H.R. 5552

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

Mr. LOWENTHAL introduced the following bill; which was referred to the Committee on

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,
SECTION 1. SHORT TITLE.

This Act may be cited as the “Migratory Bird Protection Act of 2020”.

SEC. 2. AMENDMENTS TO THE MIGRATORY BIRD TREATY ACT.

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

(b) COMMERCIAL ACTIVITY.—

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

“SEC. 14. INCIDENTAL TAKE OF MIGRATORY BIRDS.

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

“(b) GENERAL PERMITS.—The Secretary shall regulate the incidental take of migratory birds as a result of commercial activity by issuing general permits for particular industries, as identified by standard industrial classification, that the Secretary determines have broadly similar levels of incidental take and for which generally-applicable best management practices or technologies exist.
that can effectively avoid or minimize such impacts. With respect to each such industry, the Secretary shall, based on the best available science—

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

“(2) specify appropriate mitigation to be implemented by a person seeking coverage under a general permit, including adoption of best management practices or technologies that the Secretary has determined are practicable and effective in avoiding or minimizing the incidental take of migratory birds as a result of such commercial activity;

“(3) specify a mitigation fee in an amount the Secretary determines is sufficient to reasonably compensate, through habitat restoration or other appropriate measures, for any incidental take of migratory birds that results from such commercial activity; and

“(4) specify a permit fee in an amount that the Secretary determines is sufficient to offset the cost of developing and revising such regulations and administering the research program established under subsection (s).

“(e) REVISION OF GENERAL PERMITS.—The Secretary shall revise a general permit issued under sub-
section (b) if such Secretary determines that revision is appropriate, or if—

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

“(2) new best management practices or technologies can significantly reduce such incidental take and can practicably be adopted by the persons engaged in such commercial activity; or

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

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

“(e) PRIORITY GENERAL PERMITS.—

“(1) IN GENERAL.—The Secretary shall give priority to development of general permits with respect to industries for which substantial information exists regarding the extent and nature of incidental
take of migratory birds caused by such industry and
the efficacy and practicability of best management
practices and technologies in reducing such inci-
dental take.

“(2) COMMERCIAL ACTIVITIES WITH SPECIFIC
deadlines.—The Secretary shall issue general per-
mits under subsection (b)—

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

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

“(ii) methane and other gas burner
pipes;

“(iii) communication towers;

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

“(v) wind power generation facilities;

and

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

“(f) MITIGATION FEE.—The mitigation fee for each
general permit shall be the amount that the Secretary de-
determines reasonably compensates, through habitat restora-
tion or other appropriate measures, for any incidental take
of migratory birds that results from the covered commercial activity after the application of any mitigation measures specified by the Secretary under subsection (b)(2). Such determination shall be, to the maximum extent practicable, based on objective and standardized metrics such as the size or capacity of a facility for which a person seeks coverage.

“(g) **Endangered Species Act of 1973 and National Environmental Policy Act.**—Before issuing a general permit pursuant to subsection (b), the Secretary shall consult the United States Fish and Wildlife Service and the National Marine Fisheries Service pursuant to section 7(a)(2) of the Endangered Species Act of 1973 (16 U.S.C. 1536(a)(2)), and prepare an Environmental Impact Statement pursuant to section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)).

“(h) **Persons Seeking Authorization for Incidental Take.**—Except as provided in subsection (i), a person is authorized to incidentally take migratory birds if such person is engaged in a commercial activity with respect to which a general permit has been issued under subsection (b) and such person—

“(1) notifies the Secretary in writing that such person is accepting coverage under such permit;
“(2) annually certifies, in writing, to the Secretary that such person is in compliance with this Act and maintains records demonstrating such compliance;

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

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

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

“(i) Violation of Terms of General Permit.—The Secretary shall end the coverage of a person under a general permit if such person does not fulfill the requirements to maintain such permit under subsection (h).

“(j) Duration of Coverage Under a General Permit.—Except as provided in subsection (i), a person authorized to take migratory birds pursuant to a general permit shall be subject to the terms of such general permit for a period of ten years beginning on the date such person
is first authorized for such take, irrespective of different
terms in a subsequently issued general permit.

“(k) Platform for Efficient Certification.—
The Secretary shall establish a web-based platform or
other efficient mechanism for persons to file a certification
and pay the fees required by subsection (h) without requir-
ing individualized review.

“(l) Interim Coverage for Commercial Activities Proposed for a General Permit.—

“(1) Commercial Activity with a Specified Deadline.—Persons or entities engaged in commer-
cial activities listed in subsection (e)(2) shall, upon
payment of a mitigation fee in an amount deter-
dined under paragraph (3) and submission of a cer-
tification of compliance to the Secretary in accord-
ance with this subsection, be exempt from liability
for incidental take caused by such commercial activi-
ties until the earlier of—

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

“(B) with respect to—

“(i) an activity described in subsection
(e)(2)(A), the date that is 5 years after the
date of enactment of this section; or
“(ii) an activity described in subsection (e)(2)(B), the date that is 8 years after the date of enactment of this section.

“(2) Commercial activity for which the Secretary has given notice of intent to issue a permit.—A person engaged in a commercial activity for which the Secretary has given notice in the Federal Register of intent to issue a general permit under subsection (b) shall, upon payment of a mitigation fee in an amount determined under paragraph (3) and submission of a certification of compliance to the Secretary in accordance with this subsection, be exempt from liability for incidental take caused by such commercial activities until the earlier of—

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

“(B) the issuance of such regulation.

“(3) Mitigation fee.—The amount of the mitigation fee required by paragraph (1) and (2) shall be the amount the Secretary determines is sufficient to reasonably compensate, through habitat restoration or other appropriate measures, for any incidental take of migratory birds that results from the relevant commercial activity.
“(4) **Certification of Mitigation Measures.**—A person seeking interim coverage under this subsection shall submit to the Secretary a certification identifying any measures such person has taken to minimize incidental take of migratory birds resulting from the commercial activity for which such person is seeking interim coverage and committing to continue such measures for the duration of the interim coverage.

“(5) **Reckless or Grossly Negligent Conduct.**—The exemption from liability for commercial activities receiving interim coverage under this subsection shall not extend to incidental take that is caused by conduct that is reckless or grossly negligent.

“(m) **Individual Permits.**—The Secretary may provide a permit on an individual basis to incidentally take migratory birds to a person engaged in a commercial activity for which authorizing regulations have not been issued. Each individual permit shall—

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

“(2) specify the duration of the permit, not to exceed 10 years;
“(3) specify the amount and nature of incidental take authorized by the permit;

“(4) specify best management practices or technologies that the Secretary has determined are practicable and effective in avoiding or minimizing the incidental take of migratory birds by such commercial activity;

“(5) specify a mitigation fee in an amount the Secretary determines is sufficient to reasonably compensate, through habitat restoration or other appropriate measures, for any incidental take of migratory birds that results from such commercial activity;

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

“(7) require such person to submit to the Secretary an annual certification demonstrating such person’s compliance with the terms of the permit;

“(8) provide for the terms of the permit to be revised during the duration of such permit if new information indicates that—
“(A) the extent or nature of the incidental take of migratory birds caused by such commercial activities is significantly different than was understood at the time such permit was issued; or

“(B) new best management practices, technologies or other measures can significantly reduce such impacts and can practicably be adopted by the applicant; and

“(9) provide for revocation of the permit if the applicant fails to comply with the terms of such permit.

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

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

“(p) DEPOSIT OF MITIGATION FEES.—Mitigation fees paid under this section shall be deposited into the North American Wetlands Conservation Fund established under the North American Wetlands Conservation Act (16
U.S.C. 4401 et seq.), the Neotropical Migratory Bird Conservation Fund established by section 9 of the Neotropical Migratory Bird Conservation Act (16 U.S.C. 6108), or such other fund or account established by the Secretary provided that priority for use of such fees shall be given to mitigating impacts or restoring or enhancing populations of bird species—

“(1) affected by the permitted activities; and


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

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

“(1) the conservation status of migratory birds;
“(2) the impacts upon migratory birds of commercial activities for which authorizing regulations have been issued under this section;

“(3) the effectiveness of best management practices, technologies, and other measures in reducing such impacts; and

“(4) such Secretary’s progress in carrying out the functions and responsibilities given to the Secretary under this section.

“(s) RESEARCH PROGRAM.—The Secretary shall establish and maintain, in consultation with research institutions, institutions of higher education (as such term is defined in section 101(a) of the Higher Education Act of 1965 (20 U.S.C. 1001(a))), wildlife conservation groups, and representatives of commercial activities regulated under this section, a research program to—

“(1) evaluate the effectiveness of best management practices and technologies incorporated in regulations and permits under this section;

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

“(3) evaluate the impacts of commercial activities regulated under this section on bird populations.

“SEC. 15. DEFINITIONS.

“For the purposes of this Act:
“(1) INCIDENTAL TAKE.—The terms ‘incidental take’ and ‘incidentally take’ means the killing or taking of migratory birds that directly and foreseeably results from, but is not the purpose of, a commercial activity.

“(2) COMMERCIAL ACTIVITY.—The term ‘commercial activity’ means——

“(A) the conduct of any aspect of a business, concession, or service in order to provide goods or services to any person for compensation, including manufacturing, distributing, transporting, and marketing goods and services; and

“(B) activities of federal, state, or local governments related to the management or administration of government property or programs.

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

“(4) SECRETARY.—The term ‘Secretary’ means the Secretary of the Interior acting through the Di-
rector of the United States Fish and Wildlife Service.”.

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

(A) in section 3, by striking “of Agriculture”; 

(B) in section 5—

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

(ii) by striking “Agriculture authorized by the Secretary of Agriculture” and inserting “Interior authorized by the Secretary”; 

(C) in section 6(d) by striking “of the Interior”; and 

(D) in section 9, by striking “of Agriculture”.

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

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