

Federal District Court Upholds Criminal Conviction Under the Migratory Bird Treaty Act for Bird Deaths Resulting from Oil Refinery Operations

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In *United States v. Citgo Petroleum Corporation*, 2012 U.S. Dist. LEXIS 125996 (S.D. Tex. Sept. 5, 2012), a federal district court in Texas upheld the conviction of CITGO Petroleum Corporation and CITGO Refining and Chemicals Company, L.P. (collectively “CITGO”) for violations of the Migratory Bird Treaty Act (“MBTA”). The court ruled that CITGO’s failure to cover two large, open-top petroleum tanks, as required by the Clean Air Act and Texas law, directly resulted in the taking of migratory birds when they flew into the tanks and died. In applying a strict liability interpretation of the MBTA, the court held that due process is satisfied only if defendants proximately caused the harm to protected birds. This decision reflects the growing importance of the MBTA and efforts to promote the conservation of migratory birds. *See, e.g.*, Migratory Bird Conservation, 77 Fed. Reg. 60,381 (Oct. 3, 2012) (notice of availability of Memorandum of Understanding between National Marine Fisheries Service and U.S. Fish and Wildlife Service).

BACKGROUND AND DECISION

In *U.S. v. CITGO*, CITGO was convicted of unlawfully taking and aiding and abetting the taking of migratory birds at its petroleum refinery located along the Corpus Cristi ship channel and within a major bird flyway. Between April and May of 2003, ten birds were found in two large, open-top tanks and were determined to have died as a result of landing in oil. Pursuant to the Clean Air Act, the court concluded CITGO was required to install emission control equipment (roofs) on the two tanks. In addition, the court concluded that Texas law also required operators to “screen, net, cover, or otherwise render harmless to birds . . . open-top storage tanks that are eight feet or greater in diameter and contain a continuous or frequent surface film or accumulation of oil.” The court found that the evidence demonstrated that, as early as 1997, CITGO was aware that birds were being trapped or killed in the two tanks.

The MBTA makes it unlawful for any person, “at any time, by any means or in any manner,” to take or kill any migratory bird without a permit or as otherwise provided by regulations. 16 U.S.C. § 703(a). Federal courts are currently split regarding the types of activities that constitute a violation of the MBTA. For example, a number of courts have determined that the MBTA’s intended scope is limited to the types of activities engaged in by hunters and poachers and does not extend to other acts that indirectly or unintentionally cause the death of protected birds. In contrast, other courts have explicitly rejected this argument and found that the MBTA applies to other conduct that results in the taking and killing of migratory birds.



While the Fifth Circuit has held that violations of § 703 are strict liability offenses, requiring no proof of specific intent to commit the crime, it has not yet definitively addressed the scope of conduct covered by the MBTA. In applying the strict liability standard, the district court rejected CITGO's argument that strict liability for any conduct causing the death of migratory birds would lead to absurd results, such as liability for driving a vehicle, owning a building with windows, or owning a cat. Order at 7. The district court followed a Tenth Circuit opinion which concluded "a strict liability interpretation of the MBTA for the conduct charged here satisfies due process only if defendants proximately caused the harm to protected birds." *Id.* at 11 (citing *United States v. Apollo Energies, Inc.*, 611 F.3d 679, 686 (10th Cir. 2010)).

In upholding the conviction, the district court concluded that CITGO's conduct was the proximate cause of the harm to the birds because it was reasonably foreseeable that CITGO's operation of open-air tanks would result in bird deaths. First, the court noted that it was the unlawful nature of CITGO's underlying act that directly resulted in the taking of migratory birds in violation of the MBTA, as distinguished from otherwise lawful conduct such as driving a car, owning a cat or a building with windows, or the operations of oil companies in other MBTA cases. *Id.* at 11. Second, the court determined that, based upon the evidence presented, it was reasonably foreseeable that protected migratory birds might become trapped in the oil on top of the tanks and that CITGO had been aware of this happening for many years without implementing a remedy. *Id.* at 13.

While the district court interpreted the scope of the MBTA broadly, the court emphasized that this interpretation satisfies due process only if the defendants proximately caused the harm to protected birds. Accordingly, a defendant will be liable if it is reasonably foreseeable that its activities would result in bird deaths. As a result, pursuant to the court's analysis, elements relating to predictability of future harm to birds become more significant when assessing liability under the MBTA.

IMPLICATIONS

This decision demonstrates the continued split in authority among the federal courts regarding the breadth of activities included within the scope of MBTA liability for the taking and killing of migratory birds. While unclear whether CITGO will appeal, until this split is resolved, there will be continued uncertainty with respect to MBTA compliance and criminal enforcement.

FOR ADDITIONAL INFORMATION

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