

MIGRATORY BIRD TREATY REFORM ACT OF 1998

MAY 19, 1998.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. YOUNG of Alaska, from the Committee on Resources,
submitted the following

REPORT

[To accompany H.R. 2863]

[Including cost estimate of the Congressional Budget Office]

The Committee on Resources, to whom was referred the bill (H.R. 2863) to amend the Migratory Bird Treaty Act to clarify restrictions under that Act on baiting, to facilitate acquisition of migratory bird habitat, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the “Migratory Bird Treaty Reform Act of 1998”.

SEC. 2. ELIMINATING STRICT LIABILITY FOR BAITING.

Section 3 of the Migratory Bird Treaty Act (16 U.S.C. 704) is amended—

(1) by inserting “(a)” after “SEC. 3.”; and

(2) by adding at the end the following:

“(b) It shall be unlawful for any person to—

“(1) take any migratory game bird by the aid of baiting, or on or over any baited area, if the person knows or reasonably should know that the area is a baited area; or

“(2) place or direct the placement of bait on or adjacent to an area for the purpose of causing, inducing, or allowing any person to take or attempt to take any migratory game bird by the aid of baiting on or over the baited area.”.

PURPOSE OF THE BILL

The purpose of H.R. 2863, as introduced, is to amend the Migratory Bird Treaty Act of 1918 to clarify restrictions under that Act on baiting, to facilitate acquisition of migratory bird habitat, and for other purposes.

BACKGROUND AND NEED FOR LEGISLATION

In 1916, the United States and Great Britain (for Canada) signed a Convention for the Protection of Migratory Birds. The fundamental goal of this Convention was to establish an international framework for the protection and conservation of migratory birds.

Under the Treaty, unless and except as permitted by regulation, it is unlawful at any time to "pursue, hunt, take, capture, kill, possess, offer for sale, sell, offer to barter, barter, offer to purchase, purchase, deliver for shipment, ship, export, import * * * any migratory bird, any part, nest, or egg of any such bird * * * included in the terms of the convention between the United States and Great Britain for the protection of migratory birds." The United States has also signed similar agreements with Mexico and the former Soviet Union.

What is a migratory bird? Under the Convention, the term "migratory bird" means all wild species of ducks, geese, brants, coots, gallinules, rails, snipes, woodcocks, crows, and mourning and white-winged doves.

In 1918, the U.S. Congress passed the Migratory Bird Treaty Act. This Act became our domestic law implementing the Convention and it committed this nation to the conservation of migratory birds. In addition, the Act instructed the U.S. Fish and Wildlife Service to develop regulations on the harvest of this renewable resource. Both the Convention and the 1918 Act were designed to reduce the take of migratory birds on an international basis.

U.S. REGULATIONS

In the 80 years since Congress passed the Migratory Bird Treaty Act, the U.S. Fish and Wildlife Service has issued numerous Federal regulations governing the circumstances by which a hunter may take a migratory bird. For instance, the U.S. Fish and Wildlife Service annually issues regulations establishing the hunting seasons and bag limits (number an individual may kill) for each migratory bird. These regulations are issued only after an extensive biological review of population levels, reproduction rates, and the amount of available habitat for these species.

Over the years, the Service has also issued regulations, strongly supported by the hunting community, restricting the methods by which an individual may harvest a migratory bird. For example, it is illegal to take a migratory bird by:

- Use of a sinkbox or any other type of floating device that places the hunter beneath the surface of the water;

- Use of a motor vehicle or aircraft;

- Use or aid of live birds or decoys;

- Use or aid of recorded or electronically amplified bird calls or imitations of those sounds; and

- Use of any shot except steel shot, bismuth-tin shot, or other shot approved by the Secretary of the Interior that is nontoxic to waterfowl.

Generally, there has been little controversy over these regulations, and their enforcement has had a beneficial impact on migratory bird populations. However, there is one regulation dealing

with the hunting of migratory birds over a “baited field” that has sparked tremendous debate.

PROBLEMATIC BAITING REGULATIONS

Congress has never passed a law that says: this is baiting and this practice is illegal. In fact, it is not illegal to bait a field or to feed migratory birds. It is, however, strictly prohibited to hunt in such an area. While the U.S. Fish and Wildlife Service has modified its baiting regulations 17 times, there have been no changes in the last 25 years, despite continuing problems with fairness and clarity. For example:

If you are hunting over a baited field, whether you know it or not, you are guilty. There is no defense.

There is virtually no opportunity to present evidence in a case. It does not matter whether there is a little or a lot of bait, or if it served as an attraction to the migratory bird.

It does not matter if you have a signed affidavit from the landowner asserting that bait was not present. This document has no value in court.

It does not matter if the bait is a mile away from the hunting site.

There are also continuing inconsistencies in law enforcement, conflicting decisions issued by Federal courts, and, most importantly, injustices experienced by migratory bird hunters, farmers, wildlife managers, landowners, and professional guides who are being cited for violating baiting prohibitions. The judicial record and the history of law enforcement under this prohibition demonstrate that the courts and law enforcement officials have not and, in far too many cases, conscientiously will not provide the clarity necessary for uniform and just application of baiting prohibitions. Therefore, Congress has an obligation to bring uniformity to enforcement since these regulations were promulgated as the result of an international treaty and should not mean one thing in one State and another elsewhere.

Over the past decade, there have been several attempts to address the problems associated with the baiting regulations. In 1990, a Law Enforcement Advisory Commission, created by the U.S. Fish and Wildlife Service, found the enforcement of regulations concerning baiting were “confusing” and “too complex.” One of the Commission’s recommendations was that “a task force should be established to review 50 CFR Part 20 (migratory bird hunting regulations) in an effort to clarify and simplify the existing regulations. This task group should include field agents, Service biologists, representatives of private organizations, State agencies, and possibly Technical Committee members from the various flyways.” It took seven years for this task force to be established at the request of the Service.

On May 1, 1997, the International Association of Fish and Wildlife Agencies Ad Hoc Committee on Baiting submitted its recommendations to the U.S. Fish and Wildlife Service. This Ad Hoc Committee included representatives from the various flyway councils, Ducks Unlimited, the National Wildlife Federation, North American Wildlife Enforcement Officers Association, the Wildlife

Legislative Fund of America, and the Wildlife Management Institute.

The Ad Hoc Committee made a number of recommendations to modernize and improve the baiting regulations. The Committee recommendations focus on four major areas: agricultural crops, management of natural vegetation, migratory game birds other than waterfowl, and strict liability. In particular, the Committee rejected the "strict liability" aspect of existing regulations. In its Executive Summary, the Committee stated:

In an attempt to address every intentional violator, the regulations compromise the truly innocent hunter. The Committee therefore recommends the hunter be required to know or have had a reasonable opportunity to know that a hunted area is considered a baited area. Additionally, this change will effectively reduce the "zone of influence" in many cases because the farther hunters are from the actual bait, the less likely they are to have a reasonable opportunity to determine its presence.

The Committee also recommended that it be "unlawful for any person to place or direct the placement of bait" for the purpose of causing hunters to take migratory game birds by the aid of baiting or on or over the baited area.

In his cover letter to Mr. John Rogers, then Acting Director of the U.S. Fish and Wildlife Service, Mr. R. Max Peterson, Executive Vice President of the International Association of Fish and Wildlife Agencies, requested that the Ad Hoc Committee's recommendations receive "favorable consideration * * * and that these ultimately be submitted to the Federal Register as a Fish and Wildlife Service proposal for public review and comment." Instead, the U.S. Fish and Wildlife Service promulgated its own proposed rule in the March 25, 1998, Federal Register, for public comment until May 26, 1999. This rule would make a number of modifications in key terms such as baited area, baiting, manipulation, natural vegetation, and normal agricultural and soil stabilization practices. However, the proposed rule stipulates that "no changes are proposed in the application of strict liability to the migratory game bird baiting regulations." This is a repudiation of the Ad Hoc Committee's recommendations and contrary to the Administration's testimony presented to the Resources Committee last year.¹

STRICT LIABILITY FOR HUNTING OVER A BAITED FIELD

The majority of courts apply a legal standard of strict liability for hunting migratory birds over a baited field. The hunter is guilty of hunting over bait, regardless of whether the hunter knew of the bait, or if there was a reasonable opportunity to know of its presence. If the hunter is there, and the bait is there, he or she is guilty. There is no legal defense, and this strict liability standard violates one of the basic tenets of criminal law where intent must

¹In presenting the Administration's view on H.R. 741 [a predecessor bill to H.R. 2863], Dr. Robert Streeter expressed a number of concerns but stated that "the known or should have known standard, I think, could be addressed." Subcommittee on Fisheries Conservation, Wildlife and Oceans hearing on H.R. 741, May 15, 1997.

be proved, or reasonably imputed, before a person can be found guilty of the crime charged.

Such a doctrine has resulted in cases where defendants were liable for knowledge of bait a mile from the hunting site,² and a citation where there were as few as 13 kernels of corn in a pond in the middle of a 3,000-acre cornfield.³ Even though a court may find that a hunter did not place the alleged bait, did not know, and could not have reasonably known of its presence, it “reluctantly” will affirm a conviction of “unfortunate” defendants.⁴

Adding further insult, a retired law enforcement agent of the U.S. Fish and Wildlife Service, Mr. Vernon G. Ricker, testifying in opposition to a predecessor bill to H.R. 2863, candidly asked and responded to his own question, “Have I ever charged someone for hunting over bait that I truly believed did not know the area was baited? And I would say yes. I have in my career. I probably charged people for hunting over bait that truly didn’t know.” Mr. Ricker could have chosen to simply issue a warning and not a citation to those individuals who were unaware of any baiting problems involving migratory birds.

These circumstances are unacceptable.

H.R. 2863, as amended in Committee, removes strict liability for hunting for a baited field. The bill is simply designed to provide an opportunity for a defendant to place evidence before the court that he or she did not, in fact, know of the alleged bait and that he or she could not have reasonably known of its presence. This standard has been followed since 1978 in the Federal 5th Judicial Circuit pursuant to *United States v. Delahoussaye*.

We conclude that at a minimum [the bait] must have been so situated that [its] presence could have been reasonably ascertained by a hunter properly wishing to check the area of his activity. Any other interpretation would simply render criminal conviction an unavoidable consequence.⁵

573 F.2d 910, 912–913 (5th Cir. 1978).

The 5th Circuit includes the States of Louisiana, Mississippi, and Texas where migratory birds are hunted in great numbers. The record indicates that this legal standard has, in no manner, lessened the conviction of persons who, by the evidence presented, have violated the baiting prohibitions. For example, based on information supplied by the U.S. Fish and Wildlife Service, in the most recent hunting season in Louisiana (1996–97), of the 52 persons cited by the Service for hunting over a baited field, 43 were found guilty. In 1995 in Mississippi (the most recent year statistics are available), 22 baiting citations were issued; all 22 cited persons were found guilty or paid fines. In Texas, the Service also batted .1000, with six persons charged in the 1996–97 hunting season, and six found guilty or paid fines. In total, from 1984 to the 1996–97 hunting season, 2318 citations were issued in these three states using the “known or should have known” liability standard. The

² *United States v. Orme*, 851 F. Supp. 708 (D. Md. 1994), *aff’d* without opinion, 51 F.2d 268 (4th Cir. 1995).

³ *United States v. Lonergran*, No. 89–0468 (E.D. Cal. 1989).

⁴ *United States v. Callett*, 747 F.2d 1102 (6th Cir. 1984).

⁵ 573 F.2d 910, at 912–913 (5th Cir. 1978).

Service obtained guilty pleas or payments of fines in 2042 cases, over 88 percent.⁶

As these statistics show, for the past 20 years, the *Delahoussaye* decision has been effectively used to protect migratory birds. During that time, no migratory bird population has been put at risk, and there have been numerous baiting convictions under the “knows or should know” standard. Based on this evidence, it is not surprising that the U.S. Fish and Wildlife Service has never attempted to overturn or challenge this decision.

Application of the *Delahoussaye* standard will not lessen the protection of migratory birds or eliminate the opportunity for conviction of those persons who have, in fact, as demonstrated by the evidence, violated the baiting prohibitions. The standard of proof and defense still requires evidence as in any criminal case. If a preponderance of evidence so demonstrates, a defendant in a baiting case will be found guilty. This standard is far less stringent than the “beyond a reasonable doubt” standard in all other criminal cases.

Over the years, sportsmen have demonstrated their support to maintain viable and healthy fish and wildlife resources by the millions of dollars and untold volunteer hours they have contributed to conservation efforts. By the confusing and inappropriate application of the legal standard of strict liability, many migratory bird hunters have left the field rather than face a potential criminal conviction even when they would be totally innocent of the charges.

The Committee intends to periodically review the effects of changing the strict liability standard. It is expected that this change will have no adverse effect on migratory bird populations nor will it compromise law enforcement. Subsequent oversight, however, will enable the Committee to evaluate the effects of H.R. 2863 and make additional changes, or return to the strict liability standard, if warranted by the facts.

ZONE OF INFLUENCE

A second area where the strict liability doctrine has caused unreasonable problems is the doctrine of the “zone of influence” of the alleged bait bringing the migratory bird to the gunning venue. The Committee heard where Fish and Wildlife Service agents have testified that bait five miles from the gunning area is a circumstance requiring citation and, under strict liability, criminal conviction. In other cases, baiting convictions have been returned against unknowing hunters a full mile away from the alleged baited site. Such circumstances clearly place an unwarranted and impossible burden on a hunter to reconnoiter such unreasonable distances from a blind or a dove stand. The Committee expects the Fish and Wildlife Service to act reasonably in regard to the zone of influence in promulgating regulations, and issue citations only in circumstances where a reasonably diligent hunter could ascertain the presence of sufficient bait to influence migratory birds.

⁶This number does not include the 210 instances in which the U.S. Fish and Wildlife Service or the relevant court dismissed the case for other grounds.

PLACEMENT OF BAIT

H.R. 2863 also seeks to ensure that a person actually placing the bait for purpose of luring migratory birds to a given area will be cited for “baiting” even though he or she may not be hunting. In many cases, citations are only given to the hunters, and the person causing the illegal condition is not charged since he or she is not present when the citations are issued. In this case, someone doing the baiting could be charged even though the hunter may prove that he or she did not know, or could not have reasonably known, of the presence of bait. This change in the law implements one of the recommendations of the Ad Hoc Committee on Baiting, discussed above.

COMMITTEE ACTION

H.R. 2863 was introduced by the Chairman of the Resources Committee, Congressman Don Young (R-AK), and Congressmen John Tanner (D-TN), John Dingell (D-MI), Curt Weldon (R-PA), and Cliff Stearns (R-FL) on November 6, 1997, and referred to the Committee on Resources.

On May 15, 1997, the Subcommittee on Fisheries Conservation, Wildlife and Oceans conducted a hearing on H.R. 741, a predecessor bill to H.R. 2863. Testimony was heard from Senator John Breaux (D-LA); Congressman Cliff Stearns (R-FL); Dr. Robert Streeter, Assistant Director for Refuges and Wildlife, U.S. Fish and Wildlife Service; Mr. Brent Manning, Director, Illinois Department of Natural Resources; Mr. William P. Horn, Birch, Horton, Bittner and Cherot; Mr. Stephen S. Boynton, Henke and Associates; Dr. Rudolph Rosen, Executive Director, Safari Club International; Mr. Dan Limmer, Regional Executive, National Wildlife Federation; Dr. Rollin D. Sparrowe, President, Wildlife Management Institute; Ms. Susan Lamson, Director of Conservation, Wildlife and Natural Resources, National Rifle Association; Mr. W. Ladd Johnson, Board Member, National Waterfowl Federation; Mr. William Boe, Gainesville, Florida; Mr. Vernon Ricker, Retired Special Agent, U.S. Fish and Wildlife Service; Mr. Terrance J. Sullivan, Secretary, League of Kentucky Sportsmen; Mr. Charles Conner, Germantown, Tennessee; and Mr. Fred Bonner, Carolina Adventure.

On April 29, 1998, the full Resources Committee met to consider H.R. 2863. Chairman Young offered an amendment in the nature of a substitute that limited the scope of the bill to the replacement of “strict liability” with the “knows or reasonably should know” standard. The amendment was adopted by voice vote. The bill, as amended, was then ordered favorably reported to the House of Representatives by voice vote.

SECTION-BY-SECTION ANALYSIS

SECTION 1. SHORT TITLE

This Act may be cited as the “Migratory Bird Treaty Reform Act of 1998.”

SECTION 2. ELIMINATING STRICT LIABILITY FOR BAITING

Section 3 of the Migratory Bird Treaty Reform Act is amended by adding the following: “It is unlawful for any person to take any migratory game bird by aid of baiting, or on or over any baited area, if the person knows or reasonably should know that the area is a baited area; or place or direct the placement of bait on or adjacent to an area for the purpose of causing, inducing, or allowing any person to take or attempt to take any migratory game bird by the aid of baiting on or over the baited area.”

COMMITTEE OVERSIGHT FINDINGS AND RECOMMENDATIONS

With respect to the requirements of clause 2(1)(3) of rule XI of the Rules of the House of Representatives, and clause 2(b)(1) of rule X of the Rules of the House of Representatives, the Committee on Resources’ oversight findings and recommendations are reflected in the body of this report.

CONSTITUTIONAL AUTHORITY STATEMENT

Article I, section 8 of the Constitution of the United States grants Congress the authority to enact H.R. 2863.

COST OF THE LEGISLATION

Clause 7(a) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison by the Committee of the costs which would be incurred in carrying out H.R. 2863. However, clause 7(d) of that rule provides that this requirement does not apply when the Committee has included in its report a timely submitted cost estimate of the bill prepared by the Director of the Congressional Budget Office under section 403 of the Congressional Budget Act of 1974.

COMPLIANCE WITH HOUSE RULE XI

1. With respect to the requirement of clause 2(1)(3)(B) of rule XI of the Rules of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974, H.R. 2863 does not contain any new budget authority, spending authority, credit authority, or an increase or decrease in tax expenditures. According to the Congressional Budget Office, enactment of H.R. 2863 could reduce receipts from criminal fines, but any loss of receipts would be insignificant and largely offset by decreased direct spending from the Crime Victims Fund, where these fines are deposited.

2. With respect to the requirement of clause 2(1)(3)(D) of rule XI of the Rules of the House of Representatives, the Committee has received no report of oversight findings and recommendations from the Committee on Government Reform and Oversight on the subject of H.R. 2863.

3. With respect to the requirement of clause 2(1)(3)(C) of rule XI of the Rules of the House of Representatives and section 403 of the Congressional Budget Act of 1974, the Committee has received the following cost estimate for H.R. 2863 from the Director of the Congressional Budget Office.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

U.S. CONGRESS,
 CONGRESSIONAL BUDGET OFFICE,
 Washington, DC, May 14, 1998.

Hon. DON YOUNG,
 Chairman, Committee on Resources,
 House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 2863, the Migratory Bird Treaty Reform Act of 1998.

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

Sincerely,

JUNE E. O'NEILL, *Director.*

Enclosure.

H.R. 2863—Migratory Bird Treaty Reform Act of 1998

CBO estimates that enacting H.R. 2863 would have no significant effect on the federal budget. Because the bill may reduce receipts from criminal fines, pay-as-you-go procedures would apply. Any loss of receipts would not be significant, however, and would be largely offset by decreased direct spending from the Crime Victims Fund (into which these fines are deposited). H.R. 2863 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act of 1995 and would not affect the budgets of state, local, or tribal governments.

H.R. 2863 would codify a standard for determining when someone is guilty of hunting migratory birds over an area baited with bird feed. At present, there is no statutory rule for deciding the issue; thus, the standard is determined by the courts and differs from jurisdiction to jurisdiction. In most areas of the country, courts usually apply strict liability—anyone found hunting over a baited field is guilty of violating federal law whether the person knew that the area was baited or not. In contrast, H.R. 2863 would establish a national standard, presently applied in only a few states, that would make it unlawful for a person to hunt over a field only if that person knows or reasonably should know that the area is baited.

It is possible that applying the new standard nationally could make it somewhat more difficult for some prosecutors to prove that the law has been violated, resulting in fewer convictions in some states. CBO estimates, however, that the aggregate decrease in federal revenues from fines would be insignificant because the overall conviction rate would be unlikely to fall by much—these rates are already extremely high in all states, regardless of which standard is applied. In any case, losses of revenues would result in similar decreases in direct spending from the Crime Victims Fund.

The CBO staff contact for this estimate is Deborah Reis. This estimate was approved by Robert A. Sunshine, Deputy Assistant Director for Budget Analysis.

COMPLIANCE WITH PUBLIC LAW 104-4

H.R. 2863 contains no unfunded mandates.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (new matter is printed in italic and existing law in which no change is proposed is shown in roman):

SECTION 3 OF THE MIGRATORY BIRD TREATY ACT

SEC. 3. (a) That subject to the provisions and in order to carry out the purposes of the conventions, the Secretary of Agriculture 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.

(b) *It shall be unlawful for any person to—*

(1) take any migratory game bird by the aid of baiting, or on or over any baited area, if the person knows or reasonably should know that the area is a baited area; or

(2) place or direct the placement of bait on or adjacent to an area for the purpose of causing, inducing, or allowing any person to take or attempt to take any migratory game bird by the aid of baiting on or over the baited area.

