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## Beyond "Harm": Abandoning the Actual Injury Standard for Certain Prohibited Takings Under the Endangered Species Act by Giving Independent Meaning to "Harassment"

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# Beyond “Harm”: Abandoning the Actual Injury Standard for Certain Prohibited Takings Under the Endangered Species Act by Giving Independent Meaning to “Harassment”

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## I. INTRODUCTION

As new technology and a desire for progress propel us into the next millennium, a corresponding daily depletion of national and worldwide wildlife resources perpetuates the frightening biological problem of species extinction, resulting in "irreplaceable losses" to medicine, science, ecology, and aesthetics.<sup>1</sup> Every species is a part of the intricate and complicated ecosystem; its stability depends on the continued existence of each of its components.<sup>2</sup> Each black-footed ferret, blue whale, and red wolf contributes to the delicate "balance of nature," a state of ecology that must be maintained for humans to survive.<sup>3</sup> Indeed, scientists have derived much-needed knowledge from other species: how to increase worldwide food production, cures for disease, and a deeper understanding of how the human body functions.<sup>4</sup> Geneticists and biologists have just begun to uncover the vast resources stored in wildlife that can enrich human life.<sup>5</sup> With each species extinction comes a lost opportunity—one that cannot be replaced or artificially reproduced.<sup>6</sup> Thus, undertaking the protection and revival of endangered species is more than an exercise for animal lovers and aesthetes—it is an effort demanded by the human instinct of self-preservation.<sup>7</sup>

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1. See George Cameron Coggins, *Conserving Wildlife Resources: An Overview of the Endangered Species Act of 1973*, 51 N.D. L. REV. 315, 321 (1975) (exploring congressional discussions of the proposed Endangered Species Act and the reasons for its enactment). In 1992, a study estimated that 50,000 species are lost every year, with as many as 4,000 at risk of extinction in the U.S. alone by the year 2000. See *Species Act, Endangered*, WALL ST. J., Jan. 15, 1992, at A12.

2. See 119 CONG. REC. 25,668 (1973).

3. *Id.* at 30,166.

4. See *id.*

5. See *id.* at 30,162.

6. See *id.*

7. See *id.* at 30,166. Mr. Tom Garrett, Wildlife Director of the Friends of the Earth, contemplated the consequences of the species extinction problem. He stated:

We appear caught up today in a metastasizing biological disaster. The precipitous decline of our fellow living creatures throughout the planet mirrors our own chance of avoiding a prodigious calamity. If we cannot contain the proliferation of our own kind, if we will not restrain our nihilistic and randomly destructive technology, the animals

The Endangered Species Act of 1973 ("ESA" or "Act"),<sup>8</sup> the "most comprehensive legislation for the preservation of endangered species ever enacted by any nation,"<sup>9</sup> contains a variety of protections designed to save from extinction those species that the Secretary of the Interior ("Secretary") designates as threatened or endangered.<sup>10</sup> The Act seeks to preserve at-risk species through three basic mechanisms: (1) a federal land acquisition program;<sup>11</sup> (2) the imposition of strict obligations on federal agencies to avoid adverse effects on endangered species;<sup>12</sup> and (3) a prohibition on the taking of endangered species by anybody.<sup>13</sup> The Act provides that "[t]he term 'take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."<sup>14</sup> Since the ESA's enactment twenty-five years ago, "difficult questions of proximity and degree"<sup>15</sup> have arisen regarding the definition of "take," particularly in determining the scope of the term "harm."<sup>16</sup> While "harass" is similarly "vague and expansive,"<sup>17</sup> it has not enjoyed such heated debate.

The first purpose of this Note is to orient the term "harm" within the general dialogue about the scope of ESA-prohibited takings. Accordingly, after a brief overview of endangered species

which we are [before Congress] striving to save will not survive, and our own "harvest" will surely be at hand.

*Endangered Species Act of 1973: Hearings Before Subcomm. on Env't of the Senate Comm. on Commerce*, 93d Cong. 106 (1973) [hereinafter *Hearings*].

8. Pub. L. No. 93-205, 87 Stat. 884 (1973) (codified as amended at 16 U.S.C. §§ 1531-1544 (1994)).

9. *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978).

10. See 16 U.S.C. § 1531. The Act defines the term "endangered species" to mean "any species which is in danger of extinction throughout all or a significant portion of its range." *Id.* § 1532(6).

11. See *id.* § 1534.

12. See *id.* § 1536.

13. See *id.* § 1538.

14. See *id.* § 1532(19).

15. *Babbitt v. Sweet Home Chapter of Communities*, 515 U.S. 687, 708 (1995).

16. For example, in *Marbled Murrelet v. Babbitt*, 83 F.3d 1060 (9th Cir. 1996), *Forest Conservation Council v. Rosboro Lumber Co.*, 50 F.3d 781 (9th Cir. 1995), and *American Bald Eagle v. Bhatti*, 9 F.3d 163 (1st Cir. 1993), the courts struggled to give meaning to a word with a "potential breadth [that] . . . is indisputable." *Sweet Home Chapter of Communities v. Babbitt*, 17 F.3d 1463, 1464 (D.C. Cir. 1994), *modifying*, 1 F.3d 1 (D.C. Cir. 1993) (*per curiam*), *rev'd* 515 U.S. 687 (1995). The struggle to define the parameters of "harm" has been long and hard—the term has seen a regulatory definition, a regulatory redefinition, and a subsequent circuit split over the meaning of the redefinition. See *generally id.*; *Palila v. Hawaii Dep't of Land & Natural Resources (Palila IV)*, 852 F.2d 1106, 1108 (9th Cir. 1988); 50 C.F.R. § 17.3 (1998) (definition of "harm"). The issue was partially resolved by the Supreme Court in *Sweet Home*.

17. *Sweet Home*, 17 F.3d at 1475 (Mikva, C.J., dissenting).

legislation in Part II, Part III explores current views on the scope of "harm" as revealed by judicial application of the term and its regulatory definition. A series of Ninth Circuit cases held that showing an action poses a significant risk of harm to a protected species is sufficient to sustain an ESA cause of action,<sup>18</sup> while the First Circuit held that only showing past or present injury to a protected species will suffice.<sup>19</sup> Both agencies developed these standards largely in the context of "harm" analysis, while only cursorily addressing "harassment." Additionally, the Supreme Court subsequently emphasized the necessity of showing "actual harm or injury" where the prohibited taking occurs through "harm," but was absolutely silent regarding the applicability of the "significant risk of harm" standard to "harassment."<sup>20</sup> Part IV offers a critique of these two models and an analysis of *Sweet Home's* effect on ESA-takings jurisprudence.

This Note then highlights "harassment" in the context of ESA-prohibited takings and demonstrates the term's independent meaning within the definition of "take." Part V overviews the U.S. Fish & Wildlife Service's regulations defining "harm" and "harass." The Secretary's final redefinition of "harm" stressed that no liability for "harm" would be found absent "actual harm or injury,"<sup>21</sup> but defined "harass" as encompassing acts and omissions that create a "likelihood of injury to wildlife."<sup>22</sup> Comparison of these definitions reveals that "harm" involves the proof of past or present injury standard, while "harass" incorporates the significant risk of harm standard.

This Note advocates an alternative approach to analyzing takings claims—using "harassment" analysis in cases where a threat of future harm is alleged, and "harm" analysis in cases of past or present injury. This Note concludes that this alternative approach, consistent with both the legislative intent behind the takings prohibition and the regulatory understanding of it, is fairer in application to both humans and endangered species than the First and Ninth Circuit models.

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18. See, e.g., *Rosboro*, 50 F.3d at 783; *National Wildlife Fed'n v. Burlington N. R.R.*, 23 F.3d 1508, 1511 (9th Cir. 1994); *Palila IV*, 852 F.2d at 1108.

19. See *Bhatti*, 9 F.3d at 165.

20. See *Babbitt v. Sweet Home Chapter of Communities*, 515 U.S. 687, 708 (1995); see also *infra* Part III.C.

21. Final Redefinition of "Harm," 50 C.F.R. § 17.3 (1998).

22. *Id.* (emphasis added).

## II. FEDERAL LEGISLATION FOR THE PROTECTION OF ENDANGERED SPECIES

### A. Precursors to the Endangered Species Act

Two statutes predating the ESA responded to mounting national concern over the extinction of animal and plant life in the United States: the Endangered Species Preservation Act of 1966<sup>23</sup> ("ESPA"), and the Endangered Species Conservation Act of 1969<sup>24</sup> ("ESCA"). While the ESPA and ESCA addressed the same problem as the ESA,<sup>25</sup> a brief discussion of the scope and lack of enforcement provisions in these precursors helps orient the ESA in the evolving field of endangered species jurisprudence.

#### 1. The Endangered Species Preservation Act of 1966

In 1966, Congress passed the ESPA, the first law specifically designed to protect endangered species as a class.<sup>26</sup> In retrospect, the ESPA's provisions seem grossly inadequate to accomplish its stated purpose of "provid[ing] . . . for the conservation, protection, restoration, and propagation of selected species of native species of fish and wildlife . . . that are threatened with extinction," because it did not establish implementation programs or penalties for violators.<sup>27</sup> Although it carried little practical weight outside the National Wildlife Refuge System, the ESPA's symbolic import was great: Congress had made species extinction a national concern.<sup>28</sup> In particular, the ESPA prohibited takings of "any fish, bird, mammal, or other wild vertebrate or invertebrate animals" in danger of extinction.<sup>29</sup> It defined "taking" to mean "pursue, hunt, shoot,

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23. Pub. L. No. 89-669, 80 Stat. 926 (1966) (repealed 1973).

24. Pub. L. No. 91-135, 83 Stat. 275 (1969), *repealed by* Endangered Species Act of 1973, § 14, Pub. L. No. 93-205, 87 Stat. 884, 903.

25. See H.R. REP. NO. 97-567, at 9-10 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2807, 2809.

26. See Federico Cheever, *An Introduction to the Prohibition Against Takings in Section 9 of the Endangered Species Act of 1973: Learning to Live With a Powerful Species Preservation Law*, 62 U. COLO. L. REV. 109, 123 (1991). Two years earlier the Bureau of Sports Fisheries and Wildlife (which evolved into the Fish and Wildlife Service) had compiled the first endangered species list. See Ike C. Sugg, *Caught in the Act: Evaluating the Endangered Species Act, Its Effects on Man and Prospects for Reform*, 24 CUMB. L. REV. 1, 17-18 (1993).

27. Endangered Species Preservation Act §1(a).

28. President Johnson, moved by the significance of the ESPA, called it "a milestone in the history of conservation." Sugg, *supra* note 26, at 18.

29. Endangered Species Preservation Act, 80 Stat. at 928.

capture, collect, or attempt to pursue, hunt, shoot, capture, collect or kill."<sup>30</sup> The definition of "taking" did not include the broad terms "harm" and "harass."<sup>31</sup> Three factors limited the ESPA's practical impact: (1) the taking "prohibition was subject to more or less unlimited exception at the discretion of the Secretary,"<sup>32</sup> (2) it protected only endangered species living on national wildlife refuge land,<sup>33</sup> and (3) the duty to protect endangered species extended only to "the Secretary of the Interior, the Secretary of Agriculture, and the Secretary of Defense, together with the heads of bureaus, agencies, and services within their departments" and only "insofar as [was] practicable and consistent with the primary purposes of such bureaus, agencies, and services."<sup>34</sup> In sum, the ESPA only protected endangered species living on certain federal lands, and only when convenient for particular agencies.

## 2. The Endangered Species Conservation Act of 1969

Three years later, the ESCA "sought to ameliorate the perceived inadequacies of the ESPA, while retaining those provisions which gave it strength"<sup>35</sup> by banning the importation of endangered species of fish and wildlife and expanding the government's land acquisition authority.<sup>36</sup> The classification of species as "endangered" under the ESCA was narrower than under the ESPA, prohibiting only the importation of species "threatened with worldwide extinction."<sup>37</sup> As the decade drew to a close, the ESPA and ESCA served as models of wildlife protection for the rest of the world.<sup>38</sup>

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30. *Id.* § 5(b), 80 Stat. at 929.

31. *See id.*

32. Cheever, *supra* note 26, at 124.

33. *See* Endangered Species Preservation Act § 4, 80 Stat. at 927.

34. *Id.* § 1(b), 80 Stat. at 926 (emphasis added).

35. Sugg, *supra* note 26, at 19.

36. Endangered Species Conservation Act of 1969, Pub. L. No. 91-135, 83 Stat. 275 (1969) (repealed 1973).

37. *Id.* § 2, 83 Stat. at 275. One author, however, argues that the ESCA actually expanded the classifications of species eligible for protection by amending the Lacey Act of 1900 to prohibit the importation of unlawfully taken reptiles, amphibians, mollusks, and crustaceans in addition to wild birds and mammals. *See* Sugg, *supra* note 26, at 19.

38. *See* 119 CONG. REC. 30,165 (1973). The U.S. efforts to preserve endangered species stimulated international interest, giving rise to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), Mar. 3, 1973, 27 U.S.T. 1087. Eighty nations attended the conference and agreed to join forces in combating international trade in endangered species. *See Hearings, supra* note 7, at 76, 78.

*B. The Endangered Species Act of 1973*

In 1973, despite congressional efforts to protect animals threatened with extinction, the rate of species disappearance was rapidly increasing.<sup>39</sup> There was a general recognition that while the ESPA and ESCA embodied sound purpose and policy,<sup>40</sup> given their limited scope, Congress's goal of conserving, protecting, restoring, and propagating species in imminent danger of extinction remained unattainable.<sup>41</sup> Built on the framework of the ESPA and ESCA, the Endangered Species Act of 1973 sought to preserve the spirit of the precursor legislation while developing management and enforcement provisions to expand the practical effect of the federal endangered species conservation program.<sup>42</sup>

The Act, administered by the United States Fish and Wildlife Service ("FWS") and the National Marine Fisheries Service ("NMFS"),<sup>43</sup> has the broad purposes of "provid[ing] a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved [and] provid[ing] a program for the conservation of . . . such endangered species."<sup>44</sup> To accomplish these goals, the ESA first requires a listing of both endangered<sup>45</sup> and threatened species,<sup>46</sup> extending protection for the first time to animals

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39. See 119 CONG. REC. 30,167 (1973) (statement of Rep. Clausen).

40. See *id.* at 30,162.

41. See *id.* at 25,668.

Since 1969, the lessons learned from implementation of the [ESCA] on a Federal and State level have prompted the need for basic and comprehensive revisions. Experience has taught us that, under existing laws, the Federal Government was unable to adequately provide conservation and protection measures to [endangered and threatened] species.

*Id.* at 30,164 (statement of Rep. Goodling). President Nixon was the first to propose legislation amending the ESCA in his Environmental Message of February 8, 1972. See *Hearings, supra* note 7, at 75-76.

42. See S. REP. NO. 93-307 (1973), reprinted in 1973 U.S.C.C.A.N. 2989, 2991. Expressing his satisfaction with differences between the precursor legislation and the House bill that later became part of the ESA, Representative Gilman remarked that "[t]he measure now before us . . . puts some teeth in our efforts to provide a program for the conservation and protection of endangered wildlife." 119 CONG. REC. 30,167 (1973).

43. The ESA gives these agencies broad discretion to establish and publish guidelines "to insure that the purposes of [the Act] are achieved efficiently and effectively." 16 U.S.C. §§ 1533(h), 1538(d)(3), 1539(f)(5) (1994). Accordingly, the FWS has promulgated definitions for twenty-five statutory terms, including "harm" and "harass." See 50 C.F.R. § 17.3 (1998).

44. 16 U.S.C. § 1531(b).

45. "The term 'endangered species' means any species which is in danger of extinction throughout all or a significant portion of its range." *Id.* § 1532(6).

46. See *id.* § 1533(c). The Secretary also has the discretion to list species that "so closely resemble" endangered or threatened species that attempting to differentiate between the two



not yet endangered but "likely to become endangered species within the foreseeable future."<sup>47</sup> The definitions of "endangered" and "threatened" species expanded to include a species in danger of extinction "throughout all or a significant portion of its range,"<sup>48</sup> instead of limiting protection, as previously, to only those species threatened with worldwide extinction.<sup>49</sup> For each species on the endangered list, the Secretary *must* issue regulations to provide for its conservation and has discretion to issue such regulations for threatened species as well.<sup>50</sup> Because Congress regarded acquiring private land an integral part of conserving those species threatened by habitat destruction, land acquisition by the federal government once again became a means of implementing the Act's goals.<sup>51</sup> Section 7 of the Act mapped out a critical departure from previous legislation, requiring all federal departments and agencies to use their powers to further the ESA's purposes by (1) carrying out programs for the conservation of endangered and threatened species as directed by the Secretary, and (2) taking "such action necessary to insure that actions authorized, funded or carried out by them do not jeopardize the continued existence" of such species or destroy or modify their critical habitat.<sup>52</sup> This directive applies to federal entities even when species

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species creates an additional threat to the endangered or threatened species, if he determines that listing the "look-alike" species will facilitate the enforcement of and further the policy of the ESA. *Id.* § 1533(e).

47. *Id.* § 1532(20). Many consider Section 4, the provision for listing species, the "cornerstone of the ESA." J.B. Ruhl, *Regional Habitat Conservation Planning Under the Endangered Species Act: Pushing the Legal and Practical Limits of Species Protection*, 44 SW. L.J. 1393, 1396 (1991). Congress itself deemed the listing process "the keystone of the Endangered Species Act." H.R. REP. NO. 97-567, at 10 (1982), reprinted in 1982 U.S.C.C.A.N. 2807, 2810. In 1978, Congress amended the ESA to require the Secretary to consider the economic impact of listing a species before deciding to do so, Pub. L. No. 95-632, 92 Stat. 3751 (1978), but the 1982 amendments to the ESA removed economic considerations from the listing process, revealing Congress's unwillingness to sacrifice the protection of endangered species to economic concerns. See *infra* note 168 and accompanying text.

48. 16 U.S.C. §§ 1532(6), (20).

49. See *supra* note 37 and accompanying text.

50. See 16 U.S.C. § 1533(d). The FWS, via regulation, has made all prohibited interactions with endangered species likewise applicable to threatened species. See 50 C.F.R. § 17.31(a) (1998). Special rules and permits allow exceptions to the extension of this blanket rule. See Steven G. Davison, *Alteration of Wildlife Habitat as a Prohibited Taking Under the Endangered Species Act*, 10 J. LAND USE & ENVTL. L. 155, 162 & n.40 (1995), for a discussion of the FWS's regulation affording nearly equal protection to threatened and endangered species and the special rules and permits by which the Secretary grants exceptions.

51. See Albert Gidari, *The Endangered Species Act: Impact of Section 9 on Private Landowners*, 24 ENVTL. L. 419, 451 (1994). For a description of the land acquisition program and its funding, see 16 U.S.C. § 1534.

52. 16 U.S.C. § 1536(a).

conservation conflicts with the primary purpose of the department or agency.<sup>53</sup>

Section 9, the scope of which will be explored throughout this Note, prohibits any person from importing, exporting, taking, possessing, selling, delivering, carrying, transporting, or receiving any endangered species of fish or wildlife.<sup>54</sup> The Section 9 prohibitions are enforced through Section 11,<sup>55</sup> the "teeth"<sup>56</sup> of the Act. This section gives private citizens the authority to seek injunctive relief against violators.<sup>57</sup> ESA violators, with few exceptions, receive civil or criminal fines and forfeit any endangered species taken.<sup>58</sup> Federal agencies have the authority to revoke violators' licenses and permits, and criminal violators face imprisonment.<sup>59</sup> Finally, governmental protection of endangered species goes beyond the provisions of the ESA. Congress provided that the Act prescribes merely a "federal floor" to regulate the taking of endangered and threatened species, and states are free to adopt more protective measures if they desire.<sup>60</sup>

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53. See *Gidari*, *supra* note 51, at 451. Allowing federal agencies to avoid protecting endangered species when doing so would conflict with their primary purpose was a major limitation on the ESA. See *supra* Part II.A.1. The directive to agencies to protect endangered species regardless of the agencies' primary missions has led one expert to remark that the ESA "elevates the goal of conservation of listed species above virtually all other considerations." DANIEL J. ROHLF, *THE ENDANGERED SPECIES ACT: A GUIDE TO ITS PROTECTIONS AND IMPLEMENTATION* 25 (1989).

54. See 16 U.S.C. § 1538(a)(1). Section 10 provides a few very limited exceptions to the Section 9 takings prohibition. The FWS or NMFS can grant a takings exception: (1) "for scientific purposes or to enhance the propagation or survival of" an endangered species, (2) in instances of "undue economic hardship," when a party suffers severe economic harm by the listing of a species as endangered (in which case the exemption is usually limited to a one-year duration), and (3) for certain native Alaskans who take endangered species for subsistence purposes. *Id.* § 1539; see *infra* Part IV.A and notes 165-167 and accompanying text (discussing another limited set of exceptions to the Section 9 takings prohibition called "incidental take permits" added by Congress in 1982).

55. See 16 U.S.C. § 1540.

56. See *supra* note 27.

57. See 16 U.S.C. § 1540(g); see also *infra* Part IV.A and notes 172-177 (discussing the ESA's injunction provisions).

58. See 16 U.S.C. § 1540(g). An ESA violator can escape both civil and criminal penalties by demonstrating "a good faith belief that he was acting to protect himself or herself, a member of his or her family, or any other individual from bodily harm, from any endangered or threatened species." *Id.* §§ 1540(a)(3), (b)(3).

59. See *id.* § 1540. The licenses and permits revoked need not directly relate to the taking.

60. See *id.* § 1535(f); 119 CONG. REC. 30,163 (1973).

### III. CURRENT VIEWS ON THE SCOPE OF "HARM"

Although the Section 9 takings prohibition<sup>61</sup> has been characterized as a "simple, unambiguous" provision, its scope remains unclear after twenty-six years.<sup>62</sup> The statute defines "take" as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."<sup>63</sup> One word in the definition of "take," "harm," has inspired an entire body of Section 9 caselaw and scholarship.<sup>64</sup> The FWS defines "harm" as "an act which actually kills or injures wildlife. Such an act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering."<sup>65</sup> Despite the FWS's efforts to delineate the scope of "harm" prohibited by the ESA, controversy raged for two decades over what kind of habitat modifica-

61. See *supra* note 54 and accompanying text.

62. Rather than attributing Section 9's controversial and litigious record to statutory ambiguity and a genuine disagreement over the scope of the provision as written, Cheever argues that courts have been unwilling to fully enforce the taking prohibition because it is so "breathhtaking in its reach and power." Cheever, *supra* note 26, at 109-10.

63. 16 U.S.C. § 1532(19).

64. See, e.g., Davison, *supra* note 50, at 161 (arguing that the FWS's definition of "harm" is not facially void for vagueness but is in fact a reasonable interpretation by an agency of an ambiguous statutory provision); Gidari, *supra* note 51, at 498 (asserting that the expanding definition of "harm" threatens "the very underpinning of our society—the right to exclusive use and enjoyment of one's property"); James Tyler Moore, Note, *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon: Defining "Harm" Under Section 9 of the Endangered Species Act*, 32 IDAHO L. REV. 81, 108-09 (1995) (arguing for a statutory amendment limiting the scope of "harm" to the "direct application of force against an endangered species"). For cases exploring the appropriate definition of "harm," see *Babbitt v. Sweet Home Chapter of Communities*, (*Sweet Home*) 515 U.S. 687 (1995); *American Bald Eagle v. Bhatti*, 9 F.3d 163 (1st Cir. 1993); *Sierra Club v. Yeutter*, 926 F.2d 429 (5th Cir. 1991); *Palila v. Hawaii Dep't of Land and Natural Resources (Palila II)*, 639 F.2d 495 (9th Cir. 1981); *Hamilton v. City of Austin*, 8 F. Supp. 2d 886 (W.D. Tex. 1998).

65. 50 C.F.R. § 17.3 (1998). The definition quoted here is actually a revised definition of the term issued by the Secretary of the Interior in 1981. See Final Redefinition of "Harm," 46 Fed. Reg. 54,748, 54,748 (1981). The original definition characterized "harm" as:

[A]n act or omission which actually injures or kills wildlife, including acts which annoy it to such an extent as to significantly disrupt essential behavioral patterns, which include, but are not limited to, breeding, feeding, or sheltering; significant environmental modification or degradation which has such effects is included within the meaning of "harm."

*Id.* The two definitions are basically the same in substance. See *Sweet Home Chapter of Communities v. Lujan*, 806 F. Supp. 279, 284 n.1 (D.D.C. 1992), *aff'd*, 515 U.S. 687 (1995). The Secretary had contemplated a more significant revision of the definition and proposed a rule that would have significantly limited the scope of the word "harm." See Proposed Redefinition of "Harm," 46 Fed. Reg. 29,490, 29,490 (1981). After receiving 262 comments opposed to the proposed rule and only 66 in favor, the Secretary abandoned the proposal and left the basic meaning of the original definition intact. See Final Redefinition of "Harm," 46 Fed. Reg. at 54,748; Sugg, *supra* note 26, at 34; see also *infra* Part V.A.

tion would result in a "harm."<sup>66</sup> That debate culminated in a facial challenge to the Secretary's definition of "harm," heard by the Supreme Court in 1995.<sup>67</sup> The Court upheld that definition, affirming that habitat modification may constitute a "harm" in violation of Section 9.<sup>68</sup> But habitat modification causing harm to an endangered species is just one of many ways humans can commit a prohibited "taking,"<sup>69</sup> revealing that the question, "What constitutes a 'harm?'" is merely one small issue in a deeper and more fundamental inquiry—"What constitutes a 'taking?'" The jurisprudence arising from the "harm" debate informs this larger inquiry.

In the context of the "harm" debate, courts have developed two analytical models to evaluate takings claims.<sup>70</sup> The framework adopted by the First Circuit requires proof of a past or present injury to an endangered species before finding a "taking."<sup>71</sup> In contrast, the Ninth Circuit's model employs a much lower standard—any act or omission that creates a significant risk of harm to an endangered species constitutes a Section 9 violation.<sup>72</sup> Parts III.A and III.B explore these analytical models in turn. Part III.C assesses the effect

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66. See *infra* Part III.

67. See generally *Sweet Home*, 515 U.S. 687.

68. See *id.* at 700.

69. See 16 U.S.C. § 1532(19) (1994).

70. Part III stresses the differences between the analytical models adopted by the Ninth and First Circuits, although they do share one important characteristic. With rare exception, both circuits have made the "harm" inquiry co-extensive with the presumptively larger "taking" inquiry. See *infra* notes 95, 107, 133 and accompanying text. Thus, while the two circuits have adopted radically different standards for what constitutes "harm," their entire takings analyses consist of applying the "harm" standard. But see *Marbled Murrelet v. Pacific Lumber Co.*, 880 F. Supp. 1343, 1367 (N.D. Cal. 1995), *aff'd*, 83 F.3d 1060 (9th Cir. 1996). In *Marbled Murrelet*, however, a Ninth Circuit district court buttressed its harm finding with a finding of harassment, thereby stretching its taking inquiry beyond harm. See *id.* at 1367. At the time the district court decided *Marbled Murrelet*, a facial challenge to the regulatory definition of "harm" was before the Supreme Court in *Sweet Home*, 515 U.S. 687. The independent finding of a taking through harassment may have been designed to retain the validity of the court's holding in case of an unfavorable decision in the pending *Sweet Home* case. When *Marbled Murrelet* reached the appellate court, "harm" had survived the facial challenge. See *id.* at 708. See generally *Marbled Murrelet v. Babbitt*, 83 F.3d 1060 (9th Cir. 1996). The Ninth Circuit affirmed the lower court's finding of "harm" and found no need to consider the harassment issue. See *Marbled Murrelet*, 83 F.3d at 1069 n.5.

71. See, e.g., *American Bald Eagle v. Bhatti*, 9 F.3d 163, 165-66 (1st Cir. 1993); *Strahan v. Cox*, 939 F. Supp. 963, 986 (D. Mass. 1996).

72. The Ninth Circuit has consistently held that a significant risk of harm is a "harm." See, e.g., *Marbled Murrelet*, 83 F.3d at 1068; *Forest Conservation Council v. Rosboro Lumber Co.*, 50 F.3d 781, 784-85 (9th Cir. 1995); *Palila v. Hawaii Dep't of Land and Natural Resources (Palila IV)*, 852 F.2d 1106, 1108 (9th Cir. 1988); see also *infra* Part III.A. A "harm" is a Section 9 violation. See 16 U.S.C. § 1532(19).

of the Supreme Court's decision in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon* on Section 9 jurisprudence.

A. *The Ninth Circuit Standard: A Significant Risk of Harm*

In 1978, the Supreme Court enjoined the construction of the Tennessee Valley Authority's virtually complete \$100 million Tellico Dam because its completion would have eradicated the only known population of an endangered species of fish.<sup>73</sup> While *Tennessee Valley Authority v. Hill* turned on Section 7 of the ESA (setting forth the duty of a federal agency to ensure that its actions do not jeopardize endangered species), the implications of the decision reached all provisions of the Act, particularly Section 9. Despite the TVA's argument for a "common sense" approach to interpreting the ESA and plea for a "reasonable" remedy to the Tellico Dam problem, the Court declared that "Congress has spoken in the plainest of words, making it abundantly clear that . . . endangered species [are] the highest of priorities."<sup>74</sup> The majority opinion "held unequivocally for the vigorous application of congressional intent"<sup>75</sup> and made clear that, when interpreting the Act, the federal courts should not seek to limit its practical effects.<sup>76</sup>

Exactly one year later, when a district court in Hawaii resolved the first claim grounded in the Section 9 taking prohibition,<sup>77</sup> it employed a broad and expansive reading. In *Palila v. Hawaii Department of Land and Natural Resources (Palila I)*, national and local conservation groups alleged that the Hawaii Department of Land and Natural Resources' maintenance of feral<sup>78</sup> sheep and goats for sport hunting in the Palila habitat constituted a "taking" in violation of Section 9.<sup>79</sup> The Palila, an endangered bird species, lives exclusively in the mamane-naio forest on the slopes of Mauna Kea on the Island of Hawaii and depends on the mamane trees for food, shelter, and nest sites.<sup>80</sup> By eating the seedlings and shoots of the

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73. See *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 172-73 (1978).

74. *Id.* at 194.

75. Cheever, *supra* note 26, at 135.

76. See *id.* at 136; see also *Hill*, 437 U.S. at 173.

77. See *Palila v. Hawaii Dep't of Land & Natural Resources (Palila I)*, 471 F. Supp. 985 (D. Haw. 1979), *aff'd*, 639 F.2d 495 (9th Cir. 1981).

78. The term "feral" denotes an animal that presently lives as a wild creature but was once domesticated or has descended from domesticated animals. See *id.* at 989 n.8.

79. See *id.* at 987.

80. See *id.* at 989.

mamane trees, the feral sheep and goats prevented the maturation of new mamane trees and the regeneration of the mamane-naio forest.<sup>81</sup>

Without evidence of Palila deaths, injuries, or population decline,<sup>82</sup> the court still found a Section 9 taking based on its interpretation of the Secretary's definition of "harm," even though the definition characterizes significant habitat modification or degradation as "harm" only when it actually kills or injures wildlife.<sup>83</sup> The court's "harm" analysis was brief, without discussion of the "actual harm or injury" element of the regulatory definition quoted in the opinion.<sup>84</sup> Despite the conclusory nature of the court's holding, its findings reveal its reasoning: feral animals eat the young seedlings of the trees on which the birds depend, preventing the growth of new trees; without continuous regeneration of the trees and forest, the birds will eventually lack food and shelter; thus, the animals are "harmed."<sup>85</sup> The court's analysis characterized processes that will cause harm to endangered species in the future as "harm" within the ESA's proscription.

The Ninth Circuit affirmed the district court's decision in *Palila II*,<sup>86</sup> but rendered an arguably broader interpretation of an ESA "taking."<sup>87</sup> After paraphrasing the Secretary's definitions of both "harass"<sup>88</sup> and "harm" (omitting any reference to the regulatory

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81. *See id.* at 990.

82. *See id.* at 988 n.2.

83. After quoting the Secretary's definition of harm, the court concluded "[t]he undisputed facts bring the acts and omissions of defendants *clearly within [this] definition*]. I conclude that there is an unlawful 'taking' of the Palila." *Id.* at 995 (emphasis added). The regulatory definition of "harm" was slightly different at that time, but its basic meaning is no different today. *See supra* note 65.

84. *See Palila I*, 471 F. Supp at 995.

85. *See* *Gidari*, *supra* note 51, at 466-67.

86. *See Palila v. Hawaii Dep't of Land & Natural Resources (Palila II)*, 639 F.2d 495, 497 (9th Cir. 1981).

87. *See* *Gidari*, *supra* note 51, at 468.

88. The court stated that the regulations define harass as "an intentional or negligent act or omission that significantly disrupts normal behavior patterns of the endangered animal." *Palila II*, 639 F.2d at 497. Why the court mentioned the word "harass" and a portion of that term's definition in the opinion remains unclear, as the parties did not dispute whether the maintenance of feral sheep and goats in the mamane-naio forest constituted "harassment," resulting in a prohibited "taking." In paraphrasing the Secretary's definition of harassment, the court did not indicate that creating a "likelihood of injury to wildlife" by annoying it to the extent of significantly disrupting its normal behavioral patterns constitutes "harassment." *See* 50 C.F.R. § 17.3 (1998). Under the Secretary's definition, "harass" means "an intentional or negligent act or omission which creates the likelihood of injury to wildlife." *Id.* Despite the chain of events that must occur before the Palila suffers harm, the court did not ground its holding in harassment's "likelihood of injury" language. Perhaps the court included the

requirement of actual death or injury for a finding of "harm"),<sup>89</sup> the court held that "[t]he defendant's action in maintaining feral sheep and goats in the critical habitat . . . violat[es] the Act since . . . the Palila was endangered by the activity."<sup>90</sup> By mentioning the term "harass" and defining "harm" without the Secretary's attendant requirement of actual death or injury, the court expanded the scope of "taking" to include those acts that pose a risk of harm to endangered species.<sup>91</sup> Building on the district court's opinion that characterized future harm as "harm," the appellate court found "endangerment" of an endangered species to be prohibited by the ESA.<sup>92</sup>

Seven years later, the Hawaii court that decided *Palila I* had the opportunity to reexamine its takings analysis, again in the context of the mamane-naio forest on Mauna Kea.<sup>93</sup> The Palila's habitat was being degraded by another sport hunting animal, the mouflon sheep, which also fed on mamane tree seedlings.<sup>94</sup> The district court narrowly formulated the issue in *Palila III*, stating that its single inquiry was "whether the mouflon sheep [were] 'harming'<sup>95</sup> the Palila."<sup>96</sup> Because the endangered bird's population had grown since the *Palila I & II decisions*,<sup>97</sup> and because all acknowledged that it would take years for the feeding habits of the mouflon sheep to affect the Palila's ability to shelter, feed, and nest in the mamane trees,<sup>98</sup> the defendants stressed that there was no showing of "actual injury"

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paraphrased definition as an indication of the broad scope of the taking prohibition, of which "harm" is but one facet.

89. See *Palila II*, 639 F.2d at 497.

90. *Id.* The court did not define or explain what it meant by "endanger." Webster's Dictionary defines "endanger" as "to bring into danger or peril of *probable* harm or loss." WEBSTER'S NEW INTERNATIONAL DICTIONARY 748 (3d ed. 1993) (emphasis added). Since no evidence of injuries to the Palila was reported, it seems likely that the court, in using the term "endanger," was indicating that a risk of harm to an endangered species would constitute a taking under some circumstances.

91. *But see* *Gidari*, *supra* note 51, at 468-70 (arguing that the court's exclusion of the actual death or injury requirement was not intentional, but that the court had "confused" the Section 7 obligations of the federal government with the Section 9 takings prohibition).

92. See *Palila II*, 639 F.2d at 497. Because "harass" reaches a significant risk of harm, the court could have grounded its "takings" analysis in terms of "harass" rather than "harm." In a sense, the court ascribed valid "takings" analysis to the wrong term.

93. See generally *Palila v. Hawaii Dep't of Land and Natural Resources (Palila III)*, 649 F. Supp. 1070 (D. Haw. 1986), *aff'd*, 852 F.2d 1106 (9th Cir. 1988).

94. See *id.* at 1072.

95. It is unclear why the court searched only for a harm, rather than the direct statutory term "take." Part IV.B of this Note observes that the term "harm" under the significant risk of harm model has been elasticized to encompass the entire spectrum of takings, such that "harm" and "take" are synonymous under this model, as it has evolved in the Ninth Circuit.

96. *Palila III*, 649 F. Supp. at 1072.

97. See *id.* at 1073.

98. See *id.* at 1075.

to the Palila that would meet the Secretary's definition of "harm."<sup>99</sup> The defendants argued that the only effect of the mouflon sheep's presence in the Palila habitat was a "potential injury," not an "actual injury," thus falling outside the scope of "harm."<sup>100</sup> In response, the district court explained:

A finding of "[actual] harm" does not require death to individual members of the species; nor does it require a finding that habitat degradation is presently driving the species further toward extinction. Habitat destruction that *prevents the recovery of the species* by affecting essential behavioral patterns *causes actual injury* to the species and effects a taking under section 9 of the Act.<sup>101</sup>

The *Palila III* district court's decision reaffirmed the district and circuit holdings in *Palila I & II*, stressing that the concept of "harm" may embody risk of harm and future harm. But this time the district court stretched "harm" to include those activities that keep an endangered species *at status quo*.<sup>102</sup> Under this definition of harm, it becomes difficult to distinguish between that which does not affect an endangered species and that which harms it. The Ninth Circuit explicitly declined to reach this broader holding<sup>103</sup> but agreed with the district court's treatment of the suggested dichotomy between "potential" and "actual" harm in its *Palila IV* opinion.<sup>104</sup> It found the district court's interpretation of the word "harm" consistent with both the Secretary's construction of the statute<sup>105</sup> and the policy and purpose of Congress in enacting the ESA.<sup>106</sup> The *Palila IV* reasoning

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99. *See id.*

100. *See id.*

101. *Id.* (emphasis added). Arguably, the court's response to the argument that "potential injury" should be treated differently than "actual injury" offers little clarification on the court's position. The Ninth Circuit revisited and clarified this point in *Forest Conservation Council v. Rosboro Lumber Co.*, 50 F.3d 781 (9th Cir. 1995). *See infra* notes 107-15 and accompanying text.

102. *See Palila III*, 649 F. Supp. at 1075, 1077 ("[I]f the habitat modification prevents the population from recovering, then this causes injury to the species and should be actionable under section 9.").

103. *See Palila v. Hawaii Dep't of Land & Natural Resources (Palila IV)*, 852 F.2d 1106, 1110 (9th Cir. 1988), *aff'g* 649 F. Supp. 1070 (D. Haw. 1986).

104. *See id.* at 1108.

105. *See id.* The circuit court reasoned that when the Secretary had redefined the word "harm" in 1981, he was aware of the *Palila II* holding and let that construction of "harm" stand in his notice of redefinition. The part of the *Palila III* holding reaffirmed by the circuit court being no different from the holding in *Palila II*, the court regarded this interpretation of "harm" as consistent with the Secretary's construction of the ESA. *See id.*

106. The court found support for its interpretation of "harm" in legislative history that declared that "take" should be defined as broadly as possible. *See id.* It did not consider looking to other terms used to define "take" to accomplish that broadness.



suggests that the Ninth Circuit's concern for the technical definition of "harm" did not survive its attempt to give that term a scope that corresponds with the congressionally intended scope of "take."

In *Forest Conservation Council v. Rosboro Lumber Co.*, the Ninth Circuit was "called upon to resolve . . . the scope of the term 'harm'" in a dispute between a group seeking to enjoin a lumber company from clear-cutting forty acres of timber on which one pair of Northern Spotted Owls reportedly lived.<sup>107</sup> The defendants argued that no "harm" befell to the owls because only harm that had previously or was presently occurring qualified as a prohibited act under the Secretary's regulatory definition of the term—as a mere "potential" injury rather than "actual" injury, future harm did not suffice.<sup>108</sup> The *Rosboro* court significantly clarified the Ninth Circuit's analytical model for takings claims by explicitly breaking its harm analysis into two elements: timing and risk.<sup>109</sup> While reaffirming its previous holdings that future harm can constitute "harm," the court recognized that future harm poses a unique problem of uncertainty.<sup>110</sup> Finding support in the language, purpose, and structure of the ESA, the court considered mere "potential" injury<sup>111</sup> too tenuous to constitute "harm," but held that an act "reasonably certain" to injure an endangered species satisfies the "actual injury" requirement, and thus constitutes actionable<sup>112</sup> "harm."<sup>113</sup> In sum, the Ninth Circuit<sup>114</sup> held that an injury

107. *Forest Conservation Council v. Rosboro Lumber Co.*, 50 F.3d 781, 782-83 (9th Cir. 1995). Again, the opinion does not indicate why the court limited its inquiry to the scope of the term "harm," rather than elucidating the meaning of "take." The district court had concluded that the ESA requires a plaintiff to show either a past or present injury to an endangered species unless the action at issue would result in the extinction of that species. *See id.* at 783. Plaintiff had only alleged a future injury to the Spotted Owls that would not result in extinction; thus the district court refused to grant an injunction. *See id.*

108. *See id.* at 784. This argument comes directly from the regulatory history of the terms "harm" and "harass." *See infra* notes 206-15 and accompanying text.

109. *See Rosboro*, 50 F.3d at 784.

110. *See id.* "Proof" of a future harm necessarily involves scientific and statistical risk analysis, which can attain only a limited degree of certainty.

111. The court explained that "potential" means "existing in possibility," something that "may or may not occur." *Id.* at 784 (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY (2d ed. 1939)). Juxtaposing "potential injury" with "imminent threat of injury" in the context of the court's analysis of the *degree of certainty* required to constitute harm, the court explained that "imminent" means "ready to take place, near at hand." *Id.* (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY (2d ed. 1939)). While the word "potential" connotes a sense of risk, the definition of "imminent" reveals that it stands for a notion of *timing*. In its effort to separate the elements of risk and timing, the court inadvertently demonstrated the extent of those concepts' interrelation.

112. The court stated in a footnote that if this were not a citizen suit seeking an injunction, but instead one brought by the Attorney General seeking criminal and civil penalties, the court would engage in a different analysis. *See id.* at 786 n.3. It indicated that in the criminal and civil penalty context, an imminent threat of harm may not suffice as "harm." *See id.* It is

to an endangered species that allegedly will take place in the future constitutes "harm" within the meaning of the regulatory definition of that term if the harm is reasonably certain to occur.<sup>115</sup>

*B. The First Circuit Standard: Proof of Past or Present Injury*

Under the analytical structure adopted by the First Circuit for takings claims, "harm" can be found only with proof of past or present injury to an endangered species. Surprisingly, two district courts in the Ninth Circuit<sup>116</sup> first articulated this narrow reading of Section 9—a reading later rejected by that court of appeals<sup>117</sup> but embraced by the First Circuit.<sup>118</sup> In light of the scarcity of Section 9 cases in the

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unlikely, however, that the court will have to engage in such an alternative analysis because the cases involving allegations of future harm are by their very nature cases involving plaintiffs seeking injunctive relief to prevent the occurrence of that future harm. See, e.g., *Marbled Murrelet v. Babbitt*, 83 F.3d 1060 (9th Cir. 1996) (issuing a preliminary injunction based on a showing of a reasonably certain threat of imminent harm to a protected species); *Hamilton v. City of Austin*, 8 F. Supp. 2d 886 (W.D. Tex. 1998) (holding a threat of future injury to an endangered species insufficient to merit a preliminary injunction); *Loggerhead Turtle v. County Council*, 896 F. Supp. 1170 (M.D. Fla. 1995) (holding the future threat of even a single taking sufficient to invoke the authority of the ESA and issuing an injunction accordingly). The First Circuit, in *American Bald Eagle v. Bhatti*, developed the competing analytical model for takings claims in the injunctive setting, as well, but did not demonstrate how its analysis would differ in a suit seeking civil or criminal penalties. See *American Bald Eagle v. Bhatti*, 9 F.3d 163, 165-67 (1st Cir. 1993).

113. See *Rosboro*, 50 F.3d at 784-85. The court seemingly envisioned a continuum of certainty, running from actual injury (the most certain), to imminent threat of injury (less certain), and ending with potential injury (the least certain). Under *Rosboro*, the first two are actionable, and the last is not. See *id.*

114. An Eleventh Circuit court has followed this Ninth Circuit interpretation in at least one case. In *Loggerhead Turtle*, a Florida district court held "[t]he future threat of even a single taking [to be] sufficient to invoke the authority of the [Endangered Species] Act" and supported its holding with a discussion of *Rosboro*. *Loggerhead Turtle*, 896 F. Supp. at 1180.

115. The *Rosboro* decision was reaffirmed by the Ninth Circuit in *Marbled Murrelet v. Babbitt*, 83 F.3d 1060, 1064-65 (9th Cir. 1996). In that case an environmental group brought an action seeking to enjoin a logging company from harvesting trees in the habitat of the Marbled Murrelet, an endangered bird species. See *id.* at 1062. The defendants challenged the notion that a future harm can constitute a "harm," citing the post-*Rosboro* Supreme Court decision, *Sweet Home*. See *id.* The *Marbled Murrelet* court repeated the holding in *Rosboro* ("a reasonably certain threat of future harm" is actionable under the ESA) stating that *Sweet Home* "does not affect the vitality of that holding." *Id.* at 1068. See *infra* Part III.C for a discussion of *Sweet Home* and its effect, if any, on the Ninth Circuit model.

116. See generally *California v. Watt*, 520 F. Supp. 1359 (C.D. Cal. 1981); *Swan View Coalition v. Turner*, 824 F. Supp. 923 (D. Mont. 1992).

117. See *supra* Part III.A.

118. See *Strahan v. Coxe*, 127 F.3d 155, 164-65 (1st Cir. 1997); *American Bald Eagle v. Bhatti*, 9 F.3d 163, 165-66 (1st Cir. 1993).

First Circuit, a brief look at the Montana district court case<sup>119</sup> that served as the analytical precursor to the First Circuit model helps to illustrate the development of the strict interpretation of "actual harm" and how that standard operates when applied to facts.

In *Swan View Coalition v. Turner*, an environmentalist organization charged the United States Forest Service and others with "taking" threatened grizzly bears and endangered gray wolves by operating and maintaining roads in their habitat.<sup>120</sup> Defendants sought summary judgment on the takings claim.<sup>121</sup> To survive the motion, plaintiffs had to provide enough evidence to support a finding by a reasonable trier of fact that the habitat modification caused by the roads both significantly impaired the species' essential behavioral patterns and "that [such] impairments actually kill or injure" them.<sup>122</sup> The *Swan View* court held that the requirement of actual injury or death could only be satisfied with either (1) records of *past* individual injuries or fatalities or (2) records of *present* species population decline, and only when such evidence established a direct correlation with the habitat modification.<sup>123</sup> After characterizing the "showing of injury" as "the pivotal element" of a taking, the court implicitly established that showing risk of harm in the future is insufficient to withstand summary judgment.<sup>124</sup>

One year later, animal preservationists in Massachusetts sought to enjoin the Metropolitan District Commission from allowing controlled deer hunting on a Bald Eagle reservation, enabling the

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119. See generally *Swan View*, 824 F. Supp. 923. *California v. Watt*, decided by a California district court in 1981, was the first case to articulate the strict actual harm standard. In a two paragraph analysis of plaintiff's Section 9 claim, the California district court held that a "threat to the continued survival of species protected by [the ESA] . . . would . . . not constitute a 'taking.'" *Watt*, 520 F. Supp. at 1387. In a footnote, the court addressed the possibility that the defendants committed "harassment," quoting the regulatory definition of that term as "an intentional or negligent act or omission . . . annoying wildlife to such an extent as to significantly disrupt normal behavior patterns." See *id.* at 1388 n.24 (quoting the regulatory definition, now codified at 50 C.F.R. § 17.3 (1998)). The court omitted the language in the definition that prohibits creating the "likelihood of injury to wildlife." See 50 C.F.R. § 17.3. It uncovered no evidence in the record to support a finding of harassment, despite an admission that the defendant's activities constituted a "threat" to the survival of the species. See *Watt*, 520 F. Supp. at 1388-89.

120. See *Swan View*, 824 F. Supp. at 926.

121. See *id.*

122. *Id.* at 939. Both requirements come from the Secretary's definition of "harm." See 50 C.F.R. § 17.3.

123. See *Swan View*, 824 F. Supp. at 939-40.

124. The *Swan View* plaintiffs presented enough evidence of deaths and population decline to withstand summary judgment on the grizzly bear taking claim but not on the gray wolf claim. See *id.* at 940.

First Circuit to establish its standard for Section 9 claims.<sup>125</sup> The plaintiffs in *American Bald Eagle v. Bhatti* claimed that the deer hunt would result in the "taking" of Bald Eagles through a simple chain of events: hunters use lead slugs as ammunition; during a hunt, some deer are injured but not recovered by the hunters; those injured deer eventually die; Bald Eagles feed on the lead-tainted deer carrion and are poisoned.<sup>126</sup> The district court construed the issue to be "'whether the hunt will cause harm or it will harass, or cause the Bald Eagle to be harassed,'" and placed the burden of proof on the plaintiffs to show the deer hunt posed a *significant risk of harm* to the Bald Eagle.<sup>127</sup> The appellate court explicitly rejected the significant risk of harm standard, stating that, "[b]y requiring the plaintiffs to show only 'a significant risk of harm' instead of 'actual harm,' the district court required a lower degree of certainty of harm than we interpret the ESA to require."<sup>128</sup>

Two elements of the appellate court's analysis, in fact, revealed that *nothing less than one hundred percent certainty of death or injury* to an endangered species would establish a taking. First, the animal conservationists urged the court to establish a numerical standard for determining what actions constitute a "taking" of an endangered species.<sup>129</sup> The court responded, "the proper standard for establishing a taking under the ESA, far from being a numerical probability of harm, has been unequivocally defined as a showing of actual harm."<sup>130</sup> Second, despite the fact that the Secretary's definition of "harassment" includes acts that create the *likelihood of injury to wildlife*,<sup>131</sup>

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125. The deer hunt was intended to alleviate certain environmental problems arising from the overpopulation of deer in the Quabbin Bald Eagle Reservation, such as over-consumption of tree seedlings and declining water quality in the Reservation's Reservoir, which provides water to almost all of metropolitan Boston. See *American Bald Eagle v. Bhatti*, 9 F.3d 163, 164 (1st Cir. 1993). The Reservation comprised approximately 125 square miles and was home to between thirteen and forty-five endangered Bald Eagles at the time. See *id.*

126. See *id.*

127. *Id.* at 167 n.5 (quoting the district court, which did not publish its opinion).

128. *Id.*

129. See *id.* at 165.

130. *Id.* The court viewed "a numerical probability of harm" and "actual harm" as different categories. This contrasts greatly with the Ninth Circuit opinions, which have held that "a significant risk of harm" constitutes "actual harm" in some instances. See *supra* Part III.A. Even though the court considered and dismissed the factual possibility of harassment, it suggested that actual harm constitutes the only recognized form of taking. See *Bhatti*, 9 F.3d at 165. But see 16 U.S.C. § 1532(19) (1994) (listing pursuit, trapping, and capturing, inter alia, as other forms of taking).

131. The Secretary's definition reads:

the court reasoned that “[b]ecause appellants have not shown that bald eagles . . . will ingest lead slugs or fragments thereof during future hunts, we have no reason to consider whether the ingestion of lead slugs or fragments thereof . . . would amount to ‘harassment’ of the bald eagles.”<sup>132</sup>

Thus, it seems that the First Circuit’s “actual harm” standard applies to any kind of taking,<sup>133</sup> and that the “actual harm” standard can be met only with proof of past or present death or injury to the endangered species,<sup>134</sup> as any future harm to the species would involve a numerical probability analysis, which the *Bhatti* court considered an improper standard under the ESA.<sup>135</sup>

### C. *The Supreme Court Upholds the Regulatory Definition of “Harm”*

While the First and Ninth Circuits cemented opposing analytical models to assess Section 9 takings claims, plaintiffs<sup>136</sup> brought a facial challenge in the D.C. Circuit to the Secretary’s regulatory definition of the term “harm,” charging that in promulgating the definition the Secretary exceeded his authority under the Act and that the regulatory definition of “harm” exceeded the statutory scope of its

“Harass” in the definition of “take” in the Act means an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding or sheltering.

50 C.F.R. § 17.3 (1998).

132. *Bhatti*, 9 F.3d at 166 n.4 (emphasis added).

133. The ESA defines ten ways in which an endangered species can be taken: harassing, harming, pursuing, hunting, shooting, wounding, trapping, killing, capturing, collecting, or attempting to do any of these things. See 16 U.S.C. § 1532(19). Under the court’s reading, however, its interpretation of the requirements of harm has enveloped terms like pursuit, capture, and harassment, even though the ESA made these terms co-equal with “harm” under the broader term “take.”

134. While it must be inferred from the reasoning in *Bhatti* that future harm will never satisfy the First Circuit’s interpretation of “actual harm,” a Massachusetts district court interpreted *Bhatti*’s holding to mean just that. See *Strahan v. Coxe*, 939 F. Supp. 963, 985 n.37 (D. Mass. 1996).

135. The court conceded that “the record indicates that bald eagles can be harmed by the ingestion of lead,” but declined to find a “taking” absent evidence that the Bald Eagles would definitely eat the lead-tainted deer carrion. *Bhatti*, 9 F.3d at 166. The First Circuit reaffirmed its strict actual harm analysis in 1997. See *Strahan v. Coxe*, 127 F.3d 155, 164-65 (1st Cir. 1997). There, a record replete with evidence of past deaths and injuries to Northern Right Whales from entanglement in fishing nets caused the First Circuit to find a “taking” in violation of Section 9. See *id.*

136. Plaintiffs were various organizations, businesses, and individuals whose livelihoods depended in some way on the timber industry of the Pacific Northwest and Southeast. See *Sweet Home Chapter of Communities for a Great Or. v. Lujan*, 806 F. Supp. 279, 281 (D.C. Cir. 1992), *aff’d*, 515 U.S. 687 (1995).

parent term "take."<sup>137</sup> The Supreme Court upheld the definition based on the text, structure, legislative history, and purpose of the ESA.<sup>138</sup> The Court held that the Secretary reasonably construed the intent of Congress when he defined "harm" to include "'significant habitat modification or degradation that actually kills or injures wildlife.'"<sup>139</sup> Unfortunately, the majority opinion offered little guidance to the lower courts in the difficult task of *interpreting* the Secretary's definition of "harm." Thus, *Sweet Home* did little to resolve the conflict between the First and Ninth Circuits,<sup>140</sup> which disagree not over whether the regulatory definition of "harm" should apply to takings claims, but how it should be applied.<sup>141</sup> Both circuits espouse the "actual harm" standard in the definition of "harm" but have fundamentally different understandings of what constitutes "actual harm."<sup>142</sup>

The *Sweet Home* concurrence addressed the issue of how to apply the regulatory definition, which it too found valid on its face.<sup>143</sup> The concurrence cautioned that while the regulation, by its terms, did not exceed the Secretary's authority under the ESA, some applications of that regulation were inappropriate—particularly *Palila IV*.<sup>144</sup> It stressed that the regulation itself limited harm to "actual, as opposed to hypothetical or speculative, death or injury," and that application of the regulation must be limited by "ordinary principles

137. See *Babbitt v. Sweet Home Chapter of Communities*, 515 U.S. 687, 690 (1995).

138. See *id.* at 708.

139. *Id.* (quoting 50 C.F.R. § 17.3 (1998)).

140. This Note focuses exclusively on the First and Ninth Circuits' takings analyses, as both circuits offer developed jurisprudence in this area. Notably, a district court in the Fifth Circuit recently decided a takings claim without espousing either model. See generally *Hamilton v. City of Austin*, 8 F. Supp. 2d 886 (W.D. Tex. 1998). The district court, in a rather colorful opinion, held that for an activity to constitute a taking, that particular activity must result in imminent extinction. See *id.* at 893. Refusing to grant an injunction, the court stated, "while the activities during the pool cleaning experimentation may occasionally annoy, stress, or otherwise 'take' individual Salamanders," the court "finds no evidence that continued pool cleanings by the City . . . could possibly cause the extinction of the Salamanders." *Id.* at 893. This analysis makes the First Circuit strict proof-of-past-or-present-injury standard look moderate. The court denied that its opinion was "extreme," arguing instead that the opinion avoided an extreme reading of the Act. The court poeticized:

"The Endangered Species Act in its extreme makes no sense./

Only Congress can change it to make this problem past tense."

*Id.* at 888.

141. See *supra* Parts III.A-B.

142. See *id.*

143. See *Sweet Home*, 515 U.S. at 709-14 (O'Connor, J., concurring).

144. See *id.* at 714; see also *infra* note 147.

of proximate causation" and foreseeability.<sup>145</sup> This position charts a middle ground between the First and Ninth Circuit models because, while rejecting the idea of limiting harm to instances of past or present injury or death,<sup>146</sup> it requires a closer causal nexus between habitat modification and resulting harm to the protected species than does the Ninth Circuit model.<sup>147</sup>

#### IV. A CRITIQUE OF THE CURRENT ANALYTICAL MODELS USED IN TAKINGS CLAIMS

The vast majority of ESA takings claims have been litigated in the context of "harm."<sup>148</sup> The Ninth Circuit has interpreted the regulatory definition of "harm" broadly, and has regarded the definition's actual death or injury requirement as satisfied upon a showing of reasonable certainty that injury to a protected species will occur in the future. The First Circuit has constricted the definition, finding harm only upon proof of past or present injury. While the circuit split over the scope of harm's definition is unsettling, it merely reflects a deeper problem: fundamental confusion over the general scope of Section 9, arising from a focus on "harm" in takings jurisprudence to the exclusion of the other statutory terms used to define "take," particularly "harassment." In evaluating takings claims, both circuits have exclusively inquired about "harm," making it difficult to apply the Secretary's definition of harm to these claims while maintaining the breadth of the takings prohibition intended by Congress.<sup>149</sup>

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145. *Sweet Home*, 515 U.S. at 709.

146. To illustrate her understanding of the scope of the regulatory definition, Justice O'Connor explained that habitat modifications that make it "impossible for an animal to reproduce . . . impair its most essential physical function and render that animal, and its genetic material, biologically obsolete. This, in my view, is actual injury." *Id.* at 710. She went on to state that "foreseeable" injury to a protected species will suffice under the regulation. *See id.* at 713.

147. *See id.* at 714 (explaining that *Palila IV* was wrongly decided according to the regulation's own terms because destruction of the seedlings by feral sheep did not proximately cause actual death or injury to identifiable birds but merely prevented the regeneration of forest land).

148. *See Sweet Home Chapter of Communities for a Great Or. v. Babbitt* (*Sweet Home I*), 1 F.3d 1, 2 (D.C. Cir. 1993) (per curiam), *modified*, 17 F.3d 1463 (D.C. Cir. 1994), *rev'd* 515 U.S. 687 (1995) (noting that most of the controversy surrounding the statutory definition of "take" has "concerned the meaning of 'harm' and the degree to which this term encompasses damage to habitats").

149. In other words, the term "harm" has come to overshadow the remaining terms used to define "take." This has caused confusion over the scope of the takings prohibition, evidenced by the heated debate over what kinds of habitat modification the ESA prohibits.

The following analysis reveals that while the Ninth Circuit model yields results consistent with Congress's intent and purpose in enacting the ESA's takings prohibition, in application it has subjected the term "harm" and its regulatory definition to "ruthless dilation."<sup>150</sup> Conversely, the First Circuit model remains true to the regulatory definition of harm, but the standard it embodies is too stringent for application to all takings claims.

*A. Legislative Intent Counsels Against Using the First Circuit Standard as the Threshold for All Takings Claims*

Deep concern for the biological problem of extinction and a perceived need to "devote whatever resources were necessary" to avoid further depletion of wildlife resources pervaded congressional discussion of the proposed ESA.<sup>151</sup> The sweeping purpose of the Act, to conserve both endangered and threatened species and the ecosystems upon which they depend, represents the firm congressional commitment to ameliorating the extinction problem.<sup>152</sup> Furthermore, comparing the ESA to its predecessor laws<sup>153</sup> reveals that the 1973 Act, demanding—with few exceptions—protection for a broad range of species,<sup>154</sup> departed significantly from previous wildlife legislation and made saving endangered species a national priority.<sup>155</sup> The Supreme Court, after a thorough examination of the legislative history of the Act, declared that "[t]he plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost."<sup>156</sup>

Congressional reports indicate that lawmakers intended to define "take" "in the broadest possible manner to include every conceivable way a person can 'take' or attempt to 'take' any [endangered or threatened] fish or wildlife."<sup>157</sup> Admittedly, the preenactment

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150. See *Sweet Home*, 515 U.S. at 720 (Scalia, J., dissenting); see also *infra* note 204.

151. *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 177 (1978).

152. See 16 U.S.C. § 1531(b) (1994).

153. See *supra* Part II.

154. See 16 U.S.C. § 1533(c)-(d).

155. See *Hill*, 437 U.S. at 185.

156. *Id.* at 184.

157. S. REP. NO. 93-307, at 7 (1973), reprinted in 1973 U.S.C.C.A.N. 2989, 2995. Similarly, a report in the House indicated that the prohibition against takings in Section 9 of the ESA "includes, in the broadest possible terms, restrictions on the taking, importation and exportation, and transportation of [endangered] species." H.R. REP. NO. 93-412, at 15 (1973). One commentator observed that while the House and Senate's statements regarding the



legislative history of the ESA contains little consideration of the effects of the Section 9 takings prohibition beyond this statement, but the general indications of congressional intent, an examination of postenactment legislative action and debate, and an analysis of the overall structure of the Act illuminate the appropriate scope and interpretation of Section 9.

In 1978, appropriations for the Act's programs required reauthorization.<sup>158</sup> Not surprisingly, congressional debate centered on the wisdom of maintaining such a powerful law for the protection of endangered species,<sup>159</sup> as the Supreme Court had just handed down its decision in *Hill*, a case demonstrating the profound economic consequences the law could have in application.<sup>160</sup> Several proposed amendments would have severely cut back the sweeping effects of the ESA, but all were ultimately defeated.<sup>161</sup> Indeed, after rigorous debate, the Act sustained only minor alterations (which did not affect Section 9),<sup>162</sup> demonstrating continued congressional commitment to the preservation of endangered species even in the face of great potential economic costs.<sup>163</sup>

Appropriations for ESA programs came up for reauthorization again in 1982.<sup>164</sup> Recognizing the takings prohibition's broad scope, Congress permitted the FWS and NMFS, in particularly narrow circumstances, to grant exemptions from the takings prohibition when those takings are incidental to an agency's actions, the Secretary preauthorizes them, and the agency develops a plan to minimize the

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breadth of the term "take" are often cited, they offer "little substantive guidance for applying section 9 in specific cases." Cheever, *supra* note 26, at 129-30.

158. See generally H.R. REP. NO. 95-1625 (1973), reprinted in 1978 U.S.C.C.A.N. 9453.

159. Representative Whitten argued, "Congress never intended that this [A]ct be used to stop the development of our country." 124 CONG. REC. 37,115 (1978). Representative Dingell, of the opposing view, encouraged Congress to put "the long-term interest of human welfare" above "short-term, short sighted and single purpose goals that can only be accomplished by destroying the very life forms that could someday be of enormous benefit to mankind." *Id.* at 38,126.

160. See *Hill*, 437 U.S. at 194-95 (enjoining the completion of a \$100 million dam because it would harm a species of endangered fish); see also *supra* notes 73-76.

161. See 124 CONG. REC. 21,285 (1978) (proposing amendment No. 3097, which would have allowed federal agencies to jeopardize endangered species when avoiding harm to the species would impede the primary mission of the agency and to exempt from the Act all federal projects more than fifty percent complete); *id.* at 21,353 (proposing amendment No. 3115, which would have altered the policy statement of Section 2(b) to provide for endangered species preservation where "consistent with the welfare and national goals of the people of the United States"); *id.* at 21,356-57 (proposing amendment No. 3113, which would have limited the definition of threatened species to only those species that "[a]re of substantial benefit to mankind").

162. Although Congress made significant amendments to sections 4 and 7, in the context of the entire Act, the changes were not substantial. See generally Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, 92 Stat. 3751 (1978).

163. See Cheever, *supra* note 26, at 142.

164. See generally H.R. REP. NO. 97-567 (1982), reprinted in 1982 U.S.C.C.A.N. 2807.

harmful effect on the species in question.<sup>165</sup> Because an incidental taker must submit a habitat conservation plan to the FWS that demonstrates how the injury to the endangered species will be mitigated to the greatest extent practicable, incidental take permits are difficult, time-consuming, and expensive to obtain.<sup>166</sup> Thus, while incidental take permits introduce flexibility into the Act and give the FWS the ability in limited circumstances to mitigate unreasonably harsh results under the ESA, they in no way strip the Act of its power.<sup>167</sup> To the contrary, Congress demonstrated its continued commitment to rigorous protection of endangered species in the same set of amendments by eliminating all economic considerations from the process of listing endangered species, making biological criteria the sole basis for decisions to list animals as endangered or threatened.<sup>168</sup> Five years after the 1982 amendments, "266 Members of Congress voted against [a proposed amendment] giving the Secretary of the Interior the power to waive the provisions of the ESA when deemed necessary to protect human life."<sup>169</sup> Only 151 members voted in favor—further indication of Congress's support of the ESA as a powerful, far-reaching statute.<sup>170</sup>

While the postenactment congressional action and debate favor an expansive reading of the takings prohibition, an examination of the overall structure of the ESA offers the most probative evidence of Congress's intent to make imminent threat of injury to endangered wildlife actionable.<sup>171</sup> The Act confers on both private citizens and the

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165. See 16 U.S.C. § 1536(b)(4), (c)(2) (1994); see also 50 C.F.R. § 17.3 (1998) (defining incidental taking). After consultation, the Secretary may issue an incidental taking statement if the Secretary concludes: (1) the agency's action, with any reasonable and prudent alternatives incorporated, will not likely jeopardize the continued existence of protected species under the ESA; and (2) any incidental taking of these species will not likely jeopardize their existence. See 16 U.S.C. § 1536(b)(4). The incidental take statement must identify the expected effect of the takings, the reasonable and prudent measures necessary to minimize the impact, and the terms and conditions that the agency must comply with to implement these measures. See *id.*

166. See Davison, *supra* note 50, at 165-66.

167. See Cheever, *supra* note 26, at 149.

168. See H.R. REP. NO. 97-567, at 12 (1982), reprinted in 1982 U.S.C.C.A.N. 2807, 2812. "The principal purpose of the amendments to Section 4 is to ensure that decisions pertaining to the listing and delisting of species are based solely upon biological criteria and to prevent non-biological considerations from affecting such decisions." *Id.* at 19, reprinted at 2819.

169. Donald J. Barry, *Amending the Endangered Species Act, The Ransom of Red Chief, and Other Related Topics*, 21 ENVTL. L.J. 587, 590 (1991).

170. See Sugg, *supra* note 26, at 3.

171. See *Forest Conservation Council v. Rosboro Lumber Co.*, 50 F.3d 781, 785 (9th Cir. 1995).

Attorney General authority to seek injunctions to enforce the ESA.<sup>172</sup> Injunctive relief by its very nature targets future actions, and the citizen suit provision does not require proof of past or present injury to the protected species to make claims of future injury actionable.<sup>173</sup> To the contrary, the legislative history of Section 11 reveals that Congress had *prospective* injuries in mind when drafting the citizen suit provision.<sup>174</sup> Likewise, Congress explained that it authorized the Attorney General to seek injunctions because

[i]njunctions provide greater opportunity to attempt resolution of conflicts *before harm to a species occurs* . . . . The ability to enjoin a violation of the Act rather than the ability only to prosecute a completed violation will better serve the interests of the public, the *potential* violator and the *potentially harmed* species.<sup>175</sup>

Furthermore, when actions “pos[e] a *significant risk* to the well-being of any [endangered species],” plaintiffs may seek judicial relief immediately after notifying the Secretary, an exception carved out of the sixty-day notice requirement of the citizen suit provision.<sup>176</sup> This exception demonstrates Congress’s intent to stop harm to protected species before it occurs, and “[n]owhere does Congress [make] a plaintiff’s standing to enjoin [prospective harm] contingent upon a showing of past injury.”<sup>177</sup>

Nonetheless, the First Circuit declined to enjoin actions allegedly constituting a future threat of harm to an endangered species, declaring that “[t]he proper standard for establishing a taking under the ESA . . . has been unequivocally *defined* as a showing of ‘actual harm,’” in turn defining “actual harm” as past or present injury.<sup>178</sup> In spite of the evidence that Congress intended to make a significant threat of harm actionable under the ESA without a showing of past or present harm, the *Bhatti* court explained that the proper standard for a taking had been “*defined*” as “actual harm,” strongly suggesting that it conflated the regulatory definition of the

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172. Private citizens find this right in the citizen suit provision, 16 U.S.C. § 1540(g) (1994), while the Attorney General receives such authority in section 1540(e)(6).

173. *See id.* § 1540(g).

174. *See* H.R. REP. NO. 93-412, at 19 (1973).

175. *Rosboro*, 50 F.3d at 786 (quoting S. REP. NO. 97-418 (1982)) (emphasis added).

176. 16 U.S.C. § 1540(g)(2)(C).

177. *Rosboro*, 50 F.3d at 786; *see supra* note 113 and accompanying text (discussing the appropriateness of extracting an interpretation of the scope of the takings prohibition from the ESA provisions on injunctive relief).

178. *See American Bald Eagle v. Bhatti*, 9 F.3d 163, 165-66 (1st Cir. 1993).

term "harm" with its parent statutory term "take."<sup>179</sup> This resulted in the court's erroneous application of the strict proof of past or present injury standard to takings in general, not just takings through harm<sup>180</sup>—a result inconsistent with the intended effect of the ESA and the takings prohibition.

*B. A Significant Risk of Harm Cannot Satisfy the Regulatory Requirement of "Actual Harm" for Takings by "Harm"*

As demonstrated in Part III, the term "harm" and its regulatory definition have inspired an entire body of case law and scholarship, revealing a deep confusion over the scope of the term in application.<sup>181</sup> In *Sweet Home*, the Supreme Court recognized that Congress gave the Secretary broad interpretive power under the ESA because administering the Act "requires an expertise and attention to detail that exceeds the normal province of Congress."<sup>182</sup> In light of the broad discretion conferred upon him, the Court advocated judicial deference to the Secretary's definition of "harm."<sup>183</sup> Because the Court affords the Secretary's interpretation/definition of "harm" deference,<sup>184</sup> an examination of the term's regulatory history and revision<sup>185</sup> considerably aids in delineating its proper scope.

Uncomfortable with the *Palila II*<sup>186</sup> court's interpretation of the Secretary's 1975 definition of "harm,"<sup>187</sup> the FWS proposed a revised definition in 1981.<sup>188</sup> The FWS recognized that one could construe the original definition to include "significant [habitat] modification or

179. *See id.*

180. *See id.* at 166 n.4 (requiring plaintiffs to prove past or present injury to the Bald Eagle for a finding of "harassment").

181. *See supra* note 64.

182. *Babbitt v. Sweet Home Chapter of Communities*, 515 U.S. 687, 708 (1995). *See infra* Part V.B.2 for a discussion of the Supreme Court's *Chevron* analysis in *Sweet Home*, the Court's support of the Secretary's interpretive power under the ESA, and an application of the *Chevron* doctrine to the "harassment" context.

183. *See Sweet Home*, 515 U.S. at 708; *see also supra* Part III.C; *infra* Part V.B.2.

184. *See Sweet Home*, 515 U.S. at 708.

185. *See* Final Redefinition of "Harm," 46 Fed. Reg. 54,748, 54,748 (1981); Proposed Redefinition of "Harm," 46 Fed. Reg. 29,490, 29,490 (1981) (proposed June 2, 1981).

186. *Palila v. Hawaii Dep't of Land & Natural Resources (Palila II)*, 639 F.2d 495 (9th Cir. 1981), *aff'g* 471 F. Supp. 985 (D. Haw. 1979).

187. *See* Final Redefinition of "Harm," 46 Fed. Reg. at 54,748 (noting that "the issue had begun to appear in judicial opinions and the Service desired to clarify the definition to avoid any results which would be inconsistent with the Act"); *see also supra* note 65 (quoting the original definition of harm).

188. *See* Proposed Redefinition of "Harm," 46 Fed. Reg. at 29,490.

degradation" as a prohibited "harm" "without further proof of actual injury or death to a listed species."<sup>189</sup> The agency was uncomfortable with courts finding "harm" absent proof of past or present injury because "harm," unlike "harass," is a strict liability taking that involves criminal penalties.<sup>190</sup> To avoid that construction, the proposed revision characterized harm as "an act . . . which injures or kills endangered or threatened species of wildlife."<sup>191</sup> The FWS ultimately rejected the proposed definition in favor of the present characterization of "harm" as "an act which actually kills or injures wildlife . . . [including] habitat modification [which] actually kills or injures wildlife."<sup>192</sup> Because the 1981 final definition closely resembles the original,<sup>193</sup> the redefinition's primary value laid in the FWS's accompanying commentary, which described the agency's understanding of the definition.<sup>194</sup> That commentary emphasized that the FWS drafted the revised definition to embody a proven injury standard—specifically, the word "actually" appears in the phrase "actually kills or injures" "to bulwark the need for *proven injury* to a species."<sup>195</sup> Thus, in promulgating and revising the definition of "harm," the FWS clearly rejected the significant risk of harm standard in the context of "harm" takings.<sup>196</sup>

Nevertheless, the Ninth Circuit applies a significant risk of harm standard to all takings claims while characterizing these claims

189. *Id.*

190. *See id.* at 29,491; *see also* 16 U.S.C. § 1538 (1994). The agency explicitly stated that it was comfortable finding "harassment" without a showing of past or present injury because the definition of "harass" incorporates an element of intent. *See* Proposed Redefinition of "Harm," 46 Fed. Reg. at 29,490. *See infra* Part V.A (examining the differences in the FWS definitions of "harass" and "harm" and the FWS's stated understanding of those differences).

191. *See* Proposed Redefinition of "Harm," 46 Fed. Reg. at 29,490.

192. 50 C.F.R. § 17.3 (1998). The full definition reads:

"Harm" in the definition of "take" in the Act means an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.

*Id.*  
193. *See supra* note 65 (discussing the similarity between the original definition and the final redefinition).

194. *See* Final Redefinition of "Harm," 46 Fed. Reg. 54,748, 54,748-49. Perhaps the final definition only slightly modified the original because the root of the problem in delineating the scope of "harm" laid not in the text of the definition itself but in the conflation of the terms "harm" and "take" in judicial application.

195. *Id.* at 54,748 (emphasis added). The term "actual" connotes the effect desired by the FWS; "actual" is defined in part as "presently existing in fact" (as opposed to something expected in the future). *Id.*; *see also* BLACK'S LAW DICTIONARY 34 (6th ed. 1990).

196. *See* Final Redefinition of "Harm," 46 Fed. Reg. at 54,748.

as takings by "harm."<sup>197</sup> Indeed, the Ninth Circuit analysis characterizes injury to endangered species that will allegedly take place in the future as "actual harm" within the meaning of the regulatory definition of that term if a party can demonstrate that the harm is reasonably certain to occur.<sup>198</sup> Thus the Ninth Circuit has come to interpret "harm" and its regulatory definition exceedingly broadly, given the FWS's clear intent that courts find "harm" only with evidence of past or present injury to the endangered species.

Instead of seeking guidance in the plain meaning of the regulatory definition of "harm" or from the body that promulgated that definition, the Ninth Circuit has turned to the Act itself in search of support for the significant risk of harm standard, citing the ESA's broad scope and structure. While the *Palila IV* court recognized that "[t]he scope of the definition of harm is important because it *in part* sets the limit on what acts or omissions violate the Act's prohibition against 'taking' an endangered species," it failed to acknowledge a difference in the scope of the two terms when establishing its expansive reading of "harm."<sup>199</sup> The court relied on the plain language of the statute, the overall purpose of the Act, and the "policy of Congress evidenced by the legislative history [of the ESA]" to support its holding that the concept of "harm" within the context of the Act may embody risk of harm and future harm.<sup>200</sup> Similarly, the *Rosboro* court adopted the reasoning of *Palila I* and further argued that Congress's inclusion of injunctive relief provisions in the ESA precluded takings from being limited to instances of past or present injury to endangered species.<sup>201</sup> Rather than granting an injunction based on a finding of "harassment," however, the court limited itself to the "harm" inquiry,<sup>202</sup> and held that habitat modification "reasonably certain to injure" an endangered species "satisfies the 'actual injury' requirement."<sup>203</sup>

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197. See, e.g., *Forest Conservation Council v. Rosboro Lumber Co.*, 50 F.3d 781, 783 (9th Cir. 1995); *Palila v. Hawaii Dep't of Land & Natural Resources (Palila II)*, 649 F. Supp. 1070, 1072 (D. Haw. 1986), *aff'd*, 852 F.2d 1106 (9th Cir. 1988).

198. See, e.g., *Marbled Murrelet v. Babbitt*, 83 F.3d 1060, 1068 (9th Cir. 1996); *Rosboro*, 50 F.3d at 784-85; *Palila v. Hawaii Dep't of Land & Natural Resources (Palila IV)*, 852 F.2d 1106, 1008 (9th Cir. 1988), *aff'd* 649 F. Supp. 1070 (D. Haw. 1986). See generally *supra* Part III.A.

199. *Palila IV*, 852 F.2d at 1108 (emphasis added).

200. *Id.*

201. *Rosboro*, 50 F.3d at 785-86.

202. See *id.* at 783 ("[T]he dispute we are called upon to resolve is the scope of the term 'harm.'").

203. *Id.* at 784.

In sum, the Ninth Circuit has elasticized the term "harm" and the "actual injury" requirement of its regulatory definition to encompass a significant risk of harm in the future based on Congress's intent to apply the *takings* prohibition broadly.<sup>204</sup>

V. AN ALTERNATIVE APPROACH TO ANALYZING TAKINGS CLAIMS INVOLVING A THREAT OF FUTURE HARM: GIVING INDEPENDENT MEANING TO "HARASSMENT"

Under the ESA, "harming" a protected species is but one way a person can commit a taking, and courts' analyses should reflect that legislative choice. This Note proposes a resolution to the confusion over the scope of the takings prohibition by interpreting the scope of the statutory term "take" as separate from, and different than, the regulatory scope of the term "harm," eliminating the co-extensiveness of the harm inquiry and the takings inquiry. Particularly, this Note advocates giving the term "harassment" independent meaning from "harm," allowing it to serve a particular function in the Section 9 takings prohibition.

A. *The Scope of "Harass" Under Its Regulatory Definition*

While Congress left little preenactment legislative history on the takings prohibition, it apparently gave some thought to the term "harass" and its role in Section 9.<sup>205</sup> The House Report on the Act indicates that "[take] includes harassment, whether intentional or [negligent]. This would allow, for example, the Secretary to regulate or prohibit activities of birdwatchers where the effect of those activities might disturb the birds and make it difficult for them to hatch or raise their young."<sup>206</sup> The regulatory definition of "harass," issued in 1975,<sup>207</sup> appears to be directly based on this bit of legislative history, as it characterizes the term as "an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal

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204. See *Sweet Home Chapter of Communities for a Great Or. v. Babbitt* (Sweet Home I), 1 F.3d 1, 13 (D.C. Cir. 1993) (per curiam) (Sentelle, J., dissenting), *modified*, 17 F.3d 1463 (D.C. Cir. 1994), *rev'd*, 515 U.S. 687 (1995) (arguing against using legislative history to "deprive the definition of any bounds whatsoever and turn the word into a free-form concept").

205. H.R. REP. NO. 93-412, at 11 (1973).

206. *Id.*

207. The agency issued the original definition of "harm" at the same time. See 40 Fed. Reg. 44,412, 44,412-16 (1975).

behavior patterns which include, but are not limited to, breeding, feeding, or sheltering."<sup>208</sup>

Comparing this definition to a proposed definition of "harass" offered by the FWS two months earlier reveals the intended scope of the final definition.<sup>209</sup> The proposed definition would have characterized all actions (regardless of intent or negligence) that *either* "actually or potentially harm[]" endangered species through death, injury, or seriously disruptive annoyance, as prohibited "harassment."<sup>210</sup> However, in September 1975, when the agency issued the first set of definitions, it broke the contents of the proposed definition of "harass" into two distinct categories: "harm" and "harass."<sup>211</sup> The concepts of "actual harm" and death appeared only in the definition of "harm," while "harassment" was limited to acts intentionally or negligently causing a "likelihood of injury."<sup>212</sup> The FWS explicitly noted that, in promulgating these two different definitions, it intended to make "harass" applicable to those acts "with the potential for injury," and "harm" applicable to acts "which actually (as opposed to potentially), cause injury," revealing its view of "actual" and "potential" harm as mutually exclusive categories.<sup>213</sup> "Potential" means "having the capacity or a strong possibility for development into a state of actuality."<sup>214</sup> The agency's stated intention of making "harass" applicable to potential injuries directly implicates the significant risk of harm standard.<sup>215</sup>

208. 50 C.F.R. § 17.3 (1998). The promulgation notice issued by the Secretary, however, did not offer any guidance as to how the agency formulated this definition. The original definition of "harass" remains in effect today, with an exemption added for normal animal husbandry practices—an amendment effective October 13, 1998. See *Captive-bred Wildlife Regulation*, 63 Fed. Reg. 48,634, 48,634 (1998); see also WEBSTER'S NEW INTERNATIONAL DICTIONARY 1310 (3d ed. 1993) (defining "likelihood" as "probability").

209. See 40 Fed. Reg. 28,714, 28,714 (1975) (proposed July 8, 1975).

210. *Id.* (emphasis added) (defining "[h]arass" in the definition of "take" [as] an act which either actually or potentially harms wildlife by killing or injuring it, or by annoying it to such an extent as to cause serious disruption in essential behavior patterns, such as feeding, breeding or sheltering") *Id.*

211. Compare the original definition of "harm," quoted in the Proposed Redefinition of "Harm," 46 Fed. Reg. 29,490, 29,490 (1981), with the definition of "harass," found at 50 C.F.R. § 17.3.

212. 50 C.F.R. § 17.3.

213. 40 Fed. Reg. 44,412, 44,413 (1975). *But see* Gidari, *supra* note 51, at 483 (opining that proof of actual injury is necessary for takings by "harm" and "harass"); Moore, *supra* note 64, at 103 (insisting that "harassment" requires proof of actual injury, but offering no evidence in support of that contention).

214. WEBSTER'S NEW INTERNATIONAL DICTIONARY 1775 (3d ed. 1993).

215. The phrases "significant risk" and "strong possibility" connote the same degree of likelihood in the future.



Both "harm" and "harassment" constitute Section 9 violations.<sup>216</sup> Although the required evidentiary showing of injury for "harass" is much lower than that for "harm,"<sup>217</sup> its intent requirement keeps "harass" from conceptually swallowing "harm," giving the terms independent significance.<sup>218</sup> The FWS elaborated on this point in the commentary accompanying the 1981 proposed redefinition of "harm."<sup>219</sup> It explained that, while showing just a "likelihood of injury" meets the definition of "harass," "it will not result in criminal liability for habitat modification unless . . . the defendant [also] knew or reasonably should have known<sup>220</sup> that his actions would be likely to injure" endangered or threatened species.<sup>221</sup> It noted that in contrast, once the higher evidentiary burden under "harm" (a showing of actual death or injury) is met, a Section 9 transgressor becomes subject to criminal penalties without a further showing of fault.<sup>222</sup>

216. See 16 U.S.C. § 1532(19) (1994).

217. See Proposed Redefinition of "Harm," 46 Fed. Reg. 29,490, 29,491 (1981). The assertion that the evidentiary showing under "harass" is lower than that under "harm" comes from two observations: (1) "harassment" may be shown when there is a risk of injury, whereas harm's threshold is "actual injury;" and (2) an animal can be "harassed" by a significant "disruption" of its "normal" behavioral patterns, whereas an animal can only be "harmed" by a significant "impairment" of its "essential" behavioral patterns. See 50 C.F.R. § 17.3.

218. See 50 C.F.R. § 17.3 (defining "harass"). Scholars dispute which definition—"harm" or "harass"—has a more stringent standard of proof, due to the interplay between the degree of harm element and the fault/no fault requirements. Compare *Gidari*, *supra* note 51, at 191 (arguing that the definition of "harass" is broader than the definition of "harm"), with *Moore*, *supra* note 64, at 103 (arguing that "the standard of proof required under 'harass' is more stringent than the standard required under 'harm'").

219. See Proposed Redefinition of "Harm," 46 Fed. Reg. at 29,491.

220. The original promulgation notice of the definition of "harass" did not explore the meaning of the definition's intent or negligence requirement. See *id.* In 1981, the commentary accompanying the proposed redefinition of "harm" gave the FWS the opportunity to reexamine harass's intent requirement. As noted in the text, the FWS deems the intent requirement met upon a showing that the "defendant knew or reasonably should have known" the negative consequences of his actions. *Id.* This seems to directly refute one commentator's interpretation of "harass" as including acts "creat[ing] the requisite likelihood of injury to wildlife . . . even if the person had no knowledge, or reason to know, that their [sic] act or omission created the requisite injury to wildlife." Davison, *supra* note 50, at 238 n.136. Noting that the FWS's official definition of "harass" defines neither "intentional" nor "negligent," Davison criticizes the FWS for its oversight, arguing that harass's fault requirement is meaningless because "intent" is often defined to mean nothing more than consciousness. See *id.*

221. Proposed Redefinition of "Harm," 46 Fed. Reg. at 29,491. These comments from the FWS, the agency that promulgated the definitions of "harass" and "harm," explicitly confirm the critical point that the term "harassment" applies in the habitat modification context. Some commentators have argued that because the words "habitat modification" appear in the definition of "harm" and not in the definition of "harass," only a finding of "harm" provides redress for claims of habitat modification. See, e.g., *Gidari*, *supra* note 51, at 482 (arguing that harassment has no applicability in the habitat modification context because "[t]he definition of harass specifically excluded habitat modification from its coverage").

222. See Proposed Redefinition of "Harm," 46 Fed. Reg. at 29,491.

On September 11, 1998, the FWS brought new attention to "harassment" by adding to its original definition a limited exclusion for certain human interaction with captive wildlife.<sup>223</sup> The FWS revised the definition because it worried that generally accepted husbandry practices, breeding procedures, and provision of veterinary care inevitably "disrupt normal behavioral patterns," technically constituting a Section 9 violation by "harassment."<sup>224</sup> The agency reasoned that the purpose of the ESA required revision of the definition of "harass" to allow for human interaction with captive endangered wildlife when such interaction is necessary for the proper care and maintenance of a species and not likely to cause it injury.<sup>225</sup> Significantly, the FWS adopted the original definition of "harass" completely without alteration, simply appending the exceptions for captive wildlife to the end of that original language—thereby demonstrating its continued support for the original definition and belief in its vitality.<sup>226</sup>

In sum, the FWS has already fleshed out the meaning of the word "harass" as Congress used it to define the term "take."<sup>227</sup> The agency has done so in a way that gives "harm" and "harass" separate spheres of operation, with different evidentiary thresholds and fault requirements.<sup>228</sup> Courts should defer to the FWS's work in this area and breathe life into the statutory term "harass" by abandoning the actual injury standard for claims involving only a threat of future injury.

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223. See *Captive-bred Wildlife Regulation*, 63 Fed. Reg. 48,634, 48,634 (1998). The regulation became effective October 13, 1998. See *id.*

224. See *id.* at 48,636.

225. See *id.*

226. The revised definition now reads:

"Harass" in the definition of "take" in the Act means an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavior patterns which include, but are not limited to, breeding, feeding, or sheltering. This definition, when applied to captive wildlife, does not include generally accepted: (1) Animal husbandry practices that meet or exceed the minimum standards for facilities and care under the Animal Welfare Act, (2) Breeding procedures, or (3) Provisions of veterinary care for confining, tranquilizing, or anesthetizing, when such practices, procedures, or provisions are not likely to result in injury to the wildlife.

*Id.* at 48,639-40.

227. See *supra* note 206 and accompanying text; see also 16 U.S.C. § 1532(19) (1994).

228. See *supra* notes 211-222 and accompanying text.

B. *The Sweet Home Analysis Calls for Judicial Recognition of Takings by "Harassment"*

The Supreme Court's *Sweet Home* decision serves as a model analysis for courts faced with the issue of whether to defer to the FWS's interpretation of a Section 9 takings term.<sup>229</sup> Although the Court focused on the viability of the definition of "harm," one may easily analogize to the "harassment" context. In this way, *Sweet Home* is quite instructive on the appropriate judicial application of the FWS's definition of "harassment." Two factors weighed heavily in the Court's *Sweet Home* analysis: (1) the statutory context of the terms used to define "take"<sup>230</sup> and (2) the *Chevron* doctrine.<sup>231</sup>

1. The Presumption Against Surplusage

The presumption against surplusage, a traditional tool of statutory construction,<sup>232</sup> expresses judicial reluctance to adopt an interpretation of a congressional enactment that renders superfluous another portion of the same law.<sup>233</sup> In *Sweet Home*, the majority reasoned that the statutory context of "harm" "suggests that Congress meant that term to serve a particular function in the ESA, consistent with but distinct from the functions of the other verbs used to define 'take.'" Moreover, the Court indicated that "harm" should have "a character of its own not to be submerged by its association."<sup>234</sup> When "harm" is interpreted to incorporate a significant risk of harm standard, as the Ninth Circuit has done, "harassment," defined as acts causing a "likelihood of injury," serves no independent function in the takings prohibition—it is rendered superfluous.<sup>235</sup> If "harm" and

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229. See generally *Babbitt v. Sweet Home Chapter of Communities*, 515 U.S. 687 (1995).

230. See *id.* at 702.

231. See *id.* at 708.

232. See Bradford C. Mank, *Textualism's Selective Canons of Statutory Construction: Reinforcing Individual Liberties, Legislative Authority, and Deference to Executive Agencies*, 86 KY. L.J. 524, 601-02 (1998).

233. See *Mackey v. Lanier Collection Agency*, 486 U.S. 825, 837 (1988).

234. *Sweet Home*, 515 U.S. at 702 (quoting *Russel Motor Car Co. v. United States*, 261 U.S. 514, 519 (1923)).

235. While the presumption against surplusage has been employed by the Supreme Court in the takings prohibition context, D.C. Circuit Chief Judge Mivka argued persuasively against its use in deciphering Section 9:

There is no reasonable definition of the word "harm" (or, for that matter, the word "harass") that would not render superfluous some of the other defined terms. For example, one cannot "kill" or "wound" an animal without also "harming" it, even under the narrowest conceivable interpretation of "harm."

"harass" are interpreted consistently with their regulatory definitions, however, they retain individual character—"harm" applying to claims involving proof of past or present injury, and "harass" (with its fault requirement) applying to claims where only a threat of future injury can be shown.

## 2. The *Chevron* Doctrine

Judicial review of an agency's construction of a statute Congress entrusts it to administer follows the deferential approach set out by the Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*<sup>236</sup> *Chevron* stands for the proposition that a court must defer to an agency's resolution of a specific statutory question and not substitute its own construction of a statutory provision where there is statutory silence or ambiguity with respect to the specific question and the agency's interpretation of the statute offers a "permissible construction" or a "reasonable interpretation" of the statute.<sup>237</sup> The *Sweet Home* analysis reflects the underlying rationale of the *Chevron* doctrine:

When it enacted the ESA, Congress delegated broad administrative and interpretive power to the Secretary . . . . The proper interpretation of "harm" involves a complex policy choice. When Congress has entrusted the Secretary with such broad discretion, we are especially reluctant to substitute our views of wise policy for his.<sup>238</sup>

The Supreme Court has thus indicated that the judiciary should afford the Secretary great deference in interpreting the terms used to define "take." Thus, the key issue becomes whether the FWS's definition of "harass" reasonably interprets the ESA. It clearly does. The agency gleaned the definition in question from an illustration of "harassment" in the legislative history of the Act.<sup>239</sup> The very

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*Sweet Home Chapter of Communities v. Babbitt*, 17 F.3d 1463, 1475 (D.C. Cir. 1994) (Mivka, C.J., dissenting), *modifying*, 1 F.3d 1 (D.C. Cir. 1993) (per curiam), *rev'd* 515 U.S. 687 (1995). The FWS has also recognized that no matter how it defines several of the verbs Congress used to define "take," considerable overlap will result in some instances. See Final Redefinition of "Harm," 46 Fed. Reg. 54,748, 54,749 (1981).

236. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). See also *Sweet Home Chapter of Communities v. Babbitt*, 1 F.3d 1, 7 (1993) (per curiam) (Mivka, C.J., dissenting), *modified*, 17 F.3d 1463 (D.C. Cir.), *rev'd*, 515 U.S. 687 (1995).

237. *Chevron*, 467 U.S. at 843-45.

238. *Sweet Home*, 515 U.S. at 708.

239. See *supra* note 206 and accompanying text.

structure of the statute and its injunction provisions require a recognition that a risk of harm in the future must be actionable, at least in some circumstances.<sup>240</sup> And, given the broad legislative purpose of the Act, incorporating a likelihood of injury/significant risk of harm standard in the takings prohibition in no way threatens the Act's goal of preserving endangered species and the ecosystems upon which they depend.<sup>241</sup> To the contrary, a strict actual harm standard for all takings would disserve the ESA's purpose, as species already threatened with extinction would have to undergo further harm and depletion before becoming entitled to the protections of the ESA.

## VI. CONCLUSION

The current interpretive controversy reveals that a new approach to analyzing takings claims is needed. This Note has shown that while the First Circuit model is well suited to "harm" claims and the Ninth Circuit model appropriately applies to claims of "harassment," neither model is appropriate for use in all forms of takings claims. When applied to all takings claims, the Ninth Circuit model unfairly subjects defendants to strict liability for harm to protected species not yet sustained, while the First Circuit model unduly restricts the scope of the Section 9 takings prohibition by requiring an already endangered species to suffer further harm before providing a remedy. While the legislative history and structure of the ESA reveal that a future threat of harm must be actionable in some circumstances, applying the significant risk of harm standard in the "harassment" context, rather than in the "harm" context, alleviates the harshness of such a low standard in application because it also requires showing intent or negligence. Similarly, retaining the proof of past or present injury standard for claims of "harm" takings ensures that defendants will not be held strictly liable unless a protected species has sustained palpable damage.

This Note advocates abandoning the myopic view of all takings claims as "harm" and welcoming the concept of "harassment" as developed by the FWS. Consistent with the Act, which defined "take"

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240. See *supra* notes 172-77 and accompanying text.

241. See 16 U.S.C. § 1531(b) (1994).

as *both* "harm" and "harass," and the regulatory understanding of these terms, this approach is arguably fair to both humans and endangered species.

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