
Potential Legal Implications of Birds and Buildings

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There has been a recent increase in news coverage and awareness of the large numbers of bird deaths due to collisions with buildings in large cities in North America. The U.S. Fish and Wildlife Service estimates that building window strikes may cause between 96 and 976 million bird deaths in the United States each year. *The New York Times* recently reported that each morning, volunteers in the City of Toronto scour the sidewalks to remove bird carcasses because birds are attracted to lights inside buildings and reflections of trees and collide with glass windows. Bird collisions with building windows may implicate federal law because many of the birds that collide with windows are protected under the Migratory Bird Treaty Act (MBTA). With an increasing number of state and city governments addressing bird-safe building design, local laws are also a concern. Given the increasing amount of interest migratory birds are receiving from environmental groups and increased regulation from cities in North America, it is unlikely that buildings will continue to fly under the radar (pun intended), and it is in the construction and real estate industries' best interests to follow closely these developments.

Although each migratory bird death is a potential violation of the MBTA, the implications for building contractors and owners remain to be seen. Recent federal court decisions have not provided a clear answer as to whether everyday activities that inadvertently cause the death of a migratory bird violate the MBTA. In 1918, Congress passed the MBTA in response to overharvesting of migratory birds from hunting that was causing some bird species to become extinct and many others to drastically decrease in numbers. The statute was enacted two years after the United States and Great Britain entered into a treaty for the protection of birds migrating between the United States and Canada due to the same concerns. Although originally intended to regulate hunting, the MBTA is written in broad terms and makes it unlawful "by any means or any manner" to "pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess, offer for sale, sell, offer to barter, offer to purchase, purchase, deliver for transportation, transport, or cause to be transported, carry or cause to be carried, or receive for shipment, transportation, carriage, or export, any migratory bird." 16 U.S.C. § 703. "Take" is not defined in the MBTA, but the Service's implementing regulations define it as "to pursue, hunt, shoot, wound, kill, trap, capture or collect." 50 C.F.R. § 10.12. Violating the MBTA is a strict liability crime, which means there is no requirement of criminal intent, or *mens rea*, to constitute an offense. Therefore, anyone who "takes" a bird or otherwise violates section 703, even if not intentional, is liable under the MBTA. This is disconcerting for potential defendants whose otherwise legal activities have the potential to take migratory birds, such as oil companies, wind energy operators, or companies that build or own structures with glass windows. The MBTA imposes misdemeanor criminal penalties up to \$15,000 and/or six months in prison per violation (i.e., a single bird).

Because the MBTA is a strict liability statute, case law has

focused on the scope of liability, which generally boils down to what actions count as "take." Unfortunately, Federal Courts are split as to whether the term "take" in the MBTA includes incidental takings of migratory birds that result from activities not targeting birds (e.g., oil and gas pits, building construction, wind turbines). The Second Circuit has interpreted "take" to include instances in which a defendant has engaged in "extrahazardous" activities, regardless of intention—in this case, failure to prevent toxic pesticides from reaching a pond. *United States v. FMC Corp.*, 572 F.2d 902 (2d Cir. 1978). The Tenth Circuit, in examining bird deaths from oil drilling equipment, took it a step further, holding that the MBTA prohibits all take of migratory birds regardless of the activity. *United States v. Apollo Energies*, 611 F.3d 679 (10th Cir. 2010). A district court in the Fifth Circuit recently held that a defendant is liable under the MBTA for bird mortalities resulting from oil and gas activities if it is reasonably foreseeable that its activities would result in bird deaths. *United States v. Citgo Petroleum Corp.*, 2012 WL 3866857 (S.D. Tex. 2012). On the other hand, federal courts with a narrower view of the scope of MBTA liability include the Ninth and Eighth Circuits. In examining habitat destruction through timber sales, both circuits have held that the term "take" in the MBTA should not cover indirect actions that result in the take of migratory birds. *Seattle Audubon Soc'y v. Evans*, 952 F.2d 297 (9th Cir. 1991); *Newton County Wildlife Ass'n v. U.S. Forest Service*, 113 F.3d 110 (8th Cir. 1997). Most recently, a district court in the Eighth Circuit held that the death of migratory birds resulting from oil and gas operations does not constitute "take" under the MBTA. *United States v. Brigham Oil & Gas, L.P. et al.*, 2012 WL 120055 (N.D. 2012).

This Circuit split continues to cause confusion for potential defendants who wish to comply with the MBTA while continuing their otherwise legal activities. Further complicating matters, the MBTA does not provide a permitting scheme for incidental take of migratory birds. Instead, potential defendants must rely on the "prosecutorial discretion" of the U.S. Fish and Wildlife Service (Service) and hope that the Service does not bring an enforcement action against them. In October 2012, the Service's Chief of Law Enforcement issued a directive regarding "Enforcement of the [MBTA] as it relates to industry and agriculture" (Directive). The Directive states that the Service will "focus investigative efforts on bird take that is foreseeable, avoidable, and/or proximately caused." The Directive provides steps the Service will take when it receives information about a potential MBTA violation, including "provid[ing] the company or individual the opportunity to take remedial action to halt and/or minimize the take." Although this is somewhat encouraging, the Directive does not guarantee that the Service will exercise its prosecutorial discretion.

In addition to the MBTA, the past few years have seen a dramatic uptick in local and statewide regulation. In 1999 the Service created the Urban Conservation Treaty for Migratory Birds (Urban Bird Treaty) program to help municipal governments conserve birds that live, nest or migrate through their cities. Under the Urban Bird Treaty, the Service enters into "treaties" with a U.S. city to protect migratory birds through various educational, habitat improvement, and conservation measures. To date the Service has treaties with Phoenix, AZ; Kennedale, TX; Minneapolis and St. Paul, MN; Indianapolis, IN; Opelika, AL; Hartford, CT; Ogden, UT; Lewistown, MT; San Francisco, CA; and Washington D.C.

Many of these cities and others have developed guidelines to incorporate bird-friendly designs into building construction. Cook County, Illinois passed bird-friendly construction legislation in 2008 to require bird-safe county buildings, including retrofitting where appropriate. The Chicago Park District includes bird-safe design practices in their Request for Proposal (RFP) process. Several states and cities have “lights-out” regulations—that is, building owners are encouraged to (and in some cities, required to), during migration season, turn lights off between midnight and dawn to minimize collision deaths. Lights-out programs are found in Baltimore, Boston, Chicago, Detroit, Houston, Indianapolis, Minneapolis and St. Paul, New York City, Portland, San Francisco, Toronto, Washington, D.C., and Wisconsin.

Some cities have gone beyond lights-out programs. To the north and in a migratory corridor, Toronto passed an ordinance in 2009 requiring that new construction incorporate specific Bird-Friendly Development Guidelines. San Francisco recently passed an ordinance that includes a robust set of recommendations and requirements to ensure bird-safe design. Its regulations extend not only to certain types of new construction, but can also apply to existing construction. In New York, the Bird-friendly Buildings Act was introduced to the legislature (not yet adopted) that calls for the creation of a Bird-Friendly Building Council.

Nongovernmental organizations have also been increasingly active in developing bird-friendly guidance and have worked closely with cities and other governmental entities to develop bird-safe building practices. The American Bird Conservancy (ABC) and Audubon Society (national and state chapters) have developed guidance including design, lighting, and deterrent mechanisms to reduce collisions. Guidance for bird-safe design typically focuses on location, lighting, and materials. ABC’s “Bird-Friendly Building Design” for example, sets forth the following standard for a bird-friendly building: (1) At least 90 percent of exposed façade material from ground level to 40 feet (the primary bird collision zone) has been demonstrated in controlled experiments to deter 70 percent or more of bird collisions; (2) At least 60 percent of exposed façade material above the collisions zone meets the above standard; (3) There are no transparent passageways or corners, or atria or courtyards that can trap birds; (4) Outside lighting is appropriately shielded and directed to minimize attraction to night migrating songbirds; (5) Interior lighting is turned off at night or designed to minimize light escaping through windows; (6) Landscaping is designed to keep birds away from the building’s façade; and (7) Actual bird mortality is monitored and compensated for (e.g., in the form of habitat preserved or created elsewhere, mortality from other sources reduced, etc.). Available at www.abcbirds.org/abcprograms/policy/collisions/glass.html. While this ABC publication is not law, ABC is one of several nongovernmental organizations actively involved in developing local regulations.

Modern trends such as green building have shown an increased amount of glass in building designs. The amount of glass in a building is the largest indicator of collision likelihood. Moreover, where glass buildings are located near parks, treed areas etc. without proper deterrent mechanisms, there is a much higher likelihood of bird collision. Lighting too, both internal and external, dramatically affects the likelihood of collision. Deterrent mechanisms such as “fritted” glass, patterned or angled glass, “down-lighting,” building orientation,

and lights-out programs decrease the likelihood of collision. As additional incentive for green-focused builders to keep birds in mind, in October of 2011, the U.S. Green Building Council added a pilot credit for bird-collision for the use of bird-deterrent design features to its LEED programs. Many cities look to the LEED system as a recognized certifiable system for meeting green design standards when developing their own city codes and RFPs.

What does this mean for the construction and real estate industry? First, it is important for contractors and building owners to be aware of their potential liability under the MBTA. While some circuits have held that the MBTA does not extend to take occurring incidentally to otherwise lawful activity such as building construction, other circuits have extended the MBTA to otherwise lawful activity. The MBTA is a strict liability statute and the Service can prosecute for bird deaths. Second, it is a steadily increasing trend for cities to develop regulations either encouraging or requiring bird-friendly design. Builders should stay current as to what the regulations are for their intended building sites. Even where bird-friendly design is encouraged and not mandatory, builders should consider adopting bird-safe measures into its design. Should the Service begin to prosecute for building collision deaths, or should a city adopt retro-fitting requirements, having bird-safe measures in place should minimize the risk of incurring costs later? Finally, the industry should be involved in delineating the bird-safe measures being incorporated into the guidance. By working in advance with these organizations developing the guidance, the industry increases the likelihood that practicable, reasonable measures will be incorporated into these guidance documents.