WHERE YOU OPERATE MATTERS: THE FIFTH CIRCUIT WIDENS THE SPLIT ON MBTA LIABILITY

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Last week the Fifth Circuit issued a ruling that reduces uncertainty regarding criminal liability for taking migratory birds. In particular, the ruling alleviates potential liability for facilities where interactions with migratory birds are effectively unavoidable—such as wind production facilities, power transmission lines, and other energy production or manufacturing facilities. These types of facilities face a fundamental tension under the Migratory Bird Treaty Act ("MBTA"): on the one hand, the MBTA imposes strict criminal liability for the take of migratory birds; and on the other hand, there is no permit available to authorize the unintentional take of migratory birds. The Fifth Circuit's ruling joins other circuits around the country in holding that the MBTA applies only to the intentional take of migratory birds; however, the court's ruling widens the split between circuits that differ in how MBTA liability applies.

In *U.S. v. CITGO*, the appeals court reversed a criminal conviction against Citgo Petroleum Corporation ("Citgo") for taking migratory birds protected under the MBTA. *U.S. v. CITGO Petroleum Corp.*, 2015 WL 5201185, 9 (5th Cir. Sept. 4, 2015). The lower court convicted Citgo on five counts of intentionally letting migratory birds die in oil tanks. The lower court concluded that "Based on the evidence presented at trial, not only was it reasonably foreseeable that protected migratory birds might become trapped in the layers of oil on top of Tanks 116 and 117, Citgo was aware that this was happening for years and did nothing to stop it. Citgo's unlawful, open-air oil tanks proximately caused the deaths of migratory birds in violation of the MBTA." *U.S. v. CITGO Petroleum Corp.,* 893 F. Supp. 2d 841, 848 (S.D. Tex. 2012).

The MBTA imposes strict liability against any person who takes, captures, kills, or attempts to take, capture, or kill by any means or in any manner, except as permitted by regulation, a migratory bird, part nest, or egg thereof or any product consisting or composed of same. 16 U.S.C. §§ 703(a), 707(a). Under the MBTA, "take" means "to pursue, hunt, shoot, wound, kill, trap, capture, or collect" or to attempt to do so. Id. "Kill" is not further defined under the MBTA.

The fundamental issue—which has been litigated to different conclusions around the country—is whether a migratory bird that flies into otherwise legal industrial equipment and dies or is injured is a "take" by the operator of the equipment. Put another way, does the MBTA criminalize activities that have a legitimate purpose unrelated to impacting birds?

The Fifth Circuit rejected the lower court's interpretation of MBTA liability. The court agreed with the Eighth and Ninth Circuits that MBTA liability is "limited to deliberate acts done directly and intentionally to migratory birds." *CITGO Petroleum Corp.,* 2015 WL 5201185 at 9. The court relied on the common-law origin of the term "take" along with a comparison with other relevant statutes such as the Endangered Species Act and the Marine Mammal Protection Act, which protect against "unintentional harm" to protected species (e.g., harassment). The

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court ultimately concluded that it would be an absurd result to criminalize “all acts or omissions that directly kill birds, where bird deaths are foreseeable” because it could then mean that “all owners of big windows, communication towers, wind turbines, solar energy farms, cars, cats, and even church steeples may be found guilty of violating the MBTA.” Id. at 14 (note: the court also concluded that “the MBTA's text provides no basis, explicitly or implicitly, for criminalizing migratory bird deaths because they result from violations of other state or federal laws.”).

With the Fifth Circuit's decision, the split in circuit court decisions widens across the country. Currently, an operator of an industrial facility that is otherwise lawfully permitted and operated is criminally liable for taking a migratory bird in the Second and Tenth Circuits. See *U.S. v. FMC Corp.,* 572 F.2d 902, 908 (2d Cir. 1978); *U.S. v. Apollo Energies, Inc.,* 611 F.3d 679, 686 (10th Cir. 2010). However, if that same industrial facility were located in the Eighth or Ninth Circuits, the operator would not be held criminally liable under the MBTA for the unintentional take of a migratory bird. See *Newton Cnty. Wildlife Ass'n v. U.S. Forest Serv.,* 113 F.3d 110, 115 (8th Cir. 1997), *Seattle Audubon Soc'y v. Evans,* 952 F.2d 297, 302 (9th Cir. 1991).

It is unclear whether the United States will appeal the ruling. Moreover, with the analysis from the Second and Tenth Circuits, the government may continue to argue for a broader interpretation of MBTA liability in those circuits that have not yet ruled on the issue.

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