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MIGRATORY BIRD TREATY REFORM ACT OF 1998

OCTOBER 5 (legislative day, OCTOBER 2), 1998.—Ordered to be printed

Mr. CHAFEE, from the Committee on Environment and Public Works, submitted the following

REPORT

[to accompany H.R. 2863]

The Committee on Environment and Public Works, to which was referred a 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, reports favorably thereon with an amendment, and recommends that the bill, as amended, do pass.

GENERAL STATEMENT AND BACKGROUND

Congress enacted the Migratory Bird Treaty Act (MBTA) in 1918 to implement the 1916 Convention for the Protection of Migratory Birds between Great Britain (then having treaty-making power for Canada) and the United States. The United States entered into subsequent treaties with Mexico, Japan and the former Soviet Union to protect migratory birds, and these treaties are also implemented through the MBTA. Except as permitted by regulation adopted by the Secretary of the Interior, the MBTA makes it illegal "to pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess, offer for sale" migratory birds. In accordance with the treaties, the Secretary issues regulations establishing open seasons to hunt certain migratory birds, referred to as migratory game birds, including wild species of ducks, geese, brants, coots, gallinules, rails, snipes, woodcocks, and mourning and white-wing doves.

In 1935, the Secretary issued regulations for migratory game bird hunting, including the practice of baiting, which is the placement of corn, wheat or other grain, salt or feed to attract or lure

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birds for hunting. Currently, regulations at 50 CFR 20.21(i) prohibit persons from taking a migratory game bird "by the aid of baiting, or on or over any baited area." A baited area is defined as the "area where shelled, shucked or unshucked corn, wheat or other grain, salt, or other feed whatsoever capable of luring, attracting, or enticing such birds is directly or indirectly placed, exposed, deposited, distributed, or scattered." The regulations further provide that the bait must have been removed for ten days before the area would no longer be deemed "a baited area". The regulations provide exceptions for areas of standing crops, and areas where grains were scattered as a result of normal agricultural planting or harvesting, bona fide agricultural practices, or manipulation of a crop grown for wildlife management purposes.

Although the regulations relating to baiting have been modified a number of times, they have never required any knowledge or intent by the hunter in taking a migratory game bird with the aid of bait or over a baited field. The crime—a class B misdemeanor—was one of strict liability. Indeed, until recently, all the offenses under the MBTA were strict liability, a hallmark of the law. In 1978, the Fifth Circuit, in *United States v. Delahoussaye*, 573 F.2d 910, broke with this longstanding interpretation and became the first appellate court to hold that before a person can be prosecuted for taking a bird over a baited field, the prosecution must show that the person "should have known" that the area was baited.

In 1985, the Sixth Circuit held, in *United States v. Wulff*, 758 F.2d 1121, that strict liability felony crimes under the MBTA (relating to the sale of migratory bird parts) violated the due process rights of the defendant. In response, Congress added a scienter requirement for felony offenses under the MBTA, and expressly reinforced the strict liability standard for misdemeanors, which included baiting-related offenses.

In 1991, amid much criticism that the migratory bird hunting regulations were outdated and difficult to understand, the U.S. Fish and Wildlife Service (the Service) published a notice stating its intent to revise the regulations. In 1997, the International Association of Fish and Wildlife Agencies formed a committee to study the regulations. This committee made several recommendations to the Service, including a change in the standard from strict liability to knowledge for baiting offenses. In March 1998, the Service published a proposed rule making numerous changes to the regulations, relating to agricultural practices and moist-soil management, to clarify and simplify the baiting regulations. The Service did not propose to change the strict liability standard.

Summary and Objectives of the Legislation

This legislation modifies the standard of liability applicable to hunting with bait or over baited areas. Specifically, the standard is changed from one of strict liability to one requiring a degree of knowledge. It also makes baiting a separate offense, increases the penalties for baiting-related offenses, and requires a study of the impacts of this legislation.

The primary purpose of this legislation is to address the questions of fairness raised by the strict liability standard as it applies to baiting. Of all the offenses under the MBTA, baiting-related of-

fenses present unique problems for the hunter, who might not be able to know, no matter how diligent the hunter might be, whether a neighboring field is baited. The elimination of strict liability will allow hunters to present evidence that they took necessary precautions, and made necessary efforts, to ensure that the areas in which they were hunting were not baited.

The elimination of strict liability, however, applies only to hunting with bait or over baited areas, and is not intended in any way to reflect upon the general application of strict liability under the MBTA. Since the MBTA was enacted in 1918, offenses under the statute have been strict liability crimes. The only deviation from this standard was in 1986, when Congress required scienter for felonies under the Act.

SECTION-BY-SECTION ANALYSIS

Section 1. Short Title

This section designates the bill as the Migratory Bird Treaty Reform Act of 1998.

Section 2. Eliminating Strict Liability for Baiting

This section makes two changes to the MBTA. First, it prohibits any person from taking a migratory bird by the aid of baiting, or on or over a baited area, if the person knows or reasonably should know that the area is baited. Second, it prohibits any person from placing or directing 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. The new scienter requirement established by this section applies to knowledge of fact, not knowledge of the law. The purpose of this section is to address instances of unfairness to hunters who have been prosecuted for hunting over baited areas when that they could not reasonably have known that the area had been baited.

Section 3. Criminal Penalties

This section increases the penalty under section 6(a) of the MBTA from $500 to $10,000. Although the MBTA itself provides fines of $500, title 18 of the United States Code allows for a maximum penalty of $5,000. These offenses would remain class B misdemeanors, considered petty offenses.

The bill also creates a new, higher penalty for persons who violate section 3(b) of the MBTA in connection with guiding, outfitting, or providing any other service offered, provided, or obtained in exchange for money or other consideration. Specifically, such persons shall be fined under title 18 of the United States Code or imprisoned not more than one year, or both. This would make the offense a class A misdemeanor. This higher penalty is intended to discourage commercial operations from engaging in baiting.

Section 4. Report

This section mandates that the Secretary submit to Congress a report analyzing the effect of this legislation, and the general practice of baiting, in migratory bird conservation and law enforcement

efforts under the MBTA. The report is due no later than five years after the date of enactment of this bill.

The purpose of this report is to provide Congress with additional information with which to consider this issue in the future. The committee held a hearing on this legislation on September 24, 1998, during which it was clear that, other than anecdotal information, relatively little evidence exists to definitively support either side of the debate on the merits of this legislation. Three general issues of debate were raised, and each should be addressed in the report. The first is whether baiting itself has a significant impact on conservation of migratory birds, and specifically whether this impact can be compensated by adjusting the bag limits and seasons. The second is whether the addition of a scienter requirement for baiting-related offenses will affect migratory bird conservation by increasing the practice of baiting among hunters. The third, and most important, is whether the addition of a scienter requirement will affect law enforcement efforts. In particular, the report should consider whether the new standard has hindered enforcement efforts because of difficulties in demonstrating that a hunter knew or should have known that an area was baited. The committee intends to reexamine this issue in five years, after this study is completed.

REGULATORY IMPACT STATEMENT

In compliance with section 11(b) of rule XXVI of the Standing Rules of the Senate, the committee makes evaluation of the regulatory impact of the reported bill. The reported bill will have no regulatory impact. This bill will not have any adverse impact on the personal privacy of individuals.

MANDATES ASSESSMENT

In compliance with the Unfunded Mandates Reform Act of 1995 (Public Law 104–4), the committee finds that H.R. 2863 would impose no Federal intergovernmental unfunded mandates on State, local, or tribal governments. All of its governmental directives are imposed on Federal agencies. The bill does not directly impose any private sector mandates.

HEARINGS

On September 29, 1998, the committee held a hearing on H.R. 2863. Testimony was given by Senator Thad Cochran of Mississippi; Senator John Breaux of Louisiana; Mr. Kevin Adams, U.S. Fish and Wildlife Service; Dr. Doug Inkley, National Wildlife Federation; Ms. Tanya Metaksa, National Rifle Association; Ms. Laura Hood, Defenders of Wildlife; and Mr. Brent Manning, Illinois Department of Environmental Resources.

LEGISLATIVE HISTORY

On November 6, 1997, Representative Young introduced H.R. 2863, a bill to amend the Migratory Bird Treaty Reform Act to clarify restrictions under that Act on baiting, to facilitate acquisition of migratory bird habitat, and for other purposes. On November 13,

1997, Senator Breaux introduced S. 1533, a nearly identical bill. On April 29, 1998, the House Committee on Resources reported H.R. 2863 with a substitute amendment, which was passed by the House of Representatives on September 10, 1998. On September 14, 1998, the bill was received in the Senate and referred to the Senate Committee on Environment and Public Works. On October 2, 1998, the committee held a business meeting to consider H.R. 2863. Senator Chafee offered two amendments, which were adopted by voice vote. H.R. 2863, as amended, was favorably reported out of the committee by voice vote. No rollcall votes occurred on this bill.

COST OF LEGISLATION

Section 403 of the Congressional Budget and Impoundment Control Act requires that a statement of the cost of the reported bill, prepared by the Congressional Budget Office, be included in the report. That statement has been requested. However, it is the opinion of the committee that the business of the Senate should proceed without delay, and that the CBO statement will be printed in the Congressional Record when it is available.

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:

UNITED STATES CODE—TITLE 16—CONSERVATION

CHAPTER 7—PROTECTION OF MIGRATORY GAME AND INSECTIVOROUS BIRDS

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SUBCHAPTER II—MIGRATORY BIRD TREATY

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§ 704. Determination as to when and how migratory birds may be taken, killed, or possessed

(a) Subject to the provisions and in order to carry out the purposes of the conventions, referred to in section 703 of this title, the Secretary of the Interior 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.

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§ 707. Violations and penalties; forfeitures

(a) Except as otherwise provided in this section, any person, association, partnership, or corporation who shall violate any provisions of said conventions or of this subchapter, or who shall violate or fail to comply with any regulation made pursuant to this subchapter shall be deemed guilty of a misdemeanor and upon conviction **[**thereof shall be fined not more than $500**]**—

(1) shall be fined not more than $10,000 or be imprisoned not more than six months, or both**[**.**]***;*

(2) in the case of a violation of paragraph (1) or (2) of section 3(b) that is committed in connection with guiding, outfitting, or providing any other service offered, provided, or obtained in exchange for money or other consideration, shall be fined under title 18, United States Code, imprisoned not more than 1 year, or both.

(b) Whoever, in violation of this subchapter, shall knowingly—

(1) take by any manner whatsoever any migratory bird with intent to sell, offer to sell, barter or offer to barter such bird, or

(2) sell, offer for sale, barter or offer to barter, any migratory bird shall be guilty of a felony and shall be fined not more than $2,000 or imprisoned not more than two years, or both.

(c) 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 subchapter with the intent to offer for sale, or sell, or offer for barter, or barter such bird in violation of this subchapter shall be forfeited to the United States and may be seized and held pending the prosecution of any person arrested for violating this subchapter and upon conviction for such violation, such forfeiture shall be adjudicated as a penalty in addition to any other provided for violation of this subchapter. Such forfeited property shall be disposed of and accounted for by, and under the authority of, the Secretary of the Interior.

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