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MIGRATORY BIRD TREATY ACT PENALTY AND ENFORCEMENT ACT OF 2009

DECEMBER 17, 2010.—Ordered to be printed

Mrs. BOXER, from the Committee on Environment and Public
Works, submitted the following

R E P O R T

together with

MINORITY VIEWS

[To accompany H.R. 2062]

[Including cost estimate of the Congressional Budget Office]

The Committee on Environment and Public Works, to which was referred a bill (H.R. 2062) to amend the Migratory Bird Treaty Act (MBTA) to provide for penalties and enforcement for intentionally taking protected avian species, and for other purposes, having considered the same, reports favorably thereon and recommends that the bill do pass.

BACKGROUND AND NEED FOR THE LEGISLATION

The MBTA implements treaties and conventions for the protection of migratory birds among the U.S., Canada, Japan, Mexico and the former Soviet Union. Among other things, the Act provides that, except as expressly permitted by regulation, it is unlawful to pursue, hunt, take, capture or kill, or attempt to take, capture or kill, any migratory bird. The Act provides that the Secretary of the Interior, through the U.S. Fish and Wildlife Service (FWS) shall adopt regulations determining the extent to which, if at all, hunting, taking, capturing, killing, possessing, selling, purchasing, shipping, transporting or exporting of any migratory bird, part, nest or egg are permitted.

The requirements of the Act are enforced by the FWS, including through assertion of criminal penalties. Such penalties include:

- Any person, association, partnership or corporation which violates the MBTA or its regulations may be found guilty of a Class B misdemeanor and subject to a fine of up to \$15,000, jailed for up to six months, or both.
- Any person who knowingly takes a migratory bird with commercial intent may be found guilty of a felony with a maximum fine of \$2,000, no more than two years' imprisonment, or both.
- All guns, traps, nets, vessels, vehicles and other equipment used in pursuing, hunting, taking, trapping, ensnaring, capturing, killing, or any attempt on a migratory bird in violation of the Act with the intent to sell or barter, must be forfeited to the U.S. and may be seized and held by the FWS pending prosecution of the violator.

In 2006 and 2007 a FWS investigation determined that thousands of legally protected birds of prey, including peregrine falcons, Cooper's hawks and red-tailed hawks, had been illegally killed often using intentionally cruel methods. There is concern that the current MBTA does not provide sufficient sanctions to act as a deterrent to this kind of illegal conduct.

The purpose of H.R. 2062 is to provide for increased penalties for intentional and malicious taking of protected bird species.

H.R. 2062 amends the MBTA to provide additional new penalties for killing or wounding migratory birds protected by the Act in an aggravated manner. For the first violation, a person would be subject to a fine of up to \$100,000 under Title 18 of the U.S. Code and/or imprisonment for up to one year. For the second violation, a person would be subject to a fine of up to \$250,000 and/or imprisonment for up to two years.

H.R. 2062 also allows the use of law enforcement authority under section 3(k) of the Fish and Wildlife Improvement Act of 1978. This provision authorizes payment for information, rewards, or evidence concerning violations, with respect to the killing or wounding of a migratory bird in an aggravated manner.

SECTION-BY-SECTION ANALYSIS

Section 1. Short title

Section 1 provides that the bill may be cited as the Migratory Bird Treaty Act Penalty and Enforcement Act of 2009.

Section 2. Amendment of Migratory Bird Treaty Act

Section 2 of the bill would amend section 707 of the Migratory Bird Treaty Act to insert a new subsection (d) to establish additional misdemeanor and felony penalties and fines for actions that either kill or wound a protected bird species in an "aggravated manner." Pursuant to federal sentencing guidelines (see 18 U.S.C. 3559 and 18 U.S.C. 3571), for such a violation a person could be charged: (1) With a Class A misdemeanor for a first offense and subject to a fine of up to \$100,000, or in cases resulting in a death, \$250,000, and/or imprisonment of no less than six months and no more than one year; or (2) with a Class E felony for a second or subsequent offense and subject to a fine of up to \$250,000 and/or imprisonment for no less than one year and no more than two

years. Federal guidelines also provide that fines for organizations are increased to no more than \$200,000 for a Class A misdemeanor, or in cases resulting in a death, \$500,000, and to no more than \$500,000 for a Class E felony.

Paragraph (2) of the new subsection (d) makes applicable existing authority under the Fish and Wildlife Improvement Act of 1978 (16 U.S.C. 7421(k)) to allow the Secretary of the Interior to offer reward payments for information leading to an arrest or conviction for these new violations.

Paragraph (3) of the new subsection (d) defines the term “aggravated manner” to mean the deliberate killing or wounding of a migratory bird in a manner that demonstrates indifference to the pain and suffering of the bird, or that involves actions that would shock a reasonable person. The Committee does not intend for these new sanctions to apply to activities undertaken for other purposes through which birds are incidentally killed or wounded in violation of the MBTA (such as bird strikes against fixed facilities), nor are these violations intended to apply to the legal take of migratory birds through regulated hunting or other permitted take.

LEGISLATIVE HISTORY

On April 23, 2009, H.R. 2062 was introduced in the House by Representative Peter DeFazio. It was referred to the House Committee on Natural Resources, Subcommittee on Insular Affairs, Oceans and Wildlife where it was reported (as amended) by unanimous consent on November 18, 2009. The full House passed the bill by voice vote on December 7, 2009. It was referred to the EPW Committee on December 8, 2009.

On November 20, 2009, Senator Merkley had introduced companion legislation, S. 2811, which was referred to the EPW Committee.

On April 21, 2010, the EPW Committee held a business meeting at which H.R. 2062 was considered and approved.

ROLLCALL VOTE

At the business meeting held on April 21, 2010, the Committee voted to approve H.R. 2062 and to report the bill to the full Senate by a voice vote, with Senators Inhofe, Crapo, and Voinovich recorded as voting “nay,” and Senators Merkley, Specter, and Vitter recorded as voting “yea.”

REGULATORY IMPACT STATEMENT

In compliance with section 11(b)(2) of rule XXVI of the Standing Rules of the Senate, the Committee estimates that no regulatory impact is expected by the passage of the bill. The bill will not affect the personal privacy of individuals.

MANDATES ASSESSMENT

In compliance with the Unfunded Mandates Reform Act of 1995 (Public Law 104-4), the Committee notes that the Congressional Budget Office has concluded that “H.R. 2062 contains no intergovernmental or private-sector mandates as defined in the Unfunded

Mandates Reform Act and would not affect the budgets of state, local, or tribal governments.”

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with paragraph 11(a) of rule XXVI of the Standing Rules of the Senate and section 403 of the Congressional Budget Act of 1974, the Committee provides the following cost estimate, prepared by the Congressional Budget Office.

As ordered reported by the Senate Committee on Environment and Public Works on April 21, 2010:

APRIL 28, 2010.

Hon. BARBARA BOXER,
Chairman, Committee on Environment and Public Works,
U.S. Senate, Washington, DC.

DEAR MADAM CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 2062, the Migratory Bird Treaty Act Penalty and Enforcement Act of 2009.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Mark Grabowicz.

Sincerely,

DOUGLAS W. ELMENDORF.

Enclosure

H.R. 2062—Migratory Bird Treaty Act Penalty and Enforcement Act of 2009

CBO estimates that implementing H.R. 2062 would have no significant cost to the federal government. Enacting the legislation could affect direct spending and revenues; therefore, pay-as-you go procedures would apply, but CBO estimates that any such effects would not be significant.

H.R. 2062 would expand the current federal laws and penalties that protect migratory birds. Thus, the government might be able to pursue cases that it otherwise would not be able to prosecute. CBO expects that H.R. 2062 would apply to a relatively small number of offenders, however, so any increase in costs for law enforcement, court proceedings, or prison operations would not be significant. Any such costs would be subject to the availability of appropriated funds.

Because those prosecuted and convicted under H.R. 2062 could be subject to criminal fines, the federal government might collect additional amounts if the legislation is enacted. Criminal fines are recorded as revenues, deposited in the Crime Victims Fund, and later spent. CBO estimates that any additional revenues and direct spending would not be significant because of the small number of cases likely to be affected.

H.R. 2062 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would not affect the budgets of state, local, or tribal governments.

On November 20, 2009, CBO transmitted a cost estimate for H.R. 2062 as ordered reported by the House Committee on Natural Resources on November 18, 2009. The two versions of the legislation are the same, as are the CBO cost estimates.

The CBO staff contact for this estimate is Mark Grabowicz. The estimate was approved by Peter H. Fontaine, Assistant Director for Budget Analysis.

MINORITY VIEWS OF SENATOR INHOFE

There is no disagreement that protection of migratory birds is desirable, in fact, it is already against the law to kill a migratory bird. What is problematic is the use of the overly harsh penalties and vague language contained in this bill. These points need to be addressed before the bill moves forward.

Under the proposed bill, the penalties imposed upon those who violate the law regarding the killing of migratory birds do not fit the crime. The proposed fines and sentences placed on those convicted are unprecedented in their severity. The bill references a FWS investigation of illegally killed protected birds, some of which were killed using “intentionally cruel methods”. This investigation culminated in a Federal Court case in 2008. Federal Judge J. Kelly Arnold ruled against imposing the maximum sentence for a man who pleaded guilty to killing a Peregrine Falcon. This was classified as a Class B misdemeanor, which carried a fine of up to \$15,000, jail for six months, or both. Judge Arnold sentenced the man 120 hours of community service, stating that a stricter sentence would just be “overkill” and would cause irreparable financial damage to him and his family. As currently drafted, this bill ignores the Judge’s decision in the 2008 case, and in fact moves in the opposite direction and imposes an even harsher penalty. In order to achieve the desired result, it is crucial to insure the proportionality of the punishment to the offense, as demonstrated by the Judge’s decision in this case. Therefore, the unreasonably high penalties need to be further reviewed before continuing with this bill.

A second cause for concern is the vague language used to describe the nature of the offense. Language such as “intentionally cruel”, “malicious”, and “aggravated” fail to effectively define the offense itself and leave much up to personal interpretation. Furthermore, the bill defines the term “aggravated manner” as “the deliberate killing or wounding of a migratory bird in a manner that demonstrates indifference to the pain and suffering of the bird, or that involves actions that would shock a reasonable person”. Again, this description is completely subjective and biased. If we are to achieve the desired result, which is to appropriately penalize those who kill migratory birds, then we must be specific on what is the threshold of behavior that triggers the penalty. Aggravated activity should be more specifically defined demonstrating severe recklessness or severely depraved actions. Convictions under that charge should be reserved for particularly heinous behavior. As currently drafted, the bill fails to do that.

JAMES M. INHOFE.

CHANGES IN EXISTING LAW

In compliance with section 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill as reported are shown as follows: Existing law proposed to be omitted is enclosed in [black brackets], new matter is printed in italic, existing law in which no change is proposed is shown in roman:

* * * * *

MIGRATORY BIRD TREATY ACT

* * * * *

SEC. 2. (a) IN GENERAL.—* * *

* * * * *

SEC. 6.

(c) Whoever violates section 3(b)(2) shall be fined under title 18, United States Code, imprisoned not more than 1 year, or both.

(d)(1) *Except in the case of hunting and other activity allowed under section 3, whoever in violation of this Act kills or wounds a migratory bird in an aggravated manner shall, in lieu of any penalty for such violation—*

(A) for the first violation, be fined under title 18, United States Code, imprisoned for not more than one year, or both; and

(B) for the second and any subsequent violation, be fined under title 18 of the United States Code, imprisoned for not more than 2 years, or both.

(2) *The authority under section 3(k) of the Fish and Wildlife Improvement Act of 1978 (16 U.S.C. 742l(k)) applies with respect to a violation described in paragraph (1).*

(3) *For the purposes of this subsection the term ‘aggravated manner’ means deliberately and in a manner that—*

(A) demonstrates indifference to the pain and suffering of the bird; or

(B) involves actions that would shock a reasonable person.

[(d)] (e) All guns, traps, nets and other equipment, vessels, vehicles, and other means of transportation used by any person when engaged in pursuing, hunting, taking, trapping, ensnaring, capturing, killing, or attempting to take, capture, or kill any migratory bird in violation of this Act with the intent to offer for sale, or sell, or offer for barter, or barter such bird in violation of this Act shall be forfeited to the United States and may be seized and held pending the prosecution of any person arrested for violating this Act and upon conviction for such violation, such forfeiture shall be adjudicated as a penalty in addition to any other provided for violation of this Act. Such forfeited property shall be disposed of and ac-

counted for by, and under the authority of, the Secretary of the Interior.

