



COMMONWEALTH of VIRGINIA
Department of Wildlife Resources

Travis Voyles
Secretary of Natural and Historic Resources

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Executive Director

January 9, 2024

The Honorable Adam Ebbin
Senate of Virginia
General Assembly Building, Room 611
201 North 9th Street
Richmond, Virginia 23219

Dear Senator Ebbin,

As you will recall, Senate Bill 1348 (2023) was referred to the Department for study after being passed by indefinitely by the Committee on General Laws and Technology. While companion legislation in the House was ultimately passed in amended form, the Department is pleased to provide you with the accompanying report on the remaining subject matter that was included in the introduced legislation.

We would certainly be happy to address any further discussion or questions that you may have at any point. Let me also offer my apologies that this report comes later than originally requested, but I'm hopeful still that it will prove useful should this topic appear before the Committee again at this upcoming Session.

Sincerely,

A handwritten signature in blue ink, appearing to read "RJB", written over a light blue horizontal line.

Ryan J. Brown
Executive Director

cc: Susan Clarke Schaar, Clerk of the Senate of Virginia

REPORT ON SENATE BILL 1348 (2023)



Virginia Department of Wildlife Resources

December 2023

I. Introduction

The Department of Wildlife Resources (DWR) is pleased to provide this report pursuant to the direction of the Chairman of the Senate General Laws and Technology Committee in his letter dated March 24, 2023. That letter directed the subject matter of Senate Bill 1348 (2023) to DWR for study.

Senate Bill 1348 addressed three primary topics, two of which were related to DWR’s rulemaking and administrative procedures. As introduced, it would have removed existing Administrative Process Act (APA) exemption for case decisions made or regulations promulgated under the Virginia Endangered Species Act (§29.1-563 *et seq.*) or related to the incidental take of wildlife. It also directed certain DWR guidance documents to be published in the *Virginia Register of Regulations*.

II. Passage of House Bill 2101

Companion legislation to Senate Bill 1348 (SB1348) was filed and ultimately passed in amended form. House Bill 2101 (Delegate Bulova), as passed, addressed the publication of agency guidance documents described above. The direction of that legislation (Chapter 390 of the 2023 *Acts of Assembly*) is currently in progress, and therefore the remainder of this report will focus upon the remaining elements of SB1348; namely, rulemakings and case decisions pertaining to the state Endangered Species Act and incidental take of wildlife.

III. The Code of Virginia’s Approach to Take of Wildlife

Relevant to the subjects of Endangered Species and Incidental Take that will be discussed below, it is notable that Title 29.1 protects all of Virginia’s wildlife species except in instances where law or regulation permits activities that affect them. Specifically:

A. The following is unlawful:

10. To hunt, trap, take, capture, kill, attempt to take, capture, or kill, possess, deliver for transportation, transport, cause to be transported, by any means whatever, receive for transportation or export, or import, at any time or in any manner, any wild bird or wild animal or the carcass or any part thereof, except as specifically permitted by law and only by the manner or means and within the numbers stated.

Code of Virginia § 29.1-521 (A)(10) (portion)

“By law” is further defined by §29.1-100 to include laws of the Commonwealth or regulations adopted by the Board.

In effect, this means that the take of Virginia’s wildlife—whether or not endangered, and whether the intended result of an activity or merely incidental to it—is prohibited unless a law or regulation is adopted authorizing it. Various laws and regulations do both create more specific prohibitions/penalties and create allowances for activities that affect wildlife that would

otherwise be proscribed; a review of Title 29.1 and its associated regulations reveals examples of both.

IV. Virginia Endangered Species Act, §29.1-563 et seq. of the Code of Virginia.

The Virginia Endangered Species Act (Act) contains both specific prohibitions and allowances pertaining to the take of threatened and endangered species located in the Commonwealth. The Act and comparable laws in other states function largely to accompany and supplement the federal Endangered Species Act (16 U.S.C. 1531-1544) at the state level; not to supplant it. While much simpler than the federal act, the Act enables the adoption of the federal lists of threatened and endangered species by the Board for protection under state law, permits the addition of other species known to be threatened or endangered within Virginia to those lists for state law purposes, and grants the Board various authorities to permit the taking (direct or incidental), exportation, transportation, or possession of listed fish and wildlife.¹

Effects of the Act are largely to increase penalties for otherwise proscribed actions affecting threatened and endangered species and to provide a framework to allow for certain activities that may affect them. In many instances, unauthorized take of wildlife generally under the overarching provisions is punishable as a Class III misdemeanor; in certain cases, the Act functions to increase the penalty for otherwise prohibited taking of threatened and endangered wildlife to a Class I misdemeanor. Conversely, regulations allowing for incidental take, creating a pathway for desirable activities to take place even though they may have the undesired and indirect impact of taking state endangered wildlife, have been adopted under the authority granted to the Board (*see, e.g.*, 4VAC15-20-130(D)).

V. Incidental Take

“Incidental take”, generally, pertains to the taking of wildlife that is incidental to, but not the purpose of, an activity (contrast hunting/fishing, nuisance wildlife control, and like activities where the purpose of the activity is the taking of wildlife). The term is defined within two specific contexts in Virginia Code and regulation:

"Incidental take" means any taking of an endangered or threatened species of fish or wildlife, excluding those species appearing on the federal list specified in § 29.1-564, that otherwise would be prohibited by this article or by regulation, if such taking is incidental to but not the purpose of an otherwise lawful activity allowed in accordance with regulations adopted pursuant to § 29.1-568.

Code of Virginia § 29.1-563 (pertaining to threatened and endangered species)

¹ At current, in addition to federally listed species, listed state endangered species include 5 fish, 1 amphibian, 3 reptiles, 4 birds, 6 mammals, and 15 mollusks. State threatened species include 9 fish, 1 amphibian, 2 reptiles, 5 birds, 7 mollusks, and 3 arthropods.

"Incidental take" means any take of a regulated bird species that is incidental to, but not the purpose of, a regulated activity.

4VAC15-35-20 (pertaining to migratory birds)

Where incidental take is addressed in current Code and regulation, it is generally to define circumstances under which incidental take of wildlife is allowable, rather than prohibitive in nature, as the Code already makes the taking unlawful as described above.

VI. Administrative Process Act exemption for regulations and case decisions affecting wildlife management.

SB1348, as introduced, addressed regulatory processes and case decisions involving state endangered species or incidental take. These subjects, along with others affecting wildlife management, have historically been exempt from the provisions of the Administrative Process Act. Section 2.2-4002(A)(3) exempts from the Act "...regulations regarding the management of wildlife and for all case decisions rendered pursuant to any provisions of Chapters 2 (§29.1-200 et seq.), 3 (§29.1-300 et seq.), 4 (§29.1-400 et seq.), 5 (§29.1-500 et seq.), and 7 (§29.1-700 et seq.) of Title 29.1." This exemption has been longstanding; with the exemption for case decisions dating to 1995 (Chapter 516 of the 1995 *Acts of Assembly*) and the exemption for rulemaking procedures predating that.

A. Department of Wildlife Resources regulatory procedures.

DWR rulemakings, which are regulations of the Board of Wildlife Resources (Board), are governed by the agency's basic law in §§29.1-501 through 503 of the Code of Virginia. In addition to other requirements, the basic law requires:

The full text or an informative summary of any proposed regulation or change in the regulations shall be published not less than fifteen nor more than thirty days before it may be acted upon. The publication shall name the time and place that the specified matters will be taken up, at which time any interested citizen shall be heard. If the proposed regulation or change in the regulations is of local application, the publication shall appear in a newspaper published in or within reasonable proximity to the affected locality. However, if the proposed regulation or change in the regulations is of statewide application, the publication shall be made in a sufficient number of newspapers having a general circulation throughout the entire Commonwealth.

Code of Virginia § 29.1-501(B)

These basic law requirements are substantially similar to the process that is set forth for the Virginia Marine Resources Commission, the Commonwealth's other agency primarily engaged in wildlife management (saltwater fisheries) (*see* §28.2-209 et seq. of the Code of Virginia).

DWR has a longstanding agency practice of exceeding basic law requirements in its rulemaking processes. In general, agency regulations are reviewed every two years, with a bifurcated schedule. Regulations pertaining to terrestrial wildlife management (both game and nongame species) are addressed through processes beginning in even years and ending in odd

years, while those pertaining to aquatic species and boating have reviews that begin in odd years and end in even years. Through these review cycles, every substantive regulation of the agency is subject to examination and, if necessary, amendment on an ongoing basis.

While moving at a pace that allows for ongoing review and necessary adjustment for wildlife management purposes (discussed more fully below), DWR's established regulatory procedures attempt to mimic Administrative Process Act procedures in many ways. A brief summary follows:

Scoping Period. Though not a true Notice of Intended Regulatory Action (NOIRA) regulatory stage, each regulations cycle begins with a Scoping Period, which is a 30-60 day period in which public comment is requested on desired amendments to the body of regulations under review. These Scoping Periods are advertised through the DWR website and other means of agency outreach. Upon completion of the Scoping Period, draft regulatory amendments are developed by DWR staff pursuant to the public input received and observed wildlife management and agency needs, similar to what occurs following the completion of the NOIRA stage in an APA rulemaking.

Proposed Regulations. These draft amendments are then presented at a regular meeting of the Board, with public notice and an opportunity for the public to be heard. Upon conclusion of staff presentation, public comment, and any Board deliberations, the Board proposes the regulatory amendments by motion, and directs that they be published for public comment. Under the new Office of Regulatory Management's (ORM) procedure, the proposed regulations, along with necessary economic impact information, is first sent to that office for review. Notice of the proposals and the public comment period are thereafter published on the agency website, the *Virginia Regulatory Townhall*, and the *Virginia Register*, with written comments being accepted either through the agency website's public comment function or the *Townhall*. Public comment periods are typically 30-90 days in length. Notice of the proposals is also published in newspapers of general circulation pursuant to the publication requirement set forth in §29.1-501(B).

Final Regulations. Following the completion of the public comment period, the proposed regulations, together with any amendments made in response to the public comment period, are presented to the Board at a regular meeting. Public comment is taken, and the Board thereafter votes on final regulatory amendments. These final regulations, together with accompanying economic impact information, are then again submitted to ORM for review, and thereafter published in the *Virginia Register* prior to becoming effective.

Variations to this process occur on an as-needed basis. For instance, while the typical subject matter for each regulatory cycle rotates on a biennial basis as described above, should it be necessary, matters may be taken up by the Board outside of the normal schedule (for example, to address an emerging wildlife disease need). In addition, stakeholder advisory committees or other forms of public engagement may be utilized to help inform regulatory development.

DWR regularly receives a substantial amount of public participation through its practices. For example, recent regulatory action in 2023 to amend its wildlife regulations generated 2,876 discrete written comments during the Scoping Period and 466 written comments during the proposed regulation stage. In 2022, regulatory action to amend its fishing regulations generated 195 written comments during the Scoping Period and 26 written comments during the proposed regulation stage. The 2021 cycle of regulatory action to amend wildlife regulations generated 2,038 written comments during the Scoping Period and 619 written comments during the proposed regulation stage.

B. Department of Wildlife Resources case decisions.

Section 2.2-4001 of the APA defines agency case decisions as follows:

"Case" or "case decision" means any agency proceeding or determination that, under laws or regulations at the time, a named party as a matter of past or present fact, or of threatened or contemplated private action, either is, is not, or may or may not be (i) in violation of such law or regulation or (ii) in compliance with any existing requirement for obtaining or retaining a license or other right or benefit.

Code of Virginia § 2.2-4001

Decisions rendered by an administrative agency that may be characterized as “case decisions” vary, with judicial opinions considering communications ranging from permitting decisions and administrative enforcement actions to various agency correspondence addressing the compliance of specific parties or projects.

Within the subject matter embraced by SB1348, the most common agency decisions that may be properly considered “case decisions” occur within DWR’s Permitting Section.² DWR issues various permits to propagate, possess, or take wildlife, including those addressed by the Act (note that any species likewise listed under the federal Endangered Species Act would require federal permitting). Issuance of permits for these and other species is necessary, as Virginia law prohibits actions affecting our wildlife unless specifically authorized, as discussed above.

DWR’s Permitting Section issues and administers various permits pertaining to the agency’s broader wildlife management responsibilities; information pertaining to these permits (including a complete list of permit types and forms) can be found at:

<https://dwr.virginia.gov/permits/>.³ The agency’s permitting process, at a structural level,

² Relevant to the discussion of SB1348, DWR also provides comments to other permitting agencies who ultimately make their own case decisions based upon the input of DWR and other agencies. DWR’s comments, however, generally are limited to the likely biological impacts of a given activity, and not the activity’s compliance with the laws or regulations administered by the permitting agency.

³ Also relevant to the discussion of SB1348, in 2021, the Board adopted regulations establishing a permitting framework for the incidental take of migratory birds, 4VAC35-10 *et seq.* This framework was established due to the removal of historic federal protections for migratory birds. No requirement to obtain a permit under this framework has been adopted to date, however, as shortly following the Board’s action, the United States Fish and Wildlife Service announced an intention to adopt new federal regulations pertaining to these species, which is currently ongoing.

resembles many other administrative permitting processes in common use. Each permit has application requirements; applications are reviewed, and permits may be issued or denied. Compliance with issued permits is monitored throughout the life of the permit, and permits may be modified, suspended, or revoked as necessary.

While not strictly subject to the APA, much like other permitting agencies, DWR has an established process for the consideration of appeals filed with respect to permitting decisions. A complete description of this process (along with grounds for permit actions and enforcement mechanisms) can be found at: <https://dwr.virginia.gov/wp-content/uploads/media/permit-appeal-process.pdf>. This includes a right to request an Informal Fact Finding Proceeding before a three-person panel.

VII. Rationale for maintaining more flexible processes for wildlife management.

By exempting wildlife management, including the subjects of endangered species and incidental take, from APA procedures, the General Assembly has afforded the field more flexible frameworks for regulatory development and case decision making. Population management and response to wildlife health concerns can require swifter action than would be possible under the normal frameworks of the APA.⁴ This could be particularly important in matters affecting our most imperiled wildlife and is the primary benefit of the current process.

Though subjecting these actions to the APA would appear to provide a beneficial guarantee of the public participation opportunities of that law, in practice, these would be unlikely to differ greatly from what the existing agency process offers. Regulatory development and case decisions pertaining to wildlife management have historically been conducted with a high degree of public input and with little known procedural concern from the public. Examples of public participation are cited above; through the established agency comment periods and the submission of proposed and final regulations to ORM, it is believed that the same level of public involvement and consideration of economic impacts is achieved in the current process as would be the case under the APA. In addition, it is unknown to current staff when the last judicial appeal was noted or attempted to be noted as to the adoption of an agency regulation or permitting decision. Throughout existing processes, discussions are had with those affected by regulatory actions or permitting decisions regularly and concerns are addressed.

Finally, subjecting regulations affecting endangered species and incidental take to the APA would create a separate class of agency regulations and case decisions that would need to be administered by the agency. Whereas at current, all of the affected regulations are reviewed along with the agency's biennial reviews, these bodies of regulations would now be removed from those scheduled reviews and addressed separately. This would cause additional cost to be

⁴ It is notable that the APA does permit emergency rulemakings. Code of Virginia § 2.2-4011. While not discounting the APA's accommodation of emergency processes, it is notable that the object of the components of an emergency rulemaking that require reconsideration do not promote much greater public involvement than the current DWR process. Emergency regulations may have a duration of up to 18 months. DWR currently reviews and takes public input as to all of its regulations at least every 24 months, using the bifurcated schedule described above.

incurred by the agency and may functionally lead to these regulations being given less opportunity for public comment and review than they routinely experience today.

VIII. Conclusion

This report provides a brief summary of the topics addressed by SB1348 as that legislation was introduced. As with all matters of administrative law and procedure, much more discussion of many of the matters communicated above could be had. Additionally, while the agency would recommend that the current APA exemption for the subject regulations and case decisions be maintained, we are always eager to discuss means by which public participation can be increased, as well as any other matters that may be of interest to the Committee or the patron. If additional information or discussion would be helpful at any time, please do not hesitate to let us know.