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Gavel to Gavel: To kill a mockingbird

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By Jessica John Bowman

Maybe you've heard this one: A hunter asks the game warden whether he may shoot a particular animal.

"No," replies the warden, "I'm sorry, but the season doesn't start for another month."

"That's OK," responds the hunter, "with any luck I'll be able to hit one with my truck."

Perhaps the drafters of the Migratory Bird Treaty Act sought to avoid such linguistic distinctions when they chose to prohibit the "taking" of – rather than simply the shooting or trapping of – certain migratory birds. Whatever the reason behind their choice of language, the drafters' decision to utilize this inclusive wording has had far-reaching and possibly unintended effects. Although the MBTA, which was first passed in 1918, was likely intended to prohibit only the intentional killing of migratory birds, the drafters' choice of language has been construed broadly. Today, even the unknowing, unintentional killing of a protected animal may result in a misdemeanor violation of the act, punishable by a $15,000 fine and a six-month prison sentence.

The prohibition against even the accidental taking of protected birds has significant implications for industry groups in Oklahoma. Under the MBTA, both individuals and business entities may be held liable for the taking or killing of migratory birds, even where the taking is the accidental product of routine industrial activity. The 10th Circuit recently reaffirmed that business entities may be held strictly liable for accidental violations of the act, holding that drilling operators who utilized equipment that trapped and killed birds – heater treaters, in the case of *United States v. Apollo Energies Inc.* – were guilty of a misdemeanor violation of the MBTA.

Does this mean that any act that results in the death of a protected bird will constitute a violation of the MBTA? Probably not. The 10th Circuit recognized that there are important constitutional limitations on strict-liability crimes: Where a party could not possibly foresee or anticipate that its conduct would have the effect of "taking" a bird, the party may not be held liable under the act; to hold otherwise would, according to the court, stretch the MBTA beyond its constitutional breaking point. As a result, ordinary activities that have the unforeseeable effect of killing a protected bird – closing a window or driving a car, for example – would probably not result in criminal liability under the act.

Many industrial activities, however, will present dangers to migratory birds that are readily foreseeable. For example, in the burgeoning wind power industry, the risk of avian mortality from turbine impact is evident. Likewise, the risk that a bird will become trapped in a heater-treater exhaust pipe is now known. These and other industrial activities may threaten protected species and could result in criminal liability in the event that the activity in question causes the death of a protected animal.

To avoid criminal liability under the MBTA, entities should take proactive steps to mitigate the obvious risks resulting from industrial activities, such as routinely inspecting equipment for bird remains and screening or covering potential hazards. Above all, industrial entities should follow any protective measures recommended by the U.S. Fish and Wildlife Service. The fact that the FWS has recommended protective measures may provide the necessary proof that the industrial activity at issue may foreseeably cause the death of protected migratory birds. Since the federal government has exclusive power to prosecute violations of the MBTA, adherence to FWS recommendations is, in all likelihood, the best means of avoiding liability for accidental MBTA violations.

Jessica John Bowman is a litigator with the law firm of McAfee & Taft.

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Oklahoma City Tenth Floor • Two Leadership Square 211 N. Robinson • Oklahoma City, OK 73102-7103 (405) 235-9621 office • (405) 235-0439 fax
Tulsa 1717 S. Boulder Suite 900 • Tulsa, OK 74119 (918) 587-0000 office • (918) 599-9317 fax