H. R. 4833

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

JULY 29, 2021

Mr. LOWENTHAL (for himself, Mr. FITZPATRICK, Mr. GRIJALVA, Ms. SALAZAR, Mr. SUOZZI, Mr. KILMER, Ms. PINGREE, Mr. CICILLINE, Mrs. MCBATH, Mr. ESPAILLAT, Mr. HUFFMAN, Mr. BRENDAN F. BOYLE of Pennsylvania, Ms. MCCOLLUM, Ms. DEBENNE, Ms. ESHOO, Mr. BLUMENTHAL, Mr. POOLY, Mr. GALLEGOS, Ms. STEVENS, Mrs. CAROLYN B. MALONEY of New York, Mr. CASTEN, Ms. DEGETTE, Mr. CONNOLLY, Ms. SPEIER, Ms. BLUNT ROCHESTER, Ms. WILD, Ms. SCHAUKOWSKY, Mr. THOMPSON of California, Ms. SCANLON, Mr. COOPER, Ms. VELÁZQUEZ, Mr. DEFAZIO, Mr. LEVIN of Michigan, Mr. GOTTHEIMER, Mr. TAKANO, Mr. QUIGLEY, Ms. JACOBS of California, Mr. COHEN, Mr. HORSFORD, Mr. LARSEN of Washington, Ms. HOULAHAN, Mrs. DINGELL, Ms. NORTON, Mr. LIEU, Mr. PAPPAS, Ms. KUSTER, Mr. BEYER, Ms. SLOOTKIN, Mr. KILDEE, and Ms. STRICKLAND) introduced the following bill; which was referred to the Committee on Natural Resources

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.
Be it enacted by the Senate and House of Representatives 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 2021”.

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 clas-
sification, 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 imple-
mented by a person seeking coverage under a gen-
eral permit, including adoption of best management
practices or technologies that the Secretary has de-
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 com-
pensate, through habitat restoration or other appro-
priate 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 ad-
ministering the research program established under
subsection (r).
“(c) Revision of General Permits.—The Secretary shall revise a general permit issued under subsection (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 re-
spect 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-
termines reasonably compensates, through habitat restoration 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 Sec-
retary that such person is in compliance with this
Act and maintains records demonstrating such com-
pliance;
“(3) adopts each best management practice or
technology specified by the Secretary under sub-
section (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 Sec-
retary under subsection (b)(4) at the time such per-
son 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 require-
ments 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 requiring individualized review.

“(l) 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 (r);

“(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 re-
duce 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 per-
mit.
“(m) COMPLIANCE CERTIFICATION.—The Secretary
shall make each certification submitted under this section
publicly available.
“(n) 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.
“(o) 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 Con-
servation 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 popu-
lations of bird species—
“(1) affected by the permitted activities; and


“(p) 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.

“(q) 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) the Secretary’s progress in carrying out the functions and responsibilities given to the Secretary under this section.
“(r) RESEARCH PROGRAM.—The Secretary shall est-

tablish and maintain, in consultation with research institu-
tions, institutions of higher education (as such term is de-

fined 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 manage-

ment practices and technologies incorporated in reg-

ulations and permits under this section;

“(2) develop and evaluate new or improved best

management practices and technologies; and

“(3) evaluate the impacts of commercial activi-

ties 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 ‘com-

mercial activity’ means—

“(A) the conduct of any aspect of a busi-

ness, 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 Director 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”.

(e) 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.”.