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(Original Signature of Member)

116TH CONGRESS  
2ND SESSION

# H. R. 5552

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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.

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## IN THE HOUSE OF REPRESENTATIVES

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

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# 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,*

1 **SECTION 1. SHORT TITLE.**

2 This Act may be cited as the “Migratory Bird Protec-  
3 tion Act of 2020”.

4 **SEC. 2. AMENDMENTS TO THE MIGRATORY BIRD TREATY**  
5 **ACT.**

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

10 (b) **COMMERCIAL ACTIVITY.**—

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

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

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

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  
25 similar levels of incidental take and for which generally-  
26 applicable best management practices or technologies exist

1 that can effectively avoid or minimize such impacts. With  
2 respect to each such industry, the Secretary shall, based  
3 on the best available science—

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

6 “(2) specify appropriate mitigation to be imple-  
7 mented by a person seeking coverage under a gen-  
8 eral permit, including adoption of best management  
9 practices or technologies that the Secretary has de-  
10 termined are practicable and effective in avoiding or  
11 minimizing the incidental take of migratory birds as  
12 a result of such commercial activity;

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

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

23 “(c) REVISION OF GENERAL PERMITS.—The Sec-  
24 retary shall revise a general permit issued under sub-

1 section (b) if such Secretary determines that revision is  
2 appropriate, 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  
7 that 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  
18 would apply and other interested stakeholders and afford  
19 such persons an opportunity to submit relevant informa-  
20 tion.

21 “(e) PRIORITY GENERAL PERMITS.—

22 “(1) IN GENERAL.—The Secretary shall give  
23 priority to development of general permits with re-  
24 spect to industries for which substantial information  
25 exists regarding the extent and nature of incidental

1 take of migratory birds caused by such industry and  
2 the efficacy and practicability of best management  
3 practices and technologies in reducing such inci-  
4 dental take.

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

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

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

12 “(ii) methane and other gas burner  
13 pipes;

14 “(iii) communication towers;

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

17 “(v) wind power generation facilities;  
18 and

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

22 “(f) MITIGATION FEE.—The mitigation fee for each  
23 general permit shall be the amount that the Secretary de-  
24 termines reasonably compensates, through habitat restora-  
25 tion or other appropriate measures, for any incidental take

1 of migratory birds that results from the covered commer-  
2 cial activity after the application of any mitigation meas-  
3 ures specified by the Secretary under subsection (b)(2).  
4 Such determination shall be, to the maximum extent prac-  
5 ticable, based on objective and standardized metrics such  
6 as the size or capacity of a facility for which a person  
7 seeks coverage.

8 “(g) ENDANGERED SPECIES ACT OF 1973 AND NA-  
9 TIONAL ENVIRONMENTAL POLICY ACT.—Before issuing a  
10 general permit pursuant to subsection (b), the Secretary  
11 shall consult the United States Fish and Wildlife Service  
12 and the National Marine Fisheries Service pursuant to  
13 section 7(a)(2) of the Endangered Species Act of 1973  
14 (16 U.S.C. 1536(a)(2)), and prepare an Environmental  
15 Impact Statement pursuant to section 102(2)(C) of the  
16 National Environmental Policy Act of 1969 (42 U.S.C.  
17 4332(2)(C)).

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

24 “(1) notifies the Secretary in writing that such  
25 person is accepting coverage under such permit;

1           “(2) annually certifies, in writing, to the Sec-  
2           retary that such person is in compliance with this  
3           Act and maintains records demonstrating such com-  
4           pliance;

5           “(3) adopts each best management practice or  
6           technology specified by the Secretary under sub-  
7           section (b)(2);

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

12          “(5) pays the permit fee specified by the Sec-  
13          retary under subsection (b)(4) at the time such per-  
14          son notifies the Secretary pursuant to paragraph  
15          (1).

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

20          “(j) DURATION OF COVERAGE UNDER A GENERAL  
21          PERMIT.—Except as provided in subsection (i), a person  
22          authorized to take migratory birds pursuant to a general  
23          permit shall be subject to the terms of such general permit  
24          for a period of ten years beginning on the date such person

1 is first authorized for such take, irrespective of different  
2 terms in a subsequently issued general permit.

3 “(k) PLATFORM FOR EFFICIENT CERTIFICATION.—  
4 The Secretary shall establish a web-based platform or  
5 other efficient mechanism for persons to file a certification  
6 and pay the fees required by subsection (h) without requir-  
7 ing individualized review.

8 “(l) INTERIM COVERAGE FOR COMMERCIAL ACTIVI-  
9 TIES PROPOSED FOR A GENERAL PERMIT.—

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

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

22 “(B) with respect to—

23 “(i) an activity described in subsection  
24 (e)(2)(A), the date that is 5 years after the  
25 date of enactment of this section; or



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

4                   “(2) COMMERCIAL ACTIVITY FOR WHICH THE  
5                   SECRETARY HAS GIVEN NOTICE OF INTENT TO ISSUE  
6                   A PERMIT.—A person engaged in a commercial ac-  
7                   tivity for which the Secretary has given notice in the  
8                   Federal Register of intent to issue a general permit  
9                   under subsection (b) shall, upon payment of a miti-  
10                  gation fee in an amount determined under para-  
11                  graph (3) and submission of a certification of com-  
12                  pliance to the Secretary in accordance with this sub-  
13                  section, be exempt from liability for incidental take  
14                  caused by such commercial activities until the earlier  
15                  of—

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

18                   “(B) the issuance of such regulation.

19                   “(3) MITIGATION FEE.—The amount of the  
20                   mitigation fee required by paragraph (1) and (2)  
21                   shall be the amount the Secretary determines is suf-  
22                   ficient to reasonably compensate, through habitat  
23                   restoration or other appropriate measures, for any  
24                   incidental take of migratory birds that results from  
25                   the relevant commercial activity.

1           “(4) CERTIFICATION OF MITIGATION MEAS-  
2           URES.— A person seeking interim coverage under  
3           this subsection shall submit to the Secretary a cer-  
4           tification identifying any measures such person has  
5           taken to minimize incidental take of migratory birds  
6           resulting from the commercial activity for which  
7           such person is seeking interim coverage and commit-  
8           ting to continue such measures for the duration of  
9           the interim coverage.

10           “(5) RECKLESS OR GROSSLY NEGLIGENT CON-  
11           DUCT.—The exemption from liability for commercial  
12           activities receiving interim coverage under this sub-  
13           section shall not extend to incidental take that is  
14           caused by conduct that is reckless or grossly neg-  
15           ligent.

16           “(m) INDIVIDUAL PERMITS.—The Secretary may  
17           provide a permit on an individual basis to incidentally take  
18           migratory birds to a person engaged in a commercial activ-  
19           ity for which authorizing regulations have not been issued.  
20           Each individual permit shall—

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

23           “(2) specify the duration of the permit, not to  
24           exceed 10 years;

1           “(3) specify the amount and nature of inci-  
2           dental take authorized by the permit;

3           “(4) specify best management practices or tech-  
4           nologies that the Secretary has determined are prac-  
5           ticable and effective in avoiding or minimizing the  
6           incidental take of migratory birds by such commer-  
7           cial activity;

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

13          “(6) specify a permit fee, to be paid at the time  
14          such person submits a certification to the Secretary  
15          pursuant to paragraph (7), to offset the cost of de-  
16          veloping and revising such permit and administering  
17          the research program established under subsection  
18          (s);

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

22          “(8) provide for the terms of the permit to be  
23          revised during the duration of such permit if new in-  
24          formation indicates that—

1           “(A) the extent or nature of the incidental  
2           take of migratory birds caused by such commer-  
3           cial activities is significantly different than was  
4           understood at the time such permit was issued;  
5           or

6           “(B) new best management practices, tech-  
7           nologies or other measures can significantly re-  
8           duce such impacts and can practicably be  
9           adopted by the applicant; and

10          “(9) provide for revocation of the permit if the  
11          applicant fails to comply with the terms of such per-  
12          mit.

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

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

22          “(p) DEPOSIT OF MITIGATION FEES.—Mitigation  
23          fees paid under this section shall be deposited into the  
24          North American Wetlands Conservation Fund established  
25          under the North American Wetlands Conservation Act (16

1 U.S.C. 4401 et seq.), the Neotropical Migratory Bird Con-  
2 servation Fund established by section 9 of the Neotropical  
3 Migratory Bird Conservation Act (16 U.S.C. 6108), or  
4 such other fund or account established by the Secretary  
5 provided that priority for use of such fees shall be given  
6 to mitigating impacts or restoring or enhancing popu-  
7 lations of bird species—

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

9 “(2) identified as ‘birds of conservation con-  
10 cern’ under authority of section 13 of the Fish and  
11 Wildlife Conservation Act of 1980 (16 U.S.C. 2912).

12 “(q) AUTHORIZATION OF APPROPRIATIONS.—There  
13 is authorized to be appropriated \$10,000,000 for each fis-  
14 cal year beginning after the date of the enactment of this  
15 section to carry out this section.

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

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

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

4           “(3) the effectiveness of best management prac-  
5           tices, technologies, and other measures in reducing  
6           such impacts; and

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

10          “(s) RESEARCH PROGRAM.—The Secretary shall es-  
11          tablish and maintain, in consultation with research institu-  
12          tions, institutions of higher education (as such term is de-  
13          fined in section 101(a) of the Higher Education Act of  
14          1965 (20 U.S.C. 1001(a))), wildlife conservation groups,  
15          and representatives of commercial activities regulated  
16          under this section, a research program to—

17                 “(1) evaluate the effectiveness of best manage-  
18                 ment practices and technologies incorporated in reg-  
19                 ulations and permits under this section;

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

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

24          **“SEC. 15. DEFINITIONS.**

25          “For the purposes of this Act:

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

6           “(2) COMMERCIAL ACTIVITY.—The term ‘com-  
7           mercial activity’ means——

8                   “(A) the conduct of any aspect of a busi-  
9                   ness, concession, or service in order to provide  
10                  goods or services to any person for compensa-  
11                  tion, including manufacturing, distributing,  
12                  transporting, and marketing goods and services;  
13                  and

14                  “(B) activities of federal, state, or local  
15                  governments related to the management or ad-  
16                  ministration of government property or pro-  
17                  grams.

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

23           “(4) SECRETARY.—The term ‘Secretary’ means  
24           the Secretary of the Interior acting through the Di-

1 rector of the United States Fish and Wildlife Serv-  
2 ice.”.

3 (2) CONFORMING AMENDMENTS.—The Migra-  
4 tory Bird Treaty Act is amended—

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

7 (B) in section 5—

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

9 (ii) by striking “Agriculture author-  
10 ized by the Secretary of Agriculture” and  
11 inserting “Interior authorized by the Sec-  
12 retary”;

13 (C) in section 6(d) by striking “of the In-  
14 terior”; and

15 (D) in section 9, by striking “of Agri-  
16 culture”.

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

20 “(e) Whoever in violation of this Act, shall inciden-  
21 tally take a migratory bird or violate the terms of a permit  
22 or any rule issued by the Secretary to administer section  
23 14 of this Act may be assessed a civil penalty by the Sec-  
24 retary of not more than \$10,000 per violation, except that  
25 unpermitted incidental take which is caused by conduct



1 that is reckless or grossly negligent shall be subject to the  
2 penalties of subsection (a). The Secretary is authorized  
3 to commence a civil action for appropriate relief, including  
4 a permanent or temporary injunction, for any violation of  
5 the terms of a permit or regulation issued under such sec-  
6 tion.”.