

NOTE

SHARING HOME *SWEET HOME* WITH FEDERALLY PROTECTED WILDLIFE

Babbit v. Sweet Home Chapter of Communities for a Great Oregon,
115 S. Ct. 2407 (1995).

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*Like winds and sunsets, wild things were taken for granted until progress began to do away with them. Now we face the question whether a still higher "standard of living" is worth its costs in things natural, wild, and free. . . . Conservation is getting nowhere because it is incompatible with our Abrahamic concept of land. We abuse land because we regard it as a commodity belonging to us.*¹

Although naturalist Aldo Leopold wrote this passage decades before Congress enacted the federal Endangered Species Act (ESA),² his observations about our often conflicting desires to preserve wildlife and use land remain accurate today. Less than two years after the ESA's passage in 1973, the Secretary of the Interior (Secretary)³

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1. ALDO LEOPOLD, A SAND COUNTY ALMANAC AND SKETCHES HERE AND THERE at vii–viii (1949).

2. 16 U.S.C. §§ 1531–44 (1994).

3. Congress delegated authority to the Secretary of the Interior "to promulgate such regulations as may be appropriate to enforce" the ESA. *Id.* § 1540(f). The "harm" regulation, the subject of this Note, was actually promulgated by the Director of the Fish and Wildlife Service. *Babbit v. Sweet Home Chapter of Communities for a Great Or.*, 115 S. Ct. 2407, 2410 n.2 (1995). The Fish and Wildlife Service is part of the Department of the Interior. *United States v. Guthrie*, 50 F.3d 936, 943 n.4 (11th Cir. 1995). Al-

dealt with these polar desires by promulgating a regulation. That regulation prohibits persons⁴ from injuriously altering, or “harming,” the habitat of any animal protected under the ESA.⁵ After extensive litigation, the federal Supreme Court recently upheld the “harm” regulation in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*.⁶

In 1992, various landowners, logging companies, and timber workers from the Pacific Northwest and the Southeast challenged the “harm” regulation on its face as contrary to the ESA.⁷ Seeking a declaratory judgment, the plaintiffs argued that the regulation invalidly prevented logging activity in the habitats of the northern spotted owl⁸ and the red-cockaded woodpecker,⁹ which caused the plaintiffs economic injury.¹⁰ The defendant, the Secretary, contended

though entrusting the Secretary of the Interior with the bulk of ESA responsibility, Congress delegated limited authority to the Secretary of Commerce to oversee certain marine animals. 16 U.S.C. § 1533; *Guthrie*, 50 F.3d at 943 n.4.

4. The ESA defines a “person” as any “entity subject to the jurisdiction of the United States,” which includes any private, federal, or state entity. 16 U.S.C. § 1532(13).

5. 50 C.F.R. § 17.3 (1994). The regulation states, in pertinent part:

Harm in the definition of “take” in the [ESA] 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. This regulation interprets one of the prohibitions of the ESA that renders it “unlawful for any person . . . to . . . take any [endangered or threatened] species within the United States or the territorial sea of the United States.” 16 U.S.C. § 1538(a)(1)(B). The ESA further defines “take” as “to harass, *harm*, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” *Id.* § 1532(19) (emphasis added). The “take” prohibition does not apply to federally protected plants. *See id.* § 1538(a)(2).

6. 115 S. Ct. 2407 (1995). The case was argued on April 17, 1995, and decided on June 29, 1995. *Id.*

7. *Sweet Home Chapter of Communities for a Great Or. v. Lujan*, 806 F. Supp. 279, 281 (D.D.C. 1992), *rev'd sub nom.* *Sweet Home Chapter of Communities for a Great Or. v. Babbitt*, 17 F.3d 1463 (D.C. Cir. 1994), *rev'd*, 115 S. Ct. 2407 (1995). The plaintiffs were unsuccessful on two other claims. First, they argued that the “harm” regulation was unconstitutionally vague. *Id.* They additionally sought to invalidate 50 C.F.R. § 17.31 (1991), a regulation that extends all “endangered” species protection to “threatened” species unless otherwise indicated by the Secretary. *Id.* at 286. Neither argument was appealed to the Supreme Court. *Sweet Home*, 115 S. Ct. at 2410 nn.3–5.

8. The northern spotted owl is protected as a “threatened species” under 50 C.F.R. § 17.11 (1994). “Threatened species” usually enjoy the same protection as “endangered species.” *See* 50 C.F.R. § 17.31 (1994).

9. The red-cockaded woodpecker is protected as an “endangered species” under 50 C.F.R. § 17.11 (1994). It was listed pursuant to the Endangered Species Conservation Act of 1969, the ESA predecessor. *Sweet Home*, 115 S. Ct. at 2410 n.4.

10. *Sweet Home*, 115 S. Ct. at 2410.

that the regulation was a legitimate interpretation of the ESA.¹¹ Under statutory construction analysis, the Supreme Court held that the Secretary did not exceed his authority under the ESA and, therefore, the “harm” regulation was valid.¹²

The *Sweet Home* opinion has focused new attention on the scope of the “harm” regulation, especially its effect on private landowners. Without the “harm” regulation, landowners would have more freedom to use their property. Arguably, landowners could comply with the ESA, even if they destroy a California condor's¹³ nest, a northern swift fox's¹⁴ den, a grizzly bear's¹⁵ cave, or a Florida panther's¹⁶ domain, as long as a protected animal was not *directly* injured or killed.¹⁷ However, because loss of habitat is the main cause of species' loss,¹⁸ unrestricted private land use would likely extinguish such protected species as the woodland caribou,¹⁹ the red wolf,²⁰ and the bald eagle.²¹

This Note will explain *Sweet Home*'s effect on the “harm” regulation. First, it will examine the policy, purpose, and provisions of the ESA in general. Then, more specifically, this Note will review the “harm” regulation, its elements, and application to certain land activities. Next, although the thrust of the *Sweet Home* opinion focused on issues of statutory construction, this Note will explore those portions of the majority, concurring, and dissenting opinions that may affect the scope of the “harm” regulation. Finally, this Note

11. *Sweet Home*, 17 F.3d at 1464.

12. *Sweet Home*, 115 S. Ct. at 2409–18.

13. See 50 C.F.R. § 17.11 (1994) (listing the California condor as “endangered”). For a discussion of the difference between “endangered” and “threatened” species, see *infra* text accompanying notes 32–33.

14. See 50 C.F.R. § 17.11 (1994) (listing the Northern swift fox as “endangered”).

15. See *id.* (listing the grizzly bear as “threatened”).

16. See *id.* (listing the Florida panther as “endangered”).

17. One critic suggested that, if the Supreme Court invalidated the “harm” regulation, landowners would be allowed to “take actions such as chopping down a tree containing the nest of an endangered red-cockaded woodpecker or bulldozing a beach where threatened sea turtles lay their eggs — as long as the animals are not around.” Doug Harbrecht, *A Question of Property Rights and Wrongs*, NATIONAL WILDLIFE, Oct./Nov. 1994, at 7.

18. See *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 176–77 (1978).

19. See 50 C.F.R. § 17.11 (1994) (listing the woodland caribou as “endangered”).

20. See *id.* (listing the red wolf as “endangered”).

21. See *id.* (listing the bald eagle as “endangered” in all conterminous states except Michigan, Minnesota, Oregon, Washington, and Wisconsin, where the bald eagle is merely “threatened”).

will analyze why the Court was correct to uphold the “harm” regulation, but erroneous in its interpretation of it.

I. HISTORICAL OVERVIEW

A. Background Information on the Endangered Species Act, the “Take” Prohibition, and the “Harm” Regulation

Unlike the brief gestation period of the Alabama red-bellied turtle,²² the birth of the Endangered Species Act took several years. In the late 1960s, the detrimental effects of pesticides and rapid development caused many Americans to fear for the future of this country's wildlife.²³ Congress responded by passing the Endangered Species Preservation Act of 1966 (ESPA),²⁴ which merely allowed federal agencies to preserve species' habitats at their discretion.²⁵ Subsequently, although Congress had strengthened the ESPA somewhat,²⁶ increasing environmental concerns, including an international commitment to stop endangered species' commerce,²⁷ prompted Congress to deal more comprehensively and effectively with the rapid and unacceptable pace of species' extinction.²⁸ With little opposition,²⁹ Congress ultimately enacted the Endangered Species Act of 1973 (ESA)³⁰ to preserve troubled species and their habitats. In doing so, Congress recognized that preserving the ecosystems upon which troubled species depend was the best way to ensure population recovery.³¹

22. See 50 C.F.R. § 17.11 (1994) (listing the Alabama red-bellied turtle as “endangered”).

23. See Daniel J. Rohlf, *The Endangered Species Act: A Guide to Its Protections and Implementations*, STAN. ENVTL. L. SOC'Y, 1989, at 20.

24. 80 Stat. 926 (1966).

25. See Rohlf, *supra* note 23, at 21.

26. See *id.* The revised Act was called the Endangered Species Conservation Act, 83 Stat. 275 (1969). Rohlf, *supra* note 23, at 21.

27. Convention on International Trade in Endangered Species of Wild Fauna and Flora, March 3, 1973, 27 U.S.T. 1087.

28. See Rohlf, *supra* note 23, at 22–23.

29. See *id.* at 25 (arguing that “[i]f commercial interests and government agencies that have subsequently been affected by the [ESA] had presented a vocal opposition in 1973, the legislative outcome may have been altered”).

30. 16 U.S.C. §§ 1531–44 (1994). The federal Supreme Court has labeled the ESA “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.” *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978).

31. See 16 U.S.C. § 1531. The ESA's fully stated purpose is “to provide a means whereby the ecosystems upon which endangered species and threatened species depend

Troubled animals are shielded from certain human activity if they are listed under the ESA. The ESA classifies animals which deserve protection into two categories: (1) endangered species, which are “in danger of extinction throughout all or a significant portion of [their] range,”³² and (2) threatened species, which are “*likely* to become . . . endangered . . . within the foreseeable future.”³³ With the exception of marine animals,³⁴ the Secretary of the Interior classifies suspect species³⁵ as endangered or threatened³⁶ and should contemporaneously designate their “critical habitat.”³⁷ Once a species is

may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of [certain international treaties and conventions].” *Id.* § 1532(b).

32. *Id.* § 1532(6).

33. *Id.* § 1532(20) (emphasis added).

34. The Secretary of Commerce, acting through the National Marine Fisheries Service, classifies suspect marine species as endangered or threatened. *Id.* § 1533; *United States v. Guthrie*, 50 F.3d 936, 943 n.4 (11th Cir. 1995); Rohlf, *supra* note 23, at 26.

35. Under the ESA, “species” is defined to include “any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature.” 16 U.S.C. § 1532(16). Therefore, fish and wildlife may be classified by species, subspecies, or distinct geographical populations. *Id.* However, plants may only be classified by species or subspecies. *Id.* When deciding whether to list a troubled species, the listing party cannot consider economic factors. *Id.* § 1533. Rather, the decision to list must be made solely on the basis of scientific data. *Id.* Before the listing becomes final, the listing party must issue a proposed version in the Federal Register, followed by a public comment period. *Id.*

36. Current endangered and threatened species are listed in 50 C.F.R. § 17.11 (1994). Endangered American mammals include: (1) eight species of bats, (2) the Point Arena mountain beaver, (3) the woodland caribou, (4) the eastern cougar, (5) the key deer, (6) the black-footed ferret, (7) two species of fox, (8) the West Indian manatee, (9) seven species of mice, (10) the ocelot, (11) the Florida panther, (12) the Lower Keys rabbit, (13) two species of rats, (14) four species of squirrels, (15) the gray wolf, and (16) the red wolf. *Id.* Endangered American birds include: (1) the Hawaii akepa, (2) the Audubon's crested caracara, (3) the California condor, (4) two species of cranes, (5) the Hawaiian duck, (6) the bald eagle, (7) the northern aplomado falcon, (8) the palila, (9) the brown pelican, (10) the Attwater's greater prairie-chicken, (11) two species of sparrows, (12) the wood stork, and (13) two species of woodpeckers. *Id.* Endangered American reptiles, amphibians, and fish include: (1) the American and saltwater crocodile, (2) the blunt-nosed leopard lizard, and several species of (3) turtles, (4) salamanders, (5) toads, (6) chubs, (7) daces, (8) darters, (9) gambusias, (10) madtorns, (11) pupfish, (12) shiners, (13) springfish, (14) suckers, and (15) trout. *Id.* Numerous American clams, snails, insects, arachnids, and crustaceans are also listed. *Id.* If an insect is considered a “pest,” it will not be protected under the ESA. *See* 16 U.S.C. § 1533. Endangered and threatened plants, although not subject to the “taking” provision, are listed in 50 C.F.R. § 17.12 (1994).

37. 16 U.S.C. § 1533(a)(3) (requiring the Secretary to designate critical habitat “to the maximum extent prudent and determinable”). A protected species’ “critical habitat” includes those areas physically occupied by the species and/or essential to their conserva-

listed, the Secretary must “establish and implement” a recovery plan for it.³⁸ This recovery plan may include acquiring land.³⁹

Federal agencies must respect the Secretary's plan by insuring that their actions will not potentially jeopardize the conservation of any protected species or the integrity of its critical habitat.⁴⁰ To implement this “respect,” federal agencies have a duty to consult with the Fish and Wildlife Service⁴¹ if their proposed action may affect threatened or endangered species.⁴²

In addition to restricting the actions of federal agencies, the ESA also prohibits certain private and state⁴³ activity with respect to listed species. First, persons⁴⁴ may not trade any endangered or threatened species.⁴⁵ Second, and most notably, the ESA forbids any

tion. *Id.* § 1532(5)(A). Unlike in the listing process, the Secretary may consider economic factors in designating a listed species' critical habitat. *Id.* § 1533.

38. *Id.* § 1534(a).

39. *Id.* § 1534(b). The Secretary acquires land with funds from the Land and Water Conservation Fund Act of 1965. *Id.*

40. *Id.* § 1536(a)(2). A federal agency “jeopardizes” protected species if its proposed action would “reasonably . . . be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.” 50 C.F.R. § 402.02 (1994); see also *Connor v. Burford*, 848 F.2d 1441, 1452 n.24 (9th Cir. 1988).

41. If a federal agency's proposed action may affect a listed marine mammal, it must consult with the National Marine Fisheries Service instead of the Fish & Wildlife Service. See 16 U.S.C. § 1533.

42. *Id.* § 1536(a)(2). After consultation with the acting agency, the Fish and Wildlife Service (FWS) issues a biological opinion. See *id.* § 1536. If the FWS concludes that the agency's proposed action will “jeopardize” endangered or threatened species, the agency may not proceed, unless the Secretary certifies the agency's petition for an exemption and the Endangered Species Committee, or the “God Squad,” grants it. See *id.*; *Portland Audubon Soc'y v. Oregon Lands Coalition*, 984 F.2d 1534, 1536 (9th Cir. 1992) (discussing “the statutorily-created Endangered Species Committee . . . , known popularly as ‘The God Squad’”). On the other hand, if the FWS concludes that the agency's proposed action will not “jeopardize” endangered or threatened species, the agency may proceed. See 16 U.S.C. § 1536. However, the agency will probably want to apply for an “incidental take” permit before proceeding. See *id.* § 1539. For purposes of the FWS' “jeopardy” analysis, the applying agency may be allowed to assume that its private co-actors will comply with the “harm” regulation. See *Seattle Audubon Soc'y v. Lyons*, 871 F. Supp. 1291, 1303, 1311–13 (W.D. Wash. 1994).

43. “State” actors include cities and other local governments. 16 U.S.C. § 1532(13). State actors and private entities are treated equally under the ESA. See *id.* Federal agencies, however, have additional duties under the ESA. See *id.* § 1536, discussed *supra* notes 40–42 and accompanying text.

44. The ESA defines a “person” as any “entity subject to the jurisdiction of the United States,” which includes any private, federal, or state entity. *Id.* § 1532(13).

45. *Id.* § 1538(a), (c), (d); see, e.g., *United States v. Venter*, No. 91-50084, 1992 U.S. App. LEXIS 621 (9th Cir. 1992) (affirming the conviction of a South African safari leader

person from “taking” endangered fish or wildlife.⁴⁶ The “taking” prohibition applies to a wide range of human activity. In defining “take,” the ESA specifies that one cannot attempt to or actually “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect” any protected species.⁴⁷ Although the legislative history of both houses indicates that Congress intended to define “take” “in the broadest possible manner to include every conceivable way in which a person can ‘take’ or attempt to ‘take’ any fish or wildlife,”⁴⁸ Congress did not define any of these “take” verbs, such as “harass” and “harm,” in the ESA.

Although the ESA does not define any of the “take” verbs, the Secretary of the Interior, to whom Congress delegated regulatory authority,⁴⁹ has defined two of them. First, the Secretary construed “harass” to cover any person's negligence that likely injures wildlife, especially those acts which “significantly disrupt normal behavioral patterns.”⁵⁰ Second, and less than two years after the passage of the ESA, the Secretary construed “harm” to cover any “act which actu-

for importing threatened zebras); *United States v. Nuesca*, 945 F.2d 254 (9th Cir. 1991) (affirming the convictions of two men who possessed endangered seal and turtle meat in their freezers); *United States v. Nguyen*, 916 F.2d 1016 (5th Cir. 1990) (affirming the conviction of a fisherman who possessed and imported a threatened loggerhead sea turtle).

46. 16 U.S.C. § 1538(a)(1)(B)–(C) (prohibiting “taking” “within the United States,” its “territorial seas,” and the “high seas”). The “taking” prohibition applies to both endangered and threatened fish and wildlife. 50 C.F.R. § 17.31 (1994). It does not apply to endangered or threatened plants, which are protected under 16 U.S.C. § 1538(a)(2). One who knowingly “takes” a protected species is subject to civil and criminal penalties of up to \$25,000 and \$50,000, respectively. *Id.* § 1540.

47. *Id.* § 1532(19) (1988) (emphasis added).

48. S. REP. NO. 307, 93d Cong., 1st Sess. 1, 7 (1973); *see also* H.R. REP. NO. 412, 93d Cong., 1st Sess. 1, 15 (1973) (noting that “‘take’ includes, in the broadest possible terms, restrictions on the taking . . . of [endangered and threatened] species”).

49. *See* 16 U.S.C. § 1540(f).

50. 50 C.F.R. § 17.3 (1994). The regulation fully defines “harass” 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 behavioral patterns which include, but are not limited to, breeding, feeding or sheltering.” *Id.* *But cf.* *United States v. Hayashi*, 5 F.3d 1278 (9th Cir. 1993) (reversing the conviction of a Hawaiian defendant who chased dolphins away by shooting at them because he did not “harass” them under the Marine Mammal Protection Act). The *Sweet Home* Court quoted a passage from the ESA's legislative history that suggested the verb “harass” “would allow, for example, the Secretary to regulate or prohibit the 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.” 115 S. Ct. at 2416 (citing H.R. REP. NO. 412, 93d Cong., 1st Sess. 1, 14 (1973)).

ally kills or injures wildlife,” which may include “significant habitat modification or degradation” that “significantly impair[s] essential behavioral patterns, including breeding, feeding or sheltering.”⁵¹

Landowners who fear that their habitat-modifying activities will “take” an endangered or threatened animal can apply for a protective permit.⁵² In 1982, Congress amended the ESA to allow the Secretary to permit an unlawful “taking” that is merely incidental to otherwise permissible activity.⁵³ Before receiving an “incidental taking” permit, however, a landowner⁵⁴ must submit a “conservation plan.”⁵⁵ At a minimum, the conservation plan must specify (1) what impact the “taking” will have, (2) how the landowner actually and fiscally plans to “minimize and mitigate” the impact, and (3) what

51. 50 C.F.R. § 17.3 (1994). Although the Secretary originally construed “harm” in 1975, he immaterially amended it in 1981 to clarify that “habitat modification would not be considered a taking unless there was proof of attendant death or injury.” *Sweet Home*, 806 F. Supp. at 284 n.1. The previous version defined “harm” as “an act or omission which actually injures or kills wildlife, including acts which annoy it to such an extent as to significantly disrupt essential behavior 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’.*” *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 184 n.30 (1978) (emphasis by the Court) (quoting 50 C.F.R. § 17.3 (1976)). For the complete text of the current “harm” regulation, see *supra* note 5.

52. See generally *Friends of Endangered Species, Inc. v. Jantzen*, 760 F.2d 976 (9th Cir. 1985) (involving a developer who received an “incidental taking” permit).

53. 16 U.S.C. § 1539. The legislative history of the “incidental taking” amendment indicates that Congress modeled it after the California proposal that would allow private developers to lawfully build homes and commercial space as long as they surrounded it with habitat sanctuaries for the endangered Mission Blue butterfly. H.R. REP. NO. 835, 97th Cong., 1st Sess. 19 (1982), reprinted in 1982 U.S.C.C.A.N. 2807, 2872. In general, the drafters noted that the “incidental take” exception covers “situations where the unintentional taking may occur on private lands owned by a developer who has no need of a federal permit.” H.R. REP. NO. 567, 97th Cong., 1st Sess. 1 (1982), reprinted in 1982 U.S.C.C.A.N. 2807, 2815. In *Friends of Endangered Species, Inc. v. Jantzen*, 760 F.2d 976, 982–83 (9th Cir. 1985), the court upheld the Secretary’s decision to grant an “incidental taking” permit to the California developers discussed in the ESA’s legislative history. For a further discussion of *Friends*, see *infra* notes 116–22 and accompanying text. Both federal and state courts recognize that developers who find protected species on their property should seek an “incidental taking” permit by filing a “conservation plan.” See, e.g., *Pacific Northwest Generating Coop. v. Brown*, 822 F. Supp. 1479, 1488–89 (D. Or. 1993), *aff’d*, 25 F.3d 1443 (9th Cir. 1994); *Southwest Diversified, Inc. v. City of Brisbane*, 652 F. Supp. 788, 790 (N.D. Cal. 1986); *Southwest Diversified, Inc. v. City of Brisbane*, 280 Cal. Rptr. 869, 870 (Ct. App. 1991); *W.W. Dean & Assoc. v. City of South San Francisco*, 236 Cal. Rptr. 11, 13 (Ct. App. 1987).

54. Any person subject to the “take” prohibition, not just a landowner, may apply for an “incidental take” permit. See 16 U.S.C. § 1539.

55. *Id.* § 1539.

“alternative actions” the landowner considered and why he or she rejected them.⁵⁶ If satisfied that “the taking will not appreciably reduce the likelihood of the survival and recovery of the species,” the Secretary shall issue the permit, which may be conditioned on the landowner's mitigation efforts.⁵⁷

B. The Elements of “Harm”

Like “take,” “harm” is broadly defined. As mentioned earlier, the Secretary defined “harm” to mean any “act which actually kills or injures wildlife.”⁵⁸ The regulation elaborates by stating that “harm” may include “significant habitat modification or degradation” that “significantly impair[s] essential behavioral patterns, including breeding, feeding, or sheltering.”⁵⁹ Therefore, under the regulation, land activity is merely one way to unlawfully “harm” protected species.⁶⁰ However, because most of the “harm” litigation, including *Sweet Home*, has centered around the regulation's application to landowners,⁶¹ this Note will focus on that part of the definition.

1. “Significant Habitat Modification or Degradation”

Land-action “harm” requires some change in current land use.⁶²

56. *Id.* § 1539(a)(2). In addition to these requirements, the Secretary may require more information in the “incidental take” permit. *Id.*

57. *Id.* The Secretary may revoke an “incidental take” permit if he or she “finds that the permittee is not complying with [its] terms and conditions.” *Id.*

58. 50 C.F.R. § 17.3 (1994).

59. *Id.*

60. See *infra* notes 62–68, 108–59 and accompanying text for a discussion of land activities which may “harm” protected wildlife.

61. For a discussion of “harm's” non-land use applications, see *Defenders of Wildlife v. Administrator, Env'tl. Protection Agency*, 882 F.2d 1294, 1299–1301 (8th Cir. 1989) (holding that the EPA's policy decision “harmed” protected species because it allowed private landowners to use a certain pesticide).

62. See, e.g., *Forest Conservation Council v. Rosboro Lumber Co.*, 50 F.3d 781 (9th Cir. 1995) (changing an old-growth forest by clear-cutting its trees); *Morrill v. Lujan*, 802 F. Supp. 424 (S.D. Ala. 1992) (changing undeveloped private land by constructing a hotel); *Florida Key Deer v. Board of County Comm'rs*, 772 F. Supp. 601 (S.D. Fla. 1991) (changing a habitat by building a road). Landowners with water rights can also “harm” if they significantly change current water use. See, e.g., *United States v. Glenn-Colusa Irrigation Dist.*, 788 F. Supp. 1126 (E.D. Cal. 1992) (changing a habitat\river by extracting water).

First, the property in question must be “habitat.”⁶³ Although the ESA defines “critical habitat,” it does not define “habitat.”⁶⁴ Therefore, if the land in question falls within a protected species’ “critical habitat,” then “habitat” is satisfied.⁶⁵ If the land is not “critical habitat,” it needs to be at least “suitable” for and “occupied” by a protected species.⁶⁶

The change in land use must also be “significant.” Although it is a factual question, a change is more likely to be found “significant” the more permanent, pervasive, or different it is.⁶⁷ For example, in *Fund for Animals, Inc. v. Florida Game & Fresh Water Fish Commission*, four days of airboat traffic was not a “significant” change because it was temporary, covered a small area so that animals could easily retreat, happened every year, and created no more noise than local airplanes did.⁶⁸ Therefore, in *Fund*, the endangered Florida panther, the endangered Everglades kite, and the threatened indigo snake were not “harmed.”⁶⁹

2. Actual Injury or Death to a Suspect Species

63. 50 C.F.R. § 17.3 (1994).

64. 16 U.S.C. § 1532(5). For a discussion of “critical habitat,” see *supra* note 37 and accompanying text.

65. See, e.g., *Palila v. Hawaii Dep't of Land & Natural Resources*, 852 F.2d 1106, 1107 n.1 (9th Cir. 1988) (allowing sheep to graze on a landowning entity's property that was part of the endangered palila's critical habitat); *Sierra Club v. Lyng*, 694 F. Supp. 1260 (E.D. Tex. 1988) (proposing to clear-cut a forest that was part of the red-cockaded woodpecker's critical habitat), *rev'd on other grounds sub nom. Sierra Club v. Yeutter*, 926 F.2d 429 (5th Cir. 1991).

66. See, e.g., *Marbled Murrelet v. Pacific Lumber Co.*, 880 F. Supp. 1343, 1359–60 (N.D. Cal. 1995) (finding a privately owned forest “occupied by” and “suitable habitat for” the marbled murrelet, a threatened bird), *appeal dismissed*, No. 94-15194, 1995 U.S. App. LEXIS 17355 (9th Cir. 1995); *Morrill v. Lujan*, 802 F. Supp. 424 (S.D. Ala. 1992) (finding privately owned land adjacent to the endangered Perdido Key Beach mouse's “critical habitat” occupied by and suitable for the animal).

67. See, e.g., *Fund for Animals, Inc. v. Florida Game & Fresh Water Fish Comm'n*, 550 F. Supp. 1206, 1210 (S.D. Fla. 1982).

68. *Id.*; see also *National Wildlife Fed'n v. Burlington N. R.R.*, 23 F.3d 1508, 1512–13 (9th Cir. 1994) (affirming a finding of no “significant” land change because a grain spill was “localized” and quickly cleaned up). Installing a fence around one's property might be another example of an insignificant change in land use. See *Christy v. Hodel*, 857 F.2d 1324, 1329 n.4 (9th Cir. 1988), *cert. denied*, 490 U.S. 1114 (1989).

69. 550 F. Supp. at 1210.

Under the “harm” regulation, the land activity in question must “actually injure or kill wildlife.”⁷⁰ Certain levels of proof regarding “actual death” may be more convincing than others. At one extreme, proof that an individual, specific animal had died was lacking in *National Wildlife Federation v. National Park Service*.⁷¹ On the other hand, proof that a species population had declined was sufficient in *Sierra Club v. Lyng*.⁷²

Proving “actual injury” can be more difficult. The “harm” regulation states that land activities may injure wildlife if they “significantly impair[] essential behavioral patterns.”⁷³ These “essential behavioral patterns” include “breeding, feeding, or sheltering.”⁷⁴ Because “injury” is less concrete than “death,” courts usually examine the status of a species population rather than individual, specific animals.⁷⁵ For example, in *Palila v. Hawaii Department of Land & Natural Resources (Palila II)*, proof that a protected species population exclusively ate, lived, and mated in certain mature vegetation was enough to show that a landowning entity “injured” the species by allowing sheep to eat the immature vegetation.⁷⁶ The *Palila II*

70. 50 C.F.R. § 17.3 (1994).

71. 669 F. Supp. 384, 389 (D. Wyo. 1987) (holding that the existence of a campground in the threatened grizzly bear's habitat did not “harm” the bears because none had died); *accord* National Wildlife Fed'n v. Hodel, 23 Env't. Rep. Cas. (BNA) 1089 (E.D. Cal. 1985) (stating that land-action “harm” requires proof of death to “individuals of a species”).

72. 694 F. Supp. 1260, 1270–71 (E.D. Tex. 1988) (finding that the population of the endangered red cockaded woodpecker had severely declined over ten years, as evidenced by “statistical information”), *rev'd on other grounds sub nom.* Sierra Club v. Yeutter, 926 F.2d 429 (5th Cir. 1991); *accord* Marbled Murrelet v. Pacific Lumber Co., 880 F. Supp. 1343, 1357 (N.D. Cal. 1995) (examining evidence that the endangered marbled murrelet population had declined after logging), *appeal dismissed*, No. 94-15194, 1995 U.S. App. LEXIS 17355 (9th Cir. 1995); *Swan View Coalition v. Turner*, 824 F. Supp. 923, 938–40 (D. Mont. 1992) (finding that proof of a “general” decline in the grizzly bear population was sufficient, although “slim,” evidence of actual death).

73. 50 C.F.R. § 17.3 (1994). Mere impairment of a protected species' behavior is not necessarily injurious; the impairment must be actually injurious. *Swan View Coalition, Inc. v. Turner*, 824 F. Supp. 923, 938–39 (D. Mont. 1992).

74. 50 C.F.R. § 17.3 (1994).

75. *See, e.g., Palila v. Hawaii Dep't of Land & Natural Resources (Palila II)*, 852 F.2d 1106 (9th Cir. 1988).

76. *Id.* at 1107 n.1, 1108–09. This case is called *Palila II* because it followed the near-identical case of *Palila v. Hawaii Dep't of Land & Natural Resources*, 639 F.2d 495 (9th Cir. 1981) (*Palila I*). In *Palila I*, the same landowning entity allowed goats and a different type of sheep to eat the immature vegetation on which the endangered palila wholly relied in its mature state. 639 F.2d at 497. Like the *Palila II* court, the *Palila I* court held that the land activity had “harmed” the endangered bird. *Id.* at 499.

court specifically left open the question of whether “actual injury” includes “preventing the recovery of an endangered species.”⁷⁷ Unlike in *Palila II*, in *American Bald Eagle v. Bhatti*, proof that a protected species population ate a type of animal contaminated by lead was lacking and, therefore, resulting “injury” was not established.⁷⁸

The prohibited impact, injury or death, must be on “wildlife” protected by the ESA.⁷⁹ The ESA expansively defines “wildlife.” As a result, the prohibited impact may be on any part of an endangered or threatened animal, including its eggs or offspring.⁸⁰

3. Causation

In order to constitute actionable “harm,” the change in land use and the prohibited impact must be factually connected. Courts call this connection the “critical link between habitat modification and injury.”⁸¹ Because “harm” is merely one way to unlawfully “take” a suspect species under the ESA,⁸² courts have not applied a higher

77. 852 F.2d at 1110.

78. 9 F.3d 163, 165–66 (1st Cir. 1993) (holding that because mere risk of injury does not satisfy “harm,” plaintiffs must show that the endangered bald eagle actually ate lead-infested deer and were actually injured as a result); see also *Pyramid Lake Paiute Tribe v. United States Dep't of the Navy*, 898 F.2d 1410, 1419 (9th Cir. 1990) (holding that the endangered cui-ui had not been “harmed” because plaintiffs presented no evidence that the defendant's leasing of water rights actually impaired the fishes' spawning). A species population may also be “actually injured” if a landowner's actions causes its members to become blind, uncoordinated, neurologically dysfunctional, and susceptible to more diseases. *National Wildlife Fed'n v. Hodel*, 23 Env't. Rep. Cas. (BNA) 1089 (E.D. Cal. 1985) (discussing the effects of lead on bald eagles).

79. 50 C.F.R. § 17.3 (1994). Although the “harm” regulation merely uses the term “wildlife,” courts have assumed that it extends to all protected “fish.” See, e.g., *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 184 n.30 (1978) (noting that a proposed dam would “harm” the endangered snail darter, a fish); *Pyramid Lake Paiute Tribe v. United States Dep't of the Navy*, 898 F.2d 1410, 1419 (9th Cir. 1990) (analyzing whether the endangered cui-ui, a fish, had been “harmed”); *Sierra Club v. Lujan*, No. MO-91-CA-069, 1993 U.S. Dist. LEXIS 3361, *83–88 (W.D. Tex. 1993) (holding that the endangered fountain darter, a fish, was “harmed” by withdrawing water from an aquifer).

80. 16 U.S.C. § 1539(8) (defining “fish or wildlife”). Individual animals in lawful captivity are not protected by the ESA, even if they are a member of a suspect species. In *Defense of Animals v. Cleveland Metroparks Zoo*, 785 F. Supp. 100, 101–02 (N.D. Ohio 1991).

81. *Morrill v. Lujan*, 802 F. Supp. 424 (S.D. Ala. 1992) (quoting *Palila v. Hawaii Dep't of Land & Natural Resources*, 649 F. Supp. 1070, 1077 (D. Haw. 1986), *aff'd*, 852 F.2d 1106 (9th Cir. 1988) (*Palila II*)).

82. 16 U.S.C. § 1532(19) (defining “take”). For a further discussion of ESA “takings,” see *supra* notes 46–48 and accompanying text.

causation standard for “harm” than any other “take” verb.⁸³ Although the doctrine of proximate causation, including notions of foreseeability, is often employed in tort law,⁸⁴ it has not been applied in any ESA “taking” analysis.⁸⁵ Therefore, in *Palila II*, proof that a landowner's sheep ate certain immature vegetation on which the endangered palila totally relied in its mature state was enough to establish a “critical link.”⁸⁶

Only one “harm” case has mentioned proximate cause. In *United States v. Glenn-Colusa Irrigation District*, the federal government sought to enjoin a landowning entity from pumping water out of a river.⁸⁷ Although the entity was responsible for the pumping, a state agency had installed a screen between the river and the pump.⁸⁸ As water approached the screen, it reached excessive speeds.⁸⁹ As a result, threatened Sacramento River winter-run chinook salmon often became trapped against the screen, unable to resist the oncoming current.⁹⁰ Highly vulnerable to predation, the population of the fish species declined.⁹¹ The government argued that the entity's

83. See, e.g., *Palila II*, 852 F.2d 1106, 1110 (requiring a cause and effect relationship between land-action and animal injury); *Morrill*, 802 F. Supp. at 430 (requiring “substantial evidence” that land-action “could threaten” the endangered Perdido Key beach mouse); *Sierra Club v. Lyng*, 694 F. Supp. 1260, 1271 (E.D. Tex. 1988) (requiring a cause and effect relationship between land-action and animal injury), *rev'd on other grounds sub nom.* *Sierra Club v. Yeutter*, 926 F.2d 429 (5th Cir. 1991). In one ESA “takings” criminal case, the court instructed the jury that in order to find the defendant guilty it must find that (1) the defendant knowingly took an animal; (2) the animal was protected under the ESA; and (3) the Secretary of the Interior did not permit the defendant to take such animal. *United States v. St. Onge*, 676 F. Supp. 1044, 1045 (D. Mont. 1988). No instruction about “causation” or “proximate causation” was given. See *id.*

84. *California v. Watt*, 520 F. Supp. 1359, 1379 (C.D. Cal. 1981) (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 44 (4th ed. 1971)), *rev'd on other grounds*, 683 F.2d 1253 (9th Cir. 1982). In the absence of express statutory language, the *Watt* court refused to imply a requirement of proximate causation in the Coastal Zone Management Act. *Id. But cf.* *No Oilport! v. Carter*, 520 F. Supp. 334, 371–73 (W.D. Wash. 1981) (implying a proximate causation requirement in the Treaty of Medicine Creek, 10 Stat. 1132 (1855)).

85. As of March 29, 1996, the following search in LEXIS' “GENFED;COURTS” library only produced one relevant proximate cause/ESA case out of eight listed ones: “ENDANGERED SPECIES ACT AND TAK! OR TOOK AND PROXIMAT! W/15 CAUS!”

86. 852 F.2d at 1108–10.

87. 788 F. Supp. 1126, 1128 (E.D. Cal. 1992).

88. *Id.* at 1133. The state agency had installed the fish screen because the landowning entity had failed to install one pursuant to California law. *Id.*

89. *Id.* at 1130.

90. *Id.*

91. *Id.* at 1129–30.

habitat-modifying pumping was causing “harm” to the fish.⁹² The entity, on the other hand, asserted that the state's screen was the cause of the “harm.”⁹³ The court enjoined the entity from pumping during the fish's mating season, finding that the pumping caused the unlawful “harm” because, without it, “[t]he screen itself present[ed] no hazard to the salmon.”⁹⁴ The court presumably applied some form of proximate causation analysis, because, in response to one of the entity's arguments, it refused “to adopt the California definition of proximate cause of a taking rather than federal common law.”⁹⁵ Although mentioning proximate cause, the *Glenn-Colusa* court did not state any test for meeting it.⁹⁶

4. Penalties and Injunctions

Persons who violate the “harm” regulation are subject to criminal and civil penalties.⁹⁷ First, the Secretary may civilly sue “harm” violators.⁹⁸ If the Secretary proves a “knowing” violation, the violator may be liable up to \$25,000.⁹⁹ If the Secretary merely proves a violation, the violator may be liable up to \$500.¹⁰⁰ As alternatives to civil suits, federal prosecutors may seek criminal penalties.¹⁰¹ Violators may be criminally liable up to \$50,000 and one year in prison for each “knowing” violation.¹⁰²

92. *Id.* at 1133.

93. *Id.*

94. *Id.* The court also reasoned that, because the entity was required by California law to install a fish screen, its failure to do so should not excuse its ESA violation. *See id.*

95. *Id.* at 1133–34. The *Glenn-Colusa* court refused to apply California's definition of proximate causation, reasoning that Congress did not intend the ESA to “apply differently in different states depending on state law definitions of proximate cause.” *Id.*

96. *See id.* at 1128–34.

97. 16 U.S.C. § 1540. In both criminal and civil cases, alleged ESA-violators may affirmatively raise self-defense. *Id.* § 1540(a)(3), (b)(3). The affirmative defense only covers persons; alleged violators may not raise self-defense of property. *Christy v. Hodel*, 857 F.2d 1324 (9th Cir. 1988), *cert. denied*, 490 U.S. 1114 (1989); *Mountain States Legal Found. v. Hodel*, 799 F.2d 1423, 1427–28 (10th Cir. 1986), *cert. denied*, 480 U.S. 951 (1987).

98. 16 U.S.C. § 1540(a). In an ESA civil suit, the standard of proof is a preponderance of evidence. *See id.*

99. *Id.* § 1540(a)(1).

100. *Id.*

101. *See id.* § 1540(b), (g)(2). In criminal ESA cases, the standard of proof is guilt beyond a reasonable doubt. *See id.*

102. *Id.* § 1540(b).

In addition to providing post-“harm” civil and criminal penalties, the ESA also allows certain parties to enjoin land activities pre-“harm.”¹⁰³ Unlike with civil and criminal penalties, both the government, through the Attorney General of the United States,¹⁰⁴ and private citizens¹⁰⁵ may seek injunctions. Parties seeking injunctions must show that “future injury is sufficiently likely.”¹⁰⁶ In the context

103. *See id.* § 1540(e)(6), (g)(1).

104. *Id.* § 1540(e)(6); *see also* United States v. Glenn-Colusa Irrigation Dist., 788 F. Supp. 1126 (E.D. Cal. 1992) (granting the United States' motion to enjoin a landowner from pumping water, which “harmed” the threatened Sacramento River winter-run chinook salmon).

105. 16 U.S.C. § 1540(g)(1)(A); *see also* National Wildlife Fed'n v. Burlington N. R.R., No. CV-91-79-GF, 1992 U.S. Dist. LEXIS 22146, *8 (D. Mont. 1992) (“The sole remedy available to private citizens under the ESA . . . is injunctive relief.”), *aff'd*, 23 F.3d 1508 (9th Cir. 1994).

Many courts extend the ESA's “citizen suit” provision to allow protected species to bring suit “in their own right.” *Van Scoy v. Shell Oil Co.*, No. C 94-3327 FMS, 1995 U.S. Dist. LEXIS 5430, *11 (N.D. Cal. 1995); *see also* American Bald Eagle v. Bhatti, 9 F.3d 163, 164 (1st Cir. 1993) (stating how the American bald eagle, a species of bird listed as endangered, “brought this action to enjoin [a] . . . deer hunt”); *Palila v. Hawaii Dep't of Land & Natural Resources (Palila II)*, 852 F.2d 1106, 1107 (9th Cir. 1988) (explaining how the endangered palila, a bird, “has legal status and wings its way into federal court as a plaintiff in its own right”); *Marbled Murrelet v. Pacific Lumber Co.*, 880 F. Supp. 1343 (N.D. Cal. 1995) (“[A]s a protected species under the ESA, the marbled murrelet [a bird] has standing to sue ‘in its own right.’”), *appeal dismissed*, No. 94-15194, 1995 U.S. App. LEXIS 17355 (9th Cir. 1995). *But cf.* *Citizens to End Animal Suffering and Exploitation, Inc. v. New England Aquarium*, 836 F. Supp. 45, 49 (D. Mass. 1993) (finding that, like the ESA, the Marine Mammal Protection Act does not grant standing to animals). Third parties may represent such animals if their interests are “inextricably intertwined” with the animals' interests. *Van Scoy*, No. C 94-3327 FMS, 1995 U.S. Dist. LEXIS at *11-14 (finding that the plaintiff failed to show how his interests were “inextricably intertwined” with the interests of the endangered peregrine falcon, endangered California clapper rail, threatened winter-run chinook salmon, and threatened delta smelt).

Procedurally, private plaintiffs must give notice to the alleged violator and the Secretary sixty days before filing for an injunction. 16 U.S.C. § 1540(g)(2)(A). Private plaintiffs are prohibited from seeking injunctions if the government has already commenced an action. *Id.* If the Secretary is not enforcing the “take” prohibition, private parties may seek to compel such enforcement. *Id.* § 1540(g)(1)(B).

106. *National Wildlife Fed'n v. Burlington N. R.R.*, 23 F.3d 1508, 1511 (9th Cir. 1994); *see also* *Forest Conservation Council v. Rosboro Lumber Co.*, 50 F.3d 781, 784 (9th Cir. 1995) (“[A]s long as some injury to wildlife occurs, either in the past, present, or future, the injury requirement of the Secretary's [harm regulation] would be satisfied . . . [A] showing of an imminent threat of injury to wildlife suffices.”); *Marbled Murrelet v. Pacific Lumber Co.*, 880 F. Supp. 1343 (N.D. Cal. 1995) (following *Burlington*), *appeal dismissed*, No. 94-15194, 1995 U.S. App. LEXIS 17355 (9th Cir. 1995); *United States v. Glenn-Colusa Irrigation Dist.*, 788 F. Supp. 1126, 1132 (E.D. Cal. 1992) (stating that a court should grant an injunction if “irreparable injury” is “suffi-

of “harm,” however, some courts require a stronger showing that the land activity in question “will actually, as opposed to potentially, cause harm to the species.”¹⁰⁷

C. Land Activities that May “Harm” Protected Species

The types of private and public land use that may be stopped and/or penalized under the “harm” regulation are countless. Basically, as discussed above, *any* substantial change in land use that causes injury or death to a federally protected species member or population may constitute an unlawful “taking” under the ESA. Although the possibilities are many, the most extensive “harm” litigation has focused on four types of land use.

1. Development

The “harm” regulation may prevent certain commercial and residential development, especially if the land is being changed from its natural state. However, a landowner must be currently developing “habitat.” In *Morrill v. Lujan*, a citizen sought to enjoin a landowner from constructing a hotel on his eight-acre property.¹⁰⁸ Even though an experienced independent surveyor did not find any, the citizen asserted that endangered Perdido Key Beach mice lived on the landowner's property¹⁰⁹ and that construction of a hotel would “harm” the mice.¹¹⁰ The *Morrill* court denied the injunction, finding “no substantial evidence” that the development “could threaten the species” because only a small portion of the property was “suitable habitat” for the mice.¹¹¹ Although the court recognized that neigh-

ciently likely”).

107. *American Bald Eagle v. Bhatti*, 9 F.3d 163, 166 (1st Cir. 1993); *see also* *Fund for Animals, Inc. v. Florida Game & Fresh Water Fish Comm'n*, 550 F. Supp. 1206, 1210 (S.D. Fla. 1982) (refusing to enjoin airboat activity because the record failed to show that such traffic “will `significantly disrupt normal behavior patterns'”). *But see Palila II*, 852 F.2d at 1110 (affirming an injunction because the habitat destruction in question “could result in extinction” of the endangered palila).

108. 802 F. Supp. 424, 425 (S.D. Ala. 1992). The landowner had already leveled the entire property at the time of litigation. *Id.*

109. *Id.* at 426 n.2.

110. *Id.* at 426. The citizen-plaintiff also argued that the increase in visitors, especially those with cats, would “harm” the mice. *Id.*

111. *Id.* at 430. Even if the property had contained more of the mice's “suitable habitat,” the court was not convinced that any mice existed on the property. *See id.* In addition, the court reasoned that, although the number of visitors would increase, they

boring development could “harm” the mice, it stated that the mere possibility of injurious future development is not enough to stop current lawful development.¹¹²

Just as the citizen in *Morrill* tried to stop commercial development, an environmental group in *Maine Audubon Society v. Purslow* tried to stop residential development.¹¹³ In particular, the group sought to enjoin the defendant-landowners from constructing a residential community in the habitat of the threatened American bald eagle.¹¹⁴ However, the *Maine* court refused to issue an injunction because, at the time of litigation, the defendant's property did not contain any eagles or nests.¹¹⁵

Certain levels of development may ultimately help, rather than “harm,” protected species. In *Friends of Endangered Species, Inc. v. Jantzen*, commercial and residential developers purchased an entire mountain and wanted to build homes and offices on it.¹¹⁶ Facing opposition from local governments and environmental groups, the developers promised to leave two-thirds of the mountain in its natural state.¹¹⁷ During these negotiations, however, the Fish and Wildlife Service discovered that the endangered Mission Blue butterfly inhabited the grassy areas of the mountain.¹¹⁸ In need of an “incidental taking” permit,¹¹⁹ the developers, environmental groups, and local governments worked together to draft a “conservation plan.”¹²⁰ In the plan, the parties concluded that, without any development, the butterfly's grassy habitat would be overtaken by brush.¹²¹ Therefore, the developers agreed to permanently maintain grassy areas

would not likely bring cats to a hotel. *Id.* at 431.

112. *Id.*

113. 907 F.2d 265, 266 (1st Cir. 1990).

114. *Id.*

115. *Id.* at 267. In addition, the court noted that Maine's attorney general was concurrently seeking an injunction in state court. *Id.*

116. 760 F.2d 976, 979 (9th Cir. 1985).

117. *Id.*

118. *Id.* The Fish and Wildlife Service also found that the endangered San Bruno Elfin butterfly and the endangered San Francisco Garter Snake lived on the mountain, but their populations would not be affected by development. *Id.* at 979 n.3.

119. See 16 U.S.C. § 1539. For a discussion of “incidental takings,” see *supra* notes 52–53 and accompanying text.

120. *Friends*, 760 F.2d at 980; see also 16 U.S.C. § 1539 (discussing “conservation plans”). For a discussion of “conservation plans,” see *supra* notes 54–57 and accompanying text.

121. *Friends*, 760 F.2d at 980.

and disturb only fourteen percent of the butterfly's current habitat.¹²²

2. Roads

The "harm" regulation has been used to stop public entities from building roads, especially through natural areas. In *Florida Key Deer v. Board of City Commissioners*, some citizens sought to enjoin a county from building a road through the endangered key deer's habitat.¹²³ Because "harm" to the deer was likely, the court granted the citizens a preliminary injunction.¹²⁴ Frustrated, the county permanently withdrew its road-building plans.¹²⁵

The higher the number of proposed roads through undisturbed lands, the more likely some may be enjoined under the "harm" regulation. In *Swan View Coalition, Inc. v. Turner*, some environmental groups sought to enjoin road-building in a national forest, the habitat of the threatened grizzly bear.¹²⁶ Certain federal agencies had already built several roads, and were planning to build more.¹²⁷ The agencies moved for summary judgment, arguing that the groups had no evidence that the roads "harmed" bears.¹²⁸ However, the *Swan* court found genuine issues of fact regarding the disputed elements of "harm."¹²⁹ First, an expert testified that there was a "significant" number of proposed and existing roads.¹³⁰ Another expert testified

122. *Id.* After the conservation plan was submitted, the Fish and Wildlife Service granted the "incidental take" permit. *Id.* at 980–81. An environmental group that opposed any development on the mountain challenged the validity of the permit, but the *Jantzen* court sustained it. *Id.* at 981–85; see also *supra* note 53.

123. 772 F. Supp. 601, 602 (S.D. Fla. 1991); 50 C.F.R. § 17.11 (1994) (listing the key deer as an endangered species).

124. *Florida Key Deer*, 772 F. Supp. at 602.

125. *Id.* Because the *Florida Key Deer* citizens "substantially" helped further "the goals of the Endangered Species Act," the court awarded them attorneys' fees and costs. *Id.* at 601–02; 16 U.S.C. § 1540(g)(4) (stating that attorneys' fees and costs should be awarded to prevailing parties under "appropriate" circumstances).

126. 824 F. Supp. 923, 926 (D. Mont. 1992); 50 C.F.R. § 17.11 (1994) (listing the grizzly bear as a threatened species).

127. *Swan View*, 824 F. Supp. at 939. The plaintiffs alleged that the government was building too many roads through a given area of forest, i.e., building more than "one mile of road per square mile of forest land." *Id.*

128. *Id.*

129. *Id.* at 939–40.

130. *Id.* at 940.

that the grizzly bear population had slightly declined.¹³¹ Finally, the groups presented reports about bears dying near the defendants' existing roads.¹³² Given this evidence, the *Swan* court found that issues of fact existed regarding (1) "significant habitat modification," (2) actual death, and (3) causation.¹³³

3. Agriculture

Although there are no reported "harm" cases directed at farmers, case law indicates that protected species may be "harmed" by pesticides and other chemicals. In *Defenders of Wildlife v. Administrator, Environmental Protection Agency*, a federal agency registered a certain kind of pesticide, which allowed farmers to lawfully use it as rat bait.¹³⁴ An environmental group sought to enjoin the continued registration, arguing that it "harmed" the endangered black-footed ferret.¹³⁵ The trial court granted the injunction, and the appellate court affirmed, finding a "clear relationship" between the agency's registration and ferret deaths.¹³⁶

In addition to proving the other elements of "harm," it is essential for plaintiffs and prosecutors to show that members of a protected species ingested pesticide. The environmental group in *Defenders* proved that ferrets had either directly eaten the pesticide/bait or indirectly absorbed it through rat prey.¹³⁷ Similarly, in *National Wildlife Federation v. Hodel*, an environmental group proved that over ninety-six bald eagles had died as result of eating lead-infested prey.¹³⁸ Therefore, in *Hodel*, a federal agency was enjoined from permitting lead-shot deer hunting in the protected bald

131. *Id.*

132. *Id.* at 939–40.

133. *Id.* at 940. Although creating issues of fact regarding "harm" to the threatened grizzly bear, the groups failed to create any genuine issues of fact regarding "harm" to the endangered gray wolf. *Id.*; 50 C.F.R. § 17.11 (1994) (listing the gray wolf as an "endangered species"). As of the date of publication, the *Swan View* court has not issued a memorandum opinion.

134. 882 F.2d 1294, 1296 (8th Cir. 1989).

135. *Id.* at 1297; 50 C.F.R. § 17.11 (1994) (listing the black-footed ferret as an "endangered species").

136. *Defenders*, 882 F.2d at 1301.

137. *Id.*

138. 23 Env't. Rep. Cas. (BNA) 1089 (E.D. Cal. 1985); *cf.* *American Bald Eagle v. Bhatti*, 9 F.3d 163, 165 (1st Cir. 1993) (lacking proof that a protected species population ate a type of animal contaminated by lead).

eagles' habitat.¹³⁹

4. Logging

Perhaps the most drastic change in land use occurs when landowners remove most of the trees from their property. Thus, the more trees a landowner wants to cut down, the more likely it is that "harm" litigation will arise. In the recent case of *Marbled Murrelet v. Pacific Lumber Co.*, a landowner wanted to remove or "clear-cut" all his trees within ten years.¹⁴⁰ Pursuant to state law, the landowner had to survey his property for a rare type of bird, the marbled murrelet, before the state would allow him to clear-cut.¹⁴¹ After his employees conducted surveys, the landowner reported that he did not find any murrelets.¹⁴² The state then allowed him to start clear-cutting, subject to an ongoing duty to survey.¹⁴³

Once the landowner began to clear-cut, however, his employees detected seventy murrelets.¹⁴⁴ Concealing this information, the landowner ordered his tree-cutters to work overtime, including on Sundays and Thanksgiving.¹⁴⁵ Indeed, while his employees were logging around the clock, the landowner threw a party, where he and his guests played darts and used a picture of a marbled murrelet as a target!¹⁴⁶ The landowner feared that, if he reported the bird sightings, he "might be stopped" from logging, especially since the Secretary of the Interior had just listed the marbled murrelet as a "threatened species" under the ESA.¹⁴⁷ Soon, however, an environmental group discovered the murrelets and sued for a permanent injunction, alleging that the landowner's continued clear-cutting would "harm" the birds.¹⁴⁸

The *Marbled Murrelet* court first addressed whether marbled

139. 23 Env't. Rep. Cas. (BNA) 1089 (E.D. Cal. 1985).

140. 880 F. Supp. 1343, 1349-50 (N.D. Cal. 1995), *appeal dismissed*, No. 94-15194, 1995 U.S. App. LEXIS 17355 (9th Cir. 1995). Although the landowner was a corporation, the pronoun "he" will be used for narrative purposes.

141. *Marbled Murrelet*, 880 F. Supp. at 1350.

142. *Id.* at 1353.

143. *Id.*

144. *Id.* at 1357.

145. *Marbled Murrelet*, 880 F. Supp. at 1356-57.

146. *Id.* at 1353.

147. *Id.* at 1358.

148. *Id.* at 1344-45.

murrelets existed on the landowner's property. The landowner's employees testified that they did not discover any such birds.¹⁴⁹ The group's independent surveyors testified to the contrary.¹⁵⁰ Finding that protected murrelets were present, the court believed the group's surveyors over the landowner's "partial" employees.¹⁵¹

Most importantly, the *Marbled Murrelet* court addressed whether the murrelet population would be "actually injured" by the landowner's clear-cutting. The court found that logging would "significantly impair" the birds' ability to breed.¹⁵² Because murrelets mate and nest in the same tree every year, the court reasoned that clear-cutting would destroy many nests, disorient returning birds, and increase competition "for the few remaining nest sites."¹⁵³ In addition, because the forest would lose its natural density, the court reasoned that the nesting murrelets and their offspring faced "increased risk of avian predation."¹⁵⁴ Therefore, because of a "definite threat of future harm," the court permanently enjoined the landowner from clear-cutting his property.¹⁵⁵

Unlike landowners who clear-cut, landowners who remove a limited number of trees in a protected species' habitat are less likely to violate the "harm" regulation. In *Sierra Club v. Lyng*, the court held that a federal agency "harmed" the endangered red-cockaded woodpecker by clear-cutting a federally-owned forest.¹⁵⁶ As an alternative, the court recommended that the agency selectively, as opposed to totally, cut its timber.¹⁵⁷ The court reasoned that if the agency removed fewer trees, then the tree-dependent woodpecker could maintain normal mating, breeding, and feeding habits.¹⁵⁸

149. *Marbled Murrelet*, 880 F. Supp. at 1361-66.

150. *See id.*

151. *Id.*

152. *Id.* at 1365-66.

153. *Marbled Murrelet*, 880 F. Supp. at 1366.

154. *See id.*

155. *Id.* at 1367-69. The court also found that the landowner's logging would unlawfully "harass" the marbled murrelet. *Id.* Before concluding, the court suggested that the landowner might be able to cut some trees in the future if he obtained an "incidental take" permit by submitting a "conservation plan." *Id.* at 1368.

156. 694 F. Supp. 1260, 1270-72 (E.D. Tex. 1988), *rev'd on other grounds sub nom.* *Sierra Club v. Yeutter*, 926 F.2d 429 (5th Cir. 1991).

157. *See id.* at 1263 n.2, 1267-71.

158. *See id.* at 1271-72. For other cases involving logging and the "harm" regulation, see *Forest Conservation Council v. Rosboro Lumber Co.*, 50 F.3d 781 (9th Cir. 1995) (reversing a trial court's refusal to enjoin a landowner's clear-cutting); *Seattle Au-*

II. COURT'S ANALYSIS

In a six-three decision, the Supreme Court upheld the “harm” regulation.¹⁵⁹ Justices O'Connor, Kennedy, Souter, Ginsburg, and Breyer joined Justice Stevens' majority opinion.¹⁶⁰ Although Justice O'Connor agreed with the *Sweet Home* outcome, she filed a concurring opinion.¹⁶¹ Chief Justice Rehnquist and Justice Thomas joined Justice Scalia's dissenting opinion.¹⁶²

A. Justice Stevens' Opinion for the Court

Under statutory construction analysis, the *Sweet Home* Court held that the “harm” regulation was a legitimate interpretation of the ESA's “take” prohibition.¹⁶³ The Court stated that a federal agency's gap-filling regulation is “legitimate” under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*¹⁶⁴ if it reasonably

dubon Soc'y v. Evans, 952 F.2d 297, 302–03 (9th Cir. 1991) (stating that proposed logging would “harm” the threatened northern spotted owl under the ESA, but not the Migratory Bird Treaty Act); Public Resources Protection Ass'n v. Department of Forestry & Fire Protection, 865 P.2d 728, 732 (Cal. 1994) (noting how California cuts trees in its forests in such a way as to avoid an ESA “taking”).

159. *Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, 115 S. Ct. 2407 (1995). The parties argued the case on April 17, 1995, and the Court rendered a decision on June 29, 1995. *Id.* See *supra* notes 6–12 and accompanying text for a discussion of the facts of *Sweet Home*.

160. *Id.*

161. *Id.* at 2418–21 (O'Connor, J., concurring).

162. *Id.* at 2421–31 (Scalia, J., dissenting).

163. *Id.* at 2409–18.

164. 467 U.S. 837, 842–45 (1984). Prior to 1984, the Supreme Court selectively deferred to agency constructions when interpreting statutes. *Cf.* KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 3.1 (1994) (suggesting that, prior to 1984, the Supreme Court randomly deferred to agency constructions). When the Court, as well as lower courts, had to interpret ambiguous statutes, it often adopted existing administrative constructions. For example, the Supreme Court has deferred to EEOC guidelines when interpreting Title VII of the Civil Rights Act of 1964. *See* *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 431 (1975). The Court has also used administrative rulings to clarify congressional intent on the Voting Rights Act of 1965. *See* *United States v. Board of Comm'rs*, 435 U.S. 110 (1978).

In 1984, the Supreme Court in *Chevron* announced a two-step test to determine when courts should defer to an agency's construction of a statute the agency administers. 467 U.S. at 842–45. Before the *Chevron* test applies, Congress must have explicitly or implicitly delegated legislative authority to an executive agency. *See id.* The first prong of the *Chevron* test requires a court to determine whether Congress unambiguously addressed the precise regulatory issue. *Id.* at 842. If Congress unambiguously ad-

reflects the intent of Congress.¹⁶⁵ The Court reasoned that the “harm” regulation was reasonable in light of the ESA's text, purpose, structure, legislative history, and “incidental take” amendment.¹⁶⁶ In general, the Court deferred to the Secretary's “complex policy choice” because of his “regulatory expertise” and Congress' broad delegation of enforcement power.¹⁶⁷

Throughout his statutory construction analysis, Justice Stevens commented on certain aspects of the “harm” regulation. First, Justice Stevens responded to the dissent's assertion that the “harm” regulation does not require injury to particular animals.¹⁶⁸ His reply

dressed the precise issue, then a conflicting regulation must be struck down. *Id.* at 842–43; *see, e.g.*, *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 292–94 (1988) (invalidating two regulations under *Chevron's* first step because they conflicted with their corresponding statute's plain meaning); *International Union v. General Dynamics Land Sys. Div.*, 815 F.2d 1570, 1576 (D.C. Cir.) (invalidating a regulation that directly conflicted with statutory language), *cert. denied*, 484 U.S. 976 (1987). Conversely, if the regulation precisely fulfills congressional intent, a court must uphold it. *See Chevron*, 467 U.S. at 843 n.9.

If Congress did not address the regulatory issue, the court must move to *Chevron's* second prong: whether the agency reasonably interpreted the statute. *Id.* at 843–45. A court must analyze this question from the agency's perspective, not whether the court would have identically interpreted the statute had Congress delegated regulatory authority to it. *Id.* at 843 n.9. Given the characteristics of the statute in question, especially its text and legislative history, a court should examine whether the agency's construction was a reasonable one. *See id.* at 842–45. For other discussions of *Chevron*, see Timothy B. Dyk & David Schenck, *Exceptions to Chevron*, ADMIN. L. NEWS (ABA, Chicago, Ill.), Winter 1993, at 1; Stephen Breyer, *The 1991 Justice Lester R. Roth Lecture: On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845 (1992); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 978 (1992); William D. Popkin, *An “Internal” Critique of Justice Scalia's Theory of Statutory Interpretation*, 76 MINN. L. REV. 1133, 1155–59 (1992).

If a court determines that the agency faced a textually ambiguous statute with an equally ambiguous legislative history, it should defer to the agency's construction, unless the agency based its construction on an irrational policy choice. Dyk & Schenck, *supra*, at 1. If a court violates this rule and invalidates a regulation when the corresponding statute is textually and historically ambiguous, then it is substituting its policy choice over the agency's. *See DAVIS, supra*, § 3.3. The rationale behind *Chevron* was that agencies, which usually possess greater statutory expertise than courts, deserve deference when construing ambiguous statutes based on policy choices. *Chevron*, 467 U.S. at 845. Often an agency's regulation is based on controversial policy, yet still upheld as reasonable. *See, e.g.*, *Rust v. Sullivan*, 500 U.S. 173, 179, 184 (1991) (upholding a Department of Health and Human Services' regulation that prohibited federal abortion counseling under the Public Health Service Act).

165. *Sweet Home*, 115 S. Ct. at 2416–18.

166. *Id.* at 2412–18.

167. *Id.* at 2416–18.

168. *Id.* at 2414 n.13.

was that “harm” requires actual injury or death to “wildlife.”¹⁶⁹

Justice Stevens also addressed causation. In a textual analysis of the word “harm” in the ESA's definition of “take,” he concluded that “harm” includes both direct and indirect injuries to animals.¹⁷⁰ However, Justice Stevens explained that “harm” must meet “ordinary requirements of proximate causation and foreseeability” before being actionable under the ESA.¹⁷¹ As an example of “harm,” he stated that someone who drained a pond while knowing that it would kill a listed species would be guilty of an ESA “taking.”¹⁷² Justice Stevens ultimately noted, though, that many “harm” scenarios will involve “difficult questions of proximity and degree.”¹⁷³

While analyzing the ESA's structure, Justice Stevens next addressed what land is subject to the “harm” regulation. He stated that the “harm” regulation applies to *all* lands, not just those that fall within the “critical habitat” of a protected species.¹⁷⁴

Finally, in his structural analysis, Justice Stevens commented on enforcement aspects of the “harm” regulation. He explained that, unless the Secretary acquires the land,¹⁷⁵ the government has no ESA-power to prevent a landowner's “harmful” activity “until an animal has actually been killed or injured.”¹⁷⁶

B. Justice O'Connor's Concurring Opinion

169. *Sweet Home*, 115 S. Ct. at 2414 n.13.

170. *Id.* at 2413.

171. *Id.* at 2412 n.9., 2414 n.13. Justice Stevens stated that these “ordinary requirements” apply to all criminal and civil actions under the ESA. *Id.* at 2412 n.9. However, he did not elaborate on what requirements are “ordinary.” *See id.* at 2412 n.9, 2414 n.13.

172. *Id.* at 2414.

173. *Sweet Home*, 115 S. Ct. at 2418.

174. *Id.* at 2415. The Court was comparing the ESA's “take” and “jeopardy” prohibitions. The Court stated that these two provisions are not identical, partly because “harm” applies to all lands, whereas “jeopardy” applies only to “critical habitat.” *Id.* Also, the Court said that a federal agency can “jeopardize” a protected species without “harming” it because it is easier to “jeopardize” than it is to “harm.” *See id.* For a discussion of the “jeopardy” prohibition, see *supra* notes 40–42 and accompanying text.

175. *See* 16 U.S.C. § 1534(a) (1994).

176. *Sweet Home*, 115 S. Ct. at 2415.

Justice O'Connor limited her agreement with the majority "on two understandings."¹⁷⁷ First, she believed that the "harm" regulation requires, on its face, death or injury to "actual, individual members of [a] protected species."¹⁷⁸ In her view, the "harm" regulation does not bar land activities that only prevent potential population growth.¹⁷⁹ As an example, Justice O'Connor explained that a landowner who cuts down a tree would not "harm" a protected species merely because it "could have eaten" the tree's leaves or "could . . . have fruitfully multiplied in its branches."¹⁸⁰

The "harm" regulation does apply, in Justice O'Connor's opinion, to land activities that interfere with "essential behaviors" like breeding, feeding, or sheltering to the point of actual injury or death.¹⁸¹ In particular, she believed that a landowner who significantly impairs a protected animal's ability to breed "harms" it under the regulation.¹⁸² She reasoned that the animal suffers "actual injury" because the landowner impairs one of its "essential physical functions" and renders "that animal, and its genetic material, biologically obsolete."¹⁸³ For example, Justice O'Connor stated that a landowner who destroys the piping plover's¹⁸⁴ "last remaining" breeding ground "harms" it because he or she has destroyed the bird's ability to reproduce.¹⁸⁵

Justice O'Connor's second "understanding" of *Sweet Home* was that actionable "harm" encompasses "ordinary principles of proximate causation."¹⁸⁶ She reasoned that the "harm" regulation "clearly rejects speculative or conjectural effects" because it includes the word "actually."¹⁸⁷ Instead, Justice O'Connor stated that landowners should only be liable under the "harm" regulation if their activities "proximately (foreseeably) cause death or injury" to protected ani-

177. *Id.* at 2418 (O'Connor, J., concurring).

178. *Id.* at 2419.

179. *See id.* at 2418-19.

180. *Sweet Home*, 115 S. Ct. at 2419 (O'Connor, J., concurring).

181. *Id.*

182. *Id.*

183. *Id.*

184. The piping plover, a bird, is listed as an endangered species. 50 C.F.R. § 17.11 (1994).

185. *Sweet Home*, 115 S. Ct. at 2419 (O'Connor, J., concurring).

186. *Id.*

187. *Id.*

mals.¹⁸⁸

In defining the “ordinary principles” of proximate causation, Justice O'Connor admitted that there are no “precise” guidelines.¹⁸⁹ She stated, however, that by injecting notions of foreseeability, proximate causation will usually “eliminate the bizarre” to achieve a “fair” result.¹⁹⁰ Justice O'Connor then gave two “extreme” examples. First, a landowner would proximately cause “harm” if he or she drained a pond, killing an endangered fish.¹⁹¹ On the other hand, a landowner would not proximately cause “harm” if, after he or she had fertilized and tilled a field, a tornado carried the injurious fertilizer “miles away” into a protected species' habitat.¹⁹²

Based on these two “understandings” of *Sweet Home*, Justice O'Connor believed that *Palila v. Hawaii Department of Land & Natural Resources (Palila II)*¹⁹³ was “wrongly decided.”¹⁹⁴ Because the *Palila II* court held that a landowning entity “harmed” the endangered palila by permitting sheep to eat certain “seedlings that, when full-grown, might have fed and sheltered” the bird, Justice O'Connor felt that *Palila II* conflicted with the regulation on its face.¹⁹⁵ She explained that, in *Palila II*, “[d]estruction of the seedlings did not proximately cause actual death or injury to identifiable birds; it merely prevented the regeneration of forest land not currently inhabited by actual birds.”¹⁹⁶

Although she disapproved of *Palila II*, Justice O'Connor would not have invalidated the “harm” regulation.¹⁹⁷ Instead, she stated that it had “innumerable valid habitat-related applications.”¹⁹⁸ However, Justice O'Connor concluded by noting that either Congress or the Secretary could change the “harm” regulation.¹⁹⁹

C. Justice Scalia's Dissenting Opinion

188. *Id.* at 2420.

189. *Sweet Home*, 115 S. Ct. at 2420 (O'Connor, J., concurring).

190. *Id.*

191. *Id.*

192. *Id.*

193. 852 F.2d 1106 (9th Cir. 1988).

194. *Sweet Home*, 115 S. Ct. at 2421 (O'Connor, J., concurring).

195. *Id.* at 2420–21.

196. *Id.* at 2421.

197. *Id.*

198. *Id.*

199. *Id.*

Justice Scalia began his dissent by stating that the *Sweet Home* decision was financially unfair to *all* private landowners, both rich ones and the “simplest” of farmers.²⁰⁰ He and the other two dissenters would have invalidated the “harm” regulation because it was a “radically” unreasonable interpretation of Congress' intent.²⁰¹ Justice Scalia asserted that, to by-pass the regulation's facial defects, the majority “created” a new-and-improved regulation so that it could uphold it as a reasonable interpretation of the ESA.²⁰²

Justice Scalia believed that the “harm” regulation was unreasonable for two main reasons. First, he stated that, unlike the ESA's “taking” prohibition, the “harm” regulation merely requires causation-in-fact.²⁰³ Although the *Sweet Home* majority stated that “harm” requires proximate causation, Justice Scalia found that statement wholly inconsistent with the majority's notion that “harm” includes indirect injuries to animals.²⁰⁴ Indeed, he could not think of any “category of causation that is indirect and yet also proximate.”²⁰⁵ Because the regulation does not require proximate causation on its face,²⁰⁶ Justice Scalia concluded that the majority wrongly added proximate causation to “harm” in order to sustain the regulation as reasonable.²⁰⁷

Justice Scalia's second and “most important” reason for dissenting centered on the regulation's “actual injury” requirement.²⁰⁸ He stated that the “harm” regulation unlawfully “encompasses injury inflicted, not only upon individual animals, but upon populations of the protected species.”²⁰⁹ Because it contains the word “breeding,”

200. *Sweet Home*, 115 S. Ct. at 2421 (Scalia, J., dissenting).

201. *See id.* at 2421, 2431. Justice Scalia assumed that the majority was correct in applying the *Chevron* test. *Id.* at 2421. For a discussion of *Chevron*, see *supra* note 164.

202. *See id.* at 2431. Justice Scalia accused the majority of engaging in “law a la carte.” *Id.*

203. *Id.* at 2421.

204. *Sweet Home*, 115 S. Ct. at 2429 (Scalia, J., dissenting).

205. *Id.*

206. Justice Scalia stated that the “harm” regulation's inclusion of the word “actually” did not help define “harm's” causation requirement. *Id.* Indeed, Justice Scalia explained how the “harm” regulation on its face applies to a “farmer who tills his field and causes erosion that makes silt run into a nearby river which depletes oxygen and thereby ‘impairs [the] breeding’ of protected fish.” *Id.* at 2423.

207. *Id.* at 2429–31.

208. *Sweet Home*, 115 S. Ct. at 2422–23 (Scalia, J., dissenting).

209. *Id.* at 2422.

Justice Scalia reasoned that the “harm” regulation prohibits habitat modifications that prevent new generations from being born.²¹⁰ He rejected the view that a landowner can injure an existing animal by impairing its ability to breed.²¹¹ Just as with proximate causation, Justice Scalia explained how the *Sweet Home* majority limited the “harm” regulation’s “actual injury” to particular animals in order to salvage it as reasonable.²¹² Therefore, he believed that, after *Sweet Home*, a landowner who destroys a protected species’ essential breeding grounds would not be “harming” it because he or she would not be injuring or killing any *living* animal.²¹³

To conclude, Justice Scalia stated that, under *Sweet Home*’s new version of the “harm” regulation, “habitat modification can constitute a ‘taking[]’ . . . only if it results in the killing or harming of individual animals, and only if that consequence is the direct result of the modification.”²¹⁴ He asserted that the majority had essentially created a new regulation and invalidated the Secretary’s version of “harm,” facially defined to prohibit even those land activities that remotely affect potential animals.²¹⁵

III. CRITICAL ANALYSIS

A. *Sweet Home*’s Effect on the Validity of the “Harm” Regulation

First and foremost, the Supreme Court correctly upheld the “harm” regulation as a legitimate statutory construction. Under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, an agency regulation should be upheld if the statute it construes is textually and historically ambiguous and the regulation is based on a rational policy choice.²¹⁶ Because “harm,” in the definition of

210. *See id.* at 2422–23. Justice Scalia believed that “impairment of breeding” would not be part of the “harm” regulation if it meant injury to existing animals. *Id.* at 2430–31 n.5.

211. *Id.*

212. *Sweet Home*, 115 S. Ct. at 2430–31 (Scalia, J., dissenting).

213. *Id.* at 2431.

214. *Id.*

215. *See id.* Justice Scalia also disapproved of the “harm” regulation’s application to “omissions,” but did not elaborate much on this issue. *See id.* at 2422.

216. 467 U.S. 837, 845 (1984). For a further discussion of *Chevron*, see *supra* notes 164–65 and accompanying text.

“take,” is not defined by the ESA's text or legislative history,²¹⁷ the Secretary of the Interior's “harm” regulation filled a gap. The Supreme Court properly deferred to the Secretary's gap-filling “harm” regulation, recognizing that he was using his “regulatory expertise” to make a “complex policy choice.”²¹⁸

Not only was the “harm” regulation based on a rational and “complex” policy choice, but also a “good” one. The Secretary struck a workable balance between our desires to freely-use land and our goal, via the ESA, to protect troubled animals and their habitats. On the one hand, it would probably not be economically wise to preclude any change in land use on a protected species' habitat. Yet, because habitat destruction is the main cause of wildlife extinction,²¹⁹ allowing landowners to alter their property to the point where their actions visibly impact protected species populations would defeat the ESA's purpose.²²⁰ Between these two extremes is the “harm” regulation, an integral component of federal²²¹ policy to protect endangered and threatened species.²²²

Although the thrust of *Sweet Home* focused on statutory construction, it also affected the scope of the “harm” regulation. The Court, through its majority, concurring, and dissenting opinions, added new elements to, and misinterpreted current elements of, “harm.” Because of these mistakes, certain land activities may be more difficult to enjoin or penalize.

B. *Sweet Home*'s Effect on the Elements of “Harm”

217. See *supra* notes 48–49 and accompanying text.

218. *Sweet Home*, 115 S. Ct. at 2418 (Stevens, J., for the majority), discussed *supra* text accompanying note 167.

219. *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 179 (1978).

220. Of course, in any ESA analysis, protecting endangered and threatened species should take priority over any “adverse economic consequences.” *Endangered Species Comm. of the Building Indus. Ass'n v. Babbitt*, 852 F. Supp. 32, 42 (D.D.C. 1994) (citing *Tennessee Valley Auth. v. Hill*, 437 U.S. 153 (1978)).

221. States can enact stricter legislation as long as it does not conflict with the ESA. 16 U.S.C. § 1535(e) (1994); see also *Swan View Coalition, Inc. v. Turner*, 824 F. Supp. 923 (D. Mont. 1992) (holding that the ESA pre-empted Montana's less restrictive “take” provision, which did not prohibit “significant habitat modification”).

222. Brief for Federal Petitioners for Rehearing and Suggestion for Rehearing In [sic] Banc at 2, *Sweet Home Chapter of Communities for a Great Or. v. Babbitt*, 30 F.3d 190 (D.C. Cir. 1994) (No. 92-5255) (denying Defendant's suggestion for rehearing en banc), *rev'd*, 115 S. Ct. 2407 (1995). This brief was filed in the Court of Appeals for the District of Columbia after the appellate court invalidated the “harm” regulation. *Id.*

Throughout its statutory construction analysis, the Court went beyond conventional statutory construction analysis by sharing its interpretation of the “harm” regulation. Although it may be dicta, the Court’s “thoughts” on “harm” may leave the door open for courts to narrow the regulation’s scope.

1. “Significant Habitat Modification or Degradation”

Unlike the other three elements of “harm,” this element was correctly interpreted by the Court, although it was virtually silent on the issue. Although both the majority and the dissenting opinions quoted the regulation’s “significant” change in land use language,²²³ the majority merely noted that “minimal” land activities would not likely “harm” protected wildlife.²²⁴ In addition, the Court clarified that “habitat,” within the definition of “harm,” does not mean “critical habitat.”²²⁵ Therefore, *all* land is subject to the “harm” regulation — not just areas designed as “critical habitat.”

2. *Actual Injury or Death to a Suspect Species*

Regarding this element, the *Sweet Home* Court was divided on two issues. The first issue was whether the prohibited impact, injury or death, must be inflicted, at a minimum, on *specific members* or *populations* of a protected species. The *Sweet Home* majority answered this issue very briefly. Quoting from the “harm” regulation,²²⁶ it merely stated that “wildlife” must be actually injured or killed.²²⁷ Justice O’Connor, in her concurring opinion, squarely answered the issue: she would require death or injury to “actual, individual members of [a] protected species.”²²⁸ In contrast, Justice Scalia believed that “harm” merely requires death or injury to animal populations.²²⁹

223. *Sweet Home*, 115 S. Ct. at 2410 (Stevens, J., for the majority), 2421 (Scalia, J., dissenting).

224. *See id.* at 2414 (Stevens, J., for the majority).

225. *Id.* at 2415, discussed *supra* note 174 and accompanying text.

226. *See* 50 C.F.R. § 17.3 (1994).

227. *Sweet Home*, 115 S. Ct. at 2414 n.13, discussed *supra* text accompanying note 169.

228. *Id.* at 2418–19 (O’Connor, J., concurring), discussed *supra* text accompanying note 179.

229. *Id.* at 2422 (Scalia, J., dissenting), discussed *supra* text accompanying note 209.

Although the majority's "wildlife" answer is vague, courts should interpret it to include populations of wildlife. This interpretation is consistent with the ESA's definition of "wildlife." Under the ESA, "wildlife" is defined to include protected animals and any of their parts, eggs, or offspring.²³⁰ Because the majority requires "harm" to "wildlife," then injury to protected animals' parts, eggs, or offspring includes "harm" to populations. Indeed, if a landowner somehow destroys a Mississippi sandhill crane's²³¹ eggs, then he or she has altered the natural circle of life. The same result occurs if a landowner somehow aborts a mountain lion's²³² unborn cub, which is a "part" of the lion. Whatever the scenario, injury to animal parts or existing eggs may result in unnatural population declines.

In addition to reflecting a possible injury to an animal's parts or eggs, proof of a population decline could also be evidence of actual death to individual, specific animals. Thus, in cases like *Sierra Club v. Lyng*²³³ and *Swan View Coalition, Inc. v. Turner*,²³⁴ the plaintiffs proved "actual death" through scientific evidence of a population decline.²³⁵ On the other hand, in the absence of convincing population surveys, courts should require proof of actual injury or death to individual animals — just as the court did in *National Wildlife Federation v. National Park Service*.²³⁶

Courts should not treat the *Sweet Home* majority's brief "wildlife" answer as an opportunity to follow Justice O'Connor's "individual members" approach. In her reasoning, Justice O'Connor failed to reconcile the term "wildlife" in the "harm" regulation with the ESA's expansive definition of "wildlife." She did not recognize

230. 16 U.S.C. § 1539(8) (defining "fish or wildlife"), discussed *supra* notes 79–80 and accompanying text.

231. See 50 C.F.R. § 17.11 (1994) (listing the Mississippi sandhill crane as "endangered").

232. See *id.* § 17.11 (listing the mountain lion as "threatened").

233. 694 F. Supp. 1260 (E.D. Tex. 1988), *rev'd on other grounds sub nom.* *Sierra Club v. Yeutter*, 926 F.2d 429 (5th Cir. 1991), discussed *supra* note 72 and accompanying text.

234. 824 F. Supp. 923 (D. Mont. 1992), discussed *supra* notes 126–33 and accompanying text.

235. *Sierra Club*, 694 F. Supp. at 1270–71; *Swan View*, 924 F. Supp. at 926. Although the *Sierra Club* plaintiffs proved actual death, the *Swan View* plaintiffs created an issue of fact regarding actual death. *Sierra Club*, 694 F. Supp. at 1270–71; *Swan View*, 924 F. Supp. at 926.

236. 669 F. Supp. 384, 389 (D. Wyo. 1987), discussed *supra* note 71 and accompanying text.

that the “taking” prohibition applies to protected animals, their parts, eggs, and offspring. In addition, she did not address the notion that “actual death” could be, and has been, proven in different ways — i.e. through population surveys. Instead, by requiring proof that an individual, specific animal has been killed, Justice O'Connor practically requires ESA plaintiffs and prosecutors to bring a carcass to court! To avoid Justice O'Connor's narrow approach, courts should interpret the “harm” regulation to minimally require actual injury or death to a species' population.

Also under the “prohibited impact” element of “harm,” the *Sweet Home* Court addressed the issue of whether a landowner actually injures wildlife by disturbing its ability to breed. While the majority did not answer this issue, the concurring and dissenting Justices debated it. Justice O'Connor believed that an animal that is prevented from breeding is actually and physically injured.²³⁷ Justice Scalia believed to the contrary, reasoning that only a *potential* animal is prevented from being created.²³⁸ Justice O'Connor's approach reflects a plain reading of the “harm” regulation, which states that one can actually injure an animal by disturbing its breeding ability.²³⁹ The Secretary was merely illustrating *one* way to injure wildlife.

More importantly, Justice O'Connor's approach on this issue is more in touch with the spirit of the ESA. When Congress enacted the ESA, it granted some basic rights to troubled animals. These “rights” were probably modeled after ones that we enjoy — i.e. the right not to be killed, wounded, or harassed for gratuitous reasons. Because a person is considered “injured” if someone robs him or her of the ability to have children,²⁴⁰ then a white-necked crow²⁴¹ should be considered “injured” if a landowner makes it unable to have chicks. In her “piping plover” example, Justice O'Connor applied this approach to similar facts.²⁴²

237. *Sweet Home*, 115 S. Ct. at 2419 (O'Connor, J., concurring), discussed *supra* notes 181–85 and accompanying text.

238. *Id.* 2430–31 n.5 (Scalia, J., dissenting), discussed *supra* note 210–11 and accompanying text.

239. 50 C.F.R. § 17.3 (1994).

240. *See, e.g.*, *Beals v. Quigg*, 11 P.2d 354 (Ariz. 1932); *Grasser v. Kitzis*, 553 A.2d 346 (N.J. Super. Ct. App. Div. 1988); *Duke v. Housen*, 589 P.2d 334 (Wyo. 1979).

241. *See* 50 C.F.R. § 17.11 (1994) (listing the white-necked crow as “endangered”).

242. *Sweet Home*, 115 S. Ct. at 2419 (O'Connor, J., concurring), discussed *supra* text accompanying notes 184–85.

However, by disapproving *Palila v. Hawaii Department of Land & Natural Resources (Palila II)*,²⁴³ Justice O'Connor contradicted her own approach. In *Palila II*, the endangered palila's only place to breed was in a certain type of mature plant.²⁴⁴ When the *Palila II* landowning entity prevented seedlings from maturing, it was detrimentally impairing the birds' ability to breed — just as the landowner who destroyed the piping plover's “last remaining” breeding ground.

Given the plain meaning of the “harm” regulation and the general spirit of the ESA, courts should recognize that impairing an animal's ability to breed can be injurious. This approach is consistent with cases like *Marbled Murrelet v. Pacific Lumber Co.*²⁴⁵ and *Sierra Club v. Lyng*.²⁴⁶

3. Causation

The *Sweet Home* majority, including Justice O'Connor, narrowed the necessary “critical link”²⁴⁷ between land alteration and its prohibited impact. Without citing any case law or statutory authority, the Court stated that actionable “harm” requires a landowner to *proximately cause* a prohibited impact on protected wildlife.²⁴⁸ In other words, the Court required land-action to *foreseeably* result in “harm.”²⁴⁹ Therefore, under the Court's view, a landowner can still indirectly injure a protected animal — as long as his or her land-actions proximately or foreseeably cause such injury or death. The dissent, on the other hand, believed that “harm” merely requires “but for” causation.²⁵⁰

243. 852 F.2d 1106 (9th Cir. 1988), discussed *supra* notes 76, 193–96 and accompanying text.

244. 852 F.2d at 1107 n.1, 1108–09.

245. 880 F. Supp. 1343, 1349–50 (N.D. Cal. 1995), *appeal dismissed*, No. 94-15194, 1995 U.S. App. LEXIS 17355 (9th Cir. 1995), discussed *supra* notes 140–55 and accompanying text.

246. 694 F. Supp. 1260, 1270–72 (E.D. Tex. 1988), *rev'd on other grounds sub nom. Sierra Club v. Yeutter*, 926 F.2d 429 (5th Cir. 1991), discussed *supra* notes 156–58 and accompanying text.

247. See *supra* notes 81–86 and accompanying text for a discussion of the “critical link.”

248. *Sweet Home*, 2412 n.9, 2414 n.13 (Stevens, J., for the majority), discussed *supra* notes 171–73 and accompanying text.

249. *Id.*

250. *Id.* at 2421 (Scalia, J., dissenting), discussed *supra* notes 203–07 and accompa-

Before *Sweet Home*, the doctrines of proximate cause and foreseeability have been virtual strangers to the ESA and the “harm” regulation. Indeed, no ESA “takings” case has employed either doctrine, and only one “harm” case, *United States v. Glenn-Colusa Irrigation District*,²⁵¹ barely mentioned proximate cause. Where, then, did the Court retrieve such “ordinary”²⁵² requirements?

Refusing to set any “proximate cause” parameters, the Court has opened the door to first-impression litigation. At what point will a landowner be relieved of ESA “harm” liability? The majority, with the exception of Justice O'Connor, has arguably approved of *Palila II* because it chose to follow it over the *Sweet Home* lower court.²⁵³ Did the Court believe “ordinary requirements of proximate causation and foreseeability”²⁵⁴ were met in *Palila II*?²⁵⁵ If so, the standards are not much, if any, higher than “but for” causation.

Even without any explicit guidelines, most of the successful “harm” cases seemed to involve proximate/foreseeable results. For example, in *Marbled Murrelet v. Pacific Lumber Co.*, a landowner had his employees conduct environmental surveys and they found protected animals on his property.²⁵⁶ Yet, the landowner proceeded to clear-cut trees and was ultimately enjoined.²⁵⁷ On the other hand, in *Morrill v. Lujan*, a landowner hired an independent wildlife consultant to inspect his property for endangered mice.²⁵⁸ The consultant reported that he did not find any mice because the property was not suitable habitat for them, and the landowner was eventually allowed to build a hotel.²⁵⁹ Therefore, under *Marbled Murrelet* and *Morrill*, landowners may have a duty to accurately inspect their property for endangered wildlife and habitat before altering their

nying text.

251. 788 F. Supp. 1126, 1128 (E.D. Cal. 1992), discussed *supra* notes 87–96 and accompanying text.

k 252. See *supra* note 171 and accompanying text.

253. See *Sweet Home*, 115 S. Ct. at 2412 (Stevens, J., for the majority).

254. *Id.* at 2412 n.9, 2414 n.13.

255. See *supra* notes 76–78, 86 and accompanying text for a discussion of *Palila II*.

256. 880 F. Supp. 1343, 1357 (N.D. Cal. 1995), *appeal dismissed*, No. 94-15194, 1995 U.S. App. LEXIS 17355 (9th Cir. 1995), discussed *supra* notes 140–55 and accompanying text.

257. *Id.* at 1356–57, 1366.

258. 802 F. Supp. 424, 428–29 (S.D. Ala. 1992), discussed *supra* notes 108–12 and accompanying text.

259. *Id.* at 428–30.

property. A landowner's failure to accurately inspect should not relieve him or her of the ability to "foresee" any potential "harm" violations.

In his dissent, Justice Scalia expressed concern about a "simple" farmer's potential "harm" liability under a "but for" causation standard.²⁶⁰ Justice O'Connor responded by assuring him that, since "harm" requires proximate causation, a farmer would not be liable for the remote consequences of his or her pesticides.²⁶¹ Under existing case law, however, Justice Scalia may have support for his concern from *Defenders of Wildlife v. Administrator, Environmental Protection Agency*,²⁶² although it was not cited in *Sweet Home*. If the *Defenders* agency caused "harm" to endangered ferrets by allowing farmers to use a certain pesticide,²⁶³ then perhaps the farmers themselves were "harming" the animals. Even under *Sweet Home*'s new "foreseeability" requirement, however, the *Defenders* agency could probably "foresee" the effects of the pesticide better than the farmers who used them.

Whatever the guidelines the *Sweet Home* Court had in mind, it should not have inserted stricter causation requirements in "harm." Because the ESA does not require proximate cause, why should "harm," merely one way to "take," be treated differently? Now, after *Sweet Home*, defendants may have a larger window to escape from "harm" liability. Courts should either ignore *Sweet Home*'s arguable dicta, or interpret "ordinary" requirements of proximate cause/foreseeability to be consistent with current "harm" case law.

4. Penalties and Injunctions

Regarding the enforcement of "harm," the Court made a very simple, but potentially sweeping, error. When comparing the government's ability to purchase habitat with its power under the "harm" regulation, the Court stated that the government has no ability to enjoin a "harmful" land activity without proof of an actual

260. See *Sweet Home*, 115 S. Ct. at 2421 (Scalia, J., dissenting), discussed *supra* text accompanying note 200.

261. *Id.* (O'Connor, J., concurring), discussed *supra* text accompanying note 192.

262. 882 F.2d 1294 (8th Cir. 1989), discussed *supra* notes 134-37 and accompanying text.

263. *Id.* at 1301.

death or injury.²⁶⁴ To the extent that the Court meant that the government has no ability *whatsoever* to enjoin “harm” violators, it was clearly wrong. The ESA specifically provides the government with such power.²⁶⁵

Assuming the Court realized the government's power to enjoin, its actual death or injury language flies in the face of other ESA provisions and case law. Under the ESA, persons who even *attempt* to “harm” protected wildlife violate its “taking” prohibition.²⁶⁶ Therefore, a landowner who wants to build an amusement park may be “attempting” to “harm” a family of gopher tortoises²⁶⁷ and could be enjoined for such a violation.

Even if a civilian or the government seeks to enjoin current “harm,” the injunction standard does not require current death or injury. Indeed, most courts require a “sufficient” showing of “future injury.”²⁶⁸ Even those courts that follow a stricter standard do not require wildlife to have already been injured or killed.²⁶⁹

Perhaps unintentionally, the *Sweet Home* Court ignored the language of the ESA and years of case law when it commented on enforcement aspects of “harm.” Courts should treat this portion of *Sweet Home* as dicta instead of seizing the opportunity to create a higher standard for granting injunctions. Indeed, under a higher standard, detrimental development, road-building, agriculture, and logging might not be stopped in time. No amount of post-“harm” monetary penalties can reverse the extinction of the Indiana bat,²⁷⁰ the Florida salt marsh vole,²⁷¹ or the Wyoming toad!²⁷²

IV. CONCLUSION

264. *Sweet Home*, 115 S. Ct. at 2415 (Stevens, J., for the majority), discussed *supra* notes 175–76 and accompanying text.

265. 16 U.S.C. § 1540(e)(6); *accord* United States v. Glenn-Colusa Irrigation Dist., 788 F. Supp. 1126 (E.D. Cal. 1992), discussed *supra* notes 104–05 and accompanying text.

266. 16 U.S.C. § 1532(19), discussed *supra* note 47 and accompanying text.

267. *See* 50 C.F.R. § 17.11 (1994) (listing the gopher tortoise as “threatened”).

268. *See supra* note 106 and accompanying text.

269. *See supra* note 107 and accompanying text.

270. *See* 50 C.F.R. § 17.11 (1994) (listing the Indiana bat as “endangered”).

271. *See id.* (listing the Florida salt marsh vole as “endangered”).

272. *See id.* (listing the Wyoming toad as “endangered”).

In *Sweet Home*, the federal Supreme Court fulfilled the primary purpose of the ESA, to preserve troubled animals, by sustaining the “harm” regulation. Perhaps concerned with private property rights, however, the Court sought to narrow the scope of “harm” by interpreting it to require current, actual injury or death to individual, specific protected wildlife proximately or foreseeably caused by a change in land use. Because these “extra” elements have never been part of “harm,” courts should merely treat *Sweet Home* as a statutory construction case that upheld the validity of an agency's regulation. When applying “harm's” elements, courts should continue to follow “harm's” other case law. In addition, although they have the power to remove it, Congress and the Secretary of the Interior should let the “harm” regulation stand. Without it, private landowners might be able to irreparably degrade the habitats of protected wildlife with little, if any, federal limitations.

Because the “harm” regulation is now good law under *Sweet Home*, it should be considered more often as a vehicle to halt unreasonable development, road-building, agriculture, logging, and other land activities. Although, as Aldo Leopold noted, we may treat land as a commodity, the ESA and the “harm” regulation were designed to prevent us from treating protected wildlife the same way.