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Fifth Circuit Decision in *Citgo* Case May Place Limits on Criminal Liability Under Migratory Bird Treaty Act

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On September 4, 2015, the US Court of Appeals for the Fifth Circuit reversed convictions of CITGO Petroleum Corporation and CITGO Refining and Chemical Company, L.P. (collectively "Citgo"), and in so doing placed potentially significant limits on the scope of strict criminal liability under the Migratory Bird Treaty Act (MBTA) for unintended or indirect killing of migratory birds, a significant issue for energy extraction and production businesses. The case also illuminated a circuit split regarding application of the MBTA.

The court also rejected the government's broad interpretation the Clean Air Act (CAA) regulations regarding the roofing of oil water separators, raising questions about criminal enforcement of some of the more complex aspects of the CAA. *United States v. Citgo Petroleum Corp*., No. 14-40128, slip op. at 1 (5th Cir. Sept. 4, 2015), available here.

The government charged Citgo with a violation of MBTA, 16 U.S.C.§ 703, which imposes strict criminal liability for the "taking" of migratory birds. The birds allegedly died in oil-water separator tanks that lacked a roof. Citgo appealed the MBTA convictions on the basis that a "taking"[1] under the MBTA required an affirmative act directed at a migratory bird. *Id*. at 19. The trial court had concluded that to "take" is "an ambiguous term that involves more activities than those related to hunting, poaching and intentional acts against migratory birds" and that it was enough that the defendant's act "proximately caused the illegal 'taking.'" *Id*. at 17. The Fifth Circuit, however, concluded that to "take" within the meaning of the MBTA is defined, as to "reduce those animals, by killing or capturing, to human control." *Id*. at 19 (citing *Babbitt v. Sweet Home Chapter Cmtys. for a Great Or.* 515 U.S. 687, 717 (Scalia, J., dissenting)). The Fifth Circuit recognized that there is a circuit split regarding whether the MBTA provides criminal penalties for unintended or indirect acts that result in the death of migratory birds. *Id*. at 23-25. The court cites cases in the Second and Tenth Circuits that imposed criminal penalties on companies for indirect acts that resulted in bird deaths on the basis that the MBTA was a strict liability crime, but ultimately joined the Eighth and Ninth Circuits in placing emphasis on the common law meaning of the word "take". *Id*. at 23-26.

In the end, the court concluded that, although the government need not prove criminal intent, it must still prove an *actus reus*—i.e., "at least an intention to make the bodily movement that constitutes that act which the crime requires." *Id*. at 25 (citing Wayne

[1] The Fifth Circuit limited review to the indictment, which charged Citgo with "taking" a migratory bird. The opinion indicates a possibility that the outcome would be different had Citgo been charged with "killing" a migratory bird. *Id*. at 19.

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R. Lafave, Criminal Law § 5.2(e) (5th ed. 2010). Therefore, siding with the Eighth and Ninth Circuits, the Fifth Circuit held that the MBTA requires "that a defendant take an affirmative action to cause migratory bird deaths. . . ." *Id*. at 25, 28 (noting any other interpretation "would enable the government to prosecute at will and even capriciously (but for the minimal protection of prosecutorial discretion)"). Because Citgo's MBTA convictions were based on the indirect act of not placing roofs on the equalization tanks, the court reversed the convictions. *Id*. at 28.

Citgo was also charged with violating CAA Subpart QQQ, which requires that oil-water separator tanks have a roof to control emissions of volatile organic compounds. *Id*. at 4; *see* 42 U.S.C. § 7413(c)(1); 40 C.F.R. § 60.692.4. The charges were premised on two uncovered equalization tanks downstream from Citgo's oil-water separators that were designed to catch the water flow from the separators. *Citgo Petroleum Corp.*, slip op. at 4. Citgo had appealed the CAA convictions on the basis that the district court judge had given an erroneous jury instruction regarding the definition of an oil-water separator by instructing the jury that an oil-water separator is primarily defined by how it is used. *Id*. at 6. Under CAA implementing regulations, an oil-water separator is defined as equipment that is "used to separate oil from water consisting of a separation tank, which also includes the forebay and other separator basins, skimmers, weirs, grit chambers, and sludge hoppers. . . ." 40 C.F.R. § 60.691; *see also Citgo Petroleum Corp.*, slip op. at 7.

The jury instruction at issue quoted the above definition and added that "[t]he definition of oil-water separator does not require that [it] have any or all of the ancillary equipment mentioned such as forebays, weirs, grit chambers, and sludge hoppers..." *Id*. at 6. This interpretation of the regulatory definition aligned with the enforcement posture of the government. The Fifth Circuit concluded, however, that based on a plain reading of the regulation, the definition of oil-water separator had two requirements: (1) it "must be 'used to separate oil from water'" and (2) it must consist of certain pieces of equipment. *Id*. at 8-9. Because the jury instruction negated the second requirement, the Fifth Circuit found that it was erroneous. *Id*. at 17.