

[DISCUSSION DRAFT]

116TH CONGRESS
1ST SESSION

H. R. _____

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 covered commercial activities, and to direct the United States Fish and Wildlife Service to make a rule establishing a permitting program authorizing and regulating 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 covered commercial activities, and to direct the United States Fish and Wildlife Service to make a rule establishing a permitting program authorizing and regulating 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 2019”.

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 (16 U.S.C. 703) “to incidentally take,” before
9 “attempt to take,”.

10 (b) **COVERED COMMERCIAL ACTIVITY.**—The Migra-
11 tory Bird Treaty Act (16 U.S.C. 703 et seq.) is amended
12 by inserting after section 13 the following:

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

14 “(a) **DEFINITIONS.**—For the purposes of this section:

15 “(1) **INCIDENTAL TAKE.**—The terms ‘incidental
16 take’ and ‘incidentally take’ means the killing or
17 taking of migratory birds that directly and
18 foreseeably results from, but is not the purpose of,
19 a covered commercial activity.

20 “(2) **COVERED COMMERCIAL ACTIVITY.**—The
21 terms ‘covered commercial activity’ and ‘covered
22 commercial activities’ mean an industry or type of
23 commercial activity that the Secretary determines
24 cause significant harm to migratory birds including:

25 “(A) oil, gas, and wastewater disposal pits;

26 “(B) methane or other gas burner pipes;

1 “(C) communication towers;

2 “(D) electric transmission and distribution
3 lines; and

4 “(E) wind and solar power generation fa-
5 cilities.

6 “(3) BEST MANAGEMENT PRACTICES.—The
7 term ‘best management practices’ means operational
8 practices, siting, and other guidelines prescribed by
9 the Secretary to avoid or minimize the killing or tak-
10 ing of migratory birds by covered commercial activi-
11 ties.

12 “(4) SECRETARY.—The term ‘Secretary’ means
13 the Secretary of the Interior.

14 “(b) PERMIT PROGRAM FOR COVERED COMMERCIAL
15 ACTIVITIES.—The Secretary shall make a rule estab-
16 lishing a permitting program that authorizes and regu-
17 lates the incidental take of migratory birds by covered
18 commercial activities in a manner that furthers the con-
19 servation of migratory birds in accordance with this Act.

20 “(c) PERMITS.—

21 “(1) GENERAL PERMITS.—

22 “(A) IN GENERAL.—The Secretary shall
23 make a rule establishing general permits that
24 authorize and regulate the incidental take of
25 migratory birds by particular industry, as iden-

1 tified by standard industrial classification, that
2 the Secretary determines have broadly similar
3 impacts on birds and for which generally-appli-
4 cable best management practices or technologies
5 that can effectively avoid or minimize such im-
6 pacts. Each general permit shall—

7 “(i) identify the covered commercial
8 activities covered by the general permit;

9 “(ii) specify the amount and nature of
10 incidental take authorized by the general
11 permit;

12 “(iii) specify appropriate mitigation to
13 be implemented by a person or entity seek-
14 ing coverage under the general permit, in-
15 cluding—

16 “(I) adoption of best manage-
17 ment practices or technologies that, in
18 the Secretary’s judgment, are prac-
19 ticable and effective in avoiding or
20 minimizing the incidental take of mi-
21 gratory birds by such covered com-
22 mercial activities;

23 “(II) adoption of compensatory
24 mitigation measures, including habitat
25 protection and restoration, to offset

1 the impacts of such covered commer-
2 cial activities, where such measures
3 can practicably be identified in the
4 general permit; and

5 “(III) payment of a mitigation
6 fee that, in the Secretary’s judgment,
7 reasonably compensates for any inci-
8 dental take of migratory birds that re-
9 sult from such covered commercial ac-
10 tivities that may remain after imple-
11 mentation of mitigation measures
12 specified under subclauses (I) and
13 (II);

14 “(iv) require applicants seeking cov-
15 erage under a general permit to maintain
16 and annually submit to the Secretary
17 records demonstrating compliance with the
18 terms of the general permit;

19 “(v) provide for revocation of coverage
20 under the general permit for an applicant
21 that fails to comply with its terms;

22 “(vi) specify the duration of the gen-
23 eral permit, not to exceed 10 years;

24 “(vii) provide for the terms of the
25 general permit to be revised during the du-

1 ration of such general permit if new infor-
2 mation indicates that—

3 “(I) the extent or nature of the
4 incidental take of migratory birds
5 caused by the covered commercial ac-
6 tivities covered under the permit are
7 significantly different than the extent
8 or nature of such incidental take that
9 formed the basis of the underlying
10 general permit; or

11 “(II) best management practices
12 or technologies can significantly re-
13 duce such incidental take and can
14 practicably be adopted by applicants
15 covered by the general permit;

16 “(viii) exclude from coverage under a
17 general permit persons, entities, or facili-
18 ties engaged in covered commercial activi-
19 ties that—

20 “(I) pose extraordinary risks to
21 migratory birds compared to the risk
22 generally posed by the range of cov-
23 ered commercial activities to which
24 such general permit applies; or

1 “(II) require site-specific consid-
2 eration of location, siting or other fac-
3 tors to achieve the same degree of
4 protection as the protection provided
5 at facilities covered by such general
6 permit; and

7 “(ix) require compliance with other
8 applicable laws, including the Endangered
9 Species Act of 1973 (16 U.S.C. 1531 et
10 seq.).

11 “(B) MECHANISM FOR EXTENDING COV-
12 ERAGE.—The Secretary shall make a rule speci-
13 fying a mechanism for efficiently extending cov-
14 erage under general permits to each applicant
15 seeking such coverage, including a means for an
16 applicant to certify such applicant’s intention to
17 adhere to the terms of an applicable general
18 permit and submit payment of the appropriate
19 mitigation fee without the need for individual-
20 ized review of such applicant’s application.

21 “(C) CONSIDERATIONS IN RULEMAKING.—
22 In developing and issuing a general permit, the
23 Secretary shall consider, based on the best
24 available science, the extent and nature of inci-
25 dental take of migratory birds caused by the

1 covered commercial activity under a general
2 permit, the efficacy and practicability of best
3 management practices and technologies in re-
4 ducing such incidental take, and the practica-
5 bility of specifying compensatory mitigation
6 measures to offset such incidental take as part
7 of a general permit. The Secretary shall consult
8 with persons engaged in the covered commercial
9 activity to which such general permit would
10 apply and other interested stakeholders and af-
11 ford such persons an opportunity to submit rel-
12 evant information.

13 “(D) PRIORITY DEVELOPMENT OF GEN-
14 ERAL PERMITS.—The Secretary shall give pri-
15 ority to development of general permits for cov-
16 ered commercial activities for which substantial
17 information exists regarding the extent and na-
18 ture of incidental take of migratory birds
19 caused by such covered commercial activities
20 and the efficacy and practicability of best man-
21 agement practices and technologies in reducing
22 such incidental take. These covered commercial
23 activities include—

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

1 “(ii) methane and other gas burner
2 pipes;

3 “(iii) communication towers;

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

6 “(v) wind and solar power generation
7 facilities.

8 “(E) MITIGATION FEE.—The mitigation
9 fee for each general permit shall be determined
10 by the Secretary and periodically revised, taking
11 into consideration the typical impacts to migra-
12 tory birds from such covered commercial activ-
13 ity and the costs for compensating for such im-
14 pacts through habitat restoration or other ap-
15 propriate measures. The mitigation fee shall, to
16 the maximum extent practicable, be calculated
17 based on objective metrics, such as the size or
18 commercial capacity of a facility seeking cov-
19 erage, and the habitat in which the covered
20 commercial activity or facility is located, and
21 take into account any compensatory mitigation
22 measures implemented in order to comply with
23 the permit terms.

24 “(F) FREQUENCY OF RULEMAKING.—The
25 Secretary shall by rule review and revise the

1 terms of each general permit not less frequently
2 than every 10 years. Such revised general per-
3 mits shall apply each new applicant and to each
4 applicant seeking an extension of such appli-
5 cant's coverage under a general permit after the
6 expiration of such general permit.

7 “(G) CONSULTATION AND ENVIRON-
8 MENTAL IMPACT STATEMENT.—Before issuing
9 a general permit, the Secretary shall consult the
10 United States Fish and Wildlife Service and the
11 National Marine Fisheries Service pursuant to
12 section 7(a)(2) of the Endangered Species Act
13 of 1973 (16 U.S.C. 1536(a)(2)), and prepare
14 an Environmental Impact Statement pursuant
15 to section 102(2)(C) of the National Environ-
16 mental Policy Act of 1969 (42 U.S.C.
17 4332(2)(C)).

18 “(2) INDIVIDUAL PERMITS.—The Secretary
19 may provide an individual permit to an entity or per-
20 son engaged in a covered commercial activity for
21 which a general permit is not available, or whose lo-
22 cation or operations poses risks to migratory birds
23 that the Secretary determines are not addressed ade-
24 quately in an otherwise-applicable general permit.
25 Each individual permit shall—

1 “(A) identify the covered commercial activ-
2 ity to which the permit applies;

3 “(B) specify the amount and nature of in-
4 cidental take authorized by the permit;

5 “(C) specify appropriate mitigation to be
6 implemented by the applicant, including—

7 “(i) adoption of best management
8 practices, technologies, or other measures
9 that, in the Secretary’s judgment, are
10 practicable and effective in avoiding or
11 minimizing the incidental take of migra-
12 tory birds by the covered commercial activ-
13 ity covered, taking into consideration the
14 location and characteristics of such activ-
15 ity;

16 “(ii) compensatory mitigation meas-
17 ures, including habitat protection and res-
18 toration, to offset the impacts of such cov-
19 ered commercial activity; and

20 “(iii) payment of a mitigation fee
21 that, in the Secretary’s judgment, reason-
22 ably compensates for any incidental take of
23 migratory birds by such covered commer-
24 cial activity that may remain after imple-

1 mentation of mitigation measures specified
2 under clauses (i) and (ii);

3 “(D) require the applicant to maintain and
4 annually submit to the Secretary records dem-
5 onstrating its compliance with the terms of the
6 permit;

7 “(E) provide for revocation of the permit if
8 the applicant fails to comply with its terms;

9 “(F) specify the duration of the permit,
10 not to exceed 10 years;

11 “(G) provide for the terms of the permit to
12 be revised during its duration if new informa-
13 tion indicates that—

14 “(i) the extent or nature of the inci-
15 dental take of migratory birds caused by
16 such covered commercial activities are sig-
17 nificantly different than was understood
18 when the permit was issued the extent or
19 nature of such incidental take that formed
20 the basis of the underlying permit; or

21 “(ii) best management practices, tech-
22 nologies or other measures can signifi-
23 cantly reduce such impacts and can prac-
24 tically be adopted by the applicant; and

1 “(H) be issued in compliance with the En-
2 dangered Species Act of 1973 (16 U.S.C. 1531
3 et seq.), the National Environmental Policy Act
4 of 1969 (42 U.S.C. 4321 et seq.), and other ap-
5 plicable laws.

6 “(d) COMPLIANCE RECORDS.—The Secretary shall
7 make records of compliance submitted by each permit
8 holder under this section publicly available.

9 “(e) DE MINIMIS ACTIVITIES.—The Secretary shall
10 make a rule identifying categories of covered commercial
11 activities by standard industrial classification that are ex-
12 empt from liability for the killing or taking of migratory
13 birds under this Act because they do not cumulatively or
14 individually pose significant risks to migratory birds.

15 “(f) MITIGATION FEES.—Mitigation fees paid under
16 this section shall be deposited as follows:

17 “(1) 50 percent of such fees into the North
18 American Wetlands Conservation Fund; and

19 “(2) 50 percent of such fees into the
20 Neotropical Migratory Bird Conservation Fund (16
21 U.S.C. 6108).

22 “(g) ADMINISTRATION.—The Secretary may make
23 rules to carry out this section.

24 “(h) AUTHORIZATION OF APPROPRIATIONS.—There
25 is authorized to be appropriated \$10,000,000 for each fis-

1 cal year beginning after the date of the enactment of this
2 section to carry out this section.

3 “(i) REPORT TO CONGRESS.—Not later than 5 years
4 after the date of enactment of this section, and at the end
5 of each 5 year period thereafter, the Secretary shall sub-
6 mit a report to the Chair and Ranking Member of the
7 House Natural Resources Committee and to the Chair and
8 Ranking Member of the Senate Environment and Public
9 Works Committee on—

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

11 “(2) the impacts upon migratory birds of cov-
12 ered commercial activities for which a general permit
13 has been issued under this section;

14 “(3) the effectiveness of best management prac-
15 tices, technologies, and other measures in reducing
16 such impacts; and

17 “(4) such Secretary’s progress in carrying out
18 the functions and responsibilities given to the Sec-
19 retary under this section.”.

20 (c) PENALTIES.—Section 6 of the Migratory Bird
21 Treaty Act (16 U.S.C. 707) is amended—

22 (1) by redesignating subsection (d) as sub-
23 section (e); and

24 (2) by inserting after subsection (c) the fol-
25 lowing:

1 “(d) Whoever violates the terms of a permit or any
2 rule issued by the Secretary to administer section 14 of
3 this Act may be assessed a civil penalty by the Secretary
4 of not more than \$10,000 per violation. The Secretary is
5 authorized to commence a civil action for appropriate re-
6 lief, including a permanent or temporary injunction, for
7 any violation of the terms of a permit or regulation issued
8 under such section.”.