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P.O. Box 1065
Charlottesville, VA 22902
(434) 971-1553
www.wildvirginia.org

Mr. Ryan Brown
Executive Director
Virginia Department of Game and Inland Fisheries
P.O. Box 90778
Henrico, VA 23228-0778

Submitted via web portal

Board of Directors:

RE: Proposals to regulate incidental take of Migratory Birds
(4VAC15-30-70, 4VAC15-30-80, 4VAC15-30-90)

Bette Dzamba

Sarah Fromme

Katie Keller

Leigh Kirchner

David Sellers

Elise Togbe

Jamie Trost

Ryan Wagener

Elizabeth Williams

I am submitting these comments on behalf of Wild Virginia and our members throughout the state and in other parts of the United States. We strongly support the initiative by the Department of Game and Inland Fisheries (DGIF) to provide state protections for migratory birds that were previously guaranteed under the federal Migratory Bird Treaty Act (MBTA). We urge the Board of Game and Inland Fisheries (Board) to initiate a formal regulatory process, in accordance with the Virginia Administrative Process Act, to adopt strong regulations as soon as possible.

Below, we address some particular issues that we believe should be addressed in the regulatory review process.

Classes of Activities Covered

The version of 4VAC15-30-70. provided for comment defines “regulated activity” or “activity” as “a construction activity that is (i) known to cause significant harm to regulated bird species and (ii) is associated with” seven listed categories of activities. We believe the list of categories provided are suitable but submit that a process to systematically consider other categories or to more closely define categories must be undertaken in the regulatory process.

In finalizing a list of the types of activities requiring incidental take permits, a literature review and an examination of records about known occurrences of harm caused to migratory birds in Virginia should be made. Based on findings from these investigations, the list provided in the example regulation should be expanded as appropriate to provide wider protection of migratory bird species.

In addition to a consideration of additional categories of activities requiring permits, we believe better definition of those categories listed in the example regulation may be appropriate. For example, the Board may adopt language with subsets of “industrial projects” specified, to avoid any question as to the scope of coverage of the permit requirement. Specific reference under this broader category

for industrial-scale wind power projects may be one such sub-category deemed useful for inclusion. Of course, the listing of more specific activities under any of the broad categories should not be deemed to limit the overall range of projects and the wording of the regulation should make this clear.

General versus Individual Permits

Long experience with the use of general permits, as an alternative to individual permits, shows us that both federal and state agencies often cover activities under general permits allowing environmental damage that should be prevented. In fact, we have found that when faced with the choice of applying individual versus general permits, regulators rarely require the individual permit processing unless forced to do so by explicit regulatory language or by public pressure. There are several reasons for this shortcoming that must be avoided in the Board's adoption of regulations as considered in this process.

1. Often the criteria that allow coverage of projects under general permits are poorly or vaguely defined. Personnel are, therefore, required to make judgements with little guidance. In developing these categories, the Board must be as specific in describing the characteristics of eligible activities as reasonably possible, to narrow the range of uncertainty for agency personnel.

There are often strong incentives for regulators to allow general permits to be used more often than appropriate to meet the broader goals of the authorizing statutes. First, agencies with limited resources may seek to avoid individual permit analyses to lessen the strain on those resources.

In addition, agency personnel will sometimes be confronted with applicants who have a strong incentive to insist on general permit coverage, to avoid the costs of more thorough analysis and additional procedural steps. Agency employees may be pressured into making decisions that favor the applicant under these circumstances. This is especially true where there is no role for the public in these decisions, as is generally true when individual permit applications are not required.

2. Even where a proposed activity falls within a category generally suitable for coverage under a general permit, there may be particular circumstances that make such coverage undesirable and damaging to resources. Therefore, agency personnel must be required to make at least a brief review and analysis of the factors presented before general permit coverage is granted. Conditions where the general permit is deemed to be in force as soon as the form is received by the agency are unacceptable.

Any regulation adopted by the Board must specify that an applicant for coverage under a general permit is not authorized to begin activities until the agency provides the regulated party with written notice that the registration statement filed is complete and adequate and that the information appears to qualify the project for general permit coverage. There should be language included, warning that if new information justifies reconsideration of

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this decision, the agency has the authority to then require an individual permit application and order activities to be stopped or limited while that application is being considered.

3. The regulation should specify that each registration statement that is received will be noticed on the agency's web site and through a distribution list for which the public can enroll. While there may not be a formal public participation process, these mechanisms will still allow members of the public to be informed and provide information that is necessary or useful to the agency.

Thank you for the opportunity to provide these comments and for the Department's work on this important issue. We look forward to further proceedings and ask that we be notified when the next steps are taken.

Sincerely,

/s/ David Sligh

David Sligh
Conservation Director