Abstract for Presentation
Professor Samuel J Panarella

Title: A Bird in the Hand: Shotguns, Deadly Oil Pits, Cute Kittens, and the Migratory Bird Treaty Act

The Migratory Bird Treaty Act (MBTA) will soon celebrate its 100th birthday, making it one of the oldest federal wildlife protection laws in the United States. The MBTA led a relatively quiet existence for much of its life, but has in recent years been the focus of an intense debate between industry and bird advocacy groups about whether its strict liability criminal and civil penalties for killing a protected bird extend to incidental killings of birds by otherwise lawful commercial activities.

This fundamental question about the scope of the MBTA remains unresolved and is the subject of a current circuit split among federal courts of appeal, with the 2nd and 10th Circuits holding that the MBTA's misdemeanor sanctions attach to incidental takes of protected birds and the 5th, 8th, and 9th Circuits limiting the scope of the law to acts intended to kill a migratory bird, such as hunting and poaching. To date, neither Congress nor the U.S. Supreme Court have shown any inclination to step in to resolve this dispute, creating an unacceptable level of developmental and operational uncertainty for industries whose commercial activities unintentionally kill birds, such as oil and gas companies and renewable energy developers.

The unsettled state of the law surrounding MBTA liability for incidental takes recently made headlines across the country when the 5th Circuit, in *United States v. Citgo Petroleum Corp.*, reversed Citgo's MBTA misdemeanor conviction for migratory bird deaths caused by birds landing in its oil pits. Amazingly, the lack of clarity around the scope of MBTA criminal liability even extends to seemingly innocuous noncommercial activities such as driving a car or owning a cat, both of which, under a plain meaning reading of the MBTA, could result in criminal prosecution.

In the presentation I will trace the byzantine reasoning underlying this circuit split and offer a practical solution to resolve it by using a category-based approach to criminal liability under the MBTA that builds off the clear congressional intent behind the MBTA to criminalize industrial activities directed at killing birds. The presentation sorts human-caused bird killing activities into three categories and proposes the appropriate MBTA liability treatment for each category, based both on the original purpose of the MBTA and on our modern understanding of the desirability of balancing critical animal species preservation against necessary industrial activity.