



February 22, 2021

Comments regarding:

**Regulation Proposed by the Virginia Department of Wildlife Resources Regarding
Incidental Take of Bird Species**

Submitted by:

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Filed electronically to the attention of:

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The Energy and Wildlife Action Coalition (EWAC)¹ submits these comments in response to the Virginia Department of Wildlife Resources' (the Department) proposed regulation regarding the incidental take of migratory birds and their habitats.² EWAC members include multiple entities that generate and deliver electricity in the Commonwealth of Virginia.

The proposed rule would define “incidental take” as take that is incidental to, but not the purpose of, a regulated activity.³ Construction or development activities would become regulated when the Department adopts a sector-specific plan that applies to those activities and identifies best management practices designed to avoid or minimize incidental take, or calls for an individual permit in certain circumstances.⁴ The proposed rule identifies categories for which sector-specific plans may be developed, including electric transmission and distribution lines and wind and solar energy projects.⁵ While the proposed regulation identifies power lines and renewable energy projects as two separate sectors, EWAC’s comments refer to them collectively as the electric power sector.

EWAC provides the following general comments regarding the proposed permitting program, which it elaborates on below:

- To avoid the potential for redundancy or conflicts with federal requirements, the Department should delay action on the proposed regulation until the federal government clarifies its intentions regarding the Migratory Bird Treaty Act (MBTA).
- The proposed permitting program will impose significant administrative burdens and costs for multiple sectors, including those that pose relatively low risks to migratory birds and those that already implement practices to avoid and minimize impacts to migratory birds, while producing minimal amounts of conservation gain.

If the Department nevertheless chooses to proceed with this proposal, EWAC offers the following more specific comments, also discussed in more detail below:

¹ EWAC is a national coalition formed in 2014 whose members consist of electric utilities, electric transmission providers, and renewable energy entities operating throughout the United States, and related trade associations. The fundamental goals of EWAC are to evaluate, develop, and promote sound environmental policies for federally protected wildlife and closely related natural resources while ensuring the continued generation and transmission of reliable and affordable electricity. EWAC supports public policies, based on sound science, that protect wildlife and natural resources in a reasonable, consistent, and cost-effective manner. EWAC is a majority-rules organization and therefore specific decisions made by the EWAC Policy Committee may not always reflect the positions of every member.

² The proposed regulation is available on the Virginia DWR website at: <https://dwr.virginia.gov/wp-content/uploads/media/Proposed-Language-4VAC15-30-70.pdf>

³ Proposed 4VAC15-30-70.B.12. Rather than use the word “incidental” in the definition, the Department may wish to consider an alternative definition, such as “take that results from, but is not the purpose of, a regulated activity.”

⁴ Proposed 4VAC15-30-70.B.17.

⁵ Proposed 4VAC15-30-70.C.7 & 8.

- The permit program should incorporate express exclusions to avoid conflicts with existing Virginia migratory bird protections and to avoid potential confusion regarding application outside of Virginia’s boundaries.
- The permit program should incorporate a standardized conservation fee approach, rather than attempting to calculate at the individual permit or sector level what compensatory mitigation may be needed to achieve the proposed “no net loss” standard.
- It appears that vegetation management within rights of way for electric transmission and distribution lines would be excluded from the definition of “regulated activity”⁶ because it is not new construction or development, but the inclusion of “expansion beyond the original or existing footprint” is ambiguous. These practices are closely akin to the agricultural and silvicultural practices exempted from the program,⁷ and should likewise be exempted.
- The exemption for activities performed under emergency situations⁸ would appear to include repairs to electric transmission and distribution lines following storms or other disruptions, since it includes restoration of essential services and public safety. This may be addressed in sector-specific plans, but could and should be made clearer in this regulation.

I. General Comments

A. Timing and Need

The Department has explained that it intends the proposed regulation to be a “backstop” to federal migratory bird policy. In January of this year, U.S. Fish and Wildlife Service (USFWS) adopted a final rule determining that the MBTA does not apply to the incidental take of migratory birds. However, the USFWS rule has not yet taken effect. On February 9, 2021, USFWS delayed the effective date of the MBTA rule. It also opened a 20-day public comment period, inviting comments on whether the MBTA rule should be amended, rescinded, delayed, or allowed to take effect. A statement from a Department of the Interior spokesperson regarding these actions indicated that the incoming administration is inclined to repeal the rule.

Should the MBTA rule be rescinded, then federal law would revert to a state in which enforcement of the MBTA against the incidental “take” of migratory birds is governed by prosecutorial discretion and varying judicial interpretations of the scope of the federal law. If the MBTA is applied to incidental take, then there also is uncertainty as to how affected entities are to comply with the law’s absolute prohibition on the unintentional take of migratory birds, given that the statute imposes strict liability and nothing other than criminal penalties for any violation.

⁶ Proposed 4VAC15-30-70.B.17.

⁷ Proposed 4VAC15-30-70.F.2.

⁸ Proposed 4VAC15-30-70.F.4.

At this point, we cannot know whether or how the Biden Administration will attempt to resolve those uncertainties. But should the federal government proceed with its own migratory bird conservation effort, whether based upon the MBTA or other authorities, there is the very real potential for that federal program to conflict with the Department’s proposed permitting program, or render the Department’s program redundant.

Since the Department has developed the proposed permitting regulation in response to federal policies that culminated in the MBTA rule, the Department should, at a minimum, delay action on its proposed permitting program until the direction of federal policy on migratory birds becomes clearer. It would not advance the Department’s conservation objectives, nor be a good use of the Department’s limited resources, to adopt a permitting program that duplicates, and potentially conflicts with, federal conservation measures that seek to achieve the same objectives.

B. Focusing Efforts Where They May Bring Meaningful Returns

The Department’s proposed regulation contemplates a permitting program built around sector-specific “best management practices, schedules, and criteria for avoiding or minimizing incidental take.”⁹ The Department should recognize that the resulting permitting program would produce little conservation benefit if it focuses on industries like the electric power sector that already have developed and are implementing voluntary practices designed to avoid and minimize impacts on migratory birds. Developing a sector-specific plan for the electric power sector might be easier from an administrative perspective, but a permit program that is based upon existing conservation measures that already are widely used in an industry would not make a material contribution to migratory bird conservation and would merely add regulatory burden to an already heavily regulated industry. Thus, the regulators and the regulated community would expend enormous administrative resources for little or no conservation gain. In the electric power sector, most of those costs would be passed on to utility customers.

The Department also should recognize that, for industries that do not have established practices, determining appropriate conservation measures would likely take years for each industry, requiring an enormous commitment of resources from the Department, the affected companies, and other stakeholders. Moreover, the majority of anthropogenic causes of migratory bird mortality, like collisions with building windows and moving vehicles, would be difficult – if not impossible – to address through a permitting program, leaving the regulatory focus on just a subset of commercial activities – including the electric power sector.

At the same time, the electric power sector’s relative contribution to migratory bird impacts is relatively small. USFWS data indicates that electric power lines represent only 3 percent of the annual mortality attributed to human activity, and wind turbines only 0.02 percent.¹⁰ Thus, developing a permitting program for the electric power sector has the dual weakness of targeting a sector that makes a relatively small contribution to migratory bird impacts and that already has widely used practices in place to avoid and minimize bird impacts.

⁹ Proposed 4VAC15-30-70.B.20.

¹⁰ USFWS, [Top Threats to Birds](#), last visited February 5, 2021.

II. Specific Comments

A. Existing Programs and Jurisdictional Limits

Virginia already has in place a Permit By Rule process for renewable energy projects that are 150 megawatts (MW) and less. The Permit By Rule requirements include an analysis of the beneficial and adverse impacts on natural resources.¹¹ If significant adverse impacts to natural resources are anticipated, including to avian species, then a mitigation plan, and in some cases compensatory mitigation, is required.¹² To avoid the potential for redundant or conflicting requirements within the state, the proposed regulation should only apply to renewable energy projects that are greater than 150 MW.

Virginia's State Corporation Commission (SCC) also has authorized several solar energy projects that exceed the Permit By Rule's generating capacity threshold, and it also has addressed project impacts on natural resources. To avoid conflicts with the SCC's actions, the Department also should exempt from the permit program projects that fall within the SCC's jurisdiction if mitigation for the take of regulated bird species and/or habitat is required.

Finally, while the apparent intent of the proposed permit program is to regulate construction activities that occur within Virginia, it is in the nature of the electric power sector that a renewable energy project located outside Virginia can deliver power into the state. There also may be other specific sectors where an activity has a connection to Virginia, but the activity and its potential impacts to migratory birds occur outside the state boundaries. The Department can avoid any potential confusion on this point by adding "within the boundaries of the Commonwealth" to the definition of "regulated activity."

B. Conservation Funding and Administrative Feasibility

The proposed regulation would allow general permits only for those activities that the Department determines can achieve *de minimis* incidental take levels through avoidance and minimization measures. Any "regulated activities that require compensation to offset unavoidable incidental take" would require an individual permit.¹³ Compensation apparently would be determined case-by-case, or potentially by rule, and be set at a level that achieves "no net loss of regulated habitats through restoration, creation, enhancement, or, in certain circumstances, out-of-kind measures."¹⁴

With this approach, the Department is proposing a significant administrative burden for itself and the regulated community. The proposed rule provides no mechanism for the company planning a regulated activity, or the Department, to quickly and easily determine whether the activity would qualify for a general permit. The Department should design its program to favor the use of general

¹¹ 9VAC15-60-40.

¹² 9 VAC15-60-60.

¹³ Proposed 4VAC15-30-70.G.2.iii.

¹⁴ Proposed 4VAC15-30-70.B.6.

permits and provide a mechanism for the threshold determination as to whether an activity is covered by a general permit or requires an individual permit that is easy to implement.

By requiring an individual permit for any activity that has more-than-minimal impacts on migratory birds or habitats, the Department is creating a program that will necessarily require significant Department resources to administer, in addition to the resources that the regulated community would have to dedicate to this new process. None of the associated costs for that process will advance migratory bird conservation. Instead, they will be consumed in administering a new permitting program.

The proposed approach to compensatory mitigation is likewise flawed because of the difficulty of determining how much impact is associated with individual regulated activities and how much credit to allow for specific habitat restoration, creation, and enhancement project. EWAC's members have substantial experience with permitting under the federal Endangered Species Act (ESA) and the Bald and Golden Eagle Protection Act (BGEPA). ESA and BGEPA permitting is often delayed by a lack of mitigation opportunities, and permitting often requires extensive time, energy, and resources be spent focused on mitigation project details. Under the ESA, mitigating impacts to some species has been hamstrung by delays in federal approval of mitigation banks and the development of metrics to equate impacts to species conservation. Under BGEPA, eagle mitigation opportunities have equally stalled over how to precisely account for each and every eagle that may or may not be impacted by a particular project/facility using the one and only mitigation measure the USFWS has approved.

If the Department is going to require some form of compensation for unavoidable impacts to migratory birds and habitats, then rather than engage in project-specific, or even sector-specific, “no net loss” calculations and ad hoc conservation efforts, it should adopt an easily calculated conservation fee and establish an in-lieu fee account to pool the collected fees and implement a directed conservation program. The Department itself could then determine on the backend how and where to apply these collected monies in order to best achieve its conservation goals with respect to migratory birds. A simply structured conservation fee would avoid significant administrative costs, put more resources directly into conservation, and avoid unnecessary delays.

C. Vegetation Management

Utilities routinely perform vegetation management within the rights-of-way for electric power lines. These practices appear to fall outside of the proposed regulation's definition of “regulated activity,” as they are not new construction or development activities, nor an expansion of an existing activity. However, the last phrase of this part of the definition (expansion beyond “the existing footprint”) is somewhat ambiguous if, for example, applied to encroaching trees and brush. Paragraph G.4 also indicates that sector-specific plans may include ongoing operational activities.

The proposed regulation would exempt agricultural and silvicultural practices from the permit program.¹⁵ The Department should consider an exemption for utility vegetation management,

¹⁵ Proposed 4VAC15-30-70.F.2.

since it involves practices that are common to agriculture and silviculture, and in any event is likely beyond the intended scope of the permit program.

D. Emergency Response

The proposed regulation appropriately exempts activities performed in response to emergencies.¹⁶ This exemption includes activities necessary to restore essential service, protect public health, address public safety, or prevent imminent property damage. Downed power lines and the interruption of electric power supply would seem to meet several of these criteria. However, the regulation would be improved by clarifying how the determination is to be made that a situation is an emergency and falls within this exemption. Rather than determining whether an emergency exists (or, after the fact, existed at the time of the activity) on a case-by-case basis, the Department could incorporate a non-exclusive list of the types or categories of events that would be considered emergencies under this rule.

III. Conclusion

EWAC strongly encourages the Department to delay action on its proposed migratory bird permitting program until it is clear that the program will not duplicate or otherwise conflict with the developing federal approach to migratory bird conservation. Should the Department proceed with this program, it should focus the program on sectors that are significantly impacting migratory birds and their habitats, rather than the electric power sector, which has minimal impacts and already has widely used minimization and avoidance practices in place. The Department also should rethink its approach to compensatory mitigation, replacing project-specific calculations with a conservation fee that would be much simpler to administer, avoiding an unnecessary expenditure of administrative resources. EWAC also appreciates the Department's consideration of the specific recommended changes set forth above.

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¹⁶ Proposed 4VAC15-30-70.F.4.