

Union Calendar No. 386

116TH CONGRESS
2D SESSION

H. R. 5552

[Report No. 116-482]

To amend the Migratory Bird Treaty Act to affirm that the Migratory Bird Treaty Act's prohibition on the unauthorized take or killing of migratory birds includes incidental take by commercial activities, and to direct the United States Fish and Wildlife Service to regulate such incidental take, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

JANUARY 8, 2020

Mr. LOWENTHAL (for himself, Mr. VAN DREW, Ms. NORTON, Mrs. DINGELL, Mr. HUFFMAN, Mr. GRIJALVA, Ms. MCCOLLUM, Ms. HAALAND, Ms. VELÁZQUEZ, Mr. GALLEGO, Mr. TED LIEU of California, Mr. BLUMENAUER, Mr. MCNERNEY, Ms. KUSTER of New Hampshire, Mrs. NAPOLITANO, Mr. BEYER, Mr. CASE, Mr. DEFAZIO, and Mr. ROONEY of Florida) introduced the following bill; which was referred to the Committee on Natural Resources

SEPTEMBER 1, 2020

Additional sponsors: Mrs. DAVIS of California, Mr. COHEN, Mr. MORELLE, Mr. CONNOLLY, Mr. QUIGLEY, Mr. HORSFORD, Ms. TITUS, Mr. CARTWRIGHT, Mr. MCGOVERN, Ms. LEE of California, Ms. WILD, Ms. DELAURO, Mr. BRENDAN F. BOYLE of Pennsylvania, Mrs. BEATTY, Ms. SCHAKOWSKY, Mr. KATKO, Mr. PAPPAS, Ms. BARRAGÁN, Ms. PINGREE, Mr. PRICE of North Carolina, Mr. ESPAILLAT, Ms. SCANLON, Mr. HASTINGS, Mr. POCAN, Mr. COOPER, Mr. SABLAN, Ms. STEVENS, Mrs. HAYES, Mr. NEGUSE, Ms. LOFGREN, Mr. SCOTT of Virginia, Mr. KIM, Ms. JACKSON LEE, Mr. THOMPSON of California, Mr. LARSEN of Washington, Mr. KHANNA, Mr. LEVIN of Michigan, Ms. BLUNT ROCHESTER, Ms. DELBENE, Mr. PALLONE, Mr. KIND, Mr. SCHNEIDER, Mr. SARBANES, Ms. ESHOO, Mr. FITZPATRICK, Mr. COX of California, Mr. TAKANO, Mr. DESAULNIER, Mr. SOTO, Ms. DEGETTE, Mr. CICILLINE, Ms. ROYBAL-ALLARD, Mr. SUOZZI, Mrs. WATSON COLEMAN, Mrs. KIRKPATRICK, Mr. KILDEE, Ms. PORTER, Mrs. CAROLYN B. MALONEY of New York, Mr. POSEY, Ms. MUCARSEL-POWELL, Mr. GARCÍA of Illinois, Mr.

CISNEROS, Mr. KILMER, Mr. JOHNSON of Georgia, Ms. BONAMICI, Ms. WASSERMAN SCHULTZ, Ms. HOULAHAN, Mr. CASTEN of Illinois, Mr. VARGAS, Ms. SPEIER, Mr. GOMEZ, Mr. HARDER of California, Mr. STANTON, Ms. JAYAPAL, Mr. GOTTHEIMER, Mr. PASCRELL, and Mr. O'HALLERAN

SEPTEMBER 1, 2020

Reported with an amendment; committed to the Committee of the Whole House on the State of the Union and ordered to be printed

[Strike out all after the enacting clause and insert the part printed in *italic*]

[For text of introduced bill, see copy of bill as introduced on January 8, 2020]

A BILL

To amend the Migratory Bird Treaty Act to affirm that the Migratory Bird Treaty Act's prohibition on the unauthorized take or killing of migratory birds includes incidental take by commercial activities, and to direct the United States Fish and Wildlife Service to regulate such incidental take, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 *This Act may be cited as the “Migratory Bird Protec-*
5 *tion Act of 2020”.*

6 **SEC. 2. AMENDMENTS TO THE MIGRATORY BIRD TREATY**

7 **ACT.**

8 *(a) INCIDENTAL TAKE.—The Migratory Bird Treaty*
9 *Act (16 U.S.C. 703 et seq.) is amended in section 2(a), by*
10 *inserting “incidentally take,” before “attempt to take,”.*

11 *(b) COMMERCIAL ACTIVITY.—*

12 *(1) The Migratory Bird Treaty Act (16 U.S.C.*
13 *703 et seq.) is amended by inserting after section 13*
14 *the following:*

15 **“SEC. 14. INCIDENTAL TAKE OF MIGRATORY BIRDS.**

16 *“(a) IN GENERAL.—It shall be a violation of this Act*
17 *for any person to incidentally take a migratory bird as a*
18 *result of a commercial activity except as authorized by this*
19 *section and regulations issued pursuant to this section.*

20 *“(b) GENERAL PERMITS.—The Secretary shall regu-*
21 *late the incidental take of migratory birds as a result of*
22 *commercial activity by issuing general permits for par-*
23 *ticular industries, as identified by standard industrial clas-*
24 *sification, that the Secretary determines have broadly simi-*
25 *lar levels of incidental take and for which generally appli-*

1 cable best management practices or technologies exist that
2 can effectively avoid or minimize such impacts. With re-
3 spect to each such industry, the Secretary shall, based on
4 the best available science—

5 “(1) identify the commercial activity covered by
6 the regulation;

7 “(2) specify appropriate mitigation to be imple-
8 mented by a person seeking coverage under a general
9 permit, including adoption of best management prac-
10 tices or technologies that the Secretary has determined
11 are practicable and effective in avoiding or mini-
12 mizing the incidental take of migratory birds as a re-
13 sult of such commercial activity;

14 “(3) specify a mitigation fee in an amount the
15 Secretary determines is sufficient to reasonably com-
16 pensate, through habitat restoration or other appro-
17 priate measures, for any incidental take of migratory
18 birds that results from such commercial activity; and

19 “(4) specify a permit fee in an amount that the
20 Secretary determines is sufficient to offset the cost of
21 developing and revising such regulations and admin-
22 istering the research program established under sub-
23 section (s).

24 “(c) REVISION OF GENERAL PERMITS.—The Secretary
25 shall revise a general permit issued under subsection (b)

1 *if such Secretary determines that revision is appropriate,*
2 *or if—*

3 “(1) *the extent or nature of the incidental take*
4 *of migratory birds caused by the commercial activity*
5 *covered by the regulation is significantly different*
6 *than the extent or nature of such incidental take that*
7 *formed the basis of the regulation;*

8 “(2) *new best management practices or tech-*
9 *nologies can significantly reduce such incidental take*
10 *and can practicably be adopted by the persons en-*
11 *gaged in such commercial activity; or*

12 “(3) *such permit has not been revised in the 10*
13 *year period beginning on the date such permit was*
14 *issued.*

15 “(d) *CONSULTATION.—The Secretary shall, before*
16 *issuing a general permit under subsection (b), consult with*
17 *persons engaged in the industry to which such permit would*
18 *apply and other interested stakeholders and afford such per-*
19 *sons an opportunity to submit relevant information.*

20 “(e) *PRIORITY GENERAL PERMITS.—*

21 “(1) *IN GENERAL.—The Secretary shall give pri-*
22 *ority to development of general permits with respect*
23 *to industries for which substantial information exists*
24 *regarding the extent and nature of incidental take of*
25 *migratory birds caused by such industry and the effi-*

1 *cacy and practicability of best management practices*
2 *and technologies in reducing such incidental take.*

3 “(2) *COMMERCIAL ACTIVITIES WITH SPECIFIC*
4 *DEADLINES.—The Secretary shall issue general per-*
5 *mits under subsection (b)—*

6 “(A) *not later than 5 years after the date*
7 *of enactment of this Act with respect to—*

8 “(i) *oil, gas, and wastewater disposal*
9 *pits;*

10 “(ii) *methane and other gas burner*
11 *pipes;*

12 “(iii) *communication towers;*

13 “(iv) *electric transmission and dis-*
14 *tribution lines; and*

15 “(v) *wind power generation facilities;*
16 *and*

17 “(B) *not later than 8 years after the date*
18 *of enactment for this Act with respect to solar*
19 *powered generation facilities.*

20 “(f) *MITIGATION FEE.—The mitigation fee for each*
21 *general permit shall be the amount that the Secretary deter-*
22 *mines reasonably compensates, through habitat restoration*
23 *or other appropriate measures, for any incidental take of*
24 *migratory birds that results from the covered commercial*
25 *activity after the application of any mitigation measures*

1 *specified by the Secretary under subsection (b)(2). Such de-*
2 *termination shall be, to the maximum extent practicable,*
3 *based on objective and standardized metrics such as the size*
4 *or capacity of a facility for which a person seeks coverage.*

5 “(g) *ENDANGERED SPECIES ACT OF 1973 AND NA-*
6 *TIONAL ENVIRONMENTAL POLICY ACT.—Before issuing a*
7 *general permit pursuant to subsection (b), the Secretary*
8 *shall consult the United States Fish and Wildlife Service*
9 *and the National Marine Fisheries Service pursuant to sec-*
10 *tion 7(a)(2) of the Endangered Species Act of 1973 (16*
11 *U.S.C. 1536(a)(2)), and prepare an Environmental Impact*
12 *Statement pursuant to section 102(2)(C) of the National*
13 *Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)).*

14 “(h) *PERSONS SEEKING AUTHORIZATION FOR INCI-*
15 *DENTAL TAKE.—Except as provided in subsection (i), a*
16 *person is authorized to incidentally take migratory birds*
17 *if such person is engaged in a commercial activity with*
18 *respect to which a general permit has been issued under*
19 *subsection (b) and such person—*

20 “(1) *notifies the Secretary in writing that such*
21 *person is accepting coverage under such permit;*

22 “(2) *annually certifies, in writing, to the Sec-*
23 *retary that such person is in compliance with this Act*
24 *and maintains records demonstrating such compli-*
25 *ance;*

1 “(3) adopts each best management practice or
2 technology specified by the Secretary under subsection
3 (b)(2);

4 “(4) pays the mitigation fee specified by the Sec-
5 retary under subsection (b)(3) at the time such person
6 notifies the Secretary pursuant to paragraph (1), and
7 annually thereafter; and

8 “(5) pays the permit fee specified by the Sec-
9 retary under subsection (b)(4) at the time such person
10 notifies the Secretary pursuant to paragraph (1).

11 “(i) VIOLATION OF TERMS OF GENERAL PERMIT.—
12 The Secretary shall end the coverage of a person under a
13 general permit if such person does not fulfill the require-
14 ments to maintain such permit under subsection (h).

15 “(j) DURATION OF COVERAGE UNDER A GENERAL
16 PERMIT.—Except as provided in subsection (i), a person
17 authorized to take migratory birds pursuant to a general
18 permit shall be subject to the terms of such general permit
19 for a period of ten years beginning on the date such person
20 is first authorized for such take, irrespective of different
21 terms in a subsequently issued general permit.

22 “(k) PLATFORM FOR EFFICIENT CERTIFICATION.—The
23 Secretary shall establish a web-based platform or other effi-
24 cient mechanism for persons to file a certification and pay

1 *the fees required by subsection (h) without requiring indi-*
2 *vidualized review.*

3 “(l) *INTERIM COVERAGE FOR COMMERCIAL ACTIVITIES*
4 *PROPOSED FOR A GENERAL PERMIT.—*

5 “(1) *COMMERCIAL ACTIVITY WITH A SPECIFIED*
6 *DEADLINE.—Persons or entities engaged in commer-*
7 *cial activities listed in subsection (e)(2) shall, upon*
8 *payment of a mitigation fee in an amount deter-*
9 *mined under paragraph (3) and submission of a cer-*
10 *tification of compliance to the Secretary in accord-*
11 *ance with this subsection, be exempt from liability for*
12 *incidental take caused by such commercial activities*
13 *until the earlier of—*

14 “(A) *the issuance of a general permit cov-*
15 *ering such commercial activity under subsection*
16 *(b); or*

17 “(B) *with respect to—*

18 “(i) *an activity described in subsection*
19 *(e)(2)(A), the date that is 5 years after the*
20 *date of enactment of this section; or*

21 “(ii) *an activity described in sub-*
22 *section (e)(2)(B), the date that is 8 years*
23 *after the date of enactment of this section.*

24 “(2) *COMMERCIAL ACTIVITY FOR WHICH THE*
25 *SECRETARY HAS GIVEN NOTICE OF INTENT TO ISSUE*

1 *A PERMIT.*—*A person engaged in a commercial activ-*
2 *ity for which the Secretary has given notice in the*
3 *Federal Register of intent to issue a general permit*
4 *under subsection (b) shall, upon payment of a mitiga-*
5 *tion fee in an amount determined under paragraph*
6 *(3) and submission of a certification of compliance to*
7 *the Secretary in accordance with this subsection, be*
8 *exempt from liability for incidental take caused by*
9 *such commercial activities until the earlier of—*

10 *“(A) the date that is 5 years after the date*
11 *of issuance of such notice; or*

12 *“(B) the issuance of such regulation.*

13 *“(3) MITIGATION FEE.*—*The amount of the miti-*
14 *gation fee required by paragraph (1) and (2) shall be*
15 *the amount the Secretary determines is sufficient to*
16 *reasonably compensate, through habitat restoration or*
17 *other appropriate measures, for any incidental take of*
18 *migratory birds that results from the relevant com-*
19 *mercial activity.*

20 *“(4) CERTIFICATION OF MITIGATION MEAS-*
21 *URES.*—*A person seeking interim coverage under this*
22 *subsection shall submit to the Secretary a certifi-*
23 *cation identifying any measures such person has*
24 *taken to minimize incidental take of migratory birds*
25 *resulting from the commercial activity for which such*

1 *person is seeking interim coverage and committing to*
2 *continue such measures for the duration of the in-*
3 *terim coverage.*

4 *“(5) RECKLESS OR GROSSLY NEGLIGENT CON-*
5 *DUCT.—The exemption from liability for commercial*
6 *activities receiving interim coverage under this sub-*
7 *section shall not extend to incidental take that is*
8 *caused by conduct that is reckless or grossly negligent.*

9 *“(m) INDIVIDUAL PERMITS.—The Secretary may pro-*
10 *vide a permit on an individual basis to incidentally take*
11 *migratory birds to a person engaged in a commercial activ-*
12 *ity for which authorizing regulations have not been issued.*
13 *Each individual permit shall—*

14 *“(1) identify the commercial activity to which*
15 *the permit applies;*

16 *“(2) specify the duration of the permit, not to ex-*
17 *ceed 10 years;*

18 *“(3) specify the amount and nature of incidental*
19 *take authorized by the permit;*

20 *“(4) specify best management practices or tech-*
21 *nologies that the Secretary has determined are prac-*
22 *ticable and effective in avoiding or minimizing the*
23 *incidental take of migratory birds by such commer-*
24 *cial activity;*

1 “(5) specify a mitigation fee in an amount the
2 Secretary determines is sufficient to reasonably com-
3 pensate, through habitat restoration or other appro-
4 priate measures, for any incidental take of migratory
5 birds that results from such commercial activity;

6 “(6) specify a permit fee, to be paid at the time
7 such person submits a certification to the Secretary
8 pursuant to paragraph (7), to offset the cost of devel-
9 oping and revising such permit and administering
10 the research program established under subsection (s);

11 “(7) require such person to submit to the Sec-
12 retary an annual certification demonstrating such
13 person’s compliance with the terms of the permit;

14 “(8) provide for the terms of the permit to be re-
15 vised during the duration of such permit if new infor-
16 mation indicates that—

17 “(A) the extent or nature of the incidental
18 take of migratory birds caused by such commer-
19 cial activities is significantly different than was
20 understood at the time such permit was issued;
21 or

22 “(B) new best management practices, tech-
23 nologies or other measures can significantly re-
24 duce such impacts and can practicably be adopt-
25 ed by the applicant; and

1 “(9) provide for revocation of the permit if the
2 applicant fails to comply with the terms of such per-
3 mit.

4 “(n) COMPLIANCE CERTIFICATION.—The Secretary
5 shall make each certification submitted under this section
6 publicly available.

7 “(o) DE MINIMIS ACTIVITIES.—The Secretary shall
8 make a rule identifying categories of commercial activities
9 by standard industrial classification that are exempt from
10 liability for the killing or taking of migratory birds under
11 this Act because they do not cumulatively or individually
12 pose appreciable risks to migratory birds.

13 “(p) DEPOSIT OF MITIGATION FEES.—Mitigation fees
14 paid under this section shall be deposited into the North
15 American Wetlands Conservation Fund established under
16 the North American Wetlands Conservation Act (16 U.S.C.
17 4401 et seq.), the Neotropical Migratory Bird Conservation
18 Fund established by section 9 of the Neotropical Migratory
19 Bird Conservation Act (16 U.S.C. 6108), or such other fund
20 or account established by the Secretary provided that pri-
21 ority for use of such fees shall be given to mitigating im-
22 pacts or restoring or enhancing populations of bird spe-
23 cies—

24 “(1) affected by the permitted activities; and

1 “(2) identified as ‘birds of conservation concern’
2 under authority of section 13 of the Fish and Wildlife
3 Conservation Act of 1980 (16 U.S.C. 2912).

4 “(q) AUTHORIZATION OF APPROPRIATIONS.—There is
5 authorized to be appropriated \$10,000,000 for each fiscal
6 year beginning after the date of the enactment of this section
7 to carry out this section.

8 “(r) REPORT TO CONGRESS.—Not later than 5 years
9 after the date of enactment of this section, and at the end
10 of each 5 year period thereafter, the Secretary shall submit
11 a report to the Chair and Ranking Member of the House
12 Natural Resources Committee and to the Chair and Rank-
13 ing Member of the Senate Environment and Public Works
14 Committee on—

15 “(1) the conservation status of migratory birds;

16 “(2) the impacts upon migratory birds of com-
17 mercial activities for which authorizing regulations
18 have been issued under this section;

19 “(3) the effectiveness of best management prac-
20 tices, technologies, and other measures in reducing
21 such impacts; and

22 “(4) such Secretary’s progress in carrying out
23 the functions and responsibilities given to the Sec-
24 retary under this section.

1 “(s) *RESEARCH PROGRAM.*—*The Secretary shall estab-*
2 *lish and maintain, in consultation with State fish and*
3 *wildlife agencies, research institutions, institutions of high-*
4 *er education (as such term is defined in section 101(a) of*
5 *the Higher Education Act of 1965 (20 U.S.C. 1001(a)),*
6 *wildlife conservation groups, and representatives of com-*
7 *mercial activities regulated under this section, a research*
8 *program to—*

9 “(1) *evaluate the effectiveness of best manage-*
10 *ment practices and technologies incorporated in regu-*
11 *lations and permits under this section;*

12 “(2) *develop and evaluate new or improved best*
13 *management practices and technologies; and*

14 “(3) *evaluate the impacts of commercial activi-*
15 *ties regulated under this section on bird populations.*

16 **“SEC. 15. DEFINITIONS.**

17 *“For the purposes of this Act:*

18 “(1) *INCIDENTAL TAKE.*—*The terms ‘incidental*
19 *take’ and ‘incidentally take’ means the killing or tak-*
20 *ing of migratory birds that directly and foreseeably*
21 *results from, but is not the purpose of, a commercial*
22 *activity.*

23 “(2) *COMMERCIAL ACTIVITY.*—*The term ‘com-*
24 *mercial activity’ means—*

1 “(A) the conduct of any aspect of a busi-
2 ness, concession, or service in order to provide
3 goods or services to any person for compensation,
4 including manufacturing, distributing, trans-
5 porting, and marketing goods and services; and

6 “(B) activities of Federal, State, or local
7 governments related to the management or ad-
8 ministration of government property or pro-
9 grams.

10 “(3) *BEST MANAGEMENT PRACTICES*.—The term
11 ‘best management practices’ means operational prac-
12 tices, siting, and other guidelines prescribed by the
13 Secretary to avoid or minimize the incidental take of
14 migratory birds.

15 “(4) *SECRETARY*.—The term ‘Secretary’ means
16 the Secretary of the Interior acting through the Direc-
17 tor of the United States Fish and Wildlife Service.”.

18 (2) *CONFORMING AMENDMENTS*.—The *Migratory*
19 *Bird Treaty Act* is amended—

20 (A) in section 3, by striking “of Agri-
21 culture”;

22 (B) in section 5—

23 (i) by striking “of the Interior”; and

1 (ii) by striking “Agriculture authorized
2 by the Secretary of Agriculture” and insert-
3 ing “Interior authorized by the Secretary”;
4 (C) in section 6(d) by striking “of the Inte-
5 rior”; and
6 (D) in section 9, by striking “of Agri-
7 culture”.

8 (c) *PENALTIES*.—Section 6 of the *Migratory Bird*
9 *Treaty Act* (16 U.S.C. 707) is amended by inserting after
10 subsection (d) the following:

11 “(e) Whoever in violation of this Act, shall incidentally
12 take a migratory bird or violate the terms of a permit or
13 any rule issued by the Secretary to administer section 14
14 of this Act may be assessed a civil penalty by the Secretary
15 of not more than \$10,000 per violation, except that
16 unpermitted incidental take which is caused by conduct
17 that is reckless or grossly negligent shall be subject to the
18 penalties of subsection (a). The Secretary is authorized to
19 commence a civil action for appropriate relief, including
20 a permanent or temporary injunction, for any violation of
21 the terms of a permit or regulation issued under such sec-
22 tion.”.

Union Calendar No. 386

116TH CONGRESS
2^D SESSION

H. R. 5552

[Report No. 116-482]

A BILL

To amend the Migratory Bird Treaty Act to affirm that the Migratory Bird Treaty Act's prohibition on the unauthorized take or killing of migratory birds includes incidental take by commercial activities, and to direct the United States Fish and Wildlife Service to regulate such incidental take, and for other purposes.

SEPTEMBER 1, 2020

Reported with an amendment; committed to the Committee of the Whole House on the State of the Union and ordered to be printed