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ARTICLES

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.

SYMPOSIUM ARTICLES

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.

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.