

MIGRATORY BIRD TREATY ACT PENALTY AND
ENFORCEMENT ACT OF 2009

DECEMBER 7, 2009.—Committed to the Committee of the Whole House on the State
of the Union and ordered to be printed

Mr. RAHALL, from the Committee on Natural Resources,
submitted the following

R E P O R T

[To accompany H.R. 2062]

[Including cost estimate of the Congressional Budget Office]

The Committee on Natural Resources, to whom was referred the bill (H.R. 2062) to amend the Migratory Bird Treaty Act to provide for penalties and enforcement for intentionally taking protected avian species, 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 all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the “Migratory Bird Treaty Act Penalty and Enforcement Act of 2009”.

SEC. 2. AMENDMENT OF MIGRATORY BIRD TREATY ACT.

Section 6 of the Migratory Bird Treaty Act (16 U.S.C. 707) is amended by redesignating subsection (d) as subsection (e), and by inserting after subsection (c) the following new subsection:

“(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.”.

PURPOSE OF THE BILL

The purpose of H.R. 2062 is to amend the Migratory Bird Treaty Act to provide for increased penalties and fines for the intentional and malicious taking of protected bird species.

BACKGROUND AND NEED FOR LEGISLATION

The Migratory Bird Treaty Act (MBTA), which was enacted in 1918, implements four treaties and conventions between the U.S. and Canada, Japan, Mexico and the former Soviet Union for the protection of migratory birds. Unless permitted by regulations, the strict liability standards of the Act provide that it is unlawful to pursue, hunt, take, capture or kill; attempt to take, capture or kill; possess, offer to or sell, barter, purchase, deliver or cause to be shipped, exported, imported, transported, carried or received any migratory bird, part, nest, egg or product, manufactured or not. The MBTA also makes it unlawful to ship, transport or carry from one state, territory or district to another, or through a foreign country, any bird, part, nest or egg that was captured, killed, taken, shipped, transported or carried contrary to the laws from where it was obtained. Subject to limitations in the Act, the Secretary of the Interior, through the U.S. Fish and Wildlife Service (hereafter, the Service) may 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 will be allowed, having regard for temperature zones, distribution, abundance, economic value, breeding habits and migratory flight patterns.

To enforce the MBTA, the Service may arrest a person for violating the Act and may execute warrants or other processes issued by an officer or court to enforce the Act and search any place to pursue a violation. All birds, parts, nests or eggs that are illegally taken may be seized and, upon conviction or court judgment, be forfeited to the United States and disposed of by the Service. The last time Congress amended the Act was in 1998 to increase penalties (Public Law 105-312, at Title I). At present, a 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, jail up to six months, or both. Anyone 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 Service pending prosecution of the violator.

In May and July of 2007, the Service arrested several individuals as part of a 14-month long nationwide undercover investigation known as “Operation High Roller.” This investigation revealed that thousands of federally-protected birds of prey, specifically raptor species, including peregrine falcons, Cooper’s hawks and red-tailed hawks, were being illegally killed in Texas, New Mexico, Oregon,

Washington and California by members of Roller Pigeon Clubs. The Service arrested a total of 12 individuals. Affidavits revealed that these perpetrators repeatedly and deliberately killed protected raptors using methods that included shooting, trapping, poisoning, suffocating, clubbing, baiting birds into glass panels, and baiting birds with pigeons rigged with fishing hooks. Affidavits also revealed that certain perpetrators utilized particularly cruel methods, such as spraying a mixture of bleach and ammonia directly into the eyes and mouths of trapped birds. Despite the horrific nature of these crimes, defendants who pleaded guilty to the Class B misdemeanor escaped with fines far smaller than the maximum allowed and were granted probation, directed to complete community service, or restricted from participating in their sport. This case has been used by bird conservation organizations and other interested stakeholders to argue that current federal law does not take these crimes seriously, and that existing MBTA penalties and fines are insufficient to function as a deterrent to prevent or dissuade illegal activity from happening.

COMMITTEE ACTION

H.R. 2062 was introduced on April 23, 2009 by Representative Peter DeFazio (D-OR). The bill was referred to the Committee on Natural Resources, and within the Committee to the Subcommittee on Insular Affairs, Oceans and Wildlife. On May 13, 2009, the Subcommittee held a hearing on the bill. Witnesses representing state fish and wildlife agencies and bird conservation organizations testified in support of the bill. The Administration also testified in support of the purpose of the bill but expressed interest in working with the Committee to clarify the scope and intent of the new penalties and fines to improve their use in prosecution and to enhance their effectiveness as a deterrent to illegal actions.

On November 18, 2009, the Subcommittee was discharged from the further consideration of H.R. 2062 and the full Natural Resources Committee met to consider the bill. Representative DeFazio offered an amendment in the nature of a substitute to narrow and clarify the scope and intent of the bill in response to the suggestions made by the Administration and other stakeholders. The amendment struck the existing bill language and adopted new language authorizing a two-step penalty approach adapted from existing penalties authorized under the Bald and Golden Eagle Protection Act (16 U.S.C. 668–668c). The amendment in the nature of a substitute was adopted by unanimous consent. The bill, as amended, was then ordered favorably reported to the House of Representatives by unanimous consent.

SECTION-BY-SECTION ANALYSIS

Section 1. Short title

Section 1 provides that this Act 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.” In accordance with 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. This definition, which was developed during five months of discussions with the bill’s sponsor and the Committee Minority, the Service, the Solicitor’s Office at the Department of the Interior and other interested stakeholders, is intended to ensure that the provisions of the legislation are utilized to address deliberate kills and wounding of a bird or birds that are undertaken in a manner involving one or more of the following elements: (1) acts that are depraved in nature, including, but not limited to acts involving mutilation or prolonged suffering of migratory birds; (2) acts that demonstrate wanton disregard for the lives of migratory birds; or (3) acts that involve solicitation of other parties to participate in the unlawful killing or wounding of migratory birds. The Committee does not intend for these new sanctions to target activities undertaken for other purposes through which birds are incidentally killed or wounded in violation of the MBTA, nor are these violations intended to apply to the legal take of migratory birds through regulated hunting or other permitted take. These amendments have no effect on the strict liability provisions of the MBTA.

COMMITTEE OVERSIGHT FINDINGS AND RECOMMENDATIONS

Regarding clause 2(b)(1) of rule X and clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee on Natural 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 this bill.

COMPLIANCE WITH HOUSE RULE XIII

1. Cost of Legislation. Clause 3(d)(2) 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 this bill. However, clause 3(d)(3)(B) 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 402 of the Congressional Budget Act of 1974.

2. Congressional Budget Act. As required by clause 3(c)(2) of rule XIII of the Rules of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974, this bill does not contain any new budget authority, spending authority, credit authority, or an increase or decrease in revenues or tax expenditures.

3. General Performance Goals and Objectives. As required by clause 3(c)(4) of rule XIII, the general performance goal or objective of this bill is to amend the Migratory Bird Treaty Act to provide for increased penalties and fines for the intentional and malicious taking of protected bird species.

4. Congressional Budget Office Cost Estimate. Under clause 3(c)(3) of rule XIII 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 this bill from the Director of the Congressional Budget Office:

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 bill could affect direct spending and revenues, but 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.

The CBO staff contact for this estimate is Mark Grabowicz. The estimate was approved by Theresa Gullo, Deputy Assistant Director for Budget Analysis.

COMPLIANCE WITH PUBLIC LAW 104-4

This bill contains no unfunded mandates.

EARMARK STATEMENT

H.R. 2062 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9 of rule XXI.

PREEMPTION OF STATE, LOCAL OR TRIBAL LAW

This bill is not intended to preempt any State, local or tribal law.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) 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 (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

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SEC. 6. (a) * * *

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(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.

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