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(Original Signature of Member)

116TH CONGRESS
2ND SESSION

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,*

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.”.