

This document has been prepared as part of the implementation project of Legal Pathways to Deep Decarbonization (Michael B. Gerrard and John C. Dernbach, eds. Environmental Law Institute [2019]) (LPDD). For background information on the project, see <https://lpdd.org>

Model language to give the Fish and Wildlife Service explicit authority to grant incidental take permits for renewables and transmission lines under the Migratory Bird Treaty Act and the Bald and Golden Eagle Protection Act.

INTRODUCTORY MEMORANDUM

1. The purpose of the Endangered Species Act (“ESA”) is to protect and recover imperiled species and the ecosystems upon which they depend. The U.S. Fish and Wildlife Service (“USFWS”) works alongside the National Marine Fisheries Services (part of the National Oceanic and Atmospheric Administration) to enforce the ESA.
2. The USFWS is a bureau within the U.S. Department of the Interior (“DOI”) and is the only agency in the Federal government whose primary responsibility is the conservation and management of fish, wildlife, plants and their habitats for the American people.
3. The ESA determined that the Secretary¹ may permit private non-federal entities any taking² otherwise prohibited by the ESA Sec. 9(a)(1)(B)³ if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity, known as “Incidental Take Permits.”
4. Incidental Take Permits may be issued pursuant to the ESA if the applicant submits a conservation plan that specifies: (a) the impact which will likely result from such taking; (b) steps the applicant will take to minimize and mitigate such impacts, and the funding that will be available to implement such steps; (c) alternative actions to such taking the applicant considered and the reasons why such alternatives are not being utilized; and (d) such other measures that the Secretary may require as being necessary or appropriate for purposes of the plan.
5. Congress passed the ESA to provide the means whereby the ecosystems upon which endangered and threatened species depend may be conserved and to provide a program for the conservation of such species.
6. The Bald and Golden Eagle Protection Act (“BGEPA”) prohibits anyone, without a permit issued by the Secretary of the Interior, from “taking” bald or golden eagles, including their parts (including feathers), nests, or eggs. The Act defines “take” as “*pursue, shoot, shoot at, poison, wound, kill, capture, trap, collect, molest or disturb.*”

¹ According to the ESA, the term “Secretary” means “except as otherwise herein provided, the Secretary of the Interior or the Secretary of Commerce as program responsibilities are vested pursuant to the provisions of Reorganization Plan Numbered 4 of 1970; except that with respect to the enforcement of the provisions of this Act and the Convention which pertain to the importation or exportation of terrestrial plants, the term also means the Secretary of Agriculture.”

² SEC. 3. For the purposes of this Act —

(19) The term “take” means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.

³ SEC. 9. (a) GENERAL.— (1) Except as provided in sections 6(g)(2) and 10 of this Act, with respect to any endangered species of fish or wildlife listed pursuant to section 4 of this Act it is unlawful for any person subject to the jurisdiction of the United States to —

(B) take any such species within the United States or the territorial sea of the United States;

7. [Regulations promulgated pursuant to the BGEPA](#) allow for the issuance of permits for the taking, possession, and transportation within the U.S. of bald eagles and golden eagles and their parts, nests, and eggs for scientific, educational, and depredation control purposes; for the religious purposes of American Indian tribes; and to protect other interests in a particular locality.
8. The Migratory Bird Treaty Act (“[MBTA](#)”) is intended to ensure the sustainability of populations of all protected migratory bird species in the four international treaties that the U.S. entered into with Canada in 1916, Mexico in 1936, Japan in 1972, and Russia in 1976. The MBTA applies only to migratory bird species that are native to the U.S. or U.S. territories, and that a native migratory bird species is one that is present as a result of natural biological or ecological processes.
9. Similar to the BGEPA, the MBTA determines that unless and except as permitted by regulations, it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to pursue, capture, or kill, possess, offer for sale, sell, offer to barter, barter, offer to purchase, purchase, deliver for shipment, ship, export, import, cause to be shipped, exported, or imported, deliver for transportation, transport or cause to be transported, carry or cause to be carried, or receive for shipment, transportation, carriage, or export, any migratory bird, any part, nest, or egg of any such bird, or any product, whether or not manufactured, which consists, or is composed in whole or part, of any such bird or any part, nest, or egg thereof.
10. As authorized by regulations promulgated pursuant to the MBTA, the USFWS issues permits to qualified applicants for activities such as falconry, raptor propagation, scientific collecting, special purposes (rehabilitation, educational, migratory game bird propagation, and salvage), take of depredating birds, taxidermy, and waterfowl sale and disposal. There is no provision in the MBTA allowing the USFWS to issue an Incidental Take Permit with respect to the species protected by the MBTA, although the statute does give DOI very broad authority “*to adopt suitable regulations permitting and governing*” take of migratory birds (16 U.S. Code § 704).⁴
11. Therefore, the Acts that regulate impacts to avian wildlife in the U.S. are colliding with renewable energy policy and promotion in the U.S. (42 USC §13201 et seq., 2005)⁵.
12. Renewable energy is defined by the U.S. Energy Information Administration as energy from sources that are naturally replenishing but flow-limited; renewable resources are virtually inexhaustible in duration but limited in the amount of energy that is available per unit of time (e.g., water, wind, solar, biomass and geothermal energy).
13. Renewable energy has generally been a component of U.S. energy policy for several decades. Various investigations, rulemaking, and enticements have been required to encourage the development of renewable energy sources. Additionally, renewable energy development projects are gaining increased attention due to reduced contribution to climate change impacts and their potential to reduce the production and consumption of fossil fuels.

⁴ (a) Subject to the provisions and in order to carry out the purposes of the conventions, referred to in section 703 of this title, the Secretary of the Interior is authorized and directed, from time to time, having due regard to the zones of temperature and to the distribution, abundance, economic value, breeding habits, and times and lines of migratory flight of such birds, to determine when, to what extent, if at all, and by what means, it is compatible with the terms of the conventions to allow hunting, taking, capture, killing, possession, sale, purchase, shipment, transportation, carriage, or export of any such bird, or any part, nest, or egg thereof, and to adopt suitable regulations permitting and governing the same, in accordance with such determinations, which regulations shall become effective when approved by the President.

⁵ See, e.g., The Energy Policy Act of 2005 promotes renewable energy by providing numerous incentives and assistance to the development of renewable forms of energy.

14. The MBTA and BGEPA, as currently enforced, have presented challenges for renewable energy projects, in some cases creating roadblocks for renewable energy project developers and/or operators if they are unable to perform their activities in compliance with the MBTA and BGEPA provisions.
15. One of the reasons why new legislation regarding renewable energy projects and incidental take under the MBTA and BGEPA is imperative is that courts have been reluctant to endorse the USFWS's attempts to issue permits under the present regulatory structure.⁶ The lack of certainty is particularly striking because the MBTA is a criminal statute; virtually any violation of the statute is a misdemeanor (16 U.S.C. § 707(a)) and knowing violations are felonies (16 U.S.C. § 707(b)).
16. This uncertainty caused by the lack of a clear and reliable regulatory scheme could threaten the further development of the renewable energy industry.
17. Considering that the activities performed by renewables energy and transmission lines entities are indispensable and may cause the disturbance of migratory birds, bald or golden eagles, or their habitat,⁷ explicitly granting authority to the Secretary of the Interior to issue Incidental Take Permits to renewable energy and transmission projects under the MBTA and the BGEPA will allow the U.S. to accelerate the development of such projects while minimizing or offsetting the potential impacts of such projects on migratory birds, bald and golden eagles, and their habitat.
18. Also, as new legislation establishes clear standards for avian conservation and reflects renewable energy values, it will allow the renewable energy industry to better move towards utilizing the vast resources in the U.S. Finally, the new legislation seeks both to ensure avian conservation and to accelerate the already rapid development and deployment of renewables and transmission infrastructure.

MODEL LANGUAGE

SECTION 1. SHORT TITLE.

This Act may be cited as the [x] Act.

SECTION 2. POLICY.

It is the policy of the United States of America to facilitate increased development of renewable energy facilities and the transmission or distribution of the electricity produced or stored by such facilities in the United States by streamlining the federal permitting process in order to reduce the production of fossil fuels and emission of corresponding greenhouse gases to the atmosphere from the production and consumption of such fuels, and to thereby limit the damage resulting from climate change to the people of the United States, public infrastructure, and natural systems.

SECTION 3. DEFINITIONS.

⁶ See, e.g., *Turtle Island Restoration Network v. U.S. Dep't of Commerce*, 878 F.3d 725, 733 (9th Cir. 2017) (striking down special-use permit issued under 50 C.F.R. § 21.27).

⁷ See, e.g., Tara J. Conkling, et al., *Vulnerability of avian populations to renewable energy production*, Royal Society of Open Science (March 2022), available at <https://royalsocietypublishing.org/doi/10.1098/rsos.211558>.

In this Act:

- (1) SECRETARY. – “Secretary” means the Secretary of the Interior.
- (2) QUALIFIED FACILITIES – “Qualified Facilities” means any facility producing electricity from a “Qualified Energy Resource” as defined pursuant to 26 USC § 45(c)(1) or providing for the transmission or distribution of the electricity produced or stored by such facility.
- (3) TAKE – “take” means pursue, shoot, shoot at, poison, wound, kill, capture, trap, collect, molest or disturb any migratory bird, or any part, nest, or egg of any such bird.

SECTION 4. PERMITTING OF QUALIFIED PROJECTS.

(a) PERMITS.

- (1) The Secretary may permit, under such terms and conditions as he shall prescribe, any taking otherwise prohibited by 16 U.S. Code § 703 or 16 U.S. Code § 668 if such taking is incidental to, and not the purpose of, the carrying out of the otherwise lawful construction, operation or maintenance of any Qualified Facility.
- (2) (A) No permit may be issued by the Secretary authorizing any taking referred to in paragraph (1) unless the applicant therefor submits to the Secretary a conservation plan that specifies— (i) the impact which will likely result from such taking; (ii) steps the applicant will take to minimize and mitigate such impacts, and the funding that will be available to implement such steps; (iii) alternative actions to such taking the applicant considered and the reasons why such alternatives are not being utilized; and (iv) such other measures that the Secretary may require as being necessary or appropriate for purposes of the plan. (B) If the Secretary finds, after opportunity for public comment, with respect to a permit application and the related conservation plan that— (i) the taking will be incidental; (ii) the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such taking; (iii) the applicant will ensure that adequate funding for the plan will be provided; (iv) the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild; and (v) the measures, if any, required under subparagraph (A)(iv) will be met; and he has received such other assurances as he may require that the plan will be implemented, the Secretary shall issue the permit. The permit shall contain such terms and conditions as the Secretary deems necessary or appropriate to carry out the purposes of this paragraph, including, but not limited to, such reporting requirements as the Secretary deems necessary for determining whether such terms and conditions are being complied with. (C) The Secretary shall revoke a permit issued under this paragraph if he finds that the permittee is not complying with the terms and conditions of the permit.

(b) NOTICE AND REVIEW.

The Secretary shall publish notice in the Federal Register of each application for an exemption or permit which is made under this section. Each notice shall invite the submission from interested parties, within thirty days after the date of the notice, of written data, views, or arguments with respect to the application; except that such thirty-day period may be waived by the Secretary in an emergency situation where the health or life of an animal is threatened and no reasonable alternative is available to the applicant, but notice of any such waiver shall be published by the Secretary in the Federal Register within ten days following the issuance of the exemption or permit. Information received by the Secretary as a part of any application shall be available to the public as a matter of public record at every stage of the proceeding.

(c) PERMIT AND EXEMPTION POLICY.

The Secretary may grant exceptions under subsections (a)(1) of this section only if he finds and publishes his finding in the Federal Register that such exceptions (1) were applied for in good faith, (2) if granted and exercised will not operate to the disadvantage of such animal, and (3) will be consistent with the purposes and policy set forth in section 2 of this Act.

SECTION 5. PENALTIES AND ENFORCEMENT.

(a) CIVIL PENALTIES

- (1) Any person who knowingly violates, and any person engaged in business as a Qualified Facility who violates, any provision of this Act, or any provision of any permit or certificate issued hereunder, or of any regulation issued in order to implement section 4(a)(1), may be assessed a civil penalty by the Secretary of not more than \$57,527 for each violation. Any person who otherwise violates any provision of section 4(a)(2), or any regulation, permit, or certificate issued thereunder, may be assessed a civil penalty by the Secretary of not more than \$1,453 for each such violation. Any person who knowingly violates, and any person engaged in business as a Qualified Facility who violates, any provision of any other regulation issued under this Act may be assessed a civil penalty by the Secretary of not more than \$ 27,612 for each such violation.
- (2) No penalty may be assessed under paragraph (a)(1) of this subsection unless such person is given notice and opportunity for a hearing with respect to such violation. Each violation shall be a separate offense. Any such civil penalty may be remitted or mitigated by the Secretary. Upon any failure to pay a penalty assessed under this subsection, the Secretary may request the Attorney General to institute a civil action in a district court of the United States for any district in which such person is found, resides, or transacts business to collect the penalty and such court shall have jurisdiction to hear and decide any such action. The court shall hear such action on the record made before the Secretary and shall sustain his action if it is supported by substantial evidence on the record considered as a whole.
- (3) Hearings held during proceedings for the assessment of civil penalties authorized by paragraph (a)(2) of this subsection shall be conducted in accordance with section 554 of title 5, United States Code. The Secretary may issue subpoenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents, and administer oaths. Witnesses summoned shall be paid the same fees and mileage that are paid to witnesses in the courts of the United States. In case of contumacy or refusal to obey a subpoena served upon any person pursuant to this paragraph, the district court of the United States for any district in which such person is found or resides or transacts business, upon application by the United States and after notice to such person, shall have jurisdiction to issue an order requiring such person to appear and give testimony before the Secretary or to appear and produce documents before the Secretary, or both, and any failure to obey such order of the court may be punished by such court as a contempt thereof.
- (4) Notwithstanding any other provision of this Act, no civil penalty shall be imposed if it can be shown by a preponderance of the evidence that the defendant committed an act based on a good faith belief that he was acting to protect himself or herself, a member of his or her family, or any other individual from bodily harm, from any endangered, threatened or protected species.

(b) ENFORCEMENT

- (1) The provisions of this Act and any regulations or permits issued pursuant thereto shall be enforced by the Secretary, the Secretary of the Treasury, or the U.S. Fish and Wildlife Service, or all such Secretaries. Each such Secretary may utilize by agreement, with or without reimbursement, the personnel, services, and facilities of any other Federal agency or any State agency for purposes of enforcing this Act.

(c) REGULATIONS

- (1) The Secretary, the Secretary of the Treasury, and the U.S. Fish and Wildlife Service, are authorized to promulgate such regulations as may be appropriate to enforce this Act, and charge reasonable fees for expenses to the Government connected with permits or certificates authorized by this Act, including processing applications and reasonable inspections under this Act. All such fees collected pursuant to this subsection shall be deposited in the Treasury to the credit of the appropriation which is current and chargeable for the cost of furnishing the services. Appropriated funds may be expended pending reimbursement from parties in interest.

SECTION 6. SEVERABILITY.

If any provision of this Act, or the application of such provision to any person or circumstance, is held to be invalid, the remainder of this Act shall remain in force and the application of the remainder of its provisions shall not be affected.

SECTION 7. EFFECTIVE DATE.

This Act shall take effect on the date of its enactment.