



An oil-slicked pied-billed grebe paddles in an evaporation pond at an oilfield wastewater disposal facility in Johnson County, Wyoming. PEDRO RAMIREZ/USFWS

Tarred and feathered

Migratory Bird Treaty Act faces ongoing challenge in the courts

One of the oldest federal wildlife laws on the books, the act prohibits the “hunt, take, capture (or) kill” of migratory birds and protects their nests and eggs — even their feathers.

In 2002, Texas environmental inspectors found 35 migratory birds dead in two large uncovered oil-water separators at a refinery near Corpus Christi. The inspectors cited CITGO Petroleum Corporation for violating the Migratory Bird Treaty Act in its taking of the birds, which included five white pelicans, four double crested cormorants and several different species of duck.

The case went to the Texas District Court in 2007, where CITGO was convicted on three of the five misdemeanor charges. But in September, the 5th Circuit Court of Appeals reversed that decision, arguing that the act didn't apply to accidental kills without criminal intent.

The Migratory Bird Treaty Act is one of the oldest federal wildlife laws on the books. Passed in 1918, it prohibits the “hunt, take, capture (or) kill” of migratory birds and protects their nests and eggs — even their feathers. The law, which currently covers 1,027 species, has long been used to protect birds making seasonal pilgrimages between Mexico, Japan, Russia, Canada and the United States from the impacts of industry. But the 5th Circuit Court's decision could erode the act's ability to penalize incidental deaths. And without the threat of litigation, conservationists fear that oil and gas com-

panies, wind farms and other industrial operations will be less concerned about preventing accidental bird deaths.

The case law isn't completely uniform when it comes to the act, and courts have disagreed over whether or not lethal actions need to be intentional in order to be prosecuted. Recent rulings in the 2nd and 10th circuit courts have taken the view that the law's prohibition on “take” applies to any activity that is likely to kill migratory birds, even if it's not deliberately designed to do so, says Eric Glitzenstein, an attorney for the American Bird Conservancy.

But the 8th Circuit Court, which is in the Midwest, and the 9th Circuit, which spans nine Western states and two Pacific Islands jurisdictions, disagree to an extent. In rulings on wind projects and federal timber harvesting, they have determined that habitat modifications that indirectly kill birds cannot be penalized under the act.

Svend Brandt-Erichsen, an attorney at Seattle-based Marten Law who represents energy companies, agrees with this narrower interpretation. “The MBTA is an older statute; it was adopted to address poaching and hunting practices affecting migratory birds, long before the concept of regulating the incidental

impacts of lawful activity,” he says.

In the Sept. 4 ruling, the court noted that a person whose car accidentally collides with a migratory bird, or owners of electrical lines that “take birds,” can't be held strictly liable. “If it applies to human activity regardless of intent, then where do you draw the line?” asks Brandt-Erichsen.

For Glitzenstein, though, there's a clear split between day-to-day human activity and “inherently hazardous activities” that allow the government to pursue charges against industry.

Driving a car is unlikely to cause the death of a migratory bird, unlike some massive industrial activities, such as wind turbines set in migratory pathways. It's not that those activities shouldn't proceed, Glitzenstein says, but rather that they need to follow the rules set up to minimize and mitigate impacts on protected species.

One such measure would be an “incidental take” permit, which allows a company to perform actions that are otherwise legal but that might cause unavoidable bird deaths. As part of the permit, Fish and Wildlife could require measures to minimize the impact of drilling pits, gas flares, power lines and the like, by shifting them away from breeding sites or migratory pathways, changing their design, and restoring damaged habitat. The agency is currently evaluating a proposal for such permits.

Though the 5th Circuit Court's ruling sets a binding precedent only in its jurisdiction, which includes Texas and parts of Louisiana and Mississippi, and is notorious for ruling against environmental regulations, Glitzenstein fears that the decision could undermine the establishment of incidental take permits. If companies feel like they're already exempt from the law's rules, they have little incentive to apply for a permit and take serious measures to protect birds.

As potential litigation continues, agency officials say they will craft regulations and policy to support a more “modern interpretation” of the Migratory Bird Treaty Act. The incidental take permit, for example, is based on the assumption that companies are indeed liable for unintentionally killing migratory birds.

Glitzenstein notes that from a self-interest standpoint, industry should support laws like the Migratory Bird Treaty Act, which can prevent a species from winding up on the endangered species list.

“If you impose the ESA, then you're really talking about imposing extremely tight measures,” he says. “Under the MBTA, industry can work with the government with reasonable measures.”

GLORIA DICKIE