House Republicans yesterday introduced a bill to reform two major bird protection laws and reduce legal risks faced by energy companies.

The bill by Rep. Jeff Duncan (R-S.C.) would amend the Migratory Bird Treaty Act of 1918 (MBTA) and the Bald and Golden Eagle Protection Act of 1940 (BGEPA), which protect more than 1,000 species including the national bird, the bald eagle.

The new measure was praised by attorneys who represent energy companies but panned by a bird advocacy group that argued it should be scrapped.

H.R. 493 is co-sponsored by Republican Reps. Walter Jones of North Carolina, Diane Black of Tennessee, Bill Johnson of Ohio, Larry Buschon of Indiana and Mick Mulvaney of South Carolina. Duncan introduced an identical measure last summer, but it never received a hearing before the House Natural Resources Committee.

It would require that upon submission of a "substantially completed application," the Fish and Wildlife Service must decide within one year whether to issue or deny a 30-year permit to "take" bald or golden eagles.

The bill could resolve a pending legal challenge to an FWS December 2013 rule allowing energy companies and other developers to obtain a 30-year eagle take permit if they agree to strict mitigation steps (Greenwire, June 19, 2014). FWS is in the midst of a comprehensive environmental review of its eagle policies, including the 30-year take rule.

Amid the legal uncertainty, the agency has yet to issue any 30-year permits. It issued its first-ever five-year eagle take permit last June to Shiloh IV Wind Project LLC for a 50-turbine wind farm north of San Francisco.

For purposes of legal certainty, wind companies say the length of eagle permits must correspond to the lifetimes of their projects, which are typically 30 years.

"It's a very elegant bill in that it addresses a problem with substantial ramifications for the oil and gas and the renewable energy industries and others," said Andrew Bell, a partner with Marten Law in San Francisco. "Having Congress affirmatively state permits must be 30 years would be helpful."

Environmental groups remain skeptical of the 30-year permits, saying FWS lacks the expertise and funding to ensure plans to offset eagle deaths are effective. The Obama administration argues mitigation steps like retrofitting power poles, idling turbines and conserving eagle habitat will keep eagle populations robust even as some birds are killed.

The bill's other major provision would exempt energy companies and others who unintentionally kill or harm migratory birds from criminal penalties under MBTA. Currently, energy projects or individuals are liable for stiff fines for killing birds, even by accident.

Federal circuit courts have come to different opinions on whether MBTA applies to incidental take.

The courts of appeal for the 8th and 9th U.S. circuits have found MBTA applies to actions directed against migratory birds like hunting, but not accidental take from commercial activities like wind projects, said Svend Brandt-Erichsen of Marten Law. But the 10th U.S. Circuit Court of Appeals has upheld criminal liability for incidental take.

Subsequently, the only two times the Justice Department has prosecuted wind farms under MBTA were for violations at turbine farms in Wyoming, which is in the 10th District. Both wind farms were found to have killed eagles, which are protected under MBTA. But the firms were not docked for BGEPA violations in part because that statute applies only when eagles are knowingly killed, a higher burden of proof.

Duncan's bill would significantly reduce liabilities for wind developers and other energy companies.

It is a reflection of Republican allegations that the Obama administration is not applying bird protection laws fairly and consistently across renewable and conventional energy sectors.

The legislation says as much, finding that "criminal prosecution under those statutes has been subjective, selective, and not applied uniformly and fairly across all sectors of society."
The bill is likely to be vigorously opposed by wildlife advocates and is not expected to draw significant Democratic support.

Robert Johns, a spokesman for the American Bird Conservancy, said, "We disagree with almost everything in this bill. "The singular exception is findings No. 10 -- ‘Protecting avian population and its habitat is important," he said. "Unfortunately, there is virtually nothing in this bill that is consistent with that notion. We would like to see it rewritten with that philosophy actually reflected in the language. And we'd be happy to help do that."