

# ENVIRONMENTAL LAW

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### ARTICLES

- A Comprehensive Solution to the Biofouling Problem for the  
Endangered Florida Manatee and Other Species..... 415  
*Kathleen D. Oppenheimer and Todd K. BenDor*

Biofouling is the undesirable accumulation of microorganisms, plants, algae, arthropods, or mollusks on a surface, such as a ship's hull, when it is in contact with water for a period of time. Biofouling and its traditional remedies pose serious environmental consequences, including 1) the transportation of nonindigenous aquatic species that can outcompete native species for space and resources, thereby reducing biodiversity and threatening the viability of fisheries or aquaculture, 2) the harmful accumulation of zinc- or copper-based toxins, and 3) the increase in weight, decrease in flexibility and mobility, and topical damage of marine mammals hosting biofouling organisms. There are a number of existing legal mechanisms that address biofouling under international law. However, due to the complexity of biofouling, this Article posits that existing mechanisms are inadequate for comprehensively regulating the problem, leaving aquatic species susceptible to numerous negative effects from biofouling. To address these inadequacies, we recommend biofouling also be mitigated under the federal Endangered Species Act (ESA). First, we consider the Florida manatee (*Trichechus manatus latirostris*) as a case study species, and suggest that Florida's Resource Conservation and Development (RC&D) areas develop a Safe Harbor umbrella agreement under section 10 of the ESA to create a new generation of ecological harbors that are safe from the dangers of biofouling. The agreement would include a Habitat Conservation Plan (HCP) that incorporates a combination of behavioral and infrastructural biofouling mitigation techniques to be applied regionally across estuary, freshwater, and saltwater ecosystems. Second, we suggest that both public and private owners of existing, proposed, and expanding marina developments be encouraged to voluntarily sign Safe Harbor Agreements under the RC&D areas' umbrella agreement to avoid owners having to navigate the long and strenuous process of obtaining individual HCPs. The comprehensive biofouling management strategy proposed as a model here would require RC&D areas to carry out a range of biofouling best management practices that would protect species and the habitats on which they depend from the adverse effects of biofouling.

*Mark Squillace and Alexander Hood*

One of the most difficult challenges facing public land managers today is how to address climate change in a meaningful way when making decisions affecting public lands. This problem is largely the product of the uncertainty surrounding climate change and the potential consequences of climate change for the large and complex landscapes and ecosystems that public land agencies manage. In February 2010, the Council on Environmental Quality (CEQ) issued draft guidance to federal agencies describing how these agencies should address climate change in their decision documents. Recognizing the difficulty of the task, however, the CEQ's draft guidance expressly disclaimed any intention of affording assistance to public land management agencies making complex land-use decisions. This Article seeks to fill that gap. It begins by describing the National Environmental Policy Act (NEPA) and the unique difficulties in applying NEPA to climate change and public land management. It then considers three case studies that illustrate the complex challenges that face public land managers, including 1) the U.S. Forest Service's treatment of the mountain pine beetle, 2) a proposal to bring 250,000 acre-feet of water from the Colorado River Basin to the Front Range of Colorado and Southern Wyoming, and 3) fossil fuel leasing on public lands, with specific discussions of shale gas fracking, coal mine methane, and oil shale extraction. These case studies form the basis for a series of recommendations for the CEQ and land-use planning agencies. Most importantly, the Article recommends that land-use planning agencies quantify the greenhouse gas emissions that result from their proposed actions and attach a price to those emissions that reflects the marginal social cost of climate change that might result from those emissions. Assigning a price to those emissions that reflects their social cost will promote more accurate cost assessments, and ensures that such costs become a meaningful part of the decision-making process. The Article also recommends that the CEQ propose rules to ensure that agencies are held accountable when they commit to adaptive management in their decision documents. Finally, the Article offers several general recommendations for coping effectively with the uncertainty and scale of climate change.

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*Kevin L. Doran and Angela M. Cifor*

This Article establishes that pursuant to the mineral reservation contained in the Stock-Raising Homestead Act of 1916 (SRHA), as well as U.S. Supreme Court jurisprudence that has further defined the scope of that reservation, the federal government likely holds title to some 70 million acres of subsurface pore space located under private land in the West. In addressing the issue of pore space ownership, scholars and regulators have focused on the question of who owns the pore space when the mineral estate has been severed from the surface estate. This approach, however, overlooks the critical fact that for the approximately 70 million acres of land patented under the SRHA, the United States government held the original fee simple absolute, and conveyed the land while retaining "all the coal and other minerals in the lands." In 1983 in *Watt v. Western Nuclear, Inc.*, the Supreme Court delineated a four-part test for determining if something falls within the scope of the SRHA's mineral

reservation—a test that was further explicated by the Court’s decision in 2004 in *BedRoc Limited, Inc. v. United States*. This Article analyzes this jurisprudence vis-à-vis the question of whether or not pore space falls within the scope of the SRHA’s mineral reservation. Based on a detailed analysis of the history of the SRHA and relevant jurisprudence by the Supreme Court and other federal and state courts, we conclude that the federal government likely owns the pore space for those lands patented under the SRHA. This conclusion has far reaching policy implications. For instance, states that have statutorily determined that ownership of the pore space is vested in the surface owner are now confronted by the prospect that these statutes are preempted by federal law when dealing with land originally conveyed by the SRHA. Moreover, given the significant acreage covered by the SRHA, federal ownership of pore space could arguably reduce the transaction costs associated with project development, thereby facilitating the rapid scaling of commercial geologic carbon storage projects.

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This Comment aims to provide an investigative view of the Lacey Act’s impact on international plant and animal trade in the context of musical instrument dealing and manufacturing. The Comment first discusses the history of the Lacey Act, followed by a more in-depth discussion of the Act’s 2008 amendment to extend protection to the harvest of plants and wood products. It then examines several instances where musical instrument manufacturers and dealers have been accused of and sometimes prosecuted for violating the Lacey Act, as well as an inspection of a few non-musical cases involving the Lacey Act and similar legislation. The Comment next addresses the issues and problems facing the Lacey Act in relation to the musical instrument trade. Finally, the Comment gives a set of recommended solutions for fixing the Lacey Act that would remedy its shortcomings without sacrificing the environmental aims and effectiveness of the law.

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## SYMPOSIUM ARTICLES

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*Kalyani Robbins*

The Migratory Bird Treaty Act (MBTA) contains a very broad ban on harming migratory birds, as well as a strict liability standard for misdemeanor violations. Without further limitation, the MBTA would theoretically apply to countless ordinary life activities, such as driving a car or having windows on one's home. Naturally, there are due process concerns with such a scenario, so Congress expressly left it to the Department of the Interior to draft more detailed implementing regulations. Unfortunately, the existing regulations fail to adequately address the potential overbreadth of the MBTA's misdemeanor application, forcing the courts to do so on an ad hoc basis. Such individualized legal analyses create the risk of developing bad law as a result of less-than-ideal test cases. This is exactly what took place in *United States v. Apollo Energies, Inc.*, 611 F.3d 679 (10th Cir. 2010), the only appellate case dealing with the MBTA's strict liability standard in the context of industrial harms—the current trend for enforcement—in several decades. In that case, the Tenth Circuit applied a “knew or should have known” standard to an industrial actor causing bird deaths, holding that criminal liability only attaches after the United States Fish and Wildlife Service has directly notified the defendant in writing of the danger his equipment presents to birds. This is a terrible case, as it completely writes the strict liability standard out of the statute. This Article argues that regulations—or even a written enforcement policy—that create prosecutorial limitations to avoid violating due process will prevent courts from struggling to cope with the MBTA's theoretically broad reach, which can result in bad law. It sorts through the historical development of strict liability, especially in the public welfare offense context, and proposes that those engaged in activities where regulation should be foreseen—such as operating oil rigs, as in *Apollo Energies*—should be held to a higher standard than others. This is in line with the Supreme Court case law justifying strict liability in the face of due process challenges. Ultimately, the Article concludes that such across-the-board line drawing for the MBTA's strict liability provisions would have prevented the Tenth Circuit from deciding *Apollo Energies* as it did.

- Migratory Bird Treaties' Issues and Potentials: Are They Valuable  
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*Mitsuhiko A. Takahashi*

This Essay explores the achievements, issues, and potentials of bilateral migratory bird treaties (MBTs). MBTs have been successful in strengthening domestic laws and facilitating international cooperation for avian conservation. However, the merits of MBTs are mostly limited to migratory bird species in a limited number of countries. Multinational treaties, such as the Bonn Convention, are likely to be capable of addressing these weak points. Nevertheless, MBTs are still a beneficial tool since multinational treaties tend to be inflexible, cumbersome, and politically driven. This Essay recommends expanding the network of MBTs geographically (which may become ancillary agreements of the Bonn Convention), as well broadening their scope to include all birds, including nonmigratory species.