order to avoid such conflicts.

The Panel's Findings

The Panel finds that the current Ministry policy against issuing simultaneous permits for breeding and rehabilitation is reasonable. There is clearly a potential for conflict

of interest when both commercial breeding and wildlife rehabilitation activities are being conducted in the same facility.

There may well be other ways for the Ministry to address the real concerns around potential conflicts, some of which have been suggested by PNWR. The Ministry may wish to explore these in the future during its legislative review of its falconry and raptor policies. However, the Panel finds that the Ministry's current policy in that regard is not unreasonable in the circumstances.

Further, the Panel finds that PNWR has established no compelling reason to deviate from this policy. Accordingly, the application of the policy to the individual circumstances of PNWR is not unreasonable or unfair. The Respondents have attempted to be responsive to the unique situation of PNWR by recognizing that, as a result of its business and profile in the community, it may occasionally receive injured birds. The Ministry has allowed it to perform short term rehabilitation or transportation to a rehabilitation facility or, in special cases, to seek other authorization from the Ministry. There is no compelling evidence that this condition is unreasonable.

Accordingly, the Panel finds that condition 11 in Appendix A to the Permit is based upon the valid policy objective of protecting against both a real and perceived conflict of interest, and it is reasonable and justified in the circumstances.

4. Whether the imposition of a general trafficking restriction and attachment of specific free flying restriction codes on the domestic bred raptors is fair and reasonable in the circumstances.

PNWR opposes the flying and trafficking restrictions imposed in Appendix C of the Permit (non traditional falconry birds such as eagles and owls). PNWR submits that this restriction precludes its use of those birds for all of the normal flying activities for which they were imported, and prevents PNWR from trafficking in and/or exporting those types of birds without a separate application. It submits that it should be given, essentially, blanket trafficking permission for the live birds that are not falconry Class I or Class II raptors. [According to the Permit, PNWR may traffic in Class 1 and Class II captive raptors, and import and export Class 1 and Class II captive-bred raptors as described in Appendix B. Non Class I and II raptors, such as PNWR's eagles and the owls at issue in these appeals are caught by Appendix C.]

Appendix C prescribes which activities may be carried out with individual birds through the use of flying status definition codes. These codes prohibit or allow birds from certain activities, such as free flying.

It is apparent that under Ministry policy, raptors in general are treated differently than other wildlife in BC. According to section 2 of the *Act*, all wildlife in BC is owned by the province. However, the policy regarding raptors states as follows⁵:

⁵ Ministry of Environment Procedure Manual, Vol. 4, Section 7, Subsection 02.01, at 1.1, pg.3, "Capture, Possession and Use of Raptorial Birds", October 16, 1996.

Notwithstanding the issuance of a permit, all raptorial birds captured from the wild in British Columbia remain the property of the Crown. However, birds bred, hatched and raised legally in captivity or those legally taken in and imported from other jurisdictions will be considered the property of the owner, but their *possession, use, transfer and export* is subject to all applicable regulations and permits.

[emphasis added]

PNWR accepts that the Ministry may want to restrict the uses of wild source raptors, but sees no valid reason to merge the captive bred ones with injured wild birds, and then to limit the uses of both categories. PNWR objects to, what it describes as, the ever increasing management of captive-bred birds through changes to permits and Ministry policy. PNWR also objects to the increasing amount of paperwork required by the Ministry and the complexity of permits which, it submits, results in more errors and the requirement of increased supervision and involvement by the Ministry.

PNWR states that it supports the alien species strategy and supports applying a precautionary principle to managing resources. It also concedes that screening new species coming into the province is appropriate. However, PNWR submits that there are ways to achieve protection of native resources without blanket restrictions on entire groups of birds, prescriptions and individual bird micro-management.

PNWR argues that the Ministry's attempt to decide where, how and why PNWR flies domestic-source birds is not in keeping with the wise and proper management of the wildlife resources of BC. Further, it argues that such intervention by the Ministry diverts valuable time and money from areas that require more attention. PNWR suggests that prescribing whether flying should be by line, with transmitter or for what exact purposes, is not biologically based and that, as professional biologists/falconers, PNWR's knowledge and expertise in that regard should have bearing upon its daily choices.

The Respondents submit, and the Panel accepts, that this policy, while unusual, is meant to reflect the Ministry's acceptance that owners of captive bred or imported birds have a strong moral claim to these birds and will be considered to be the owners for most purposes. However, the province still retains legal ownership and an interest in the birds as wildlife and, as such, retains the ability to control their use and transfer.

The Ministry acknowledges that it is less concerned with captive bred birds than wild source birds, but that it still has concerns about possible invasive species. It submits that it retains the ability to manage all wildlife, whether captive bred or wild, in the interests of conservation and management of the environment and wildlife resources in BC.

The Respondents submit that the flying restrictions imposed in Appendix C are suitable to the circumstances, but that the Ministry would be willing to consider changes if specific requests are made.

In regard to the trafficking restriction, the Respondents submit that the blanket freedom to traffic that PNWR is seeking would be exceptional. It states that

permits are normally issued in respect of identifiable individuals and identifiable transfers from one possessor to another. One exception is the "blanket permit" which is given in Appendix B for Class I and Class II raptors - the traditional falconry birds. This exception is made to reduce the amount of work involved in considering requests for transfers, provided that the transfer will be from one class of permit holder to another class of permit holder.

The Respondents acknowledge that the Ministry's policy is not to treat all captive raptors the same way. Nor has it decided to offer "blanket permits" except in those situations covered by Appendix B. The Respondents note that there may be situations where they will permit trafficking in the Appendix C birds, but this will be provided on a case-by-case basis. They submit that PNWR is not one of those cases: it has not provided sufficient rationale for the Ministry to depart from its general policy against blanket trafficking permission for live birds that are not falconry Class I or Class II raptors.

The Panel's Findings

The Panel notes that the raptors listed as Class I and Class II have recently changed in a significant way. Ministry Policy Manual Vol.4, Section 7, subsection 02.01 on the "Capture, Possession and Use of Raptorial Birds", effective October 16, 1996, states as follows:

2. Raptorial Bird Classification and Marking

2.1.1 For management and administrative purposes, raptorial birds that may be captured in BC for use in falconry are in two classes:

Class I Raptorial Birds include those species whose status or use is of special significance socially, administratively or biologically (see Table 1).

Class II Raptorial Birds include all other species that may be used in falconry. (see Table 1)

TABLE 1 Raptors That May Be Captured/Used for Falconry

Species	Class
Peregrine Falcon	1
Gyr Falcon	1
Ferruginous Hawk	1
Goshawk	2
Cooper's Hawk	2
Sharp-shinned Hawk	2
Prairie Falcon	2
Merlin	2
Kestrel	2

Northern Hawk Owl	2
Legally Imported species and their captive-bred progeny not listed above	2
Hybrids of above	2
Seamless banded, captive-bred Gyrfalcons and Peregrines	2

Class 1 birds may only be taken or held under permit by experienced falconers holding a Class 1 permit;

Class 2 birds may be taken or held under permit by falconers holding a Class 1 or a Class 2 permit.

The Ministry's "Wildlife Act Permit Licence Issuance Manual", Section 2(j) "Possess Live Wildlife", last updated June 20, 2005, sets out a similar list as Appendix B to be attached to falconry permits.

However, the Appendix B attached to PNWR's Permit is noted as having been "last updated 04-03-06", and is slightly different. Instead of "Legally Imported species and their captive-bred progeny", the updated Appendix B only lists "Legally imported Saker Falcon, Lanner Falcon, and Harris Hawk and their captive-bred progeny". In PNWR's Permit, its other birds, which include captive bred eagles and owls (which would formerly have been included as "legally imported species"), are set out in Appendix C.

There was no direct evidence regarding the history of these changes to the list or why the more general language of "legally imported species" was removed. However, from the evidence before the Panel, it is apparent that the policy was amended as a result of the concerns noted around non-native species, and to prevent non-traditional falconry birds from being included in the traditional falconry bird list. In the absence of a more specific and updated policy to deal with the newer and evolving uses of raptors, this change allows different treatment for non-traditional falconry birds than for recreational falconry birds.

The Respondents confirmed that these birds are separated out in PNWR's permit for different treatment because they are not birds typically used for falconry in BC, and do not fit easily within Ministry's policies for traditional falconry. As such, they are in a different class of raptor and are being permitted under section 2 of the *Act*. Further, the Permit contains specific terms and conditions set by the Regional Manager relating to free-flying, in order to specifically address PNWR's needs around educational/display purposes.

The Panel has already addressed the restrictions on free flying for the Spectacled Owl and the Eagle Owl. With respect to the restrictions on trafficking and free flying of the other educational raptors listed in Appendix C, the Panel finds that the restrictions and codes reflect a fair and reasonable attempt by the Ministry to address PNWR's present needs within the existing *Regulation* and falconry policy. PNWR is able to apply to traffic in individual birds on the list and the Respondents

have indicated their openness to consider changes if/when specific requests are made in relation to the flying codes.

The Panel observes that falconry and the use and flying of raptorial birds in BC is changing and evolving. Mr. Ethier stated that the Ministry will be entering into discussions with various stakeholders during its legislative review process regarding its management of falconry in the province.

PNWR has built and grown a unique, educational and popular professional business that doesn't easily fit within the existing falconry policy. The Ministry acknowledges that its written policies in this area have not kept pace with regulatory changes, and do not precisely reflect current policy in practice. This has led to confusion around raptor management policy and some inconsistencies in permitting, both of which have been frustrating for PNWR and Ministry staff. The Panel anticipates that a comprehensive review of legislation and policies will go a long way to correcting some of these problems.

DECISION

In making this decision, the Panel has carefully considered all of the evidence before it, whether or not specifically reiterated here.

The decision of the Regional Manager dated March 15, 2006 is varied by removing the restriction on free flying in relation to the Spectacled Owl and the Eagle Owl. The decision of the same date upholding and applying the policy against permitting both commercial breeding and rehabilitation in the same facility is confirmed.

With respect to the Permit under appeal, Appendix C is hereby varied by removing the flying status restriction codes "EDC" (Education/Display; caged only, unless sterilized) with respect to the Eagle Owl, and "EDNF" (Education/Display; no free-flying allowed) with respect to the Spectacled Owl, and replacing them both with flying restriction code EDFF (Free Flying for Education/Display allowed), which is also to include free flying for film and media work. The educational/display/media free flying is not geographically restricted to Duncan, except that the Eagle Owl may not be flown at Grouse Mountain or elsewhere within the known range of the Spotted Owl. This is without prejudice to the Ministry's right to include, on any future permit in regard to free flying the Eagle Owl, any new specific geographic restrictions the Ministry thinks are necessary to protect an endangered species in BC.

Condition 11 contained in Appendix A to the Permit, regarding temporary rehabilitation, is confirmed.

The flying restriction codes for the remaining raptors in Appendix C to the Permit are also confirmed, as is the Permit's general restriction on trafficking in the educational/display raptors listed in Appendix C. This does not preclude PNWR from seeking a permit to traffic in those raptors listed in Appendix C, pursuant to section 2(f) of the *Regulation*, or for the Ministry to make adjustments to the flying codes, in consultation with PNWR, with respect to individual birds or categories of raptors on any future permits.

Accordingly:

Appeal No. 2006-WIL-005 is allowed, in part.

Appeal No. 2006-WIL-016 is allowed, in part.

"Alan Andison"

Alan Andison, Chair
Environment Appeal Board

January 12, 2007