

Potential options for state regulation of incidental take of migratory birds

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AFWA Bird Conservation Committee | INCIDENTAL TAKE WORKING GROUP

APPENDIX TO THE FINAL REPORT OF THE WORKING GROUP

INTRODUCTION

This document seeks to provide states with legislative, executive, and regulatory options to regulate the incidental take of migratory birds in light of the Department of Interior’s (DOI) [change in interpretation](#) of the Migratory Bird Treaty Act (MBTA) issued on Dec. 22, 2017. Because DOI no longer interprets the MBTA as prohibiting the accidental or incidental killing or other taking of migratory birds pursuant to otherwise lawful activities, many states are now evaluating what protections they may have available or what additional authorities may be worth pursuing.

Based on a survey of state statutory authorities conducted by the Association of Fish and Wildlife Agencies (AFWA) in 2018, and subsequent feedback from members of AFWA’s Bird Conservation and Legal Committees, an Incidental Take Working Group comprising members of these committees decided to prepare this menu of options for distribution to the bird conservation community at large. This document pulls from existing statutory language, and also examines introduced legislation along with existing and proposed federal programs.

These examples are not exhaustive but seek to provide a range of options for states with gaps to fill.

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I. Executive Actions

a. Advisory Opinion

A state may choose to issue a statement through its governor, fish and wildlife agency, or attorney general's office, or some combination thereof, determining that state law prohibits incidental take. Such an opinion, or advisory memorandum, can outline the state's interest in protecting birds and include a summary and history of the existing statute and case law that provides the underlying legal authority. In December 2018, California issued a legal advisory, which may provide a useful model. **(See Appendix I.)**

b. Agency Rulemaking

For states that determine that they already possess the statutory authority to address incidental takes, a commission or agency may initiate a regulatory process to set up an incidental take permitting system. There is no current model for state regulatory action at this level, but such a rule could function similarly to language included in Section II, especially with regard to compliance and permitting.

c. Executive Order

A governor may direct an agency to take specific actions or direct its resources to certain priorities, including as follows:

The [AGENCY] shall:

- Use the full range of its management authority to [REQUIRE > AUTHORIZE > PRACTICE] take avoidance and minimization measures, as well as secure adequate mitigation when avoidance and minimization measures are insufficient by themselves, to avoid incidental take.
- Develop a comprehensive tracking system for [TYPE] activities occurring within migratory bird habitat...
- Conduct a thorough review of statutory and regulatory authorities pertaining to migratory bird conservation to identify best management practices and new opportunities for improved protection of migratory birds and their habitat based on site-specific data. This review shall be completed by [DATE].¹

Regulatory agencies of the State shall prioritize the maintenance and enhancement of migratory bird habitats and populations. Incentives to accelerate or enhance required habitat restoration should be developed, including but not limited to [LISTED INCENTIVES].²

¹ See State of Colo., Office of the Gov., Exec. Order D 2015-003: Conserving Greater Sage-Grouse Habitat (May 15, 2015), available at <https://conservationco.org/wp-content/uploads/2015/05/Sage-Grouse-EO-Language.pdf>.

² See State of Wyo., Office of the Gov., Exec. Order 2015-4: Greater Sage-Grouse Core Area Protection (July 29, 2015), available at https://wgfd.wyo.gov/WGFD/media/content/PDF/Habitat/Sage%20Grouse/SG_Executive_Order.pdf.

II. Legislative Actions

a. Prohibitions and permitting

A legislative approach would provide the most durable form of affirmation that birds will be covered by incidental take protections under state law, and open the door for the state to consider further regulations. Where state laws are currently connected to federal MBTA regulations, clarifying legislation could distinguish state law from federal regulation and insulate against external changes.

1. General prohibitions and permitting provisions

Depending on the language adopted, a robust statute might set forth the types of *actions* generally prohibited, prescribe a standard of *intent* or *responsibility*, restrict the use of certain instruments or release of certain substances, include or refer to a definition of “take”, or some combination thereof. In light of DOI’s interpretation of section 703 of the federal MBTA as highlighting “active” and not “passive” activities meant to be prohibited, we recommend that statutes achieve breadth in terms of situations and activities covered, and precision in drafting and creation of a legislative record.

The option of establishing an incidental take permitting system requires careful consideration and a prudent approach because it represents a major shift in conservation practice, from no allowance of incidental take to allowing incidental take under a regulatory framework that, ideally, is supported by robust regional or range-wide demographic trend data. The best example of a successful regulatory framework is the federal structure that determines annual migratory game bird harvest levels. This framework is underpinned by robust flyway-wide population estimates. The partitioning of allowable harvest is based on a variety of empirical data that are collected at the fly-way scale and fed into complex, continuously evolving predictive harvest rate models, which have taken decades to develop. Establishing a similar framework for nongame bird species will require considerable time, resources, and immediate cooperation and commitment from states and provinces to gather and compile regional, or in some cases, range-wide data necessary for establishing allowable take limits and measuring the cumulative effects of permitted take.

Another approach to permitting is to focus on minimizing risk within a given project, rather than focusing on mitigating population-level impacts to migratory birds, and provides an opportunity to enforce the use of best management practice guidelines for a given project. While this option avoids the immediate burden of collecting extensive demographic data and creating new population models, it lacks the ability to ensure mitigation commensurate with bird population losses, or to assess population-level impacts both of individual projects as well as across projects. States exploring permitting options will want to carefully consider the costs and benefits of different approaches and consider which, if any, approach best balances migratory bird conservation and management, state capacity, data access and needs, and other considerations.

Favored elements for general prohibitions include:

INTRODUCTION OF PROHIBITION

- “No person at any time shall [VERB]...”³
- “It is unlawful for any person to cause through carelessness, neglect or otherwise...”⁴
- “No person shall take, or have in possession or under control, or wantonly interfere with or destroy...”⁵
- “Unless otherwise prescribed by this [TITLE/CHAPTER/SECTION], it is unlawful for a person to...[VERB] except as expressly permitted...”⁶

NO (OR OTHERWISE STATED) LIMITATION ON MEANS / PROXIMITY / RESULT

- “...directly or indirectly...”⁷
- “...by any means whatever/whatsoever...”
- “...at any time or in any manner”⁸
- “...unless authorized by a validly adopted regulation of the [COMMISSION/AGENCY]...”⁹
- “...whether or not such actions result in obtaining possession of such wildlife...or their nests or eggs...”¹⁰

Favored elements for definitions of “take”, similarly to prohibitions, rely on deliberate statements of breadth and listing of actions that upon a plain reading fall short of “active” activities such as “shoot”, “trap”, “capture” or “possess”:

- “...in any manner disturbing...”¹¹
- “...disturbs any active nest...”¹²
- “...place, set, aim, or use any device, animal, substance, or agency which may reasonably be expected to accomplish [a taking]...”¹³

If possible, avoid incorporating “attempt” into proposed language; doing so may replicate some of the ambiguity that enabled DOI to construe MBTA section 703 as covering only intentional actions. Also avoid a making a general exception for the open season in order to avoid a construction of the statute as intended to apply to hunting and not all intended categories of incidental take, recreational and non-recreational.

California’s proposed amendment to its incidental take statute, by removing the existing reference to section 703 of the federal MBTA and replacing it with a reference to its own state code, is another workable example. It reads as follows:

³ See, e.g., Ala. Code § 9-11-244.

⁴ Nev. Rev. Stat. § 503.050(1).

⁵ N.H. Rev. Stat. § 209:10.

⁶ Ak. Stat. § 16.05.940(35).

⁷ Ala. Code § 9-11-244.

⁸ N.M. Stat. § 17-2-7(A).

⁹ See, e.g., Ark. Code § 15-45-210(a).

¹⁰ Fla. Stat. § 379.101(38).

¹¹ Ak. Stat. § 16.05.940(35).

¹² See, e.g., Conn. Gen. Stat. § 26-93.

¹³ Ky. Rev. Stat. § 150.010(38).

It is unlawful to take or possess any migratory nongame bird as designated in the federal Migratory Bird Treaty Act (16 U.S.C. Sec. 703 et seq.) as of January 1, 2017, any additional migratory nongame bird that may be designated in that federal act after that date, or any part of a migratory nongame described in this section, except as provided by any provision of this code, or any rule, regulation, or order made or adopted pursuant to this code, that is consistent with, or more protective than, rules and regulations adopted by the United States Secretary of the Interior under that federal act.¹⁴

By referring to existing provisions in its own code, California's proposal would insulate its protections from regulatory or interpretive changes at the federal level.

2. Regulation of pollutants and other substances and devices

Regulation of non-recreational / industrial activity with the potential to result in incidental take is an area with less sample language than general prohibitions or recovery of damages. But Indiana has language on the books that is worth consideration:

A person who, whether or not the person has been issued a certificate of approval, license, permit, or other document of approval authorized by this article or any other Indiana law, discharges, sprays, or releases waste materials, chemicals, or other substances: (1) either accidentally, negligently, or willfully; (2) in any quantity, concentration, or manner onto or in any water of Indiana, the boundary waters of the state, or onto or in public or private land; and (3) so that wild animals are killed as a result; is responsible for the kill.¹⁵

Iowa's statute attaching liability for take of animals to pollution of habitat may also be useful to other states:

A person who is liable for polluting a water of this state in violation of state law, including this chapter, shall also be liable to pay restitution to the department for injury caused to a wild animal by the pollution.¹⁶

Arizona statute invokes specific examples but transitions to the general, prohibiting take with:

- "an explosive compound, poison or any other deleterious substance..."¹⁷

Naming many specific deleterious substances, like New York statute, may be worthwhile, but capturing all substances worth regulating may be difficult and result in unintentional exclusion of certain activities. See N.Y. Env'tl. Conserv. L. § 11-0503(1) ("No dyestuffs, coal tar, refuse from a gas house, cheese factory, creamery, condensary or canning factory, sawdust, shavings, tan bark, lime, acid, oil or other deleterious or poisonous substance shall be thrown or allowed to run into any waters, either private or

¹⁴ Ca. [A.B. 454](#) (Feb. 11, 2019).

¹⁵ Ind. Code § 14-22-10-6(a).

¹⁶ Ia. Code § 481A.151(1).

¹⁷ Ariz. Rev. Stat. § 17-309(A).

public, in quantities injurious to fish life, protected wildlife or waterfowl inhabiting those waters or injurious to the propagation of fish, protected wildlife or waterfowl therein.”).

Naming specific industries, like Ohio statute, may be helpful in clarifying intended applicability, but may attract more targeted opposition. See Ohio Rev. Code § 1533.081(B) (“A person operating an energy facility whose operation may result in the incidental taking of a wild animal shall obtain a permit to do so from the chief of the division of wildlife under this section.”).

b. Injunctions and monetary recovery

A recent civil case in Colorado offers a positive example of a general incidental take / recovery statute being construed broadly by a court, awarding substantial monetary recovery to the state from a fish kill by a commercial feedlot resulting in liability for over 14,000 fish.¹⁸ The statute in this case read:

It is unlawful for any person to hunt, take, or have in such person’s possession any wildlife that is the property of this state [except as permitted by rule or regulation].¹⁹

Interestingly, state law defined “take” as referred to in that statute to mean “acquir[ing] possession” but “not includ[ing] the accidental wounding or killing of wildlife by a motor vehicle, vessel, or train.”²⁰

However, set against other provisions in the relevant title requiring knowledge or willful intent, the trial court agreed with Colorado Parks & Wildlife and found on Jan. 26, 2018 that this statute (in part because it does not include criminal penalties) prohibited the taking of wildlife by release of waste from a feedlot. Looking at state case law and legislative history, the Court “determined that ‘take’ is synonymous with ‘kill’” and that it is a “strict liability offense.”

While a separate trial was required to determine damages, and the holding regarding the statute’s applicability to incidental take is still under appeal, this ruling highlights the importance of strong legislative history, a hard look at each state’s individual case law, and the importance of care in drafting and legislative testimony.

Other potentially useful language includes:

- “The [COMMISSION/AGENCY] is authorized to bring suit in the name of the state against any person, corporation, or government agency, to restrain or enjoin the person, corporation, or government agency from discharging or dumping into a[N] [AREA] in the state any deleterious substance which is injurious to wildlife”²¹

¹⁸ *Colorado v. 5 Star Feedlot, Inc.*, Yuma Cty. Dist. Ct., 16-cv-30022 (May 2, 2018) (appeal pending at Colorado Court of Appeals) (holding that a feedlot owner is liable for a fish kill resulting from the inadvertent release of animal wastewater, regardless of intent or actual possession of the fish).

¹⁹ Colo. Rev. Stat. § 33-6-109(1).

²⁰ Colo. Rev. Stat. § 33-1-102(43).

²¹ Ariz. Rev. Stat. § 17-237.

- “Any person violating the provisions of this section shall [BE DEEMED GUILTY OF A MISDEMEANOR / ASSESSED A FINE] and upon [CONVICTION / FINDING OF CIVIL LIABILITY] fined in an amount not to exceed [## DOLLARS].”²²
- “A person who kills, injures, or possesses a [SPECIES/CATEGORY] in violation of the game and fish laws is liable to the state for the value of the wild animal as provided in this section. Species afforded protection include members of the following groups as defined by statute or rule...”²³
- “The amount of restitution shall be determined by a court by a preponderance of the evidence [IN CIVIL CASES]. In determining the amount of restitution, the court must consider the value of the wild animal under [APPLICABLE SECTION / OTHER REFERENCE MATERIAL].”²⁴

c. Compliance frameworks

A statutory or regulatory framework that links compliance certification with incidental take permitting could reinforce protections from substantial sources of mortality under state law and strengthen the adoption of best management practices and periodic reporting.

Depending on the position of courts and/or the administration, it is possible that a state incidental take permitting system would only be in compliance with the federal MBTA if clarifying legislation is passed by Congress. However, if courts uphold S.O. 37050 and the MBTA is understood to allow for incidental take, then states may create such systems in line with MBTA section 7 (16 U.S.C. § 708):

[N]othing in this Act shall be construed to prevent the several States and Territories from making or enforcing laws or regulations not inconsistent with the provisions of said conventions or of this Act, or from making or enforcing laws or regulations which shall give further protection to migratory birds, their nests, and eggs, if such laws or regulations do not extend the open seasons for such birds beyond the dates approved by the President in accordance with section three of this Act.

In the event that any state moves ahead by establishing such a system through regulation, population data should be sufficiently robust to withstand both state and federal judicial review.

Potential models include proposed legislation from the California Assembly (**see Appendix II-1 for relevant excerpts**), the U.S. Fish & Wildlife Service’s (FWS) 2015 preliminary proposal to create an

²² See, e.g., Ark. Code § 15-45-210(c).

²³ Minn. Stat. § 97A.341.1.

²⁴ Minn. Stat. § 97A.341.4.

incidental take framework for migratory birds²⁵, and FWS’s incidental take regulations for eagles and their nests (see Appendix II-2).²⁶

²⁵ U.S. Dep’t of Int., Fish & Wildlife Serv., Migratory Bird Permits; Programmatic Environmental Impact Statement – Notice of Intent, 80 Fed. Reg. 30,032 (May 26, 2015).

²⁶ 50 C.F.R. 22.26 – (incidental eagle take permits were [revised](#) in 2016 and are now called “incidental” rather than “nonpurposeful”; come in one category rather than standard and programmatic—which required differing and sometimes ambiguous levels of take avoidance activity; and are available for terms longer than 5 years subject to 5-year evaluations and adaptive management provisions).

APPENDIX I

CDFW / CA AG [Advisory Opinion](#)

California Department of Fish and Wildlife and California Attorney General Xavier Becerra Advisory Affirming California's Protections for Migratory Birds

The California Department of Fish and Wildlife (CDFW) and California Attorney General Xavier Becerra jointly provide this advisory to affirm that California law continues to provide robust protections for birds, including a prohibition on incidental take of migratory birds, notwithstanding the recent reinterpretation of the Migratory Bird Treaty Act (MBTA) by the U.S. Department of the Interior (DOI).

The Federal Government's Reinterpretation of MBTA

Section 2 of the MBTA makes it “unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, [or] kill ...” a wide variety of migratory birds, except as permitted by regulations. (16 U.S.C. § 703, emphasis added.) A bipartisan coalition of seventeen former leaders of DOI and the U.S. Fish and Wildlife Service recently confirmed that, since at least the 1970s, both agencies have consistently interpreted Section 2 of the MBTA to prohibit incidental take of migratory birds.¹ “Incidental take” is take that is incidental to but not the intended purpose of an otherwise lawful activity. (See 16 U.S.C. § 1539(a)(1)(B).) In January 2017, the DOI issued a memorandum affirming this longstanding interpretation.

In December 2017, the acting Solicitor of the DOI issued a new memorandum now disclaiming the DOI's longstanding interpretation of the MBTA as prohibiting incidental take of migratory birds. While three separate lawsuits, including one joined by the Attorney General, challenge the legality of the new memorandum and its consistency with the requirements of the MBTA, California's protections for migratory birds, including a prohibition against incidental take, remain clear and unchanged.

California Law's Protection for Birds

The protection of birds is of critical importance to both CDFW, which holds fish and wildlife resources in California in trust for the people of the State and has jurisdiction over the conservation, protection, and management of those resources (Fish and Game Code §§ 711.7(a) and 1802), and to the Attorney General, who enforces state law, including statutes protecting birds. (Cal. Gov. Code §§ 12607 and 12511.) California courts have affirmed the “legitimate and, indeed, vital nature of a state's interest in protecting its natural resources, including wildlife within the State,” stressing the State's “obligation and duty to exercise supervision over such resources for the benefit of the public generally.” (People v. Maikhio, 51 Cal.4th 1074, 1093-95 (2011).)

As identified below, California law contains a number of provisions prohibiting “take” of migratory birds. The California Fish and Game Code defines “take” for purposes of all of these statutes as “to hunt, pursue, catch, capture, kill, or attempt to hunt, pursue, catch, capture, or kill.” (Fish and Game Code § 86.) California courts have held that take includes incidental take and is not limited to hunting and fishing and other activities that are specifically intended to kill protected fish and wildlife. (See Dept. of

Fish and Game v. Anderson Cottonwood Irrigation Dist., 8 Cal.App.4th 1554, 1563-64 (1992) (“take” includes the killing of endangered species in the course of lawful activity; in that case, via unscreened diversions of water), citing Churchill v. Parnell, 170 Cal.App.3d 1094, 1098 (1985) (“take” includes the application of pesticides in water that kills fish).) More recently, in Center for Biological Diversity v. Department of Fish and Wildlife, 62 Cal.4th 204, 235-36 (2015), the California Supreme Court specifically stated that:

The broad definition of “take” in Fish and Game Code section 86 ensures that DFW can maintain legal control over actions interfering with threatened, endangered and fully protected animals even where those actions may not have been intended to kill or hurt the animal.

Unless the Fish and Game Code or its implementing regulations provide otherwise, under California law it is unlawful to:

- Take a bird, mammal, fish, reptile, or amphibian (Fish and Game Code § 2000);
- Take, possess, or needlessly destroy the nest or eggs of any bird (Fish and Game Code § 3503);
- Take, possess, or destroy any bird of prey in the orders Strigiformes (owls) and Falconiformes (such as falcons, hawks and eagles) or the nests or eggs of such bird (Fish and Game Code § 3503.5);
- Take or possess any of the thirteen fully protected bird species listed in Fish and Game Code section 3511;
- Take any non-game bird (i.e., bird that is naturally occurring in California that is not a gamebird, migratory game bird, or fully protected bird) (Fish and Game Code § 3800);
- Take or possess any migratory non-game bird as designated in the MBTA² or any part of such bird, except as provided by rules or regulations adopted by the Secretary of the Interior under the MBTA (Fish and Game Code § 3513);
- Take, import, export, possess, purchase, or sell any bird (or products of a bird), listed as an endangered or threatened species under the California Endangered Species Act unless the person or entity possesses an Incidental Take Permit or equivalent authorization from CDFW (Fish and Game Code § 2050 et seq.).

California hosts an incredible diversity of bird species, and over 600 species of migratory birds live in or migrate through California. CDFW and the Attorney General will continue to implement and enforce California law to protect these birds.

For more information regarding permit requirements for activities that may affect bird species, please visit <https://www.wildlife.ca.gov/Conservation/Environmental-Review> or contact CDFW staff for your region. To report the illegal take of birds and other wildlife, please call the CalTIP hotline at 1-888-334-2258 or visit <https://www.wildlife.ca.gov/enforcement/caltip>.

Footnotes

1. See: <https://apps.washingtonpost.com/g/documents/national/letter-from-17-former-interior-officials-to-secretary-ryan-zinke-on-new-migratory-bird-treaty-act-policy/2708/>.

2. “Migratory bird” is defined in federal regulations implementing the MBTA at 50 C.F.R. § 10.12. The list of species protected under the MBTA is set forth at 50 C.F.R. § 10.13.

APPENDIX II-1

California [Assembly Bill 2627](#)

An act to amend Section 3513 of the Fish and Game Code, relating to migratory birds.

SECTION 1.

Section XX of the [*Fish and Game Code*] is amended to read:

(a) For purposes of this section, the following terms have the following meanings:

- (1) "Best management practices" means best management practices for avoiding, minimizing, and mitigating take of migratory nongame birds that are intended to avoid significant adverse impacts to migratory nongame birds.
- (2) "Migratory nongame bird" means a migratory nongame bird as designated in the federal Migratory Bird Treaty Act (16 U.S.C. Sec. 703 et seq.) as of January 1, 2017.
- (3) "Significant adverse impact on a migratory nongame bird species" means an impact that has the potential, either individually or cumulatively, to significantly reduce the number or the range of a migratory nongame bird, as determined based on the best available scientific information.

(b) It is unlawful to take or possess any migratory nongame bird or any part of a migratory nongame bird, except as provided in subdivisions (c) or (k).

(c) Any person or entity that engages in otherwise lawful [*note: could limit to "commercial"*] activities that may result in incidental take that causes a significant adverse impact to migratory nongame birds shall be deemed in compliance with this section if that person or entity completes the self-certification requirements set forth in subdivision (d) and implements the best management practices set forth in that self-certification unless the department notifies the person or entity of the alleged noncompliance in writing as set forth in subdivision (g).

(d) To self-certify for purposes of subdivision (c), a person or entity shall do all of the following:

- (1) Submit to the department a written self-certification that includes:
 - (A) The name and contact information of the person or entity.
 - (B) A description of the activity or activities for which best management practices will be implemented including the location, the nature, the date of commencement, and the duration of the activity or activities. For existing activities, the description may include best management practices already being implemented.
 - (C) A description of the best management practices to be implemented.
- (2) Submit to the department, by January 31 of each calendar year after submitting the self-certification for the duration of the self-certification, a written annual report that includes:
 - (A) A description of all best management practices that were implemented during the preceding year.
 - (B) If any best management practices included in the self-certification were not implemented during the preceding year, an explanation for that failure to implement.

(C) A description of the scope and magnitude of any significant adverse impacts to migratory nongame birds as a result of the activity or activities.

(e) Except as provided in subdivision (f), an entity shall identify best management practices for purposes of subdivision (d) based on the best available scientific information and other relevant information, including, but not limited to, the following, as applicable:

- (1) Peer-reviewed scientific studies or reports.
- (2) Guidance documents accepted by state and federal agencies.
- (3) Documentation prepared to apply for permits and other approvals issued by public agencies.

(f) If an entity maintains a permit or approval issued by a public agency, the entity may rely on the permit or approval, or documents prepared to support the permit or approval, to demonstrate that its activities are not resulting in take that causes a significant adverse impact to migratory nongame birds or that it has implemented best management practices for purposes of subdivision (d), subject to the following conditions:

- (1) The permit or approval was issued pursuant to a process that included an assessment of the activity's impacts on migratory nongame birds and requires, when necessary, implementation of best management practices to address those impacts.
- (2) The department does not determine the permit or approval to be inconsistent with the purposes of this chapter.

(g) (1) Incidental take authority pursuant to subdivision (c) shall be effective immediately upon certification and shall continue in effect unless, no later than 120 days after the department receives the certification or an annual status report pursuant to subdivision (g), the department finds that the entity is not in compliance with this section and issues the entity a notification of noncompliance.

(2) A notification of noncompliance issued pursuant to paragraph (1) shall identify the reasons for the department's finding and specify a reasonable grace period for the entity to come into compliance with this section. The entity shall remain exempt from the prohibition in subdivision (b) during the specified grace period.

(3) For purposes of a finding pursuant to paragraph (1), in reviewing best management practices implemented by an entity, the department shall consider practical limitations to the implementation of certain best management practices at existing facilities, for ongoing operations, or for projects that have already received necessary permits or other approvals.

(h) (1) No later than December 31, 2019, the department shall, through a public stakeholder process, establish guidelines for compliance with this section.

(2) Guidelines established pursuant to this subdivision shall, at a minimum, specify the following:

(A) Procedures for the preparation and filing of certifications and annual status reports.

(B) Methods for verifying compliance over the time period during which take may occur.

(3) The department shall not establish guidelines that require entities to divulge information that would violate laws, rules, or policies established by the U.S. Department of Energy or the U.S. Department of Homeland Security for the physical security of infrastructure.

(4) The department shall not rely on the lack of guidelines established pursuant to paragraph (1) or (2) as grounds for the delay or denial of any permits or other approvals.

(5) Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code does not apply to the development, adoption, or amendment of guidelines or criteria pursuant to this section. These guidelines and criteria shall be posted on the department's Internet Web site.

(i) No later than 60 days after receiving a certification or annual report pursuant to subdivision (c) or (d), the department shall make the certification or report publicly available on its Internet Web site in a format that is readily accessible by members of the public.

(j) Nothing in this section is intended to or shall be construed to alter the department's authority under or the requirements and provisions of any of the following:

(1) The *[California Endangered Species Act (Chapter 1.5 (commencing with Section 2050) of Division 3).]*

(2) The *[California State Safe Harbor Agreement Program Act (Chapter 3.7 (commencing with Section 2089.2) of Division 3).]*

(3) The *[Natural Community Conservation Planning Act (Chapter 10 (commencing with Section 2800) of Division 3).]*

(4) Section 3511.

(k) (1) This section shall not apply to take of a migratory nongame bird if the take is authorized pursuant to another provision of this code, or any rule, regulation, or order made or adopted pursuant to this code.

(2) This section shall not apply to the take of a migratory nongame bird if:

(A) Take is authorized by a permit issued pursuant to federal law, unless the department determines that the permit is inconsistent with the purposes of this chapter and enforcement of this section against the federally permitted take would not violate clause 2 of Article VI of the United States Constitution.

(B) Take is authorized by an order issued pursuant to Part 21 (commencing with Section 21.1) of Subchapter B of Chapter I of Title 50 of the Code of Federal Regulations.

(C) Take is authorized in writing by the department or otherwise permitted under federal law for the retrieval, possession, storage, transportation, or care for the migratory nongame bird, nest, or eggs, including but not limited to for the purposes of scientific research and wildlife rehabilitation.

(l) Nothing in this section alters the department's authority to review, approve, or deny permits, orders.

SECTION 2.

[No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs that may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.]

APPENDIX II-2

50 CFR § 22.26

Permits for eagle take that is associated with, but not the purpose of, an activity

(a) Purpose and scope. This permit authorizes [take](#) of bald eagles and golden eagles where the [take](#) is compatible with the preservation of the bald eagle and the golden eagle; is necessary to protect an interest in a particular locality; is associated with, but not the purpose of, the activity; and cannot practicably be avoided.

(b) Definitions. In addition to the definitions contained in [part 10](#) of this subchapter, and § 22.3, the following definition applies in this section:

Eagle means a live bald eagle (*Haliaeetus leucocephalus*), live golden eagle (*Aquila chrysaetos*), a bald eagle egg, or a golden eagle egg.

(c) Permit conditions. In addition to the conditions set forth in [part 13](#) of this subchapter, which govern permit renewal, amendment, transfer, suspension, revocation, and other procedures and requirements for all permits issued by the Service, your authorization is subject to the following additional conditions:

(1) You must comply with all avoidance, minimization, or other mitigation measures specified in the terms of your permit to mitigate for the detrimental effects on eagles, including indirect and [cumulative effects](#), of the permitted [take](#).

(i) Compensatory mitigation scaled to [project](#) impacts will be required for any permit authorizing [take](#) that would exceed the applicable [eagle management unit take](#) limits. Compensatory mitigation for this purpose must ensure the preservation of the affected eagle species by reducing another ongoing form of mortality by an amount equal to or greater than the unavoidable mortality, or increasing the eagle population by an equal or greater amount.

(ii) Compensatory mitigation may also be required in the following circumstances:

(A) When cumulative authorized [take](#), including the proposed [take](#), would exceed 5 percent of the [local area population](#); or

(B) When available data indicate that cumulative unauthorized mortality would exceed 10 percent of the [local area population](#).

(iii) All required compensatory mitigation must:

(A) Be determined based on application of all [practicable](#) avoidance and minimization measures;

(B) Be sited within the same [eagle management unit](#) where the permitted [take](#) will occur unless the Service has reliable data showing that the population affected by the [take](#) includes individuals that are reasonably likely to use another [eagle management unit](#) during part of their seasonal migration;

(C) Use the best available science in formulating and monitoring the long-term effectiveness of mitigation measures and use rigorous compliance and effectiveness monitoring and evaluation to make certain that mitigation measures achieve their intended outcomes, or that necessary changes are implemented to achieve them;

(D) Be additional and improve upon the baseline conditions of the affected eagle species in a manner that is demonstrably new and would not have occurred without the compensatory mitigation (voluntary actions [taken](#) in anticipation of meeting compensatory mitigation requirements for an eagle [take](#) permit not yet granted may be credited toward compensatory mitigation requirements);

(E) Be durable and, at a minimum, maintain its intended purpose for as long as impacts of the authorized [take](#) persist; and

(F) Include mechanisms to account for and address uncertainty and risk of failure of a compensatory mitigation measure.

(iv) Compensatory mitigation may include conservation banking, in-lieu fee programs, and other third-party mitigation [projects](#) or arrangements. Permittee-responsible mitigation may be approved provided the permittee submits verifiable documentation sufficient to demonstrate that the standards set forth in [paragraph \(c\)\(1\)\(iii\)](#) of this section have been met and the alternative means of compensatory mitigation will offset the permitted [take](#) to the degree that is compatible with the preservation of eagles.

(2) Monitoring.

(i) You may be required to monitor impacts to eagles from the permitted activity for up to 3 years after completion of the activity or as set forth in a separate management plan, as specified on your permit. For ongoing activities and enduring site features that will likely continue to cause [take](#), periodic monitoring will be required for as long as the data are needed to assess impacts to eagles.

(ii) The frequency and duration of required monitoring will depend on the form and magnitude of the anticipated [take](#) and the objectives of associated avoidance, minimization, or other mitigation measures, not to exceed what is reasonable to meet the primary purpose of the monitoring, which is to provide data needed by the Service regarding the impacts of the activity on eagles for purposes of adaptive management. You must coordinate with the Service to develop [project](#)-specific monitoring protocols. If the Service has officially issued or endorsed, through rulemaking procedures, monitoring protocols for the activity that will [take](#) eagles, you must follow them, unless the Service waives this requirement. Your permit may require that the monitoring be conducted by qualified, independent third parties that report directly to the Service.

(3) You must submit an annual report summarizing the information you obtained through monitoring to the Service every year that your permit is valid and for up to 3 years after completion of the activity or termination of the permit, as specified in your permit. The Service will make eagle mortality information from annual reports available to the public.

(4) While the permit is valid and for up to 3 years after it expires, you must allow Service personnel, or other qualified persons designated by the Service, access to the areas where eagles are likely to be affected, at any reasonable hour, and with reasonable notice from the Service, for purposes of monitoring eagles at the site(s).

(5) The authorizations granted by permits issued under this section apply only to [take](#) that results from activities conducted in accordance with the description contained in the permit application and the terms of the permit. If the permitted activity changes after a permit is issued, you must immediately contact the Service to determine whether a permit amendment is required in order to retain [take](#) authorization.

(6) You must contact the Service immediately upon discovery of any unanticipated [take](#).

(7) Additional conditions for permits with durations longer than 5 years -

(i) Monitoring. Monitoring to assess [project](#) impacts to eagles and the effectiveness of avoidance and minimization measures must be conducted by qualified, independent third parties, approved by the Service. Monitors must report directly to the Service and provide a copy of the reports and materials to the permittee.

(ii) Adaptive management. The permit will specify circumstances under which modifications to avoidance, minimization, or compensatory mitigation measures or monitoring protocols will be required, which may include, but are not limited to: [Take](#) levels, location of [take](#), and changes in eagle use of the activity area. At a minimum, the permit must specify actions to be [taken](#) if [take](#) approaches or reaches the amount authorized and anticipated within a given time frame. Adaptive management terms in a permit will include review periods of no more than 5 years and may require prompt action(s) upon reaching specified conditions at any time during the review period.

(iii) Permit reviews. At no more than 5 years from the date a permit that exceeds 5 years is issued, and at least every 5 years thereafter, the permittee will compile, and submit to the Service, eagle fatality data or other pertinent information that is site-specific for the [project](#), as required by the permit. The Service will review this information, as well as information provided directly to the Service by independent monitors, to determine whether:

(A) The permittee is in compliance with the terms and conditions of the permit and has implemented all applicable adaptive management measures specified in the permit; and

(B) Eagle [take](#) does not exceed the amount authorized to occur within the period of review.

(iv) Actions to be taken based on the permit review.

(A) In consultation with the permittee, the Service will update fatality predictions, authorized [take](#) levels and compensatory mitigation for future years, taking into account the observed levels of [take](#) based on approved protocols for monitoring and estimating total [take](#), and, if applicable, accounting for changes in operations or permit conditions pursuant to the adaptive management measures specified in the permit or made pursuant to paragraphs (c)(7)(iv)(B) through (D) of this section.

(B) If authorized [take](#) levels for the period of review are exceeded in a manner or to a degree not addressed in the adaptive management conditions of the permit, based on the observed levels of [take](#) using approved protocols for monitoring and estimating total [take](#), the Service may require additional actions including but not limited to:

(1) Adding, removing, or adjusting avoidance, minimization, or compensatory mitigation measures;

(2) Modifying adaptive management conditions;

(3) Modifying monitoring requirements; and

(4) Suspending or revoking the permit in accordance with part 13 of this subchapter B.

(C) If the observed levels of [take](#), using approved protocols for monitoring and estimating total [take](#), are below the authorized [take](#) levels for the period of review, the Service will proportionately revise the amount of compensatory mitigation required for the next period of

review, including crediting excess compensatory mitigation already provided by applying it to the next period of review.

(D) Provided the permittee implements all required actions and remains compliant with the terms and conditions of the permit, no other action is required. However, with consent of the permittee, the Service may make additional changes to a permit, including appropriate modifications to avoidance and/or minimization measures or monitoring requirements. If measures are [adopted](#) that have been shown to be effective in reducing risk to eagles, appropriate adjustments will be made in fatality predictions, [take](#) estimates, and compensatory mitigation.

(v) Fees. For permits with terms longer than 5 years, an administration fee of \$8,000 will be assessed every 5 years for permit review.

(8) The Service may amend, suspend, or revoke a permit issued under this section if new information indicates that revised permit conditions are necessary, or that suspension or revocation is necessary, to safeguard local or regional eagle populations. This provision is in addition to the general criteria for amendment, suspension, and revocation of Federal permits set forth in §§ [13.23](#), [13.27](#), and [13.28](#) of this chapter.

(9) Notwithstanding the provisions of [§ 13.26](#) of this chapter, you remain responsible for all outstanding monitoring requirements and mitigation measures required under the terms of the permit for [take](#) that occurs prior to cancellation, expiration, suspension, or revocation of the permit.

(10) You must promptly notify the Service of any eagle(s) found injured or dead at the activity site, regardless of whether the injury or death resulted from your activity. The Service will determine the disposition of such eagles.

(11) You are responsible for ensuring that the permitted activity is in compliance with all Federal, Tribal, [State](#), and local laws and regulations applicable to eagles.

(d) Applying for an eagle take permit.

(1) You are advised to coordinate with the Service as early as possible for advice on whether a permit is needed and for technical assistance in assembling your permit application package. The Service may provide guidance on developing complete and adequate application materials and will determine when the application form and materials are ready for submission.

(2) Your application must consist of a completed application Form 3-200-71 and all required attachments. Send applications to the Regional Director of the Region in which the [take](#) would occur - Attention: Migratory Bird Permit Office. You can find the current addresses for the Regional Directors in [§ 2.2](#) of subchapter A of this chapter.

(3) Except as set forth in [paragraph \(d\)\(3\)\(ii\)](#) of this section, an applicant must coordinate with the Service to develop [project](#)-specific monitoring and survey protocols, [take](#) probability models, and any other applicable data quality standards, and include in the application all the data thereby obtained.

(i) If the Service has officially issued or endorsed, through rulemaking procedures, survey, modeling, or other data quality standards for the activity that will [take](#) eagles, you must follow them and include in your application all the data thereby obtained, unless the Service waives this requirement for your application.

(ii) Applications for eagle incidental [take](#) permits for wind facilities must include pre-construction eagle survey information collected according to the following standards, unless exceptional

circumstances apply and survey requirements can be modified to accommodate those circumstances after consultation with, and written concurrence by, the Service:

(A) Surveys must consist of point-based recordings of bald eagle and golden eagle flight activity (minutes of flight) within a three-dimensional cylindrical plot (the sample plot). The radius of the sample plot is 2,625 feet (ft) (800 meters (m)), and the height above ground level must be either 656 ft (200 m) or 82 ft (25 m) above the maximum blade reach, whichever is greater.

(B) The duration of the survey for each visit to each sample plot must be at least 1 hour.

(C) Sampling must include at least 12 hours per sample plot per year for 2 or more years. Each sample plot must be sampled at least once per month, and the survey start time for a sampling period must be selected randomly from daylight hours, 1 unless the conditions in [paragraph \(d\)\(3\)\(ii\)\(F\)](#) of this section apply.

1 Daylight hours are defined as the hours between sunrise and sunset.

(D) Sampling design must be spatially representative of the [project](#) footprint, 2 and spatial coverage of sample plots must include at least 30 percent of the [project](#) footprint. Sample plot locations must be determined randomly, unless the conditions in [paragraph \(d\)\(3\)\(ii\)\(F\)](#) of this section apply.

2 The [project](#) footprint is the minimum-convex polygon that encompasses the wind-project area inclusive of the hazardous area around all turbines and any associated utility infrastructure, roads, etc.

(E) The permit application package must contain the following:

(1) Coordinates of each sample point in decimal degrees (specify projection/datum).

(2) The radius and height of each sample plot.

(3) The proportion of each three-dimensional sample plot that was observable from the sample point for each survey.

(4) Dates, times, and weather conditions for each survey, to include the time surveys at each sample point began and ended.

(5) Information for each survey on the number of eagles by species observed (both in flight and perched), and the amount of flight time (minutes) that each was in the sample plot area.

(6) The number of proposed turbines and their specifications, including brand/model, rotor diameter, hub height, and maximum blade reach (height), or the range of possible options.

(7) Coordinates of the proposed turbine locations in decimal degrees (specify projection/datum), including any alternate sites.

(F) Stratified-random sampling (a sample design that accounts for variation in eagle abundance by, for example, habitat, time of day, season) will often provide more robust, efficient sampling. Random sampling with respect to time of day, month, or [project](#) footprint can be waived if stratification is determined to be a preferable sampling strategy after consultation and approval in advance with the Service.

(iii) Application of the Service-endorsed data quality standards of paragraphs (d)(3)(i) and (ii) of this section may not be needed if:

(A) The Service has data of sufficient quality to predict the likely risk to eagles;

(B) Expediting the permit process will benefit eagles; or

(C) The Service determines the risk to eagles from the activity is low enough relative to the status of the eagle population based on:

(1) Physiographic and biological factors of the [project](#) site; or

(2) The [project](#) design (*i.e.*, use of proven technology, micrositing, etc.).

(e) **Evaluation of applications.** In determining whether to issue a permit, we will evaluate:

(1) Whether [take](#) is likely to occur based on the magnitude and nature of the impacts of the activity.

(2) Whether the [take](#) is:

(i) Compatible with the preservation of the bald eagle and the golden eagle, including consideration of [indirect effects](#) and the [cumulative effects](#) of other permitted [take](#) and other additional factors affecting eagle populations;

(ii) Associated with the permanent loss of an important eagle use area;

(iii) Necessary to protect a legitimate interest in a particular locality; and

(iv) Associated with, but not the purpose of, the activity.

(3) Whether the cumulative authorized [take](#), including the proposed [take](#), would exceed 5 percent of the [local area population](#).

(4) Any available data indicating that unauthorized [take](#) may exceed 10 percent of the [local area population](#).

(5) Whether the applicant has proposed all avoidance and minimization measures to reduce the [take](#) to the maximum degree [practicable](#) relative to the magnitude of the impacts to eagles.

(6) Whether the applicant has proposed compensatory mitigation measures that comply with standards set forth under [paragraph \(c\)\(1\)](#) of this section to compensate for remaining unavoidable impacts after all appropriate and [practicable](#) avoidance and minimization measures have been applied.

(7) Whether issuing the permit would preclude the Service from authorizing another [take](#) necessary to protect an interest of higher priority, according to the following prioritization order:

(i) Safety emergencies;

(ii) Increased need for traditionally practiced Native American tribal religious use that requires taking eagles from the wild;

(iii) Non-emergency activities [necessary to ensure public health and safety](#); and

(iv) Other interests.

(8) For [projects](#) that are already operational and have [taken](#) eagles without a permit, whether such past unpermitted eagle [take](#) has been resolved or is in the process of resolution with the Office of Law Enforcement through settlement or other appropriate means.

(9) Any additional factors that may be relevant to our decision whether to issue the permit, including, but not limited to, the cultural significance of a local eagle population.

(f) Required determinations. Before we issue a permit, we must find that:

(1) The direct and [indirect effects](#) of the [take](#) and required mitigation, together with the [cumulative effects](#) of other permitted [take](#) and additional factors affecting the eagle populations within the [eagle management unit](#) and the [local area population](#), are compatible with the preservation of bald eagles and golden eagles.

(2) The taking is necessary to protect an interest in a particular locality.

(3) The taking is associated with, but not the purpose of, the activity.

(4) The applicant has applied all appropriate and [practicable](#) avoidance and minimization measures to reduce impacts to eagles.

(5) The applicant has applied all appropriate and [practicable](#) compensatory mitigation measures, when required, pursuant to [paragraph \(c\)](#) of this section, to compensate for remaining unavoidable impacts after all appropriate and [practicable](#) avoidance and minimization measures have been applied.

(6) Issuance of the permit will not preclude issuance of another permit necessary to protect an interest of higher priority as set forth in [paragraph \(e\)\(7\)](#) of this section.

(7) Issuance of the permit will not interfere with an ongoing civil or criminal action concerning unpermitted past eagle [take](#) at the [project](#).

(g) We may deny issuance of a permit if we determine that [take](#) is not likely to occur.

(h) Permit duration. The duration of each permit issued under this section will be designated on its face and will be based on the duration of the proposed activities, the period of time for which [take](#) will occur, the level of impacts to eagles, and the nature and extent of mitigation measures incorporated into the terms and conditions of the permit. A permit for incidental [take](#) will not exceed 30 years.

(i) Applicants for eagle incidental [take](#) permits who submit a completed permit application by July 14, 2017 may elect to apply for coverage under the regulations that were in effect prior to January 17, 2017 provided that the permit application satisfies the permit application requirements of the regulations in effect prior to January 17, 2017. If the Service issues a permit to such applicants, all of the provisions and conditions of the regulations that were in effect prior to January 17, 2017 will apply.