

PUBLICATION

Fifth Circuit Reverses Citgo Convictions Under Clean Air Act and Migratory Bird Treaty Act

September 22, 2015

The U.S. Court of Appeals for the Fifth Circuit, in *United States v. CITGO Petroleum Corp.*, No. 14-40128 (5th Cir. September 4, 2015), reversed the district court's convictions of Citgo Petroleum Corp. (Citgo) for alleged violations of the Clean Air Act (CAA) and the Migratory Bird Treaty Act (MBTA). The alleged violations arose from Citgo's waste water treatment program at its Corpus Christi oil refinery, where Citgo utilized oil-water separators, equalization tanks, and secondary treatment systems to process oil refinery wastewater.

Texas authorities, during a surprise inspection in March 2002, discovered large volumes of oil in Citgo's uncovered equalization tanks. Because the equalization tanks contained such large amounts of oil, the authorities concluded that Citgo used the uncovered equalization tanks as oil-water separators and not equalization tanks and cited Citgo for violation of the CAA, which requires that oil-water separators have emission control devices (like roofs) to limit VOC emissions. Also, because the government suspected birds had died in the uncovered tanks, the indictment also accused Citgo of "taking" migratory birds in violation of the MBTA. The district court sentenced Citgo to a \$2 million fine for the CAA counts and \$15,000 for each MBTA violation.

The Fifth Circuit, however, overturned Citgo's convictions with regard to the CAA violations, basing its reversal on harm caused by the district court's jury instructions. Specifically, the court found the jury instructions inconsistent with the text of the CAA regulations and held that the improper definition of a water-oil separator undoubtedly affected the verdict. Thus, the convictions under the CAA counts were reversed.

The appellate court also overturned Citgo's conviction under the MTBA counts, relying on the district court's erroneous definition of the word "take." Contrary to other federal appellate circuits, the Fifth Circuit has adopted the position that, regarding unintentional bird deaths, the MBTA only covers deliberate acts done directly and intentionally to migratory birds, such as hunting and trapping.