

Prudence Prevails: Fifth Circuit Supports Narrow Reading of Liability under the Migratory Bird Treaty Act



The U.S. Court of the Appeals for the Fifth Circuit recently [ruled](#) that the criminal prohibition on killing or injuring birds under the Migratory Bird Treaty Act (MBTA) “only prohibits intentional acts (not omissions) that directly (not indirectly or accidentally) kill migratory birds.” The appellate court reversed a criminal conviction under the MBTA for the deaths of migratory birds that had become trapped in uncovered equalization tanks containing oil and wastewater. In so doing, the Fifth Circuit solidified the split among federal courts over the appropriate interpretation of an unlawful “taking” under the MBTA when commercial operations inadvertently impact birds. In the process, it significantly increased the likelihood of the Supreme Court taking up the issue in the not-too-distant future. And it further cast doubt on a recently-announced regulatory initiative of the U.S. Fish & Wildlife Service (FWS) to create “incidental take permits” under the MBTA covering commercial operations’ impacts on migratory birds.

Originally enacted in 1918 to prevent the overhunting and poaching of migratory birds, the MBTA makes it a crime to “take” any migratory bird “by any means and in any manner.” The statute’s protections are far-reaching, covering virtually every bird species found in the U.S. The Act authorizes the Interior Department to issue regulations governing the issuance of permits for the taking of migratory birds in certain circumstances. Nevertheless, those permits generally are not available for commercial activities that incidentally take migratory birds. FWS has not developed a permitting program for activities that might result in the unintentional, incidental taking of migratory birds associated with the operation of projects such as industrial facilities. Consequently, whether a business is prosecuted for the unintentional or incidental

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take of a migratory bird has depended solely on “prosecutorial discretion,” with inconsistent results throughout the country and across different industry sectors.

While historically the U.S. reserved criminal actions under the MBTA for intentional takes by hunters and trappers, more recently the government has begun initiating such actions against otherwise lawful commercial activities that impact migratory birds. These cases have arisen in connection with power plants, transmission lines, oil and gas facilities, chemical plants, timber harvesting, and wind farms, despite that the associated bird deaths were incidental to authorized operations. The result has been heated disagreement between FWS and the regulated community, and subsequently among the federal courts, over whether incidental takes of birds may be prosecuted as strict liability crimes under the MBTA. The Fifth Circuit’s ruling will add fuel to the fire.

The Fifth Circuit’s opinion holds that, despite its strict liability nature, the MBTA criminalizes only an affirmative act to “take” a migratory bird. That was not present where birds simply landed in uncovered tanks. The Court further reasoned that interpreting “taking” to include omissions – such as the failure to cover industrial tanks – that indirectly result in the death of birds could produce absurd results (for example, treating a domestic cat’s predatory behavior as a taking), and Congress would have made its intent unmistakable before exposing unsuspecting citizens to criminal liability for unintentional acts.

The implications of the Fifth Circuit’s ruling are significant. As a preliminary matter, the decision further deepens the divide among the federal appellate courts over the application of the MBTA. With its ruling, the Court joined the Eighth and Ninth Circuits in concluding that the statute does not criminalize unintentional, involuntary acts and instead requires intentionality causing direct impacts to birds. On the other side, the Second and Tenth Circuits believe that the MBTA is a *strict* liability statute and that it supports criminal prosecutions of individuals and companies whose legitimate activities accidentally or indirectly take birds – with the only safeguard being the prosecutorial leanings of the government at any given time. The issue now is fully ripe for Supreme Court review.

This new court decision also dilutes FWS’s recent interest in developing an MBTA incidental take permit program and accompanying environmental review under the National Environmental Policy Act as recently [announced](#). The government already allows limited incidental taking under the MBTA for certain military and other activities; the government is now considering a broad-based incidental take permit available to a range of industry sectors, akin to regulations under the Endangered Species Act and Bald and Golden Eagle Protection Act. Such regulations, however, would be unnecessary if these incidental takes of migratory birds do not violate the MBTA in the first instance. In the meantime, project proponents and operators must look to the law of the jurisdiction in which their activities are located to understand the scope of potential MBTA liability, as well as the requirements of other potentially implicated species laws, in conjunction with their current or planned activities on private or public lands.