



February 22, 2021

Department of Wildlife Resources Regulatory Coordinator
Virginia Department of Wildlife Resources
7870 Villa Park Drive
P.O. Box 90778
Henrico, Virginia 23228-0778

Attention: 4VAC15-30-70; Incidental Take of Bird Species. (New)

To Whom It May Concern:

On behalf of the 15 local associations and 3,100 firms of the Home Builders Association of Virginia (HBAV), we appreciate the opportunity to comment on *4VAC15-30-70. Incidental Take of Bird Species. (New)* (i.e., “proposed regulation”). The residential land development and construction industry routinely conducts land clearing, earth moving, and grading activities that must comply with multiple federal, state, and local construction-phase environmental regulations. Thus, any revisions to takings requirements could significantly affect our industry’s ability to deliver new housing units to the market in a cost-effective and timely manner.

As an overarching comment, the HBAV believes that future federal action will likely address many of the concerns which prompted the Virginia Department of Wildlife Resources (“DWR” or “the Department”) to pursue this proposed regulation. Recognizing the various constraints on the Department’s time and resources, it may be prudent to refrain from adopting any final regulation until the federal government clarifies its approach to interpretation and enforcement of the Migratory Bird Treaty Act (MBTA). However, we recognize that there may be some desire to continue moving through the adoption process in case such federal action is delayed.

The HBAV appreciates the Department’s thoughtful approach to a state permitting program that addresses the impact of development on migratory birds. This two-step approach ensures that the Department will receive feedback from all affected stakeholders. This letter provides recommendations to further clarify and improve the proposed regulation.

Background

The proposed regulation is the Commonwealth’s response to revised federal interpretations of the MBTA. Specifically, under the act, no person or corporate entity may “pursue, hunt, take, capture, kill, possess, sell, purchase, barter, import, export, or transport” any migratory bird or “any part, nest, or egg of any such bird... by any means or in any manner” except as approved by the U.S. Fish and Wildlife Service (USFWS).^{1,2} On January 10, 2017, the U.S. Department of the Interior (USDOI) issued Solicitor’s

¹ 16 U.S.C. §703.

² 50 C.F.R. §§10.1-10.22.

Opinion M-37041 entitled “Incidental Take Prohibited Under the Migratory Bird Treaty Act,”³ which determined that USFWS does not need to prove the intent of an entity whose action results in the “take” of an MBTA-protected bird. On December 22, 2017, however, USDO I issued Solicitor’s Opinion M-37050, which came to the opposite conclusion. Entitled “The Migratory Bird Treaty Act Does Not Prohibit Incidental Take,”⁴ the Solicitor’s opinion determined that the MBTA’s “take” prohibition does not apply to lawful activities that result in the accidental death or injury to MBTA-protected birds. USDO I completed a rulemaking to codify M-37050 on January 7, 2021⁵ but is delaying implementation of the final rule until at least March 8, 2021.⁶

In response to M-37050, on February 14, 2020, Governor Ralph Northam announced his Administration’s intent to “develop a regulation to define and permit incidental take of migratory birds for major commercial, industrial, and construction projects in the Commonwealth.”⁷ DWR immediately initiated a rulemaking and issued the proposed regulation in January 2021. The proposed regulation authorizes DWR to issue general and/or individual permits that allow for the incidental take of migratory birds, subject to the criteria and conditions of sector-specific plans. Affected construction activities include those associated with commercial and industrial development; oil, gas, and wastewater disposal; methane or other gas burner pipes; communications towers; electric transmission and distribution lines; and transportation projects. The proposed regulation exempts certain activities including those associated with agricultural and silvicultural operations and conducted under emergency situations.

Clarification of Residential Construction Exemption

The HBAV requests that DWR include provisions to clarify that “residential land development and construction” is exempted from the list of activities subject to sector-specific plans. The stated scope of the proposed regulation, as well as USFWS experience with the MBTA, support such an exemption. Further, HBAV believes that an exemption will help DWR to more efficiently manage its resources and strategically apply permit requirements to the development activities having greatest impact on migratory bird species.

For example, Section C of the proposed regulation requires any person conducting “a regulated activity that results or will result in incidental take of a regulated bird species and/or habitat” to obtain and comply with a DWR permit.⁸ Additionally, “[n]o permit shall be available for incidental take of a regulated bird species and/or habitats unless the board has adopted a sector-specific plan requiring such permit.”⁹ Lastly, the proposed regulation authorizes the Board to adopt sector-specific plans for eight categories of development activity (i.e., “The board may adopt sector-specific plans for any of the following categories....”).¹⁰

³ U.S. Department of the Interior, Office of the Solicitor, Opinion of January 10, 2017, M-37041.

⁴ U.S. Department of the Interior, Office of the Principal Deputy Solicitor, Opinion of December 22, 2017, M-37050.

⁵ 86 Fed. Reg. 1134 (Jan. 7, 2021).

⁶ 86 Fed. Reg. 8715 (Feb. 9, 2021).

⁷ Office of Governor Ralph S. Northam. February 14, 2020. “Governor Northam Announces Plans to Protect Migratory Birds.” Available at <https://www.governor.virginia.gov/newsroom/all-releases/2020/february/headline-851832-en.html> (February 2, 2021).

⁸ Virginia DWR. 4VAC15-30-70. Incidental Take of Bird Species – Proposed Regulation

⁹ *Ibid.* 8, 4.

¹⁰ *Ibid.* 8, 4.

A plain text reading of these sections infers that the Board is authorized to adopt sector-specific plans *solely* for the eight sectors identified in lines 124 through 151¹¹. This reading is consistent with Governor Northam’s announcement, which specifically highlighted commercial, industrial, and infrastructure projects. However, the proposed regulation does not explicitly exempt residential land development and construction from activities subject to sector-specific plans as it does for “agricultural and silvicultural activities.”

Although the USFWS identifies habitat loss due to development as a cause of bird mortality, it does not provide annual mortality estimates for such activity. Rather, collisions with communication towers, electrical lines, vehicles, wind turbines, and building glass, have defined mortality estimates.¹² Such structures and materials are not generally associated with the construction-phase of residential development.

Prioritization of the Sector-Specific Plans

The proposed regulation authorizes the Board to adopt sector-specific plans for eight categories of development activity, including 1) commercial projects; 2) industrial projects; 3) oil, gas, and wastewater disposal pits; 4) methane or other gas burner pipes; 5) communication towers; 6) electric transmission and distribution lines; 7) wind and solar energy projects; and 8) transportation projects.¹³

The development of these sector-specific plans will likely require a significant investment of time and resources by the staff of DWR. Given the Department’s limited resources, the HBAV recommends that the development of the sector-specific plans be prioritized by magnitude of the sectors’ impact on migratory bird species.

For example, the Regulatory Impact Analysis for the Proposed Rulemaking to Revise Regulations Governing Take of Migratory Birds (86 Fed. Reg. 1134 (Jan. 7, 2021)) identifies the average number of incidental take cases brought against violating sectors between 2010 and 2018 (Table 1).¹⁴ Electrical businesses comprise 54 percent of the total annual cases, followed by oil and gas businesses at 27 percent. All other businesses, excluding wind energy, comprise just 15 percent of the total annual cases, and this figure includes communication towers, chemical spills, bridgework, artificial lighting, and solar-energy development. Wind energy accounts for four percent of total annual cases.

Given the fact that 85 percent of the incidental take cases between 2010 and 2018 involved electric distribution, oil and gas, or wind projects, and that the remaining 15 percent had little connection to commercial development, we recommend that the Department prioritize the sector-specific plan development process for non-commercial projects.

¹¹ *Ibid.* 8, 4.

¹² USFWS. “Threats to Birds: Migratory Bird Mortality – Questions and Answers.” (February 10, 2021).

¹³ *Ibid.* 8, 4.

¹⁴ USFWS. December 2020. Regulatory Impact Analysis: Proposed Rulemaking to Revise Regulations Governing Take of Migratory Birds.

Table 1: Average Annual Number of Incidental Take Cases (2010 – 2018)

Industry	Average Number of Cases Per Year
Electric Distribution and Transmission	30.8
Oil and Gas	15.6
Other activities*	8.5
Wind Energy	2.4
Total	57.3

Proposed Regulations Applicability to Mixed-Use Developments and Multi-Family Developments

In addition to single-family detached subdivisions, many of our members are engaged in the development and construction of multi-family housing developments, as well as mixed-use developments which blend residential uses with commercial, cultural, and/or institutional uses.

The proposed regulation authorizes the Board to adopt sector-specific plans for eight specific sub-categories of “commercial projects” and grants the Board with authority to adopt sector-specific plans for sub-categories of commercial developments not listed in the regulation. As currently drafted, it is not clear how DWR or the development community would apply the proposed regulation, or any future sector-plans, to projects that include both residential and commercial elements or multi-family developments.

For the reasons stated above, HBAV requests that 1) multi-family housing development and construction and 2) mixed-use developments where residential is the predominant use be exempted from the proposed regulations.

Sector-Specific Plans Should Describe the Permitting Process

Although outside the scope of the proposed regulation, the HBAV would like to emphasize the importance of the process through which a developer will seek coverage under new general or individual permits. Because the Federal MBTA does not include a permitting process,¹⁵ and Virginia is among the first states to expand its species protection regulations in response to M-37050,¹⁶ DWR cannot base its new permitting program on an existing one. Thus, the HBAV is concerned about the potential for situations where developers, unaware of the new permitting program, would not seek a permit and unknowingly expose themselves to prosecution by impacting migratory bird habitat.

DWR has many options for informing developers of their obligations under a new permitting process. First, clear thresholds for coverage, such as building height, materials, or area of disturbance will be

¹⁵ See, for example, 80 Fed. Reg. 30033 (May 26, 2015). At the time, USFWS was “considering rulemaking to address various approaches to regulating incidental take of migratory birds, including issuance of general incidental take authorizations for types of hazards to birds associated with particular industry sectors: issuance of individual permits authorizing take from particular projects or activities; development of memoranda of understanding with Federal agencies authorizing incidental take from those agencies’ operations and activities; and/or development of voluntary guidance for industry sectors regarding operational techniques or technologies that can avoid or minimize incidental take.” Since 2015, USFWS has not proceeded to develop a general or individual permitting program for the MBTA.

¹⁶ DWR. 2021. “Proposed Regulation: Virginia is Taking Action to Address Incidental Take of Migratory Birds.” Available at <https://dwr.virginia.gov/regulations/incidental-take-of-migratory-birds/> (February 16, 2021).

critical for alerting developers to their permitting needs. In addition, the federal Fish and Wildlife Coordination Act (FWCA)¹⁷ and its Virginia-state counterpart could provide helpful examples for how to proceed. As large users of Clean Water Act §404 permits, developers are familiar with the FWCA, which requires FWS to evaluate impacts to endangered and threatened species (including avian species) listed under the Endangered Species Act when projects impact federally regulated waters. This “one stop” approach reduces costs and timelines for regulated activities and reduces the likelihood of non-compliance. Regardless of the final approach it adopts, HBAV believes that it will be important for the Department to conduct a rigorous public information campaign to inform the development community of the new permitting program.

Clarification of Scope of Species Protected Under Sector-Specific Plans

The proposed regulation extends to migratory birds regulated by the MBTA. As of March 2020, the MBTA extends to 1,093 species, and USFWS periodically updates that list.¹⁸ The protected species are extremely diverse, extending from small to large and common (e.g., American Crow, American Robin) to uncommon species. These characteristics can impact the best management practices and permit conditions expected of the development industry. For example, USFWS’ Reducing Bird Collisions with Buildings and Building Glass Best Practices guidance notes “Because hummingbirds are so much smaller than other birds, closer spacing of the elements of any [glass] pattern (striped or otherwise) will be necessary.”¹⁹ In addition, HBAV notes that species in Virginia migrate at different times of day, which could affect requirements such as placing and location of window blinds. For example, “raptors migrate during the daytime,” while “warblers are night migrants.”²⁰

Conclusion

Thank you for the opportunity to comment on the proposed rule and for the thoughtful approach that you are taking to protect Virginia’s migratory birds. The initial framework of the proposed rule, and subsequent sector-plans, will ensure that all affected stakeholders have opportunities to provide feedback on this important environmental regulation. If you require further information, please do not hesitate to contact me at ebranosky@hbav.com or (804) 643-2797 x6.

Thank you,



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¹⁷ 16 U.S.C. §§661-666.

¹⁸ USFWS. 2021. Migratory Bird Treaty Act Protected Species (10.13 List) (February 16, 2021).

¹⁹ USFWS. July 2016. *Reducing Bird Collisions with Buildings and Building Glass Best Practices*.

²⁰ DWR. Fall Migration is Reaching its Peak! Visit the Virginia Bird & Wildlife Trail to View Migrating Birds. (February 16, 2021).