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# THE SCOPE OF “PLAINTIFFS’ HARM” IN ENVIRONMENTAL PRELIMINARY INJUNCTIONS

## I. INTRODUCTION

Deep sea adventurer and advocate Jacques Cousteau once stated: “The happiness of the bee and the dolphin is to exist. For man it is to know that and to wonder at it.”<sup>1</sup> An environmental enthusiast might consider this statement a testimonial for wildlife’s “right to exist.” Those less keen on a broad reading of animal rights might argue that it buttresses the claim that animals’ right to exist depends upon humans’ desire to enjoy that existence.<sup>2</sup> As the dominant earth species, *Homo sapiens* have power over the fate of weaker beings—power that is harnessed by environmental legislation. While animal rights laws have existed in rudimentary form since the third century BC, major wildlife protection legislation first appeared in the United States in the early 1970s.<sup>3</sup> With thousands of species facing extinction, Congress enacted legislation protecting the plant and animal life of our ecosystem. Laws such as the Endangered Species Act of 1973 (ESA)<sup>4</sup> and the National Environmental Protection Act of 1969 (NEPA)<sup>5</sup> have made great strides in shielding vulnerable wildlife. Judicial restrictions on civil environmental litigation, however, confine the focus of lawsuits to the aesthetic, recreational, and scientific needs of

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1. Gerald Jonas, *Jacques Cousteau, Oceans’ Impresario, Dies*, N.Y. TIMES, June 26, 1997, at A1, available at <http://www.nytimes.com/1997/06/26/world/jacques-cousteau-oceans-impresario-dies.html>. Cousteau’s son, Jean-Michael Cousteau, was one of the plaintiffs in the *Winter* case discussed in this Note. Settlement Agreement, Natural Res. Def. Council, Inc. v. Winter, No. 06-CV-4131 (C.D. Cal. July 7, 2006); Temporary Restraining Order at 1, Natural Res. Def. Council, Inc. v. Winter, No. 06-CV-4131 (C.D. Cal. July 3, 2006).

2. See Ian Tomb, *The Legal Perspective on Animal Rights*, in PEOPLE, PROPERTY, OR PETS? 60 (Marc D. Hauser et al. eds., 2006) for a discussion of the multiple perspectives from which society views animals’ right to life.

3. As early as the third century BC, the edicts of King Ashoka of India advocated vegetarianism and Buddhist perspectives on the treatment of animals, though the Law of Draco hinted at animal rights as early as the seventh century BC. See *Animal Rights Timeline: Antiquity*, ANIMAL RIGHTS HISTORY, <http://www.animalrightshistory.org/timeline-antiquity.htm> (last visited Jan. 5, 2011). Greco-Roman mythology of the third century AD also included stories of Triptolemus and his support for animal welfare. See *id.* Modern environmental legislation such as the Clean Air Act was enacted in the 1950s, 42 U.S.C. §§ 7401–7671 (2006) (originally enacted as the Air Pollution Control Act of 1955, ch. 360, 69 Stat. 322 (1955)), but significant animal rights legislation emerged two decades later, with the enactment of the National Environmental Policy Act in 1969 and the Endangered Species Act in 1973. See *infra* notes 4–5 and accompanying text.

4. Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2006).

5. National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4370 (2006).

humans, rather than the common underlying motivation for such litigation—the desire to curtail wildlife harm and destruction.<sup>6</sup>

In 2008, in *Winter v. Natural Resources Defense Council*,<sup>7</sup> the Supreme Court vacated a preliminary injunction that had prevented the Navy's use of active sonar emission in breeding grounds and migratory routes of thousands of bottlenose dolphins, beaked whales, and other marine mammals. The *Winter* decision made several significant changes to legal standards, most of which have been addressed by scholars and subsequent lower court rulings.<sup>8</sup> An aspect of the *Winter* opinion thus far neglected by scholars, however, lies in what the majority failed to address. The *Winter* Court bypassed an opportunity to establish a clear standard for whether animal harm should be considered within the scope of “plaintiffs’ harm”<sup>9</sup> under the test for preliminary injunctions in civil environmental litigation. Indeed, the majority opinion may have confused courts further by tacitly adopting the restrictive minority definition of the scope of “plaintiffs’ harm” in dicta.<sup>10</sup>

This Note begins by exploring the reasons that human advocates initiate litigation on behalf of animals and by describing the wildlife protection statutes and citizen suit provisions that help them do so. Part II discusses judicial ambiguity as to whether the scope of “plaintiffs’ harm” in preliminary injunction analysis for civil environmental disputes includes only the harm to the human plaintiff with standing, the harm to the animal whose injury is often the underlying motivation for litigation, or the harm to both. Part III analyzes the recent Supreme Court decision in *Winter* and the majority's implicit exclusion of injury to marine mammals from the scope of “plaintiffs’ harm.” Finally, Part IV offers three approaches to clarify the definition of “plaintiffs’ harm” within the standing doctrine and the test for preliminary injunctions: Courts could maintain the current standing doctrine and, in preliminary relief analysis, define “plaintiffs’ harm” only as the harm to the human with standing; they could maintain the current standing doctrine but consider both the

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6. See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

7. *Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365 (2008).

8. The *Winter* court (1) expounded a new standard within the test for preliminary injunctions of a “likelihood” of irreparably injury (rather than the mere “possibility” standard used by the Ninth Circuit), (2) disregarded prior pro-environment presumptions under NEPA, and (3) permitted the executive branch to supersede the enforcement of court-imposed restraining orders when national security is a consideration. See *id.*

9. I place “plaintiffs’ harm” in quotation marks in recognition that the definition of “plaintiffs” and what constitutes their “harm” in environmental controversies is subject to differing interpretations. See *infra* Parts II.B, II.D, and IV.

10. See *infra* note 132.

human harm and harm to animals in preliminary relief analysis; or (more radically) they could give animals standing to sue in their own right, dispose of the pretense of human injury, and consider only the animals’ harm in determining the appropriateness of a preliminary injunction. This Note suggests that the second approach is most realistic and appropriate, as it offers a parallel between constitutional standing and preliminary injunction analysis and also aligns with public policy supporting wildlife protection.

## II. CIVIL SUITS FOR ENVIRONMENTAL AND WILDLIFE PROTECTION

### A. *Environmental and Wildlife Protection Statutes*

In the United States, animals retain property status.<sup>11</sup> In most states, if a family pet is injured by a third party, the family can recover only the fair market value of the animal less its depreciation in value since the date of purchase.<sup>12</sup> Monetary recovery for the accidental loss of a beloved kitten might be limited to twenty dollars, without regard to the owner’s emotional attachment.<sup>13</sup> Of course, the pet has no right of its own to sue its assailant. No one other than the pet’s legal owner has standing to sue when the animal is injured, and the only damages the owner could receive are for the conversion of property.<sup>14</sup>

The avenues of recovery expand, however, when a federal statute provides protection over a particular species of wild animal, such as the endangered bald eagle or chimpanzee.<sup>15</sup> Many of these federal environmental statutes include citizen suit provisions awarding the public special power to sue on behalf of threatened animals, despite lacking ownership.<sup>16</sup>

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11. GARY L. FRANCIONE, *ANIMALS, PROPERTY, AND THE LAW* 4 (1995).

12. *See id.* at 51.

13. *See* DAVID S. FAVRE, *ANIMAL LAW: WELFARE, INTERESTS, AND RIGHTS* 327 (2008) (“One category of human that can clearly sue about legal harm to an animal is the owner of an animal. As an owner of an animal, it is not the pain of the animal that is the harm; rather, it is the harm to the human property interests that is at issue. . . . However, in no jurisdiction at the moment may Sally be considered to have standing to sue for the pain and suffering of the cat. . . . [O]nly a state prosecutor has that standing.”); *see also* FRANCIONE, *supra* note 11, at 4–5; David Hambrick, *A Legal Argument against Animals as Property*, in *PEOPLE, PROPERTY, OR PETS?* 55, 55–57 (Marc D. Hauser et al. eds., 2006).

14. “[T]he law of standing assumes that humans cannot have legally significant relationships with animals owned by others.” FRANCIONE, *supra* note 11, at 66.

15. 50 C.F.R. § 17.11(h) (2009).

16. *See, e.g.*, Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451–1466 (2006); Endangered Species Act of 1973, 16 U.S.C. § 1540(g) (2006); Clean Water Act, 33 U.S.C. § 1365

The ESA is one of the most well known of these environmental statutes. Its purpose is to protect the earth and its animals, which have “esthetic, ecological, educational, recreational, and scientific value to our Nation and its people.”<sup>17</sup> The ESA requires the U.S. Fish and Wildlife Service of the U.S. Department of the Interior to list and categorize species it considers to be endangered, threatened, or of concern.<sup>18</sup> These species are afforded special limited protection from harm, harassment, and capture (“takings”).<sup>19</sup>

Like the ESA, the Marine Mammal Protection Act (MMPA) prohibits harmful activity affecting endangered or depleted species of marine mammals (including dolphins, seals, sea lions, whales, and polar bears).<sup>20</sup> The MMPA affords slightly less protection than the ESA by permitting a wider range of adverse human activity.<sup>21</sup> The Coastal Zone Management Act (CZMA) was similarly implemented to protect the nation’s coasts, fish, wildlife, and natural characteristics, as well as humans’ ecological, commercial, and recreational interests in those objects.<sup>22</sup> The CZMA grants states significant power to implement legislation to protect and administer the state’s coastline.<sup>23</sup>

Another major vehicle for environment protection is the National Environmental Policy Act (NEPA), which addresses actions of the federal government that may adversely affect the environment.<sup>24</sup> NEPA requires that all federal agencies, including the military, file an Environmental Impact Statement (EIS) in such situations.<sup>25</sup> The EIS is a detailed report

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(2006); Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6972 (2006); Clean Air Act, 42 U.S.C. § 7604 (2006); Comprehensive Environmental Response Compensation and Liability Act, 42 U.S.C. § 9659 (2006). Suits under environmental statutes without citizen suit provisions, such as the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4347 (2006), are filed through the Administrative Procedure Act, 5 U.S.C. §§ 701–706 (2006).

17. Endangered Species Act § 1531(a)(3).

18. *Id.* § 1533.

19. *Id.* §§ 1532(19), 1538.

20. Marine Mammal Protection Act of 1972, 16 U.S.C. §§ 1361–1423 (2006); 50 C.F.R. § 216 (2008) (Marine Mammal Protection Act Regulations).

21. “The primary objective of this management must be to maintain the health and stability of the marine ecosystem; this in theory indicates that animals must be managed *for their benefit* and not for the benefit of commercial exploitation.” H.R. REP. NO. 92-707, at 22 (1971) (Committee on Merchant Marine and Fisheries) (emphasis added). “The effect of this set of requirements is to insist that the management of animal populations be carried out with *the interest of the animals* as the prime consideration.” *Id.* at 18 (emphasis added).

22. Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451–1466 (2006).

23. *Id.* § 1455b.

24. National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4347 (2006).

25. *NEPA Compliance and Enforcement*, ENVTL. PROTECTION AGENCY, <http://www.epa.gov/Compliance/nepa/> (last updated Aug. 6, 2010).

following extensive investigation and research of the possible negative impact of government activities on wildlife and natural resources.<sup>26</sup> The Environmental Protection Agency (EPA) reviews and rates all EISs and suggests reasonable alternatives to proposed actions that might mitigate foreseeable environmental harm.<sup>27</sup> For example, should the military choose a site for missile testing, it must hire experts to determine the potential short- and long-term harm to the soil, water, air, and plant and animal life. The military will submit its EIS, and the EPA may suggest that the military choose a less intrusive site, relocate the wildlife, or plant trees elsewhere to replace those to be destroyed. Should the EPA fail to prosecute perpetrators, civil suits by concerned citizens are the only remaining avenue for wildlife protection.<sup>28</sup>

#### *B. Standing to Sue in Civil Environmental Actions*

It is necessary to understand the arduousness of the standing doctrine in environmental litigation in order to appreciate why courts are ambiguous in conducting harm analysis under the test for preliminary injunctions. Article III of the U.S. Constitution requires that all matters before the court be a case or controversy.<sup>29</sup> Plaintiffs must meet both constitutional and prudential standing requirements in order to sue.<sup>30</sup> Constitutional standing requires that a plaintiff establish personal injury, that the defendant’s conduct traceably caused the injury, and that the injury is likely to be redressed through court-awarded damages or injunctive relief.<sup>31</sup> Additional prudential limitations bar standing for third parties, generalized grievances, and claims outside statutory zones of interest.<sup>32</sup>

When an individual or, as is more common, an environmental rights organization seeks to sue on behalf of an animal or species, the standing doctrine requires that at least one of the human plaintiffs satisfies all of these requirements.<sup>33</sup> Plaintiffs may not establish standing by invoking the

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26. *Id.*

27. *Id.*

28. See Hambrick, *supra* note 13, at 55–57; see also Tomb, *supra* note 2, at 60, 62.

29. U.S. CONST. art. III, § 2, cl. 1; see also *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559 (1992).

30. *Massachusetts v. EPA*, 549 U.S. 497, 516–18 (2007); *Lujan*, 504 U.S. at 560.

31. *Lujan*, 504 U.S. at 560–61.

32. *Id.* at 560; *Allen v. Wright*, 468 U.S. 737, 751 (1984). Citizen suit provisions, paired with the Administrative Procedure Act, 5 U.S.C. § 702 (2009), relax prudential standing prohibitions on generalized grievances and third-party standing. See *FAIC Sec., Inc. v. United States*, 768 F.2d 352, 357 (D.C. Cir. 1985).

33. See generally *Massachusetts v. EPA*, 549 U.S. at 505.

animals' injury, but rather must claim that the defendant's harm to the animals negatively impacted the *humans'* rights.<sup>34</sup> Examples of sufficient human injuries include impediments to the right to study and observe the animals (if the plaintiff is a scientist or scholar) or a strong and particularized emotional attachment.<sup>35</sup>

Associational standing is permitted where, in absence of injury to itself, an organization asserts a case on behalf of its members who can simultaneously establish individual standing.<sup>36</sup> Civil environmental plaintiffs, which are typically large environmental advocacy organizations,

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34. See, e.g., *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State*, 454 U.S. 464, 474–75 (1982) (“[T]he plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.” (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975))); see also Cassandra Barnum, *Injury in Fact, Then and Now (and Never Again): Summers v. Earth Island Institute and the Need for Change in Environmental Standing Law*, 17 MO. ENVTL. L. & POL’Y REV. 1, 59 n.264 (2009) (offering Christopher Stone’s comments, “‘Oh, for Pete’s sake, just sue in the name of the seals’ . . . ‘The seals are being bludgeoned to death and somebody’s saying, ‘I want to be seeing seals.’ That’s not what it’s about. It’s a very backwards way of getting the case into court.’” (quoting Rebecca Tuhus-Dubrow, *Sued by the Forest: Should Nature be Able to Take You to Court?*, BOSTON GLOBE, July 19, 2009, at C4)).

35. Plaintiffs commonly plead emotional distress from witnessing or learning of the animals’ suffering and loss of opportunity to observe and study those animals. In order to successfully claim the emotional distress factor, however, the human plaintiff must demonstrate a very strong personal connection. See *Am. Soc’y for the Prevention of Cruelty to Animals v. Ringling Bros. & Barnum & Bailey Circus*, 317 F.3d 334 (D.C. Cir. 2003) (granting standing to a former elephant handler seeking to prevent ongoing ill treatment of his elephants because the handler had an emotional and physical reaction to such treatment). But see *Int’l Primate Prot. League v. Adm’rs of the Tulane Educ. Fund*, 895 F.2d 1056, 1059–61 (5th Cir. 1990) (the *Silver Springs Monkey Case*, where former lab worker did not have standing to prevent allegedly unlawful testing on lab monkeys despite his emotional bond with them), *rev’d on other grounds*, 500 U.S. 72, 76–78 (1991) (granting standing based on petitioners’ right to contest removal of their law suit to federal court, but not based on their desire to protect the monkeys, as that issue was not raised on appeal). In order to successfully claim a loss of opportunity to observe and enjoy an animal or species, the human plaintiff must establish that the claim is based on the needs of his or her profession, though some courts have found recreational and observational interests sufficient. See *Lujan*, 504 U.S. at 594 (Blackmun, J., dissenting); see also *Japan Whaling Ass’n v. Am. Cetacean Soc’y*, 478 U.S. 221, 230 n.4 (1986) (standing granted to protect scientific whale watching); *Animal Legal Def. Fund v. Glickman*, 154 F.3d 426, 428–29 (D.C. Cir. 1998) (granting standing based on aesthetic injury to a tourist who had planned multiple return visits to a game farm where primates were held under inhumane conditions); *Alaska Fish & Wildlife Fed’n v. Dunkle*, 829 F.2d 933, 937 (9th Cir. 1987) (standing for observation and hunting of migratory birds); *Animal Welfare Inst. v. Kreps*, 561 F.2d 1002, 1005–08 (D.C. Cir. 1977) (standing for observation of Cape fur seals in natural and undisturbed habitat); *Humane Soc’y of Rochester & Monroe Cnty. v. Lyng*, 633 F. Supp. 480, 485 (W.D.N.Y. 1980) (standing granted because New York law authorized humane society to “prosecute violations of animal cruelty laws,” including branding of livestock); *Am. Horse Prot. Ass’n v. Frizzell*, 403 F. Supp. 1206, 1214 (D. Nev. 1975) (standing for continued observation of wild horses).

36. See *Hunt v. Wash. State Apple Adver. Comm’n*, 432 U.S. 333, 342–43 (1977); *Warth v. Seldin*, 422 U.S. 490, 511 (1975).

often rely on associational standing when the injuries to the organization and its individual members “are in every practical sense identical.”<sup>37</sup>

It is clear that Congress has not granted animals standing to sue in their own right,<sup>38</sup> though Article III of the U.S. Constitution may not prevent it from doing so.<sup>39</sup> Instead, when Congress enacted environmental statutes, it included citizen suit provisions that permit the public to challenge government actions that adversely affect the ecosystem or wildlife within it.<sup>40</sup> Under such provisions, Congress limited the available relief to equitable relief, including preliminary and permanent injunctions.<sup>41</sup> Violations of environmental statutes without citizen suit provisions may still be redressed under Chapter Seven of the Administrative Procedure Act.<sup>42</sup> Since the enactment of modern environmental legislation, animal rights groups have taken advantage of citizen suit provisions and the APA to sue the government for its injurious actions on behalf of the threatened wildlife. Thus, environmental organizations wishing to litigate on behalf of the environment can do so under citizen suit provisions by way of the associational standing doctrine.

Legal scholars have analyzed with considerable detail the ways to more clearly and appropriately address standing in civil environmental suits.<sup>43</sup>

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37. See *United Food & Commercial Workers Union Local 751 v. Brown Grp.*, 517 U.S. 544, 551–52 (1996) (citing *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 459 (1958)). Associational standing exists when (1) at least one of the organization’s members has standing to sue in his or her own right, (2) “the interests [the association] seeks to protect are germane to the organization’s purpose,” and (3) “neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.” *Hunt*, 432 U.S. at 343. For a case demonstrating plaintiffs’ failure to properly plead associational standing for animal protection, see *Animal Lovers Volunteer Ass’n v. Weinberger*, 765 F.2d 937, 938 (9th Cir. 1985).

38. *Citizens to End Animal Suffering & Exploitation, Inc. v. New Eng. Aquarium*, 836 F. Supp. 45, 49 (D. Mass. 1993) (“[T]he MMPA expressly authorizes suits brought by persons, not animals. This court will not impute to Congress or the President the intention to provide standing to a marine mammal without a clear statement in the statute. If Congress and the President intended to take the extraordinary step of authorizing animals . . . to sue, they could, and should, have said so plainly.”).

39. The Ninth Circuit has stated:

It is obvious that an animal cannot function as a plaintiff in the same manner as a juridically competent human being. But we see no reason why Article III prevents Congress from authorizing a suit in the name of an animal, any more than it prevents suits brought in the name of artificial persons such as corporations, partnerships or trusts, and even ships, or of juridically incompetent persons such as infants, juveniles, and mental incompetents.

*Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1176 (9th Cir. 2004).

40. See *id.*; FAVRE, *supra* note 13, at 337; see also Cass R. Sunstein, *What’s Standing after Lujan? Of Citizen Suits, “Injuries,” and Article III*, 91 MICH. L. REV. 163 (1982). For a discussion of the motivations behind citizen suit provisions, see Adam Babich, *Citizen Suits: The Teeth in Public Participation*, [1995] 25 *Envtl. L. Rep. (Envtl. Law Inst.)* 10,141 (1995).

41. FAVRE, *supra* note 13, at 337.

42. Administrative Procedure Act, 5 U.S.C. §§ 701–706 (2010).

43. See Hambrick, *supra* note 13; Sunstein, *supra* note 40; Christopher D. Stone, *Should Trees*

Proposals from wildlife advocates seek to amend the standing doctrine by granting animals standing to sue in their own right, realistically implemented through human advocates.<sup>44</sup> Some propose that the courts or even the Secretary of the Interior be given the duty of appointing court representatives for the threatened wildlife.<sup>45</sup> One suggestion includes expanding Rule 17 of the Federal Rules of Civil Procedure to include a clause addressing the representation of animals and resources.<sup>46</sup> It is also possible that permitting animal standing would, in practice, hardly alter the status quo (and thus may not be worth the trouble of lobbying), since environmental organizations already self-appoint. However, granting standing directly to animals would raise many slippery-slope concerns, including whether a *human* could sue an *animal or species* that had allegedly wronged the human.<sup>47</sup> The radicalness of this proposal justifiably prevents courts and legislators from recognizing animal standing.<sup>48</sup>

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Have Standing? Revisited: How Far Will Law and Morals Reach? A Pluralist Perspective, 59 S. CAL. L. REV. 1 (1985). See generally Preston Carter, Note, "If an (Endangered) Tree Falls in the Forest and No One is Around . . .": Resolving the Divergence Between Standing Requirements and Congressional Intent in Environmental Legislation, 84 NOTRE DAME L. REV. 2191 (2009).

44. See Carter, *supra* note 43, at 2229–30; see also *infra* note 150. Advocates temper the shock of this proposal by arguing that standing does not give the animal any additional legal rights (rights to life, liberty, and property) other than the right to sue under a specific statute. See *id.* at 2232. Sunstein, President Obama's Administrator of the White House Office of Information and Regulatory Affairs, is also a proponent of animal standing—a position which nearly lost him the job. Rachel Weiner, *Cass Sunstein Nomination Blocked by Saxby Chambliss*, HUFFINGTON POST, June 29, 2009, [http://www.huffingtonpost.com/2009/06/29/cass-sunstein-nomination\\_n\\_222196.html](http://www.huffingtonpost.com/2009/06/29/cass-sunstein-nomination_n_222196.html).

45. See Carter, *supra* note 43, at 2230, 2233.

[C]ourts should adopt a legal fiction that the animal is "autonomous" and, therefore, a "person," as it does in the case of legally incompetent humans. In practice, courts would be charged with resolving animal conflicts by determining what the animal would wish if it were capable of speaking for itself.

Hélène Landemore, *Why Should One Reject the Motion Intending to Remove Animals from the Status of Property?*, in PEOPLE, PROPERTY, OR PETS 65, 72 (Marc D. Hauser et al. eds., 2006) (discussing Steven Wise's viewpoint in RATTLING THE CAGE: TOWARD LEGAL RIGHTS FOR ANIMALS (2000)); see also Stone, *supra* note 43, at 2. Switzerland, known for its strong protection of animal rights, recently and overwhelmingly rejected a referendum that would have required each canton to hire animal attorneys. Deborah Ball, *Swiss Reject Law on Animal Rights*, WALL ST. J., Mar. 8, 2010, at A12, available at <http://online.wsj.com/article/SB10001424052748703936804575107811656131100.html>; Deborah Ball, *Scales of Justice: In Zurich, Even Fish Have a Lawyer*, WALL ST. J., Mar. 6, 2010, at A1, available at [http://online.wsj.com/article/NA\\_WSJ\\_PUB:SB10001424052748703915204575103520836794314.html](http://online.wsj.com/article/NA_WSJ_PUB:SB10001424052748703915204575103520836794314.html).

46. See Carter, *supra* note 43, at 2223.

47. Still, these slippery-slope concerns over animals-as-defendants may be resolved by Article III standing requirements: because a human would be unable to obtain compensatory damages from an animal or species, and because the court would have a difficult time enforcing an injunction against the same without also compelling a human owner or caretaker to comply with a court mandate, it is unlikely that the human could meet the constitutional standing requirement of redressability against animal defendants.

48. The administrative burden of expanding the standing doctrine may increase the amount of

### C. *The Test for Preliminary Injunctions*

After overcoming the standing requirements in environmental and wildlife litigation, plaintiffs continue to face special difficulties beyond those in normal litigation. Because the stakes are high, plaintiffs often request a preliminary injunction to prevent ongoing harm or destruction to the environment during litigation.<sup>49</sup> However, the opposing interests in environmental litigation are strong, often including the cost of withholding or forfeiting millions of dollars for planned land development and commercial growth or, as in *Winter*, the public risks of inhibiting military training activities.

Courts facing a request for a preliminary injunction conduct a four-part test. The plaintiff seeking the temporary relief must “establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest.”<sup>50</sup> These four factors are evaluated separately and weighed against each other to determine whether the preliminary relief should be granted.<sup>51</sup> The first

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environmental litigation and exacerbate the widespread epidemic of overcrowded dockets. The courtroom would literally become a zoo! Furthermore, groups composed of farmers, slaughterhouses, product-testing laboratories, and land developers would raise a strong, united front against the possibility of increasing their personal liability.

49. GEOFFREY C. HAZARD, JR. ET AL., *PLEADING AND PROCEDURE: STATE AND FEDERAL CASES AND MATERIALS* 45–46 (9th ed. 2005).

Preliminary injunctions are particularly important in environmental and other cases in which the courts have recognized that the absence of preliminary relief will result in severe, irreparable injury, including loss of life, serious safety violations, or destruction of the environment. Indeed, preliminary relief is often necessary to prevent an entire case from becoming moot.

Earthjustice, *William Myers’ Views on Access to the Courts Violate Ninth Circuit Precedent and Would Effectively Bar Many Vital Environmental and Other Public Interest Claims*, *JUDGING THE ENVIRONMENT*, available at [http://www.judgingtheenvironment.org/library/reports\\_analysis/Myers\\_Access\\_Courts.pdf](http://www.judgingtheenvironment.org/library/reports_analysis/Myers_Access_Courts.pdf).

50. *Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365, 374 (2008). The test for granting a stay is nearly identical. See *Nken v. Holder*, 129 S. Ct. 1749, 1761 (2009). The test for permanent injunctions also contains a similar analysis. See *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006).

51. See *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 542 (1987); see also *Winter*, 129 S. Ct. at 392 (Ginsburg, J., dissenting) (“Consistent with equity’s character, courts do not insist that litigants uniformly show a particular, predetermined quantum of probable success or injury before awarding equitable relief.”); *Cronin v. U.S. Dep’t of Agric.*, 919 F.2d 439, 445 (7th Cir. 1990) (“[W]hen the likelihood that the plaintiff’s claim is unjust is weighted by the (slight) harm to the defendant if the injunction is granted, granting the injunction may be only a slight injustice to the defendant even if the defendant has a somewhat stronger case.”). For Judge Posner’s discussion of a mathematical explanation of weighing the preliminary injunction factors, see *Lawson Prods., Inc. v. Avnet, Inc.*, 782 F.2d 1429, 1433–34 (7th Cir. 1986).

two factors (success on the merits and irreparable harm) are crucial.<sup>52</sup> Some courts follow the “sliding scale” approach, wherein a strong showing of irreparable injury lowers the burden of showing likelihood of success on the merits and vice versa.<sup>53</sup> The Supreme Court has held that even where there is a strong likelihood of prevailing on the merits, the plaintiff must demonstrate at least a likelihood of irreparable harm.<sup>54</sup>

The first factor—whether the plaintiff established a likelihood of success on the merits—is straightforward. Courts review the existing discovery to determine whether the proponent has made a clear showing that the opponent violated the law at issue.<sup>55</sup> Although this does not require a full evidentiary hearing, incomplete records are often fatal to plaintiffs at this early stage of litigation.<sup>56</sup>

The second factor of the test requires plaintiffs to demonstrate that, absent immediate relief, defendants will cause irreparable injury to the plaintiffs’ interests during litigation.<sup>57</sup> In civil environmental litigation, plaintiffs can successfully plead irreparable injury by showing that the defendant’s conduct may destroy a species;<sup>58</sup> anything less falls within a gray zone. Even localized harm to a species may not be worthy of relief.<sup>59</sup>

The third factor of the test involves balancing party harm, wherein courts weigh the harm to plaintiffs absent preliminary relief and the harm to defendants if the preliminary injunction is granted.<sup>60</sup> In the

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52. *Nken*, 129 S. Ct. at 1761.

53. Justice Ginsburg’s dissent in *Winter* suggests that the sliding scale approach was not affected by the majority opinion: “[C]ourts have evaluated claims for equitable relief on a ‘sliding scale,’ sometimes awarding relief based on a lower likelihood of harm when the likelihood of success is very high. This Court has never rejected that formulation, and I do not believe it does so today.” *Winter*, 129 S. Ct. at 392 (Ginsburg, J., dissenting) (citation omitted).

54. *Id.* at 375 (majority opinion).

55. *Id.*; *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam).

56. See *Cronin*, 919 F. 2d at 445–46; *Lawson Prods., Inc.*, 782 F.2d at 1440 (“[W]hen . . . there are two equally credible versions of the facts the court should be highly cautious in granting an injunction without the benefit of a full trial.”).

57. *Winter*, 129 S. Ct. at 374.

58. See *Cappaert v. United States*, 426 U.S. 128, 136 (1976) (“[T]here is grave danger that the Devil’s Hole pupfish may be destroyed, resulting in irreparable injury to the United States.” (quoting *United States v. Cappaert*, 375 F. Supp. 456, 460 (D. Nev. 1974))).

59. See *Winter*, 129 S. Ct. at 376; *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987) (noting that environmental injury is permanent and hard to remedy, but irreparable injury is not presumed merely because a federal agency fails to consider the environmental impact of its proposed actions). *But see* William S. Eubanks II, Comment, *Damage Done? The Status of NEPA After Winter v. NRDC and Answers to Lingering Questions Left Open by the Court*, 33 VT. L. REV. 649, 660 (2009) (“[L]ocalized impacts—including such impacts on wildlife—may be sufficient to establish irreparable injury.”).

60. Some courts identify this factor as “harm to the defendant” since the irreparable injury factor of the test already addresses the plaintiffs’ harm, and the test for preliminary injunctions, as a balancing test, already compares and weighs these factor against each other. See, e.g., *W. Watersheds*

environmental context, many courts have held that where irreparable injury is likely, the balancing test automatically favors the plaintiff.<sup>61</sup> Harm to the defendant that is purely pecuniary or otherwise trivial generally falls short of outweighing harm to the environment.<sup>62</sup>

The fourth factor of the test entertains public policy concerns. It is sometimes considered a balancing test for the opposing public harms, as courts evaluate the consequences to the general public in granting or denying the injunction.<sup>63</sup> One court has described the public interest factor as a “wild card,” remarking that definitions of the public interest and public policy are highly discretionary.<sup>64</sup>

#### *D. The Scope of “Plaintiffs’ Harm”*

The most discernible problem with conducting factual analysis under the four-part preliminary injunction test in civil environmental litigation occurs when evaluating the second and third factors. Both factors—irreparable injury to plaintiffs’ interests and balancing plaintiffs’ and defendant’s injuries—require courts to consider the “plaintiffs’ harm.” Case law has failed to explicitly define the scope of injury to the plaintiff in environmental protection lawsuits: is it the harm to the human plaintiff who has standing to bring the claim, the harm to the animal (whose impending injury is usually the underlying motivation for litigation), or an amalgamation of the harm to both?<sup>65</sup> Although constitutional standing

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Project v. Bureau of Land Mgmt., No. 09-0507, 2009 U.S. Dist. LEXIS 98520, at \*15–16 (D. Idaho Oct. 14, 2009); In Def. of Animals v. Salazar, 675 F. Supp. 2d 89, 103 (D.D.C. 2009).

61. See *Amoco Prod.*, 480 U.S. at 545 (“If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment.”); *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 194 (1978) (“Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities . . . .”); *Wash. Toxics Coal. v. EPA*, 413 F.3d 1024, 1035 (9th Cir. 2005) (“Congress has decided that under the ESA, the balance of hardships always tips sharply in favor of the endangered or threatened species.”); see also *Marbled Murrelet v. Babbitt*, 83 F.3d 1068, 1073 (9th Cir. 1996); *Ocean Mammal Inst. v. Gates*, 546 F. Supp. 2d 960, 970 (D. Haw. 2008). Note that these cases were primarily argued under the ESA, whereas *Winter* encompassed a variety of laws including the ESA but was centered on the NEPA claim.

62. See *Cronin v. U.S. Dep’t of Agric.*, 919 F.2d 439, 445 (7th Cir. 1990) (observing that the time value of the defendant’s profit was probably trivial, and because it was purely pecuniary and avoidable, not stronger than the plaintiffs’ harm).

63. *Yakus v. United States*, 321 U.S. 414, 440–41 (1944).

64. *Lawson Prods., Inc. v. Avnet, Inc.*, 782 F.2d 1429, 1433 (7th Cir. 1986).

65. The definition of plaintiffs’ harm in the preliminary injunction test is also relevant in the abortion context. When right-to-life organizations bring suit on behalf of unborn fetuses, should the court look at the harm to the fetus, harm to the organizations’ members, or both? Fetuses are not capable of suing in court, though FED. R. CIV. P. 17 may grant them special representation. See *Planned Parenthood League v. Bellotti*, 641 F.2d 1006, 1023 (1st Cir. 1981) (failing to decide the issue

requires the human plaintiff who initiated litigation to have an injury of his or her own without evoking third-party harm to the animal, it is not a foregone conclusion that the preliminary injunction test considers only the harm to the human plaintiff with standing.<sup>66</sup> Courts themselves have not chosen one standard or another, inconsistently defining “plaintiffs’ harm” as harm to the human, animal, or both.<sup>67</sup> As discussed *infra*, the minority view implicitly restricts the definition to human harm only, while the majority of courts are more flexible and incorporate wildlife harm within the analysis.<sup>68</sup>

The scope of “plaintiffs’ harm” is material, as the decision of whether to include animal harm in the analysis is often outcome dispositive.<sup>69</sup> If only the harm to the named plaintiff (the human) is used, it may be possible to demonstrate the irreparable injury factor, but it will be difficult to outweigh the risk to the defendant’s interests under the harm-balancing factor. For example, a human plaintiff’s mere emotional distress or loss of opportunity to observe a species in its native habitat may seem trivial when weighed against million-dollar losses in forestalled development projects. If, on the other hand, the harm to wildlife is part of the “plaintiffs’ harm,” it is easier for plaintiffs to meet their burden under the

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of whose harm should be considered in the analysis, but noting the possible effects of defining the scope of “plaintiffs’ harm” in different ways); *see also* Stephen J. Wallace, Note, *Why Third-Party Standing in Abortion Suits Deserve a Closer Look*, 84 NOTRE DAME L. REV. 1369 (2009).

66. For a basic example of when courts consider harm to those other than the plaintiff, the fourth factor of the preliminary injunction test considers various interests of the *public*. *See supra* note 63 and accompanying text. As one scholar explained:

In enacting the modern environmental statutes, Congress concluded that the common law did not adequately protect the environment in part because it did not recognize the unique nature of environmental harm: environmental injury is often physically and temporally distant from the harmful action; environmental destruction often causes noneconomic injury, such as harm to aesthetic or recreational interests; and environmental destruction can harm interests that are nonhuman, such as plants, animals, and ecosystems, wholly separate from any harm to people.

Jared A. Goldstein, *Equitable Balancing in the Age of Statutes*, 96 VA. L. REV. 485, 529 (2010). Moreover, some animals are actually named as plaintiffs and are even granted standing when the animal standing is not contested. *See, e.g., Marbled Murrelet*, 83 F.3d 1068; *Mt. Graham Red Squirrel v. Espy*, 986 F.2d 1568 (9th Cir. 1993); *Mt. Graham Red Squirrel v. Yeutter*, 930 F.2d 703 (9th Cir. 1991); *Palila v. Haw. Dep’t of Land & Natural Res.*, 852 F.2d 1106 (9th Cir. 1988); *Coho Salmon v. Pac. Lumber Co.*, 61 F. Supp. 2d 1001 (N.D. Cal. 1999); *N. Spotted Owl v. Lujan*, 758 F. Supp. 621 (W.D. Wash. 1991); *N. Spotted Owl v. Hodel*, 716 F. Supp. 479 (W.D. Wash. 1988).

67. *See infra* Part IV for a discussion of courts that have chosen each of these standards.

68. *See infra* Part IV.

69. *See* Goldstein, *supra* note 66, at 531–32. Outcome-dispositive standards are incubators for judicial activism. FAVRE, *supra* note 13, at 344 (“While a decision by a judge on the issue of standing is not supposed to reflect any opinion on the possible outcome of the merits of the case, every judge knows that if a plaintiff is found to not have standing, then in effect the plaintiff loses the case without the judge having to address the merits of the case.”).

harm-balancing factor.<sup>70</sup> What judge would rule that the relocation of a building project is graver than the extinction of the American Bald Eagle?<sup>71</sup>

In *Winter*, the Supreme Court was faced with the propriety of granting a preliminary injunction in a civil environmental protection case.<sup>72</sup> The plaintiff, environmental organization Natural Resource Defense Council (NRDC), sought to prevent injury to thousands of marine mammals. The Court compared the harm to the plaintiff with the harm to defendant, the United States Navy, and ruled in favor of the Navy.<sup>73</sup> As discussed *infra*, the Court failed to decide whether “plaintiffs’ harm” encompasses human injury, animal injury, or injury to both in the preliminary injunction test.<sup>74</sup> However, in mentioning that the plaintiffs’ injuries were merely recreational, the Court may have implicitly adopted the minority standard of defining “plaintiffs’ harm” as human harm only.

### III. THE SUPREME COURT DECISION IN *WINTER V. NRDC*

#### A. Case Background

In 2008, the Supreme Court reversed a preliminary injunction against the U.S. Navy that would have halted certain sonar emission activities to prevent harm to marine mammals.<sup>75</sup> On a military base in Southern California, the Navy conducted training activities for submarine detection that involved emitting active sonar pulses.<sup>76</sup> The ocean region used for testing sonar blasts contained at least thirty-seven species of dolphin, whale, sea lion, and other marine mammals.<sup>77</sup>

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70. See Eubanks, *supra* note 59, at 659. But see *Greater Yellowstone Coal. v. Flowers*, 321 F.3d 1250, 1257 (10th Cir. 2003) (“Plaintiffs contend that a proponent of a preliminary injunction under these circumstances, seeking to prevent harm to members of a threatened or endangered species, need not show harm to the species as a whole. We agree.” (footnote omitted)).

71. The balance of harms may not be as extreme as this example and may depend on the statute at issue. However, the import of the additional weight to the plaintiffs’ scale remains.

72. *Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365 (2008).

73. Plaintiff NRDC’s standing to sue was not addressed in the Supreme Court case. Transcript of Oral Argument at 24, 51, *Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365 (2008) (No. 07-1239), available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/07-1239.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/07-1239.pdf) (Justice Scalia was particularly concerned with the procedural standing issue).

74. See discussion *infra* Part III.

75. *Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365, 382 (2008).

76. *Id.* at 370.

77. *Id.* at 371.

Under NEPA, the Navy was required to prepare an EIS analyzing the environmental impact of the training activities before it could begin.<sup>78</sup> The Navy first completed a smaller report to determine if an EIS was necessary.<sup>79</sup> The Navy conceded that in its own study, it found that the past and continuing training activities using sonar emissions caused severe physical injuries to five species of endangered whales and nearly twenty-five other marine species.<sup>80</sup> These injuries purportedly included hemorrhaging around the brain and ears; lesions in the liver, lungs, and kidneys; and nitrogen bubbles in other organs and tissue.<sup>81</sup> Despite these findings, the Navy felt that its activities would not significantly impact the environment and decided not to prepare a full EIS.<sup>82</sup> The NRDC utilized the Administrative Procedure Act and citizen suit provisions to sue the Navy for violating the ESA, MMPA, CZMA, and NEPA.<sup>83</sup>

In a federal district court in California, the NRDC requested and received a temporary restraining order against the Navy's use of mid-frequency active sonar, but it eventually settled with the Navy after the latter agreed to implement certain mitigation measures.<sup>84</sup> Several months after the settlement, the Navy developed fourteen new sonar training exercises, again without completing an EIS.<sup>85</sup> The NRDC sued the Navy once more and requested a preliminary injunction to force the Navy to file an EIS before it could proceed with its training.<sup>86</sup> Filing the EIS would give power to the EPA, rather than the Navy, to determine whether the Navy's training activities were too harmful to the marine mammals. The district court granted NRDC's preliminary injunction to prohibit the Navy

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78. National Environmental Policy Act of 1969, 42 U.S.C. § 4332 (2006). *See supra* text accompanying notes 24–27.

79. *Winter*, 129 S. Ct. at 388 (Ginsburg, J., dissenting).

80. *Natural Res. Def. Council, Inc. v. Winter*, 530 F. Supp. 2d 1110, 1118 (C.D. Cal. 2008).

81. *Winter*, 129 S. Ct. at 392 (Ginsburg, J., dissenting); *see also* Charles Siebert, *Watching Whales Watching Us*, N.Y. TIMES, July 8, 2009, at A1, available at [http://www.nytimes.com/2009/07/12/magazine/12whales-t.html?\\_r=1&emc=etal](http://www.nytimes.com/2009/07/12/magazine/12whales-t.html?_r=1&emc=etal).

82. *Winter*, 129 S. Ct. at 388 n.1 (Ginsburg, J., dissenting) (arguing that preparing an Environmental Assessment, an evaluation used to determine whether to prepare an EIS, does not satisfy the burden to complete an EIS).

83. *Natural Res. Def. Council, Inc. v. Winter*, 530 F. Supp. 2d 1110, 1113 (C.D. Cal. 2008). The APA provides the vehicle for claims under NEPA, while the ESA and CZMA contain citizen suit provisions. The Navy was provided an exemption under the MMPA by the Secretary of Defense. *Winter*, 129 S. Ct. at 371.

84. Settlement Agreement, *Natural Res. Def. Council, Inc. v. Winter*, No. 06-CV-4131 (C.D. Cal. July 7, 2006); Temporary Restraining Order at 6, *Natural Res. Def. Council, Inc. v. Winter*, No. 06-CV-4131 (C.D. Cal. July 3, 2006).

85. Lisa Lightbody, Comment, *Winter v. Natural Resources Defense Council, Inc.*, 33 HARV. ENVTL. L. REV. 593, 595 (2009).

86. *Winter*, 129 S. Ct. at 372.

from conducting its exercises until it had filed an EIS.<sup>87</sup> The court found that the plaintiffs were likely to succeed on the merits, that there was a possibility of irreparable harm to the environment, and that this harm outweighed any harm to the Navy.<sup>88</sup> The Navy filed a motion to stay; the U.S. Court of Appeals for the Ninth Circuit affirmed the injunction but remanded to require the district court to narrowly tailor its order.<sup>89</sup> The district court imposed six conditions on the Navy if it continued its activities, two of which the Navy appealed.<sup>90</sup> The Ninth Circuit affirmed, and the Navy filed a petition for a writ of certiorari, which the Supreme Court granted.<sup>91</sup>

### B. Majority Opinion

On November 12, 2008, the *Winter* Court reversed the judgment of the lower courts and vacated the portions of the preliminary injunction contested by the Navy.<sup>92</sup> The majority found that the lower court abused its discretion when it used the wrong standard in granting the NRDC’s preliminary injunction.<sup>93</sup> The lower court had used a “possibility of irreparable injury” standard for the second factor of the test, whereas it should have used a “likelihood of irreparable injury” standard.<sup>94</sup> The majority further criticized the lower courts for failing to consider the

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87. *Natural Res. Def. Council, Inc. v. Winter*, 645 F. Supp. 2d 841, 855 (C.D. Cal. 2007).

88. *Id.*; see also *Winter*, 129 S. Ct. at 372–73.

89. *Winter v. Natural Res. Def. Council, Inc.*, 508 F.3d 885, 887 (9th Cir. 2007).

90. The conditions included:

(1) imposing a 12-mile “exclusion zone” from the coastline; (2) using lookouts to conduct additional monitoring for marine mammals; (3) restricting the use of “helicopter-dipping” sonar; (4) limiting the use of MFA sonar in geographic “choke points”; (5) shutting down MFA sonar when a marine mammal is spotted within 2,200 yards of a vessel; and (6) powering down MFA sonar by 6 dB during significant surface ducting conditions, in which sound travels further than it otherwise would due to temperature differences in adjacent layers of water.

*Winter*, 129 S. Ct. at 373 (citing *Natural Res. Def. Council, Inc. v. Winter*, 530 F. Supp. 2d 1110, 1118–21 (C.D. Cal. 2008)). The Navy appealed the final two conditions. *Winter*, 129 S. Ct. at 373.

91. *Winter v. Natural Res. Def. Council, Inc.*, 128 S. Ct. 2964 (2008) (granting certiorari).

92. *Winter*, 129 S. Ct. at 365.

93. *Id.* at 382.

94. The Supreme Court itself was uncertain as to the standard used by the lower court. *Id.* at 376.

In fact, it appears that even though the lower court used a “possibility” of irreparable injury standard, it found that plaintiffs established a “near certainty” of irreparable injury, which is a stronger finding than “likelihood” of injury. *Natural Res. Def. Council, Inc. v. Winter*, 645 F. Supp. 2d 841, 855 (C.D. Cal. 2007). Regardless of whether the Supreme Court wrongly characterized the lower court’s standard of irreparable injury, its decision to remand was supported by the failure of the lower court to give proper consideration to defendant’s harm.

Navy's evidence of hardship and injury to the full extent that it deserved.<sup>95</sup> The Court stated that it need not address the merits of the case, instead remanding for further findings of fact.<sup>96</sup> However, the majority *sua sponte* applied the preliminary injunction test to the facts before it, even though its application of the test on the merits was dictum and would not be binding on the lower court after further discovery.<sup>97</sup>

In its analysis of the facts under the preliminary injunction test, the majority favored the Navy's position.<sup>98</sup> The majority dismissed the first factor in the preliminary injunction test (likelihood of success on the merits), noting that consideration of the other factors alone required a denial of the injunction.<sup>99</sup> It also quickly disposed of the public interest factor, simply mentioning that any injury to the plaintiffs was outweighed by the public interest and the Navy's interest in training its personnel.<sup>100</sup>

The majority spent the bulk of its analysis on the second and third factors of the preliminary injunction test (the likelihood of irreparable harm to plaintiffs absent a preliminary injunction and the balance of this harm with harm to defendants).<sup>101</sup> In its analysis of these factors, the Court focused on the harm to defendants, criticizing the lower courts for discounting the Navy's evidence.<sup>102</sup> In defining the plaintiffs' harm, the Court did not state whether it should consider the harm to the NRDC organization's members, the harm to the marine mammals, or the harm to both. However, the majority opinion mentioned only the potential human injury; it characterized the scope of the plaintiffs' investment as limited to

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95. "The lower courts did not give sufficient weight to the views of several top Navy officers, who emphasized that because training scenarios can take several days to develop, each additional shutdown can result in the loss of several days' worth of training." *Id.* at 379.

96.

[W]e do not address the underlying merits of plaintiffs' claims. While we have authority to proceed to such a decision at this point, doing so is not necessary here. In addition, reaching the merits is complicated by the fact that the lower courts addressed only one of several issues raised, and plaintiffs have largely chosen not to defend the decision below on that ground.

*Winter*, 129 S. Ct. at 381 (citation omitted).

97. *See* Eubanks, *supra* note 59, at 659 ("Although the majority opinion recognized that 'the Navy asserts that plaintiffs have failed to offer evidence of species-level harm that would adversely affect *their* scientific, recreational, and ecological interests,' the majority never relied on this assertion as a basis for its ruling." (footnote omitted)). However, the majority noted that its analysis of preliminary injunctive relief also applied to any permanent injunctive relief. *Winter*, 129 S. Ct. at 381–82.

98. *Id.* at 382.

99. *Id.* at 376.

100. *Id.* Ironically, the Court quickly disposed of the public interest and the likelihood of success on the merits factors of the test for preliminary injunctions, despite its criticism of the lower court's "cursory" analysis of some of the factors of the test for preliminary injunctions. *Id.* at 378.

101. *Id.* at 375–81.

102. *Id.* at 374–78.

the plaintiffs’ aesthetic and professional interests, which it defined as plaintiffs’ ability to take whale watching trips, conduct scientific research, and observe and photograph the animals in their natural habitats.<sup>103</sup> The Court wrote:

We do not discount the importance of plaintiffs’ ecological, scientific, and recreational interests in marine mammals. Those interests, however, are plainly outweighed by the Navy’s need to conduct realistic training exercises to ensure that it is able to neutralize the threat posed by enemy submarines.<sup>104</sup>

The majority did not discuss animal injury within the breadth of harm to the plaintiff. Only once did it mention injury to marine mammals; but even that statement was made merely in the context of “impairing plaintiffs’ ability to study and observe” them.<sup>105</sup> Furthermore, the majority stated that “[f]or the plaintiffs, the most serious possible injury would be harm to an unknown number of the marine mammals that they study and observe.”<sup>106</sup> This phraseology, coupled with the Court’s previous recognition of only the humans’ harm, implies that the Court did not consider the marine mammals’ harm within the scope of “plaintiffs’ harm.”<sup>107</sup> This omission is ironic given the majority’s criticism of the lower courts for limiting the scope of defendant’s harm.<sup>108</sup> Notably, the majority never criticized or even addressed the lower courts’ significant reliance on animal injury in contemplating the full scope of harm to the plaintiffs.

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103. *Id.* at 377.

104. *Id.* at 382.

105. The majority wrote, “Plaintiffs contend that the Navy’s use of MFA sonar will injure marine mammals or alter their behavioral patterns, impairing plaintiffs’ ability to study and observe the animals.” *Id.* at 377–78. This acknowledgement of animal injury is tempered because the Court did so only as a restatement of the plaintiffs’ contention. The Court continued to filter animal harm through the lens of the human plaintiffs’ interests, rather than acknowledge the animals’ independent harm.

106. *Id.* at 377–78. If the majority were also considering harm to the animals within the “plaintiffs’ harm,” then the most serious possible injury to plaintiffs would have been death and further species endangerment. See Siebert, *supra* note 81 (observing that the majority “minimize[d], in a fairly dismissive tone, the issue of harm to marine life”).

107. Lightbody, *supra* note 85, at 600–01 (“The Court ignored the potential for serious animal and species-level harm and limited its consideration to the harm NRDC members had alleged for standing purposes.”).

108. *Winter*, 129 S. Ct. at 375.

### C. Concurrence and Dissent

The *Winter* concurring and dissenting opinions characterized the extent of “plaintiffs’ harm” more broadly than the majority. In his opinion concurring in part and dissenting in part, Justice Breyer, joined in part by Justice Stevens, discussed the danger to the environment absent a preliminary remedy.<sup>109</sup> Breyer did not address the facts under all of the preliminary injunction test factors, though he did balance the plaintiffs’ and defendant’s harms.<sup>110</sup> Along with the majority, Breyer acknowledged the faults of the district court’s analysis due to insufficient weight given to the Navy’s evidence.<sup>111</sup> But in contemplating the plaintiffs’ harm, Breyer discussed only the marine mammals’ harm, entirely dispensing with the harm to the human plaintiffs.<sup>112</sup> Breyer referred to the district court’s analysis of the potential for harm to the wildlife, as described in the military reports, without criticizing or diminishing the importance that the lower courts placed upon the animals’ injuries.<sup>113</sup> He ultimately voted to reverse the preliminary injunction because he felt that scientific evidence of actual injury to the marine mammals was lacking.<sup>114</sup> Breyer wrote that “[w]ithout such evidence [of the damage to the marine mammals], it is difficult to assess the *relevant* harm—that is, the environmental harm likely caused by the Navy’s exercises”—and therefore impossible to apply the preliminary injunction test without remanding for further findings of fact.<sup>115</sup> Breyer’s emphasis as to the need to consider “the *relevant* harm” seemed to be a disparagement of the majority’s avoidance of addressing harm to the marine mammals.<sup>116</sup> In addition to remanding for fuller discovery, Breyer ultimately would have forced the Navy to craft its training program in a manner that would mitigate potential harm to the mammals.<sup>117</sup>

The dissent analyzed animal injury to an even greater extent than the concurrence. Justice Ginsburg, joined by Justice Souter, found that the district court did not abuse its discretion when it granted the preliminary injunction.<sup>118</sup> Ginsburg wrote at length about the serious physical injuries

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109. *Id.* at 382 (Breyer, J., concurring in part and dissenting in part).

110. *Id.* at 383–84.

111. *Id.* at 384–85.

112. *Id.* at 383.

113. *Id.*

114. *Id.*

115. *Id.* at 384.

116. *Id.*

117. *Id.* at 386–87.

118. *Id.* at 387 (Ginsburg, J., dissenting).

suffered by the marine mammals, including that “[s]onar is linked to mass strandings of marine mammals, hemorrhaging around the brain and ears, acute spongiotic changes in the central nervous system, and lesions in vital organs.”<sup>119</sup> She rejected the notion that the training exercises, though of critical national interest, would trump the likely permanent harm and destruction to the mammals.<sup>120</sup> Ginsburg wrote:

In my view, this likely harm—170,000 behavioral disturbances, including 8,000 instances of temporary hearing loss; and 564 Level A harms, including 436 injuries to a beaked whale population numbering only 1,121—cannot be lightly dismissed, even in the face of an alleged risk to the effectiveness of the Navy’s 14 training exercises.<sup>121</sup>

Ginsburg exposed the majority for evading the issue of injury to the wildlife.<sup>122</sup> She also noted that the Navy’s interests did not authorize violation of legislative mandates that endangered species are among the highest national priorities.<sup>123</sup>

#### *D. Unearthing the Majority Standard*

In light of the lower court rulings and concurring and dissenting opinions, it is clear that the majority was, at the very least, made aware of the alleged mammalian injury. Thus, its omission of animal harm analysis was likely purposeful.<sup>124</sup> There are at least three plausible reasons for the majority’s omission of an analysis of wildlife harm: it did not believe that such an analysis was appropriate in light of the human-only standing doctrine, it did not believe the evidence of animal harm was reliable, or it simply wanted to lessen the sting of a controversial decision.

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119. *Id.* at 392.

120. *Id.* at 393.

121. *Id.*

122.

The majority reasons that the environmental harm deserves *less weight* because the training exercises “have been taking place in SOCAL for the last 40 years,” such that “this is not a case in which the defendant is conducting a new type of activity with completely unknown effects on the environment.”

*Id.* at 393 n.4 (emphasis added) (quoting *Winter*, 129 S. Ct. at 376 (majority opinion)). Ginsburg’s criticism of the majority was based on its failure to give enough weight to the animals’ harm, but, in fact, the majority seemed to give no weight to the animals’ harm.

123. *Id.* at 393.

124. While this argument requires an analysis of what the majority did *not* say (especially since it did not rule on the merits of the case), the relevant question becomes *why* the majority chose to ignore alleged injuries to the marine mammal population when it discussed the relevant harms.

It is possible that the majority believed that the standing doctrine precluded it from considering the harm to anyone but the human plaintiffs with legal standing. However, if this was the majority's reason for excluding an analysis of wildlife harm, then it probably would have at least criticized the lower courts and concurring and dissenting opinions for relying on animal harm, just as it criticized them for their incorrect analysis of the defendant's harm.<sup>125</sup> Given the variation among federal district and appellate courts in considering animal harm within the broader category of "plaintiffs' harm," the majority also should have taken the opportunity to reconcile the circuit split.<sup>126</sup> By ignoring the harm to the animals within the scope of "plaintiffs' harm" in the irreparable injury and balancing test factors, the Court's opinion may confuse lower courts that seek a hard rule on the scope of plaintiffs' harm in animal protection lawsuits.<sup>127</sup>

A second explanation for the Court's omission of an animal harm analysis could be that, like the concurrence, it found the evidence of harm to the animals too uncertain and thus chose to ignore it.<sup>128</sup> However, if that

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125. *Winter*, 129 S. Ct. at 379. The majority criticized the lower courts' characterization of the defendant's harm because they failed to consider the full scope of the defendant's interests. *Id.* The majority was also well aware that the lower courts considered animal harm within the scope of "plaintiffs' harm," as the Solicitor General in his oral arguments quoted language from the Ninth Circuit recognizing the irreparable injury to the marine mammals themselves. Transcript of Oral Argument at 23, *Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365 (2008) (No. 07-1239), available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/07-1239.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/07-1239.pdf).

126. See discussion *supra* Part II.D.

127. One could also argue that rather than directly characterizing plaintiff's harm as human-only harm, the Court backhandedly characterized the redress of the harm in such a limited way so as to avoid the true harm, and therefore the involvement of animals, altogether. The Court wrote: "Given that the ultimate legal claim is that the Navy must prepare an EIS, not that it must cease sonar training, there is no basis for enjoining such training in a manner credibly alleged to pose a serious threat to national security." *Winter*, 129 S. Ct. at 381. One subsequent opinion asserted that *Winter* did not affect the standards for evaluating party harm:

*Winter* does not modify or discuss the *TVA v. Hill* standard. Although *Winter* altered the Ninth Circuit's general preliminary injunctive relief standard by making that standard more rigorous, *Winter* did not address, let alone change, the Circuit's approach to the balancing of hardships where endangered species and their critical habitat are jeopardized.

Consol. Salmonid Cases v. Locke, No. 1:09-CV-01053, 2010 U.S. Dist. LEXIS 9897, at \*10 (E.D. Cal. Feb. 5, 2010) (footnote omitted) (acknowledging but distinguishing *Winter*'s analysis on the basis that *Winter* only addressed NEPA claim seeking an EIS and not the ESA claims). For Justice Ginsburg's response, see *supra* note 122. Even though the majority focused on the EIS as plaintiff's ultimate (legal) goal, the court did not characterize the harm to plaintiffs and defendants as purely procedural (indeed, Justice Scalia would not have permitted standing for mere procedural injury, see *supra* note 73 and *infra* note 135). Thus, the substantive harm analysis is still necessary, and the definition of "plaintiffs' harm" remains relevant. *Cf. id.* (discussing the marine mammal harm, presumably under the belief that the animal harm was relevant to the analysis).

128. See Lightbody, *supra* note 85, at 601.

indeed was the case, it seems likely that the Court would have at least stated this point as a reason for the omission. Also, Justice Breyer himself felt that the majority chose to ignore the animals’ harm for other reasons, as he criticized the majority for failing to analyze the “*relevant*” harm, rather than, for example, the “*uncertain*” harm.<sup>129</sup>

A third explanation for the Court’s analysis could be its desire to thwart controversy in issuing a decision hostile to endangered species. It would be highly controversial for the Court to decide that naval training is more important than 170,000 instances of death or severe injury to endangered dolphin and whale species. It is less controversial for the Court to rule that national security is more important than the plaintiffs’ mere “recreational” interests in whale watching.<sup>130</sup> By quietly removing the mammals’ alleged injuries from consideration in the irreparable injury and harm-balancing factors of the test, the majority might save itself a great deal of disdain. Although life-tenured Justices need not aim to please, public opinion undoubtedly impacts decision making.<sup>131</sup>

Whichever of these or other explanations account for the *Winter* majority’s failure to consider harm to the mammals, there remains the question of whether animal harm *can* and *should* make up a share of the “plaintiffs’ harm” category within the preliminary injunction test.

#### IV. PROPOSALS

At minimum, the *Winter* Court failed to explicate the standard for analyzing the scope of “plaintiffs’ harm” under the preliminary injunction test in environmental litigation. At worst, the decision added to the ambiguity of the appropriate criterion for the test and may have implicitly encouraged lower courts to adopt the minority standard.<sup>132</sup> A clear

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129. *Winter*, 129 S. Ct. at 384 (Breyer, J., concurring in part and dissenting in part).

130. See Lightbody, *supra* note 85, at 601 (“By only recognizing harm directly felt by NRDC members, the *Winter II* court was able to avoid placing a value on environmental damage, which would have invited controversy. Instead, the Court could trivialize the injury to NRDC members as less long-term, permanent, and worrisome than the direct harm to mammals and mammal species.”).

131. See William Mishler & Reginald S. Sheehan, *The Supreme Court as a Countermajoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions*, 87 AM. POL. SCI. REV. 87 (1993).

132. This confusion is evident from opposing interpretations of *Winter*. In *In Def. of Animals v. Salazar*, 675 F. Supp. 2d 89, 102–04 (D.D.C. 2009), a district court, quoting the *Winter* test for preliminary injunctions, considered only the harm to the human plaintiff. However, other courts considered *Winter* but continued to bring animal harm within the scope of “plaintiffs’ harm.” See, e.g., *W. Watersheds Project v. Bureau of Land Mgmt.*, No. 09-0507-E-BLW, 2009 U.S. Dist. LEXIS 98520, at \*2, 14–19 (D. Idaho Oct. 14, 2009) (considering harm to the animals, bighorn sheep, after evaluating the preliminary injunction test under *Winter*); *San Luis & Delta-Mendota Water Auth. v.*

standard is necessary because, without it, both parties are unable to properly prepare for litigation, and courts are left to their own devices in choosing between outcome-dispositive standards.<sup>133</sup>

The lack of clarity in the application of the preliminary injunction test arises from ambiguity as to the scope of harm considered within “plaintiffs’ harm”: is it the harm to the human plaintiff who has standing to bring the claim, the harm to the animal whose suffering is usually the underlying motivation for litigation, or the harm to both? This Note offers three different approaches that could be used to establish a clear standard for the preliminary injunction test. These approaches encompass changes to both the standing doctrine and the test for preliminary relief in civil environmental protection litigation. The first approach maintains the current standing requirements (a human plaintiff must have personal injury when wildlife is harmed) and considers only the human’s injury within the preliminary injunction test. The second approach maintains the current standing requirements but would require a definition of “plaintiffs’ harm” that includes both the human’s and animals’ injuries. The third approach adjusts the standing doctrine to allow animals standing to sue in their own right (with humans acting in a mere representative capacity) and, subsequently, would have courts only consider the animals’ harm as “plaintiffs’ harm.” These approaches are discussed in turn below.

#### A. Approach One: Human Standing, Human Harm Analysis

Under the first approach, the current standing doctrine remains unaffected, and only the human’s harm is considered within the scope of “plaintiffs’ harm” under the preliminary injunction test.<sup>134</sup> This approach

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Salazar, No. 1:09-CV-01053, 2009 U.S. Dist. LEXIS 45137, at \*3 n.1, 6–7, 8–9 (E.D. Cal. May 29, 2009) (reasoning that the *Winter* court found that the harm to the *animals* was outweighed by the military concerns); *Animal Welfare Inst. v. Martin*, 588 F. Supp. 2d 70, 101–06 (D. Me. 2008) (considering whether the new *Winter* test required a showing of harm to an entire lynx species or only one lynx); *Ocean Mammal Inst. v. Gates*, 546 F. Supp. 2d 960, 983 (D. Haw. 2008) (noting that, per the Ninth Circuit’s *Winter* test, it was obliged to consider the harm to the animals in the preliminary injunction analysis).

133. See Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2006). It is unlikely that Congress wanted these decisions to be made under ambiguous rules. See Sunstein, *supra* note 40, at 228–29 (“After *Lujan*, the law of redressability thus remains as it was before: Extremely fuzzy and highly manipulable. It is manipulable, first, because there is no clear metric by which to decide whether it is ‘speculative’ to say that a decree will remedy the plaintiff’s injury. It is manipulable, second, because, as we have seen, whether an injury is redressable depends on how it is defined.”). “Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities . . . .” *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 194 (1978).

134. One court explained that a human plaintiff’s harm under NEPA includes procedural injury,

logically synchronizes the scope of cognizable injury to plaintiffs in establishing standing and awarding relief.<sup>135</sup> Such a rule would be clear, uniform, and predictable. It would also quell widespread fear of animal standing by explicitly denying animals the ability to be named as plaintiffs or otherwise have their interests directly impact litigation.<sup>136</sup>

A disadvantage to this option is an emphasis on procedural form over substantive policy; it circumvents congressional intent to provide protection for threatened and endangered wildlife by focusing on the procedurally logical need to reconcile differing definitions of the “plaintiff” at different stages of litigation.<sup>137</sup> Courts could not directly consider animals’ needs at any stage of litigation, but rather could only trivialize the threat to wildlife by viewing animal injury as collateral to the human’s interests. This is incompatible with Congress’s stated purpose in enacting protective legislation and citizen suit provisions to guard wildlife.<sup>138</sup> Courts could possibly prevent this incongruence if they considered harm to the animal or resource under the “public interest” factor of the preliminary injunction test, though this would again create the issue of whether environmental harm would be harm in and of itself or

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such as “the opportunity to participate in NEPA process at a time when such participation is required and is calculated to matter.” *Save Strawberry Canyon v. U.S. Dep’t of Energy*, 613 F. Supp. 2d 1177, 1189 (N.D. Cal. 2009). That court, however, distinguished the case from *Winter* and stated that environmental harm may possibly be considered within “plaintiffs’ harm,” but the harm to human plaintiffs’ procedural injury was sufficient to show irreparable injury. *Id.*

135. In oral argument for *Winter*, “Justice Scalia went so far as to evoke explicitly the requirements of Article III standing in the discussion of what harms count for purposes of equitable injunctions.” Neil Gormley, *Standing in the Way of Cooperation: Citizen Standing and Compliance with Environmental Agreements*, 16 HASTINGS W.-NW. J. ENVTL. L. & POL’Y 397, 405–06 (2010) (citing Transcript of Oral Argument at 24, *Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365 (2008) (No. 07-1239), available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/07-1239.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/07-1239.pdf)); see also Christopher Kendall, *Dangerous Waters? The Future of Irreparable Harm Under NEPA After Winter v. NRDC*, 39 ENVTL. L. REP. NEWS & ANALYSIS 11109, 11109–17 (2009), available at <http://www.eli.org/pdf/seminars/04.29.10dc/39.11109.pdf> (asserting that the proper approach is to consider harm to the animals in the preliminary injunction analysis, but that Scalia wrongly confused the preliminary injunction test with the standing requirements).

136. *But see supra* note 44.

137. See Carter, *supra* note 43, at 2237. If the first approach was adopted, the primary focus remains on the human harm, which can often be redressed with money (whereas harm to animals and the environment cannot be redressed with money unless the money is given to a caretaker for use on the environment’s behalf). In effect, under the ESA, MMPA, CMZA, NEPA, and other animal protection statutes, human plaintiffs would use citizen suits to bring personal injury claims for injunctive relief. The very fact that Congress limited recovery to injunctive relief under citizen suit provisions makes clear that it was less concerned with human recovery and primarily concerned with environmental protection. *But see Fund for Animals v. Clark*, 27 F. Supp. 2d 8, 14 (D.D.C. 1998) (“[S]eeing or even contemplating the type of treatment of the bison inherent in an organized hunt would cause [the plaintiffs] to suffer an aesthetic injury that is not compensable in money damages.”).

138. See Landmore, *supra* note 45, at 71; see also Goldstein, *supra* note 66.

merely in relation to the harm to the public's recreational and scientific interests.<sup>139</sup>

The human-only harm approach is currently used by a small minority of courts. In *Fund for Animals v. Clark*<sup>140</sup> and *Fund for Animals v. Norton*,<sup>141</sup> the courts discussed only the human plaintiffs' interests in the local animal populations and did not directly consider the threat to these animals in analyzing the preliminary injunction test.<sup>142</sup> Beyond the D.C. district courts, no other courts have adopted this restrictive definition of the scope of plaintiffs' harm. At least one scholar, however, believes that this approach was adopted by the Supreme Court in *Winter*.<sup>143</sup>

### *B. Approach Two: Human Standing, Human and Animal Harm Analysis*

Under the second approach, the standing doctrine remains unaffected, but both the humans' and animals' harms are combined to define "plaintiffs' harm" in preliminary relief analysis. Admittedly, requiring courts to include analysis of the humans' harm will add little to the plaintiffs' scale, as the animals' harm will be very strong on its own; but, at least in theory, this approach would not illogically disregard the human plaintiffs' interests after requiring them to pass a substantially difficult hurdle in establishing personal injury-in-fact for constitutional standing. This proposal avoids the controversy of animal standing,<sup>144</sup> while at the same time upholding congressional intent and public policy to protect species from extinction.<sup>145</sup>

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139. At least one district court has analyzed animal harm under the public interest factor of the preliminary injunction test. *See* *Natural Res. Def. Council, Inc. v. Evans*, 364 F. Supp. 2d 1083, 1141 (N.D. Cal. 2003).

140. 27 F. Supp. 2d 8 (D.D.C. 1998).

141. 281 F. Supp. 2d 209 (D.D.C. 2003).

142. *Id.* at 219–20 (considering the injury to human plaintiffs' "ability to view, interact with, study, and appreciate mute swans"); *Clark*, 27 F. Supp. 2d at 14–15 (considering a preliminary injunction to prevent an organized hunt of local bison and granting the human plaintiffs' preliminary injunction even though it only considered the humans' harm).

143.

[E]quitable balancing empowers, if not requires, courts to discount those interests. As applied in *Winter*, equitable balancing only takes into account the interests of the particular parties, weighing the interests of the plaintiffs in receiving an injunction against the interests of the defendants in not being enjoined. Environmental harm carries no weight independent of its effects on the parties. The potential harm to whales factors into the balance of equities only to the extent that harm to whales might deprive the plaintiffs of opportunities to go whale watching and make nature documentaries.

Goldstein, *supra* note 66, at 531 (lamenting the disregard of environmental harm in equitable balancing).

144. *See supra* notes 35, 44.

145. *See supra* note 137.

This approach is perhaps the closest to the standard adopted by the majority of courts, though none have clearly articulated it. The First and Tenth Circuit Courts of Appeals have employed this option, as have various district courts.<sup>146</sup> However, these courts tend to ignore the human plaintiffs’ harm altogether because it is usually comparatively trivial and adds little to the plaintiffs’ scale.<sup>147</sup> Their approach is better described as a human-only standing, animal-only harm approach; but for the reasons stated above, it would be more desirable to include human harm in the equitable relief analysis, as well.

### C. Approach Three: Animal Standing, Animal Harm Analysis

The third approach requires a dramatic shift in the standing doctrine to allow animals standing to sue. While recognizing the aforementioned objections to and difficulty of implementing animal standing,<sup>148</sup> granting animal standing would obviate pretense; a concerned pro-environment organization need not search for a member with some strong personal or professional connection to the threatened wildlife in order to meet constitutional standing requirements.<sup>149</sup> Under these standing rules, courts would consider only the animal harm as “plaintiffs’ harm” in the test for preliminary injunctions because the animal or species would be the only plaintiff. This approach encourages courts to pinpoint the primary purpose for civil environmental protection litigation, namely, to prevent harm or destruction to wildlife.

A few courts have used this option, despite its seeming irreconcilability with the principles of the standing doctrine in environmental cases.<sup>150</sup>

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146. See *Greater Yellowstone Coal. v. Flowers*, 321 F.3d 1250, 1256–58 (10th Cir. 2003); *Massachusetts v. Watt*, 716 F.2d 946, 951–53 (1st Cir. 1983); *Ocean Mammal Inst. v. Gates*, 546 F. Supp. 2d 960, 983 (D. Haw. 2008). The *Ocean Mammal* court explicitly stated that the plaintiffs’ harm included the harm to wildlife: “This Court is obligated to consider the balance of the hardships on the parties. . . . The Court has already discussed what harm will come to the interests represented by Plaintiffs, i.e. marine mammals and Hawai‘i’s ocean environment, should no injunction issue . . . .” *Ocean Mammal Inst.*, 546 F. Supp. 2d at 983 (citation omitted).

147. However, in *Sierra Forest Legacy v. Rey*, 691 F. Supp. 2d 1204, 1209–10 (E.D. Cal. 2010), the court discussed the lack of irreparable injury to *both* the humans and the forest, though it did not suggest that harm to both was required or even distinct.

148. See *supra* notes 35, 38–47 and accompanying text.

149. “The disconnect is obvious: harm to endangered species, which is the harm Congress sought to prevent in passing the ESA, did not create an incidental injury to a human person, so the [organization] could not enforce the substantive provisions of the ESA via citizen suit.” Carter, *supra* note 43, at 2206.

150. See *supra* note 66 (providing examples of cases). For example, the *Palila* court colorfully ruled:

However, these decisions may be distinguished because the defendants there did not challenge the animals' standing in the first instance.<sup>151</sup>

#### D. Choosing an Approach

Each of the three approaches has advantages and disadvantages. Under the current human-only standing regime, the most logical definition of "plaintiffs' harm" for preliminary injunction analysis is limiting it to human harm only (Approach One). The approach that is most favorable to environmental protection is that which grants animal standing and defines plaintiffs' harm as animal harm (Approach Three). However, recognizing that majoritarian support for animal standing is highly unlikely in the near future, the best standard may be a compromise under the second approach, whereby the standing doctrine remains untouched, but human and animal harm are amalgamated to define "plaintiffs' harm" within the preliminary injunction test. Adopting this second approach would also be consistent with the analysis conducted by the majority of courts. Furthermore, the second approach would provide protection to endangered species, as mandated by Congress and the public through the ESA, NEPA, and other wildlife protection statutes.

### V. CONCLUSION

Environmental protection litigation imposes special challenges. The standing doctrine creates strict barriers for many wishing to speak on behalf of wildlife and natural resources. Even once the standing barrier is

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As an endangered species under the Endangered Species Act . . . the bird (*Loxioides bailleui*), a member of the Hawaiian honeycreeper family, also has legal status and wings its way into federal court as a plaintiff in its own right. The Palila (which has earned the right to be capitalized since it is a party to this proceeding) is represented by attorneys for the Sierra Club, Audubon Society, and other environmental parties who obtained an order directing the Hawaii Department of Land and Natural Resources . . . to remove mouflon sheep from its critical habitat.

*Palila v. Haw. Dep't of Land & Natural Res.*, 852 F.2d 1106, 1107 (9th Cir. 1988).

151.

[I]n *Palila*, the defendants did not challenge the propriety of having an animal as a named plaintiff. Similarly, animal species have remained named plaintiffs in other cases in which the defendants did not contest the issue.

However, in the only reported case in which the naming of an animal as a party was challenged, the court found that the animal did not have standing to bring suit.

*Citizens to End Animal Suffering & Exploitation, Inc. v. New Eng. Aquarium*, 836 F. Supp. 45, 49 (D. Mass. 1993) (citations omitted) (contrasting *Palila* with *Hawaiian Crow ('Alala) v. Lujan*, 906 F. Supp. 549 (D. Haw. 1991)); *see also* *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1173 (9th Cir. 2004) (observing that the portion of the *Palila* decision stating that animals could be plaintiffs is dictum).

broken, litigants face another difficult hurdle in obtaining preliminary injunctions. In determining whether to award temporary equitable relief, courts consider the harm to both parties but question how to define the scope of “plaintiffs’ harm”—is it the harm to the human plaintiff with standing, the harm to the animals who are the objects of the litigation, or the harm to both? A significant problem with the *Winter* decision was its failure to explicitly identify the various harms that should be encompassed within the scope of “plaintiffs’ harm” and its tacit adoption of the minority standard despite not ruling on the merits. While congressional intent and wildlife preservation policies support the consideration of animal harm within preliminary injunction analysis, it is essential that the Court choose one standard. Without a clear rule, both parties to environmental litigation are unable to properly prepare for the hurdles they will meet. Furthermore, without boundaries as to the scope of the threatened interests that courts may consider in preliminary injunction analysis, courts may, however unwittingly, choose a definition of “plaintiffs’ harm” merely because it leads to a desired result, whether that be pro-environment or pro-defendant.

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