
Are Migratory Birds Extending Environmental Criminal Liability?

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Environmental statutes frequently include criminal provisions as a means of enforcing their regulations. However, these provisions often include little if any mens rea requirement. As with any form of criminal liability that approaches strict liability, courts must therefore somehow insure that convictions satisfy constitutional due process concerns. During the last century, and accompanying the rise of regulatory statutes, the court developed the public welfare doctrine as a method of justifying the lack of a mens rea requirement for certain types of crimes. These crimes, known as public welfare offenses, involve regulations so potentially dangerous to public health and safety that the court was willing to presume that the allegedly criminal actor had knowledge of his wrongdoing, thus satisfying due process.

United States v. Apollo Energies, Inc.'s interpretation of the Migratory Bird Treaty Act demonstrates another method of ensuring due process despite the lack of a mens rea requirement. While these crimes do not fall under the coverage of the traditional public welfare doctrine, the Tenth Circuit borrowed several elements of the traditional doctrine, including foreseeability of regulation and of harm. The Tenth Circuit's willingness to use these elements outside of the public welfare setting illuminates when courts might find liability for future environmental regulatory crimes.

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Introduction.....	428
I. The Public Welfare Doctrine.....	431
II. <i>Apollo Energies</i> ' Justification for Criminal Liability without Mens Rea.....	434
A. The Migratory Bird Treaty Act: Background	434
B. Factual Description of <i>Apollo Energies</i>	434
C. <i>Apollo Energies</i> : MBTA as a Strict Liability Offense	436
D. <i>Apollo Energies</i> : Satisfying Due Process with Proximate Cause.....	437
E. Effect of the <i>Apollo Energies</i> Holding on the MBTA	440
III. How <i>Apollo Energies</i> Expands Environmental Criminal Liability Outside of the MBTA.....	442
A. Differentiating the Public Welfare Doctrine and the <i>Apollo Energies</i> Standard	442
B. Adoption of Public Welfare Doctrine Rationales	443
C. The Effect of <i>Apollo Energies</i> on Other Environmental Statutes.....	444
Conclusion	448

INTRODUCTION

Most of the major statutes enacted in the United States during the modern environmental movement provide for criminal punishment.¹ This is largely because the threat of criminal liability can gain environmental compliance more effectively than civil penalties.² Corporations that violate environmental civil regulations often simply internalize their cost of noncompliance without ever adjusting their unlawful impact on the environment.³ The fear of criminal prosecution and incarceration more effectively deters the violation of environmental statutes because these punishments are often focused on individuals, and the stigma of a criminal prosecution can have detrimental

1. See Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. § 136l(b) (2006); Toxic Substances Control Act, 15 U.S.C. § 2615(b) (2006); Solid Waste Disposal Act ("RCRA"), 42 U.S.C. § 6928(d) (2006); Clean Air Act, 42 U.S.C. § 7413(c) (2006); Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9603 (2006). For a discussion of the development of criminal enforcement provisions in environmental regulations, see generally Lawrence Friedman & H. Hamilton Hackney, *Questions of Intent: Environmental Crimes and "Public Welfare" Offenses*, 10 VILL. ENVTL. L.J. 1 (1999); Robert I. McMurry & Stephen D. Ramsey, *Environmental Crime: The Use of Criminal Sanctions in Enforcing Environmental Laws*, 19 LOY. L.A. L. REV. 1133 (1986).

2. See McMurry & Ramsey, *supra* note 1, at 1157 (discussing how criminal actions in environmental statutes have a much greater deterrent effect than civil actions).

3. See Richard J. Lazarus, *Mens Rea in Environmental Criminal Law: Reading Supreme Court Tea Leaves*, 7 FORDHAM ENVTL. L. REV. 861, 865-66 (1996) (discussing how it is easier to internalize the cost of civil enforcement penalties, and that a "criminal sanction, by contrast, cannot be so easily passed on to others, especially the sanction of incarceration").

social and professional impacts.⁴ Therefore, the availability of criminal liability in environmental law has the benefit of preventing environmental harm rather than merely redressing it.⁵

Traditional criminal liability begins with an intentional illegal act.⁶ Further, inherent to the concept of criminal liability is the notion of moral culpability. Under common law, courts require that the actor have a guilty mind or “mens rea” as a prerequisite to this moral culpability.⁷ Constitutional due process concerns arise when criminal sanctions are brought for an unintentional act committed without a guilty mind.⁸ Due process requires that one have fair notice of what conduct is criminal.⁹ Additionally, criminal liability for acts the defendant does not cause (or does not omit in violation of an affirmative duty) is unconstitutional because that would criminalize the defendant’s mere “status.”¹⁰

For instance, courts must satisfy due process concerns with strict liability statutes since these statutes could allow for criminal liability without any mens rea and also perhaps without any intention.¹¹ In addition, many regulatory crimes¹² found in environmental statutes also include decreased mens rea requirements and therefore present due process concerns. However, courts have embraced decreased mens rea requirements for certain regulatory offenses.¹³ In these situations, when criminal liability is upheld against someone with a

4. See *id.* at 866–67; see also McMurry & Ramsey, *supra* note 1, at 1157–58 (discussing the stigma of environmental criminal prosecution).

5. See Lazarus, *supra* note 3, at 866–67.

6. See HYMAN GROSS, A THEORY OF CRIMINAL JUSTICE 83–88 (1979) (concluding that a criminal act “must be done intentionally if it is to be judged a culpable act”).

7. See *Morissette v. United States*, 342 U.S. 246, 252 (1952); *United States v. Balint*, 258 U.S. 250, 251–52 (1922).

8. Constitutional due process stems from U.S. CONST. amends. V & XIV and provides that no person shall be deprived of life, liberty, or property without due process of law.

9. See, e.g., *Kolender v. Lawson*, 461 U.S. 352, 357–58 (1983) (describing the due process notice requirement and the void-for-vagueness doctrine).

10. See *Lambert v. California*, 355 U.S. 225, 228 (1957) (striking down as unconstitutional “where a person, wholly passive and unaware of any wrongdoing, is brought to the bar of justice for condemnation in a criminal case”); see also *Robinson v. California*, 370 U.S. 660, 666–78 (1962) (holding “status” crimes unconstitutional).

11. See *Staples v. United States*, 511 U.S. 600, 607 n.3 (1994) (discussing how true strict liability would mean that the actor would not even have to know they were committing a dangerous act); Lazarus, *supra* note 3, at 872 (discussing strict liability as being the absence of mens rea); 1 WAYNE R. LAFAYE, SUBSTANTIVE CRIM. L. § 5.2(b) (2d ed. 2010) (describing that mens rea can result from either intent to commit a criminal act or merely knowledge of one’s criminal activity).

12. In this Note I use the term “regulatory crimes” in place of strict liability. This is in part for consistency, but also because the term strict liability is often too freely applied. See, e.g., *Staples*, 511 U.S. at 607 n.3 (discussing the use of strict liability for public welfare offenses). Instead, regulatory crimes are more broadly criminal provisions from statutes, which often include a decreased mens rea requirement. See *id.*

13. See *United States v. Freed*, 401 U.S. 601, 607 (1971) (discussing that there are many exceptions to the typical mens rea requirements, especially in the regulation of activities involving public health, safety, and welfare).

decreased mens rea, courts strive to find justification for their punishment of this low degree of moral culpability.

The public welfare doctrine is one such justification. Public welfare offenses typically involve statutes that regulate potentially harmful or injurious items.¹⁴ The doctrine is founded on the presumption that where “dangerous or deleterious devices or products or obnoxious waste materials are involved, the probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation.”¹⁵ Thus, public welfare offenses dispense with conventional requirements for mens rea, but justify this through the presumed foreseeability of regulation.¹⁶ Therefore, by regulating only those items or activities that one should reasonably anticipate to be regulated, public welfare offenses satisfy the possible constitutional due process concerns that arise when unintentional or otherwise innocent acts are met with criminal liability.¹⁷

The holding in *United States v. Apollo Energies, Inc. (Apollo Energies)* presents an alternative justification for decreased mens rea requirements, and an approach that might apply broadly to the enforcement of future environmental regulatory crimes.¹⁸ There, the Tenth Circuit ruled that a strict liability misdemeanor provision in the Migratory Bird Treaty Act does not violate due process as long as the actor “proximately caused” the violation.¹⁹ *Apollo Energies* addresses many of the same interests protected by the public welfare doctrine: both ensure that individuals are not prosecuted for unintentional or otherwise innocuous acts without some form of notice as to possible regulation. Interestingly, however, the Tenth Circuit makes only passing reference to the public welfare doctrine.²⁰

Why then is the Tenth Circuit creating a new standard for justifying lower mens rea requirements in regulatory offenses instead of using the public welfare doctrine? This Note explains that the Tenth Circuit’s decision in *Apollo Energies* is just the latest example of courts limiting regulatory prosecutions to cases where both the elements of foreseeability of regulation and foreseeability of harm have been satisfied. *Apollo Energies*’ standard provides a template for

14. See *Staples*, 511 U.S. at 607.

15. See *United States v. Int’l Minerals & Chem. Corp.*, 402 U.S. 558, 565 (1971).

16. See *Staples*, 511 U.S. at 619.

17. See *Kolender v. Lawson*, 461 U.S. 352, 357 (1983) (discussing how under the Constitution ordinary people need to be able to understand what conduct is criminal and what conduct is not); *Lambert v. California*, 355 U.S. 225, 228 (1957) (discussing how a person “wholly passive and unaware of any wrongdoing” lacks the notice required for due process).

18. *United States v. Apollo Energies, Inc. (Apollo Energies)*, 611 F.3d 679 (10th Cir. 2010).

19. See *id.* at 682.

20. The *Apollo Energies* opinion references “public welfare” only twice. It acknowledges, by citing *Staples*, that “public welfare offenses” can be used to impose a form of strict liability. See *Apollo Energies*, 611 F.3d at 686. It then explains that this form of strict liability is not the most stringent, because public welfare offenses describe only those situations where the defendant knows that he is dealing with some dangerous or deleterious substance. See *id.* at 688. The Tenth Circuit never implies that it is applying the public welfare doctrine in its opinion. See generally *id.*

how everyday activities, especially those that negatively impact the environment, may be regulated in the future while still passing constitutional muster. The Note begins with a discussion of the public welfare doctrine. It then outlines the *Apollo Energies* decision, comparing the two and explaining how the Tenth Circuit's opinion could affect future environmental criminal liability.

I. THE PUBLIC WELFARE DOCTRINE

The public welfare doctrine allows for the prosecution of unintended acts under a regulatory statute with a minimal mens rea requirement.²¹ However, the doctrine has not been frequently applied.²² Defining where and why the public welfare doctrine should be used helps illustrate its differences with the Tenth Circuit's holding in *Apollo Energies*. It also shows that there are certain due process considerations that the courts, whether under the guise of the public welfare doctrine or not, will always require.

During the nineteenth century, the Supreme Court began to recognize that ordinary mens rea requirements interfere with enforcement of newly developed "regulatory" offenses created to protect the public welfare and should not be required.²³ For example, in *United States v. Dotterweich* the Supreme Court allowed for a public welfare offense regulating misbranded drugs in order to protect "the lives and health of people which, in the circumstances of modern industrialism, are largely beyond self-protection."²⁴ The rationale was that such legislation could dispense with conventional mens rea requirements because of the larger interest in public safety as well as the belief that those in control of a potential "hazard" should have a higher burden of responsibility.²⁵

Thus the public welfare doctrine is a method of statutory construction, which applies where there is a sufficient hazard to the public welfare.²⁶ When faced with an ambiguity in the statute, the court may choose the less strict mens rea interpretation if it determines that the statute falls under the public welfare doctrine.²⁷ For example, in *United States v. Freed*, the Supreme Court reasoned

21. See generally Friedman & Hackney, *supra* note 1, at 6–7.

22. See *Staples*, 511 U.S. at 607.

23. See Friedman & Hackney, *supra* note 1, at 6–7.

24. *United States v. Dotterweich*, 320 U.S. 277, 280 (1943). *Dotterweich* provides a classic example of a public welfare offense. Here, the general manager of a food distribution company was found guilty of introducing misbranded drugs into interstate commerce in violation of the Federal Food, Drug, and Cosmetic Act. See *id.* at 278. *Dotterweich*'s conviction was upheld despite the fact that he had no knowledge of his violation. See *id.* at 279, 285. Holding that the Act was a public welfare statute, the Supreme Court noted that the high risk to public health posed by the violation allowed for prosecution even without criminal intent or knowledge. See *id.* at 280–81.

25. See *id.* at 281.

26. See *United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 558, 565 (1971); see also *Staples*, 511 U.S. at 607 ("Typically, our cases recognizing such offenses involve statutes that regulate potentially harmful or injurious items.")

27. See J. Manly Parks, *Mens Rea in RCRA*, 18 WM. & MARY J. ENVTL. L. 219, 229 (1993–94). Parks describes how, unlike strict liability statutes, public welfare offenses can also include offenses that

that a statute regulating the possession of unregistered hand grenades required only that the defendant know he possessed hand grenades and not that they were unregistered or even regulated.²⁸ Similarly, in *United States v. Balint* the Supreme Court concluded that the Narcotic Act of 1914, which protected public safety by minimizing the spread of addictive drugs, required proof only that the defendant knew that he was selling drugs and not that he knew the specific items sold were regulated by a statute.²⁹ In *United States v. International Minerals & Chemical Corp.*, the defendant violated a regulation specifying precisely how hazardous materials should be marked and documented during transport.³⁰ The applicable criminal provision imposed criminal liability to anyone who “knowingly” violated the regulation.³¹ The Supreme Court invoked the public welfare doctrine and convicted the defendant despite his claim that he had no knowledge of the regulation.³² Following the traditional public welfare doctrine, the Supreme Court reasoned that anyone who possessed such dangerous and deleterious chemicals should be presumed to have knowledge that they were regulated.³³ Therefore, what was determinative was not whether the defendant actually knew of the regulation, but whether he knew that he possessed the substances in question, which he did.³⁴

Since the public welfare doctrine allows for criminal punishment without a heightened mens rea, public welfare offenses are typically misdemeanors, carrying only minor penalties such as fines.³⁵ In a criminal system that “generally requires a ‘vicious will’ to establish a crime, imposing severe punishments for offenses that require no mens rea would seem incongruous.”³⁶ However, in theory, public welfare offenses are not limited to misdemeanors with mild penalties. Instead, the Supreme Court in *Staples* suggested the level of punishment was simply one factor to consider in determining whether Congress intended the regulatory offense to include a heightened mens rea requirement.³⁷

do articulate some mens rea. *Id.* However, in such a case the mens rea requirement is interpreted as narrowly as the language of the statute will reasonably allow so as to advance the regulatory goals of the statute. *See id.*; *see also infra* notes 28–34 and accompanying text.

28. *See United States v. Freed*, 401 U.S. 601, 608 (1971).

29. *See United States v. Balint*, 258 U.S. 250, 254 (1922).

30. *See Int’l Minerals & Chem. Corp.*, 402 U.S. at 559.

31. *See id.*

32. *See id.* at 563–65.

33. *See id.* at 565.

34. *See id.*

35. *See Morissette v. United States*, 342 U.S. 246, 256 (1952) (“[P]enalties commonly are relatively small, and conviction does no grave damage to an offender’s reputation.”).

36. Francis Bowes Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 70 (1933).

37. *See Staples v. United States*, 511 U.S. 600, 618 (1994) (“[W]e note only that where, as here, dispensing with mens rea would require the defendant to have knowledge only of traditionally lawful conduct, a severe penalty is a further factor tending to suggest that Congress did not intend to eliminate a mens rea requirement.”).

Even when applied, the public welfare doctrine does not create a “true” strict liability offense. By requiring that a defendant at least know that he is dealing with some dangerous or deleterious substance, courts have attempted to avoid appearing to impose strict liability.³⁸ Under the public welfare doctrine, when dangerous or deleterious substances are concerned, the court can ensure that due process concerns are satisfied on the theory that “one would hardly be surprised to learn that [the prohibited conduct] is not an innocent act.”³⁹ However, this is only where the statute clearly criminalizes activity without requiring mens rea; the courts still interpret ambiguity in the statute regarding the applicable mental state in favor of the defendant and not as imposing strict liability.⁴⁰

As described by the Supreme Court, one purpose and effect of doing away with the requirement of a heightened mens rea requirement under the public welfare doctrine is to “ease the prosecution’s path to conviction.”⁴¹ Additionally, the public welfare doctrine heightens the duties of those in control of particular “industries, trades, properties or activities that affect public health, safety or welfare.”⁴² By limiting the public welfare doctrine to the regulation of items that threaten public safety, courts ensure that the defendant is *on notice*.⁴³ For example, a hand grenade is an item that could foreseeably harm the public welfare; therefore, its being regulated is reasonably foreseeable.⁴⁴ This foreseeability of regulation, creating a presumption that the defendant was on notice, allows for prosecution without violating due process, even when the defendant is not entirely aware that his conduct is criminal.⁴⁵ This is identical to the reasoning in *Apollo Energies*, which the Tenth Circuit applies without discussing public welfare.

38. See, e.g., *Int’l Minerals & Chem. Corp.*, 402 U.S. at 563–64.

39. *United States v. Freed*, 401 U.S. 601, 609 (1971).

40. See *J. Manly Parks*, *supra* note 27, at 229.

41. *Morrisette v. United States*, 342 U.S. 246, 263 (1952); see also *Friedman & Hackney*, *supra* note 1, at 9 (“[T]he public welfare doctrine obviates the government’s burden of proving that the defendant knew his conduct was illegal.”).

42. *Morrisette*, 342 U.S. at 254.

43. See *Staples v. United States*, 511 U.S. 600, 633 (1994) (Stevens, J., dissenting) (“The dangerous character of the product is reasonably presumed to provide sufficient notice of the probability of regulation to justify strict enforcement against those who are merely guilty of negligent, rather than willful, misconduct.”).

44. See *United States v. Freed*, 401 U.S. 601, 609 (1971).

45. See *Liparota v. United States*, 471 U.S. 419, 443 (1985) (White, J., dissenting) (describing that under public welfare statutes “a defendant can be convicted even though he was unaware of the circumstances of his conduct that made it illegal”).

II. APOLLO ENERGIES' JUSTIFICATION FOR CRIMINAL LIABILITY WITHOUT MENS REA

A. *The Migratory Bird Treaty Act: Background*

The Migratory Bird Treaty Act (MBTA),⁴⁶ one of the first wildlife-conservation statutes in the United States,⁴⁷ implements four international treaties aimed at protecting migratory birds.⁴⁸ The Act makes it unlawful “by any means or in any manner” to take, kill, or attempt to take or kill migratory birds protected by those international treaties.⁴⁹ Regulations promulgated under the statute further define “take” as to “pursue, hunt, shoot, wound, kill, trap, capture, or collect.”⁵⁰ Violators are guilty of a criminal misdemeanor and face a fine of up to \$15,000 and six months of imprisonment.⁵¹ The Act does not specify that a “taking” be done with any particular mental state for a misdemeanor conviction.⁵² Therefore, most courts have interpreted the statute’s misdemeanor provision to be a strict liability offense, viewing the knowledge or intent of the person committing the “taking” as irrelevant.⁵³

B. *Factual Description of Apollo Energies*

Apollo Energies addresses the appeals of two sets of MBTA misdemeanor convictions, both of which involved migratory birds getting stuck in a common oil-drilling device called a “heater-treater.” Heater-treaters are cylindrical devices up to twenty feet in height that separate water and gas from crude oil during extraction from the ground. Heater-treaters vary in designs; however,

46. 16 U.S.C. §§ 703–711 (2006).

47. See DALE D. GOBLE & ERIC T. FREYFOGLE, *WILDLIFE LAW: CASES AND MATERIALS* 852 (2002); see also *Andrus v. Allard*, 444 U.S. 51, 52 (1979) (articulating the Act’s primary purpose as “to prevent the destruction of certain species of protected birds”).

48. The first migratory bird treaty was developed between Canada and the United States in 1916. See *The 1916 Convention with Canada, U.S.-G.B.*, Aug. 16, 1916, 19 Stat. 1702. Subsequent treaties with Mexico, Japan, and the Soviet Union were integrated into the Act in 1936, 1972, and 1976 respectively. See *Convention for the Protection of Migratory Birds and Game Mammals, U.S.-Mex.*, Feb. 7, 1936, 50 Stat. 1311; *Convention for the Protection of Migratory Birds and Birds in Danger of Extinction, and their Environment, U.S.-Japan*, Mar. 4, 1972, 25 U.S.T. 3329; *Convention Concerning the Conservation of Migratory Birds and their Environment, U.S.-U.S.S.R.*, Nov. 18, 1976, 29 U.S.T. 4647.

49. 16 U.S.C. § 703 (2006).

50. 50 C.F.R. § 10.12 (2010).

51. See 16 U.S.C. § 707(a) (2006).

52. See *id.* § 707(a). The MBTA also includes felony provisions for “knowingly” selling or baiting migratory birds. See 16 U.S.C. §§ 704(b), 707(b). Convictions under these provisions can result in fines up to \$2000 and imprisonment for up to two years. However, these provisions are not at issue in this case.

53. See, e.g., *United States v. Corrow*, 119 F.3d 796, 805 (10th Cir. 1997) (holding “misdemeanor violations under § 703 are strict liability crimes”).

most superficially resemble “an over-size hot water heater, a tall metal cylinder with an exhaust stack.”⁵⁴

In December 2005, the U.S. Fish and Wildlife Service (FWS) discovered the propensity for migratory birds to become fatally caught in the exhaust pipes and louvers of heater-treaters.⁵⁵ As the Tenth Circuit explained, birds that crawl into exhaust pipes or through the louvers to form nests can, once inside, have a hard time escaping.⁵⁶ This discovery occurred during an inspection of equipment owned by appellant Apollo Energies, but no charges were brought as a result.⁵⁷ In fact, for the next year, FWS chose not to recommend prosecution for any heater-treater related MBTA violations.⁵⁸

Instead, it commenced an education campaign to alert heater-treater operators to the newly discovered threat.⁵⁹ The education campaign lasted a year and included a television report, an article in the local newspaper, and advertisements in the local trade association’s publications.⁶⁰ In addition, FWS mailed letters to known oil-drill operators.⁶¹

This education campaign reached Apollo Energies, but not another heater-treater operator, appellant Dale Walker.⁶² Walker did not learn of the issue until over a year after the education campaign had ceased, when FWS launched another wave of heater-treater inspections.⁶³ These April 2007 inspections discovered the remains of four birds in Walker’s oil-drilling equipment, as well as one in Apollo Energies’ equipment.⁶⁴ In April 2008, FWS again retrieved a protected bird from one of Walker’s heater-treaters.⁶⁵ Based on the April 2007 and April 2008 inspections, a magistrate judge convicted Apollo and Walker of misdemeanors for “taking or possessing migratory birds.”⁶⁶ Apollo Energies was fined \$1500 for its 2007 violation, and Walker was fined \$250 for each of his two violations.⁶⁷

54. Brief for Appellant at 3, *Apollo Energies*, 611 F.3d 679 (10th Cir. 2010) (No. 09-3038). For diagrams of a typical heater-treater, see *Facilities and Processing Engineering: Treater Skids*, PETRONYX, http://www.petronyx.com/facility_treater_skids.htm (last visited Oct. 5, 2010).

55. See *Apollo Energies*, 611 F.3d 679, 682 (10th Cir. 2010).

56. See *id.* at 682.

57. See *id.*

58. See *id.* at 683.

59. See *id.* at 682.

60. See *id.* at 683.

61. See *id.* at 682.

62. See *id.* at 683 n.2 (“The Fish and Wildlife agent in charge of the investigation admitted he did not send Walker the Service’s 2006 letter, and Walker testified he did not receive a Service letter until June 2007—after Fish and Wildlife searched his heater-treater for the first time.”).

63. See *id.*

64. See *id.*

65. See *id.*

66. *Id.* at 682.

67. See *id.* Violations were calculated in terms of instances of takings, rather than the number of birds taken. For example, Walker faced two fines from the magistrate judge, stemming from the two inspections of his property, even though four birds had died. See *id.*

C. Apollo Energies: MBTA as a Strict Liability Offense

On appeal in federal district court, Apollo Energies and Walker advanced two arguments. First, that the MBTA should not be interpreted as a strict liability statute. And alternatively, if the MBTA is a strict liability statute, that punishment for an unintentional or unknown “taking” violated due process as applied to their convictions. The United States District Court for the District of Kansas adhered to the traditional view of the MBTA as a strict liability statute and concluded that Apollo Energies and Walker satisfied causation requirements.⁶⁸ Specifically, the Court held that Apollo Energies and Walker proximately caused the taking of protected migratory birds after remains were discovered within their oil drilling equipment.⁶⁹

The Tenth Circuit upheld the lower court’s opinion in part, holding that MBTA convictions without knowledge or intent were constitutional as long as the actor proximately caused the violations.⁷⁰ On appeal, Walker and Apollo Energies began by questioning the district court’s statutory interpretation of the MBTA’s misdemeanor provision, arguing that the statute did not create a strict liability offense, but instead contained a mens rea requirement.⁷¹ The Tenth Circuit disagreed and affirmed the district court’s holding that there was no mens rea requirement.⁷² The court simply noted that the plain language of the Act failed to stipulate any mens rea.⁷³

The court added that this statutory interpretation was supported by legislative intent, noting the parallel doctrine that some indicia of congressional intent is typically necessary before courts can dispense with a mens rea requirement when none is explicitly stated.⁷⁴ The court then reasoned that the MBTA’s silence indicated implied congressional intent supporting a strict liability interpretation, especially considering that Congress had left the misdemeanor provision intact even after adding the word “knowingly” to create the felony offense of *selling* migratory birds.⁷⁵

Furthermore, the Tenth Circuit pointed to precedent contradicting Apollo Energies and Walker’s statutory interpretation argument.⁷⁶ *United States v. Corrow* directly held that “misdemeanor violations under § 703 [of the MBTA] are strict liability crimes.”⁷⁷ In *Corrow*, the defendant was found guilty of an

68. See *United States v. Apollo Energies, Inc.*, Nos. 08-10111-01-JTM, 08-10112-01-JTM, 2009 WL 211580, at *3, *4 (D. Kan. Jan. 28, 2009).

69. See *id.*

70. See *Apollo Energies*, 611 F.3d at 682.

71. See *id.* at 684 (referencing 16 U.S.C. § 703).

72. See *id.*

73. See *id.* (holding “[t]he statute does not supply a mens rea requirement”).

74. See *id.* at 685–86 (quoting *Staples v. United States*, 511 U.S. 600, 606 (1994)).

75. See *id.*; see also S. REP. NO. 99-445, at 15 (1986), reprinted in 1986 U.S.C.C.A.N. 6113, 6128 (“Nothing in this amendment [to create the MBTA felony offenses] is intended to alter the ‘strict liability’ standard for misdemeanor prosecutions under 16 U.S.C. 707(a) . . .”).

76. See *Apollo Energies*, 611 F.3d at 684.

77. *United States v. Corrow*, 119 F.3d 796, 805 (10th Cir. 1997).

MBTA violation for possessing migratory bird parts after he tried to sell Native American masks consisting of feathers from two protected migratory birds to an undercover National Park Service ranger.⁷⁸ In that case, the court also reasoned that the MBTA was a strict liability statute based on its plain language and therefore that a defendant was guilty regardless of whether he committed the violation knowingly or with any intent.⁷⁹

Apollo Energies and Walker attempted to differentiate their claims from *Corrow*, arguing that *Corrow*'s holding should be applied only to "active" conduct, such as possessing and selling migratory birds, and not to their own "passive" conduct.⁸⁰ However, the Tenth Circuit declined to limit *Corrow*'s application to only certain types of conduct,⁸¹ emphasizing that the broad holding in *Corrow* precluded the inclusion of a mens rea requirement for the misdemeanor provisions of the MTBA.⁸²

D. Apollo Energies: Satisfying Due Process with Proximate Cause

After affirming that the MBTA was a strict liability statute, the Tenth Circuit turned to Apollo Energies and Walker's second argument, which was that their MBTA convictions violated due process. First, they claimed that the statute was unconstitutionally vague and that it therefore did not provide adequate notice of what conduct could lead to a violation.⁸³ Further, they claimed that due process required that the defendants "cause" an MBTA violation to be guilty of a crime.⁸⁴

The Tenth Circuit quickly dispensed with Apollo Energies and Walker's vagueness argument.⁸⁵ The Court cited the void-for-vagueness doctrine discussed in *Kolender v. Lawson*,⁸⁶ in which the Supreme Court held that a criminal statute cannot be so vague that "ordinary people" are uncertain of its meaning.⁸⁷ With this, the Tenth Circuit held that the MBTA is not unconstitutionally vague because the statute enumerates and criminalizes a range of specified conduct leading to the death or captivity of protected

78. *See id.* at 798–99.

79. *See id.* at 805–06.

80. *See id.* at 684.

81. *See id.*

82. *See id.* at 684–85.

83. *See id.* at 683.

84. *See id.* According to the Tenth Circuit's opinion, defendants claimed they must simply "cause" an MBTA violation to be guilty. *See id.* However, the defendant's brief is actually more specific. It argues that a taking "requires at least negligence, if not intent." Brief for Appellant at 18, *Apollo Energies*, 611 F.3d 679 (10th Cir. 2010) (No. 09-3038).

85. *See id.* at 688.

86. *See id.* at 688; *see also* *Kolender v. Lawson*, 461 U.S. 352, 357 (1983) (discussing the void-for-vagueness doctrine).

87. *See Kolender*, 461 U.S. at 357.

migratory birds and because the MBTA's terms are "capable of definition without turning to the subjective judgment of government officers."⁸⁸

The court did find some merit in appellants' claim that the MBTA did not provide reasonable notice of prohibited conduct, thus potentially violating due process—in other words, that the regulation of the defendant's conduct was not reasonably foreseeable.⁸⁹ Citing *Staples v. United States*,⁹⁰ the court agreed that it would be unconstitutional for an otherwise "innocuous predicate act" to be met with criminal prosecution under a strict liability statute unless the defendant had notice that his conduct could lead to liability.⁹¹ In terms that echo the public welfare doctrine justifications, the court further explained that when "items have characteristics such that a reasonable person would expect the items to be regulated, strict liability for violations of those regulations passes constitutional scrutiny."⁹² But strict liability becomes suspect where a person could not reasonably foresee the items' regulation, according to the court, because the defendant would not have been on notice that his conduct could be criminal.⁹³

With this emphasis on foreseeability, the court merged the notice and causation prongs of due process analysis,⁹⁴ thus fashioning a new due process standard for strict liability statutes. The court reasoned that if the defendant's actions were the "proximate cause" of the MBTA violation, then the resulting taking of a migratory bird must have been a foreseeable outcome or foreseeable harm.⁹⁵ Further, if the harm was foreseeable, then the defendant must have known that certain conduct could result in the taking of a protected migratory bird.⁹⁶ In essence, by limiting criminal liability to those cases where the defendant proximately caused the taking of a migratory bird, the court ensured that the resulting harm was foreseeable and therefore that the defendants were on notice that they could face criminal liability.⁹⁷

88. *Apollo Energies*, 611 F.3d at 688–89.

89. *See id.* at 689–90.

90. *Staples v. United States*, 511 U.S. 600, 607 n.3 (1994) (holding that "dealing with some dangerous or deleterious substance" was sufficient notice under a strict liability regulatory statute).

91. *See Apollo Energies*, 611 F.3d at 689–90 ("When the MBTA is stretched to criminalize predicate acts that could not have been reasonably foreseen to result in a proscribed effect on birds, the statute reaches its constitutional breaking point.").

92. *Id.* at 687 (citing *United States v. Int'l Minerals*, 402 U.S. 558, 564–65 (1971)).

93. *See Apollo Energies*, 611 F.3d at 689–90.

94. *See id.* at 690 ("[T]he MBTA requires a defendant to proximately cause the statute's violation for the statute to pass constitutional muster."); *id.* at 689 ("The inquiries regarding whether a defendant was on notice that an innocuous predicate act would lead to a crime, and whether a defendant caused a crime in a legally meaningful sense, are analytically indistinct, and go to the heart of due process constraints on criminal statutes.").

95. *See id.* at 690; *see also* BLACK'S LAW DICTIONARY 1225 (9th ed. 2009) (defining "proximate cause" as "[a] cause that directly produces an event and without which the event would not have occurred").

96. *See Apollo Energies*, 611 F.3d at 690.

97. *See id.*

The Tenth Circuit applied the district court's standard for satisfying proximate cause, holding that liability would attach only where the resulting harm was foreseeable "as a natural consequence of the wrongful act."⁹⁸ The United States had proved "proximate causation" beyond a reasonable doubt at the district court level by "showing that trapped birds were a reasonably anticipated or foreseeable consequence of failing to cap the exhaust and cover access holes to the heater-treater."⁹⁹ The court added that "[w]hat is relevant . . . is what knowledge the defendants had or should have had of birds potentially dying in their heater-treaters."¹⁰⁰ If an individual has knowledge of the potential for birds to get caught in heater-treaters, then their failure to take necessary precautions could proximately cause the "taking" of a trapped bird, even if the actor did not have specific knowledge of the violation's occurrence.¹⁰¹

Following the FWS education campaign, the court found that appellant Apollo Energies had knowledge of the heater-treater problem for nearly eighteen months before the investigation that resulted in its conviction.¹⁰² With knowledge of the potential harm, Apollo Energies then failed to cover some of the heater-treater exhaust pipes, an omission that proximately caused eventual bird deaths.¹⁰³ With proximate cause satisfied, the court affirmed Apollo Energies' conviction.¹⁰⁴ Similarly, the court affirmed the conviction stemming from the April 2008 inspection of appellant Walker's heater-treater.¹⁰⁵ Walker had been previously inspected and therefore was aware of the possibility that heater-treaters could cause the "taking" of protected migratory birds.¹⁰⁶ Walker's failure to take measures to prevent those takings proximately caused the resulting bird deaths.¹⁰⁷

However, the court held that Walker did not proximately cause the takings discovered during the April 2007 inspection. At the time of that inspection, Walker was not aware of the perils of heater-treaters.¹⁰⁸ "Fish and Wildlife did not send him a letter, and he was not a member of the trade association to which the Service advertised the oil field equipment problem. Nor was Walker

98. See *id.* at 690-91; see also *United States v. Moon Lake Elec. Ass'n*, 45 F. Supp. 2d 1070 (D. Colo. 1999). In *Moon Lake Electric Ass'n*, the court upheld criminal liability for a company whose high-voltage power lines caused the taking of several migratory birds. The court concluded that proximate cause was an "important and inherent limiting feature" to the MBTA, and that liability would attach only where the resulting harm was foreseeable "as a natural consequence of the wrongful act." *Id.* at 1085.

99. *United States v. Apollo Energies, Inc.*, No. 08-10111-KMH, 2008 WL 4369300, at *7 n.16 (D. Kan. Sept. 23, 2008). The district court's proximate cause holding relied heavily on *Moon Lake Electric Ass'n*. See *id.*; see also *Apollo Energies*, 611 F.3d at 690.

100. *Apollo Energies*, 611 F.3d at 690 n.5.

101. See *id.* at 690 n.5, 691.

102. See *id.* at 691.

103. See *id.*

104. See *id.*

105. See *id.*

106. See *id.*

107. See *id.*

108. See *id.*

aware of the televised report or newspaper article about heater-treaters.”¹⁰⁹ Therefore, the Tenth Circuit overturned Walker’s 2007 conviction since without actual notice, “no reasonable person would conclude that the exhaust pipes of the heater-treater would lead to the deaths of migratory birds.”¹¹⁰ Because Walker could not have foreseen this harm, he did not proximately cause this taking of a migratory bird.

In summary, for a regulatory offense, constitutional due process requires that the defendant be on notice that his otherwise innocuous conduct might result in criminal liability. If the regulation of the defendant’s conduct is foreseeable, then the defendant must have been on notice. Foreseeability of regulation in a harm-based statute like the MBTA is established when the defendant could have foreseen the resulting harm. *Apollo Energies* then completes the chain of logic by holding that if the defendant proximately caused the harm, then the harm must have also been foreseeable.¹¹¹ This pairs the satisfaction of a proximate cause finding with the presence of foreseeable harm and raises the bar of strict liability.

E. Effect of the *Apollo Energies* Holding on the MBTA

The Tenth Circuit’s holding in *Apollo Energies* requires prosecutors to prove another element—proximate causation—in addition to those spelled out in the statute in order to hold an actor liable under the MBTA’s strict liability misdemeanor provision. The court’s analysis could have significant repercussions for environmental law, especially inasmuch as it applies to indirect or unintentional criminal acts. However, the *Apollo Energies* standard is a double-edged sword. While it could attach criminal liability to a broader range of conduct, it also erects an additional hurdle that courts must satisfy.

For example, the *Apollo Energies* standard might be an alternative option for courts that have been otherwise reluctant to extend MBTA liability for habitat modification, such as logging, that either indirectly or unintentionally causes a migratory bird death.¹¹² In *Mahler v. U.S. Forest Service*, a district court was unwilling to apply the MBTA to logging operations that resulted in the taking of migratory birds, limiting the statutory liability to direct takings, such as from hunting.¹¹³ The court reasoned that extending the MBTA to unintentional takings could lead to what has been described as “results far

109. *Id.*

110. *Id.*

111. Otherwise, presumably, the chain of causation would be too attenuated to find the defendant’s action or inactions to be the legal cause of the harm.

112. For a general discussion of how courts have treated attempts to use the MBTA to find liability for takings occurring as a result of habitat modification, see Conrad A. Fjetland, *Possibilities for Expansion of the Migratory Bird Treaty Act for the Protection of Migratory Birds*, 40 NAT. RESOURCES J. 47, 55–59 (2000).

113. See *Mahler v. U.S. Forest Serv.*, 927 F. Supp. 1559, 1579 (S.D. Ind. 1996).

beyond what a reasonable person would expect.”¹¹⁴ By applying *Apollo Energies*’ proximate cause analysis, however, the *Mahler* court could guarantee that only foreseeable harms would be met with criminal liability, thus striking a reasonable balance: satisfying due process while vindicating the intent of the MBTA and allowing for more indirect and unintentional takings to be prosecuted.

The Tenth Circuit’s holding could also increase the prosecution of MBTA violations stemming from wind turbines, which kill between 75,000 and 275,000 birds each year.¹¹⁵ Currently, wind turbine operators face relatively few allegations for illegally taking migratory birds.¹¹⁶ Perhaps the wind-energy industry will face increased MBTA claims as courts demonstrate, as in *Apollo Energies*, more willingness to find criminal liability for the unintentional takings of migratory birds.¹¹⁷

The other edge of the *Apollo Energies* sword is that the inclusion of an additional element makes prosecution more onerous. For example, if applied to an unexpected disaster such as the Deepwater Horizon oil spill, a proximate cause standard might be a burdensome step for prosecutors seeking to establish liability for corporations, whose actions directly cause large scale, but perhaps unforeseeable, migratory bird deaths.¹¹⁸ The exact burden a proximate cause standard would impose would vary since it would be based on a case-by-case factual determination of whether or not the actor had actual or constructive notice of the potential harm to migratory birds. For instance, would a court find liability for an oil tanker that strikes a reef, but not for Deepwater Horizon? In the first, a court might determine that an oil tanker in a perilous environment is on notice that a deadly oil spill might occur. However, with Deepwater Horizon, a far less common and unprecedented event, it might be argued that the oil drill operators could not have foreseen the eventual disaster that led to migratory bird takings. In *Apollo Energies*, it could be argued that Walker should have known about the hazards of heater-treaters, yet the Tenth Circuit

114. Fjetland, *supra* note 112, at 58; *see also Mahler*, 927 F. Supp. at 1579.

115. Robert Bryce, *Windmills Are Killing Our Birds: One Standard for Oil Companies, Another for Green Energy*, WALL STREET J. (Sept. 7, 2009, 7:02 PM), <http://online.wsj.com/article/SB10001424052970203706604574376543308399048.html> (estimating that U.S. wind turbines kill between 75,000 and 275,000 birds per year).

116. *See* John Arnold McKinsey, *Regulating Avian Impacts under the Migratory Bird Treaty Act and Other Laws: The Wind Industry Collides with One of its Own, the Environmental Protection Movement*, 28 ENERGY L.J. 71 (2007) (discussing how other laws, such as the ESA, are more often the source for wind turbine bird death related enforcement actions); Robert Bryce, *supra* note 115 (commenting that the Justice Department is not bringing as many MBTA cases against wind companies, at least compared to oil companies).

117. Note that the MBTA, unlike the ESA for example, does not include a private right of action. Enforcement actions are brought as “selective enforcement” at the discretion of the FWS. *See* McKinsey, *supra* note 116, at 77–79.

118. For a general discussion of the prospects of applying the MBTA to the Deepwater Horizon oil spill before the Tenth Circuit’s *Apollo Energies* opinion, *see* KRISTINA ALEXANDER, CONG. RESEARCH SERV., THE 2010 OIL SPILL: CRIMINAL LIABILITY UNDER WILDLIFE LAWS 7–9 (2010).

believed that the eventual taking of migratory birds was not foreseeable. The *Apollo Energies* standard raises the bar on liability: instead of treating the MBTA as a pure strict liability statute, *Apollo Energies* requires that courts satisfy a proximate cause analysis.

III. HOW *APOLLO ENERGIES* EXPANDS ENVIRONMENTAL CRIMINAL LIABILITY OUTSIDE OF THE MBTA

A. *Differentiating the Public Welfare Doctrine and the Apollo Energies Standard*

The *Apollo Energies* proximate cause holding addresses the same concerns about notice and due process as the public welfare doctrine. In their own way, the proximate cause holding and the public welfare doctrine both claim to ensure that due process is not violated by regulatory crimes lacking mens rea requirements. Both reach the conclusion that, in certain scenarios, the court can presume that a defendant was or should have been aware that his conduct could be regulated. This allows, in both cases, for the prosecution of activities without a stringent mental state requirement. In addition, both the public welfare doctrine and *Apollo Energies*' proximate cause standard involve cases with relatively minor criminal consequences: misdemeanor charges and fines.

Yet *Apollo Energies* did not ground its holding in the public welfare doctrine. The Tenth Circuit was aware of the doctrine as a possible approach—the United States' brief in *Apollo Energies* argued that the MBTA was itself a public welfare statute¹¹⁹—but the court declined to follow this interpretation.¹²⁰ The opinion does note similarities between the MBTA's misdemeanor provision and traditional public welfare offenses. The court states that it “relied on the fact that [like] other regulatory acts where the penalties are small and there is ‘no grave harm to an offender’s reputation,’ the Supreme Court has long recognized a different standard applies to those federal criminal statutes that are essentially regulatory.”¹²¹

However, instead of using the public welfare doctrine as its standard, the Tenth Circuit seems to adopt the appellants' view that the operation of a heater-treater is not hazardous to public safety and therefore not subject to the public welfare doctrine.¹²² One of the primary differences between public welfare

119. Brief for Appellee at 9, *Apollo Energies*, 611 F.3d 679 (10th Cir. 2010) (No. 09-3038) (“[T]he MBTA is a regulatory measure designed to protect the public welfare, derived not from common law but from a series of treaties with other states.”).

120. See *supra* note 20 and accompanying text.

121. *Apollo Energies*, 611 F.3d 679, 684–85 (10th Cir. 2010) (citing *United States v. Engler*, 806 F.2d 425, 432 (3d Cir. 1986)).

122. For the appellant's discussion of the MBTA as falling outside the scope of the public welfare doctrine, see Brief for Appellant at 24, *Apollo Energies*, 611 F.3d 679 (10th Cir. 2010) (No. 09-3038) (“The MBTA as applied prohibition against birds flying into heater treaters and dying is not a

offenses and *Apollo Energies* is that the latter does not regulate a “dangerous or deleterious” material or substance.¹²³ Instead of directly protecting human health, the MBTA protects migratory birds because, as explained by the Supreme Court two years after the statute’s enactment, birds are of “great value as a source of food and in destroying insects injurious to vegetation.”¹²⁴ Thus, the public welfare doctrine does not apply, and the court sought a different rationale by which to uphold the MBTA.

B. Adoption of Public Welfare Doctrine Rationales

Under the public welfare doctrine, the potentially harmful character of the regulated activity provides the source of the presumption that regulation is reasonably foreseeable.¹²⁵ Without a dangerous or deleterious material or conduct, the Tenth Circuit could not have presumed that the defendant was on notice without an additional requirement. The court demonstrated that it understood this limitation of the public welfare doctrine when it was unwilling to find appellant Walker liable for the taking of a migratory bird that occurred before he was aware of the potential problems posed by heater-treaters. One could have argued that the preservation of birds as a source of food and pest control was a statutory purpose sufficiently related to public health.¹²⁶ But this hardly seems adequate compared to the obviously dangerous and deleterious materials covered by the public welfare doctrine, like hand grenades, and the court did not entertain the idea.

The Supreme Court has emphasized that, for due process concerns, what is important is that the actor can be presumed to be on notice that he or she might face liability, not whether or not foreseeability of regulation stems from the dangerousness of the regulated activity.¹²⁷ Thus, if the public welfare doctrine

‘regulatory measure in the interest of public safety, which may well be premised on the theory that one would hardly be surprised to learn that [it] is not an innocent act.’” (quoting *United States v. Freed*, 401 U.S. 601, 609 (1971))).

123. *Cf. Staples v. United States*, 511 U.S. 600, 607 (1994) (describing how public welfare statutes “regulate potentially harmful or injurious items”).

124. *See Missouri v. Holland*, 252 U.S. 416, 431 (1920).

125. *See Staples v. United States*, 511 U.S. 600, 633 (1994) (Stevens, J., dissenting) (“The dangerous character of the product is reasonably presumed to provide sufficient notice of the probability of regulation to justify strict enforcement against those who are merely guilty of negligent, rather than willful, misconduct.”).

126. *See Missouri*, 252 U.S. at 431 (describing the purpose of the MBTA).

127. To illustrate this, *Staples* discussed the undesirable hypothetical of a person being held criminally liable for driving a car without a proper emissions control system. Driving an automobile is surely a dangerous activity, predictably subject to heavy regulation. Yet liability should not attach in such a case just because those elements have been satisfied since it would be unreasonable for the operator of a car without an emissions control system to foresee criminal liability. *See Staples*, 511 U.S. at 613–14. (“If we were to accept as a general rule the Government’s suggestion that dangerous and regulated items place their owners under an obligation to inquire at their peril into compliance with regulations, we would undoubtedly reach some untoward results. Automobiles, for example, might also be termed ‘dangerous’ devices and are highly regulated at both the state and federal levels. Congress

was used as a way of ensuring due process because notice was implied from the foreseeability of regulation, the proximate cause standard satisfied due process more explicitly, but without being limited to situations that involve either materials hazardous to public welfare or crimes that lack any concern about causation.

For example, in *Apollo Energies*, notice of regulation had to be established, rather than presumed. Without the clear threat to society, the Tenth Circuit could not use the traditional public welfare doctrine. Instead, by limiting MBTA liability to those takings that were proximately caused by the defendant, the Tenth Circuit was able to substitute another method of ensuring that due process was satisfied. Through its proximate cause standard, *Apollo Energies* instituted the familiar elements of foreseeability of harm and foreseeability of regulation into a statute that falls outside the realm of the public welfare doctrine.¹²⁸

C. *The Effect of Apollo Energies on Other Environmental Statutes*

Apollo Energies' greatest potential significance is not in its ability to affect MBTA prosecutions, but in its potential to affect other environmental statutes. The Tenth Circuit required a showing of proximate causation to answer the due process concerns that arise when an actor faces liability under a regulatory statute with a decreased mens rea requirement. But the MBTA is not the only regulatory statute with a decreased mens rea requirement.

The proximate cause standard used by the Tenth Circuit could allow for the criminalization of a broader range of activity. The public welfare doctrine was restricted to liability for essentially "quasi-status" crimes.¹²⁹ For example, in *United States v. Freed*, the possession of a hand grenade was criminal even if it never exploded or harmed public health.¹³⁰ *Staples* considered the public welfare doctrine for a statute that criminalized the mere possession of certain firearms.¹³¹ In contrast, under the MBTA, the mere ownership of a heater-treater is not punishable until that device executes the "taking" of a migratory bird.

might see fit to criminalize the violation of certain regulations concerning automobiles, and thus might make it a crime to operate a vehicle without a properly functioning emission control system.").

128. See generally *Apollo Energies*, 611 F.3d 679, 690–91 (2010) (describing the proximate cause standard and its relation to foreseeability).

129. Criminalizing acts that the defendant does not cause is unconstitutional, as is criminalizing acts based on the defendant's status, such as being homeless or being an alcoholic. See *Lambert v. California*, 355 U.S. 225, 228 (1957) (striking down as unconstitutional "where a person, wholly passive and unaware of any wrongdoing, is brought to the bar of justice for condemnation in a criminal case"). I use the term "quasi-status" crime to show the similarity between the possession-based crimes that are discussed in this Note and true status crimes.

130. See generally *United States v. Freed*, 401 U.S. 601 (1971) (discussing the criminality of a hand grenade and the public welfare standard).

131. See *United States v. Staples*, 511 U.S. 600, 602–03 (1994).

Suppose that *Apollo Energies* did not address the act of taking a migratory bird, but instead considered criminal liability for a quasi-status crime similar to the ones previously discussed, such as possessing, hunting, or selling migratory birds. If this were the case, then a proximate causation standard would not have been applicable since such a requirement can only be applied when there is a causal element—the taking of a migratory bird. Unlike the quasi-status public welfare offenses, the quasi-status crimes of possessing or hunting would not have included the presumed foreseeability of regulation necessary for due process since a sufficiently dangerous or deleterious material or activity would have been absent. Therefore, *Apollo Energies*' holding demonstrates that the elements considered in the public welfare doctrine can and will be applied to regulatory statutes that fall outside of the traditional scope of protecting the public health and safety, and to crimes that include a causal element.

Applying public welfare doctrine elements outside of the realm of public health and safety is not as novel as it appears, even under the MBTA. For instance, in *United States v. FMC Corp.*, the Second Circuit was willing to find an actor liable under the MBTA's strict liability provision only because the defendant, by maintaining a dangerous open pond filled with pesticide, had assumed the risk that birds might be killed on its property.¹³² In *FMC Corp.*, as with public welfare offenses, there was a regulated dangerous or deleterious activity, and from that, the court presumed that the actor had notice as to possible regulation.¹³³ Even though the dangerous or deleterious activity was not directly affecting human health, the court was willing to borrow some of the rationale of the public welfare doctrine in order to establish notice. The elements of foreseeability of harm and foreseeability of regulation were both present.

However, since *Apollo Energies*' standard considers liability for actions that are unintentionally or indirectly caused, the proximate cause standard might also be applicable to environmental regulatory statutes that present similar issues of attenuated causation.

In fact, the Supreme Court in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon (Sweet Home)* has already used a proximate cause standard in the context of the Endangered Species Act (ESA).¹³⁴ The ESA makes it unlawful for any person to "take" endangered or threatened species and defines "take" as to harass, harm, pursue, wound, or kill.¹³⁵ The case considered a challenge to the Secretary of the Interior's definition of "harm," which included "significant habitat modification or degradation where it actually kills or injures wildlife."¹³⁶ The defendants were loggers, who had no

132. *United States v. FMC Corp.*, 572 F.2d 902, 907 (2d Cir. 1978).

133. *See id.*

134. *See Babbitt v. Sweet Home Chapter of Cmty. for a Great Oregon (Sweet Home)*, 515 U.S. 687, 712–13 (1995).

135. *See* Endangered Species Act of 1973, 16 U.S.C. §§ 1532(19), 1538(a)(1)(B) (2006).

136. 50 C.F.R. § 17.3 (2010); *see also Sweet Home*, 515 U.S. at 690.

explicit desire to harm endangered species, but whose logging activities would inevitably degrade the habitat of the red-cockaded woodpecker.¹³⁷

The Supreme Court in *Sweet Home* noted that only harms that were reasonably foreseeable should be regulated and that the proximate causation requirement ensures this.¹³⁸ Justice O'Connor's influential concurrence provides further explanation of what constitutes a foreseeable harm under the ESA. O'Connor notes harms include those that result from impacts to an endangered species' essential behaviors or breeding, feeding, and sheltering that are not too attenuated. She then stresses that ESA "harm" regulations apply "where significant habitat modification . . . proximately (foreseeably) causes actual death or injury to . . . [endangered species]."¹³⁹

With *Sweet Home*, it is important to note first that proximate cause was discussed not in response to the ESA take provision's "quasi-status" definitions of "pursue" or "harass,"¹⁴⁰ but on the effect-based element of "harm." *Apollo Energies* conforms to this, which similarly addresses an issue of causation. *Sweet Home* provides further evidence that the element of foreseeability of harm will be a limiting factor in future environmental regulations.

However, unlike *Apollo Energies*, *Sweet Home* is primarily concerned with a civil provision, not a criminal regulation.¹⁴¹ Without the potential for criminal liability, courts may be less concerned with the consideration of adequate notice for due process, which is a serious concern when criminal prosecution is a possibility.¹⁴²

Whether in classic public welfare cases or the *Apollo Energies* holding, the elements of foreseeability of harm and foreseeability of regulation are likely to be required for future environmental regulatory crimes. In public welfare offenses, courts establish foreseeability of harm through the inherently

137. See *Sweet Home*, 515 U.S. at 692, 696.

138. See *id.* at 697 n.9 ("We do not agree with the dissent that the regulation covers results that are not even foreseeable."); *id.* at 700 n.13 ("[T]he dissent incorrectly asserts that the Secretary's regulation . . . dispenses with the foreseeability of harm."); *id.* at 697 n.9 (The regulation "should be read to include ordinary requirements of proximate causation and foreseeability.").

139. *Id.* at 713 (O'Connor, J., concurring).

140. I compare these definitions to status crimes because you are either "harassing" something or you are not, you are either "pursuing" something or you are not. Or in other words, an actor can achieve the status of "harassing" something even though there has not been an effect resulting from his action.

141. See Endangered Species Act of 1973 § 9, 35 U.S.C. § 1538(a)(1)(B) (2006).

142. See *Kolender v. Lawson*, 461 U.S. 352, 357 (1983); *Lambert v. California*, 355 U.S. 225, 228 (1957). There is also a criminal provision under the ESA provision at issue in *Sweet Home*. See *Sweet Home*, 515 U.S. at 697 n.9 (majority opinion). Criminal penalties are available for those who "knowingly violate" the Act. See 16 U.S.C. § 1540(a)(1). Reserving criminal liability for those who knowingly violate the Act would ensure that the actor had notice that they could have faced regulation, but *Sweet Home* declined to fully discuss the mens rea requirements of the ESA's criminal provision since the case centered only on the interpretation of the Secretary's definition of harm, not on an enforcement action. See *Sweet Home*, 515 U.S. at 697 n.9 ("We have imputed scienter requirements to criminal statutes that impose sanctions without expressly requiring scienter . . . but the proper case in which we might consider whether to do so in the § 9 provision . . . would be a challenge to enforcement of that provision itself.").

dangerous characteristics of the regulated item or activity.¹⁴³ *Apollo Energies* illustrates the advisability of limiting liability to only those harms that are foreseeable.¹⁴⁴ But the Tenth Circuit upholds liability for a relatively short chain of causation: heater-treaters can take birds. In *Sweet Home*, especially if one gives weight to Justice O'Connor's concurrence, the court seems willing to accept a much more attenuated chain of causation: loggers cut trees, which modify habitat and affect the breeding habits of endangered birds, which harm the birds.¹⁴⁵

Other than the criminal provision included in the ESA, courts might impute a proximate cause requirement into criminal penalties for non-point source water pollution¹⁴⁶ or takings under the Marine Mammal Protection Act. *Apollo Energies'* proximate cause standard seemingly stemmed from a distinction between quasi-status regulatory crimes and those that lend themselves to a causation analysis. For instance, the Marine Mammal Protection Act includes "harass" in its definition of "taking."¹⁴⁷ Harassing a marine mammal might not include a causal element. One either harasses an animal or not, just like one either possesses a hand grenade or not. A proximate cause standard might not be applicable in such a case, but neither would the public welfare doctrine apply, since there would be no dangerous or deleterious substance. Courts might bend the doctrine while requiring the prosecution to satisfy the elements of foreseeability of regulation and foreseeability of harm, as the court did in *Apollo Energies*.¹⁴⁸

143. See *United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 558, 565 (1971).

144. See *supra* note 114 and accompanying discussion.

145. *Sweet Home*, 515 U.S. at 713 (O'Connor, J., concurring). While this clarifies what may constitute a foreseeable harm, it does not necessarily equate that it will become easier to prosecute takings under section 9 of the ESA. See Steven P. Quarles et al., *Sweet Home and the Narrowing of Wildlife "Take" under Section 9 of the Endangered Species Act*, 26 *Envtl. L. Rep. (Envtl. Law Inst.)* 10,003 (1996) (arguing that *Sweet Home's* focus on proximate cause and particular animals narrowed the range of cases in which habitat modification will constitute a take); see also James R. Rasband, *Priority, Probability, and Proximate Cause: Lessons from Tort Law about Imposing ESA Responsibility for Wildlife Harm on Water Users and Other Joint Habitat Modifiers*, 33 *ENVTL. L.* 595, 609 (2003). Rasband argues that Justice O'Connor's approach suggests that a mere increased strain on a species' "essential functions" resulting from habitat modification might not constitute an actual harm because that individual could beat the odds and survive. See *id.* Rasband suggests that this might decrease the number of successful takings enforcement actions in the future. See *id.*

146. See *Nonpoint Source: Discharge Prohibitions*, ENVTL. PROT. AGENCY (Nov. 24, 2009), <http://water.epa.gov/polwaste/nps/nonpoin2.cfm#13> (stating how, unlike with the Clean Water Act, many state water pollution control acts "can be applied to nonpoint source pollution because they lack the limitation in 33 U.S.C. 1362(12) (2006), which defines 'discharge of a pollutant' as 'from any point source'").

147. See *Marine Mammal Protection Act of 1972*, 16 U.S.C. § 1372(a)(2)(A) (2006).

148. Note that under the MMPA, criminal liability is reserved for "knowing" violations of the statute. For a discussion of criminal liability for a taking under the MMPA, see *United States v. Hayashi*, 22 F.3d 859 (9th Cir. 1993), where a fisherman hoping to deter porpoises from eating the tuna on his line fired two shots into the water away from the mammals. Officials saw this action, and he was originally charged with knowingly taking a marine mammal. The Ninth Circuit overturned his conviction.

CONCLUSION

The Tenth Circuit's decision in *Apollo Energies* is another example of courts limiting regulatory prosecutions to cases where the elements of foreseeability of regulation and foreseeability of harm have been satisfied. The *Apollo Energies* standard provides a template for how environmental regulatory crimes may be addressed in the future. The holding takes several key elements from the public welfare doctrine and then allows for a more broadly applicable standard, one that is not limited to conduct or materials that are dangerous to human health. The proximate cause standard allows courts to ensure that prosecutions meet due process concerns and has the potential to shape constitutional due process analysis in future prosecutions of environmental regulatory crimes. Justifying criminal liability without a strict mens rea requirement began with the public welfare doctrine. However, *Apollo Energies* might signify that courts are becoming more willing to find criminal liability without mens rea requirements for a broader range of regulatory crimes.