

HARNESSING “HARASS” FOR HABITAT PROTECTION: THE ALTERNATIVE TO “HARM” IN ESA “TAKE” CLAIMS

Abstract: Wildlife agencies recently finalized major changes to regulations interpreting the Endangered Species Act (ESA). These regulations remove longstanding habitat protections for endangered and threatened species. To better protect wildlife and to solidify habitat protection’s role in Section 9 ESA litigation, conservation groups should bring more claims arguing that proposed projects “harass” wildlife by changing or destroying their habitat. This Note explores the potential effectiveness of “take” claims that allege “harass,” rather than “harm,” in the habitat modification context.

INTRODUCTION

Habitat loss is the leading cause of species extinction.¹ Today, thousands of species face oblivion because they may soon no longer have places to breed, eat, or shelter.² Scientists warn that the time to act is now.³ With every species lost, the risk of losing more increases.⁴

More than fifty years ago, Congress passed the Endangered Species Act (ESA) to protect the most vulnerable species and create conditions to support their recovery.⁵ Under this law, wildlife advocates have brought numerous

¹ See *Why Save Endangered Species?*, U.S. FISH & WILDLIFE SERV., <https://www.fws.gov/story/why-save-species> [perma.cc/ASG6-L36Q] (describing habitat loss as the main force driving unnaturally high rates of extinction); see also Daniel Gonçalves-Souza, Peter H. Verburg & Ricardo Dobrovolski, *Habitat Loss, Extinction Predictability and Conservation Efforts in the Terrestrial Ecoregions*, BIOLOGICAL CONSERVATION, June 2020, at 1, 1 (pointing to habitat change as the “leading cause of species extinctions”).

² See Ilkka Hanski, *Habitat Loss, the Dynamics of Biodiversity, and a Perspective on Conservation*, 40 AMBIO 248, 248 (2011) (“It is self-evident that populations and species will suffer when their habitat becomes degraded or is lost completely.”); see also *Listed Species Summary (Boxscore)*, U.S. FISH & WILDLIFE SERV.: ENV’T CONSERVATION ONLINE SYS., <https://ecos.fws.gov/ecp/report/boxscore> [perma.cc/A8RC-3YDF] (providing numbers of listed species found in the United States and abroad according to their taxonomic group and listing status). The United States alone is home to more than 1,200 endangered species. *Id.*

³ See *Biodiversity—Our Strongest Natural Defense Against Climate Change*, UNITED NATIONS, <https://www.un.org/en/climatechange/science/climate-issues/biodiversity> [perma.cc/S474-XAYS] (describing the urgency of protecting biodiversity in the face of worsening impacts from climate change).

⁴ See Glanze Patrick, *When One Species Disappears: How Ecosystem Collapse Triggers Biodiversity Loss*, SCI. TIMES (Jan. 21, 2026), <https://www.sciencetimes.com/articles/61164/20260121/when-one-species-disappears-how-ecosystem-collapse-triggers-biodiversity-loss.htm> [perma.cc/6Y2N-WVDV] (explaining how the loss of one species can set off a cascade of extinctions).

⁵ See Endangered Species Act of 1973, 16 U.S.C. § 1531(b) (explaining that the purposes of the law include “provid[ing] a means whereby the ecosystems upon which endangered species and threat-

suits to halt habitat destruction⁶—stopping logging projects, the registration of harmful pesticides, the introduction of invasive species, and highway construction plans.⁷ Given the breadth of these cases, it may come as a surprise that the power to protect habitat through litigation stems from a single word—“harm.”⁸

Recent revisions to ESA regulations eliminate these protections.⁹ In July 2026, the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) released a joint final rule rescinding regulations that defined the word “harm” in the ESA, asserting that the old definition ran contrary to the language of the Act.¹⁰ The rescission drastically narrows the scope of actions prohibited under the ESA by removing habitat modification from regulations defining “take.”¹¹

ened species depend may be conserved [and] provid[ing] a program for the conservation of such endangered species and threatened species”). See generally PERVAZE A. SHEIKH & ERIN H. WARD, CONG. RSCH. SERV., R46677, THE ENDANGERED SPECIES ACT: OVERVIEW AND IMPLEMENTATION (2021) (discussing key features of the Endangered Species Act (ESA), as well as debate about the law’s success in achieving its goals of preventing extinction and promoting recovery).

⁶ See *Case Law Index Endangered Species Act*, NAT’L AGRIC. L. CTR., <https://nationalaglawcenter.org/aglaw-reporter/case-law-index/esa/> [perma.cc/F5FM-6J9E] (providing a “comprehensive, though not necessarily exhaustive” list of more than 170 ESA suits that resulted in federal court decisions between January 2000 and May 2026).

⁷ See, e.g., *Marbled Murrelet v. Babbitt*, 83 F.3d 1060, 1068 (9th Cir. 1996) (affirming an injunction on a lumber project that threatened to “harm” endangered seabirds); *Defs. of Wildlife v. EPA*, 882 F.2d 1294, 1301 (8th Cir. 1989) (holding that the Environmental Protection Agency’s (EPA) registration of pesticides that killed endangered species violated the ESA); *Palila v. Haw. Dep’t of Land & Nat. Res.*, 639 F.2d 495, 498 (9th Cir. 1981) (holding that defendants must remove non-native game species from the habitat of an endangered bird); *Nat’l Wildlife Fed’n v. Coleman*, 529 F.2d 359, 375 (5th Cir. 1976) (ordering a lower court to grant a temporary injunction on construction of a highway that traversed the habitat of Mississippi sandhill cranes).

⁸ See Robert Chaney, *ESA’s ‘Harm’: What’s in a Word?*, MOUNTAIN J. (May 15, 2025), <https://mountainjournal.org/fish-and-wildlife-service-under-donald-trump-looks-to-change-harm-definition-in-endangered-species-act/> [perma.cc/CXX7-U97R] (“The fate of thousands of species and millions of acres of habitat hang on a single word.”); Lisa Friedman, *By Redefining ‘Harm,’ Agencies Aim to End Longstanding Wildlife Protections*, N.Y. TIMES (Apr. 17, 2025), <https://www.nytimes.com/2025/04/16/climate/trump-endangered-species-act-harm.html> [perma.cc/VR46-NFJA] (“The Trump administration is moving to effectively eliminate a crucial protection in the half-century-old Endangered Species Act by redefining a single word: harm.”).

⁹ See *Rescinding the Definition of “Harm” Under the Endangered Species Act*, 91 Fed. Reg. 43300, 43300–01 (July 14, 2026) (rescinding the definition of “harm,” which prohibited “significant habitat modification or degradation” under the definition of “take”).

¹⁰ See *id.* at 43301 (“We have concluded that the Services’ existing regulations, which contain the definition of ‘harm’ contested in *Sweet Home*, do not match the single, best meaning of the statute.”).

¹¹ See Ben Cowan et al., *No Harm, No Foul? Services Propose to Remove Harm Definition from Endangered Species Act Regulations*, TROUTMAN PEPPER LOCKE: ENV’T L. & POL’Y MONITOR (Apr. 18, 2025), <https://www.environmentallawandpolicy.com/2025/04/no-harm-no-foul-services-propose-to-remove-harm-definition-from-endangered-species-act-regulations/> [perma.cc/9VGM-LAPL] (predicting that the now-finalized rule “will significantly narrow the scope of actions qualifying as ‘take,’ and therefore requiring consultation or permits under the ESA”).

This change has alarmed conservationists and threatens to upend habitat protections as we currently know them.¹² To maintain the effectiveness of “take” litigation, advocates must diversify habitat modification claims.¹³

This Note argues that environmental advocates should bring more claims alleging that land use projects “harass”—as well as “harm”—protected species.¹⁴ Part I of this Note describes key sections of the ESA and the primary Supreme Court case defining the law’s role in preserving habitat.¹⁵ Part II examines criticisms about the effectiveness of “harass” as a basis for “take” litigation.¹⁶ Part III explains how criticisms of “harass” fall short and argues that “harass” may serve as a powerful habitat protection claim.¹⁷ In doing so, this Note calls for a more robust body of case law exploring the limits of “harass.”¹⁸

I. THE ENDANGERED SPECIES ACT AND HABITAT

The ESA is regarded as the cornerstone of the nation’s efforts to preserve biodiversity.¹⁹ Often described as the pit bull of environmental laws, the ESA is lauded by environmentalists for its relatively few exceptions and its powerful ability to halt development in its tracks.²⁰ Yet, fifty years since its inception, the ESA has lost much of its political luster.²¹

¹² See Kiley Price & Wyatt Myskow, *How the Trump Administration’s Interpretation of One Word—‘Harm’—Could Gut Habitat Protections for Endangered Species*, INSIDE CLIMATE NEWS (Apr. 17, 2025), <https://insideclimatenews.org/news/17042025/trump-administration-endangered-species-protections-harm-definition/> [perma.cc/ZLL4-D4PT] (“There’s just no way to protect animals and plants from extinction without protecting the places they live, yet the Trump administration is opening the floodgates to immeasurable habitat destruction”) (quoting Noah Greenwald, co-director of endangered species at the Center for Biological Diversity); see also Press Release, Ctr. for Biological Diversity, Scientists, Legal Experts Urge Halt to Trump Assault on Imperiled Wildlife Habitat (May 19, 2025) <https://biologicaldiversity.org/w/news/press-releases/scientists-legal-experts-urge-halt-to-trump-assault-on-imperiled-wildlife-habitat-2025-05-19/> [perma.cc/9TGR-AWDM] (describing the “harm” definition rescission as the potential “nail in the coffin for imperiled species[.]” such as the Florida manatee, green sea turtle, and the northern spotted owl).

¹³ See *infra* notes 66–252 and accompanying text.

¹⁴ See *infra* notes 19–252 and accompanying text.

¹⁵ See *infra* notes 19–65 and accompanying text.

¹⁶ See *infra* notes 66–210 and accompanying text.

¹⁷ See *infra* notes 211–252 and accompanying text.

¹⁸ See *infra* notes 66–252 and accompanying text.

¹⁹ See ROBERT V. PERCIVAL, CHRISTOPHER H. SCHROEDER, ALAN S. MILLER & JAMES P. LEAPE, *ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY* 898 (10th ed. 2024) (describing the ESA as “the safety net when broader efforts fail”).

²⁰ See, e.g., *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 172–73 (1978) (affirming an injunction to halt the completion of the Tellico Dam in order to protect an endangered fish, although the dam was virtually complete at the time of the decision); see also Ryan S. Meczowski, *The Price of Species Protection: The Effect of the ESA on Forest Landowners*, 1 WM. & MARY POL’Y REV. 185, 185 (2010) (explaining that the pit bull nickname reflects the ESA’s ability to provide “powerful species protection by implementing restrictions that clamp down on land-use activities without letting go”).

²¹ See Press Release, House Comm. on Nat. Res., *It’s Time to Reform the Endangered Species Act* (Mar. 6, 2025), <https://naturalresources.house.gov/news/documentsingle.aspx?DocumentID=416964>

Although the Act was overwhelmingly popular at its adoption,²² a growing number of politicians and corporations have come to view the ESA as a headache for landowners and an impediment to economic development.²³ As a result, many have lobbied to temper its most forceful provisions—particularly those related to habitat preservation.²⁴ This Part describes key sections of the Act, evaluates the history of the “harm” regulation, and discusses previous challenges to the recently discarded definition of “harm.”²⁵

A. Key Provisions of the ESA

Within the long list of complicated environmental statutes, the ESA is comparatively straightforward.²⁶ Section 4 of the Act describes the process and requirements for adding species to the list of those “threatened” or “endangered”—a list that currently includes more than 1,200 species living in the United States.²⁷ Section 7 directs federal agencies to ensure that their actions—

[perma.cc/TU48-6KTW] (announcing a bill by Arkansas Representative Bruce Westerman proposing extensive changes to the ESA); *see also* Press Release, Endangered Species Coal., Report Exposes How Congress and Industry Allies Are Jeopardizing America’s Most Beloved Wildlife (Nov. 17, 2025), <https://www.endangered.org/report-exposes-how-congress-and-industry-allies-are-jeopardizing-americas-most-beloved-wildlife/> [perma.cc/RWM3-2QEV] (introducing a report describing the threatened harmful impacts of the Westerman bill on ten endangered species).

²² *See* PERCIVAL ET AL., *supra* note 19, at 901 (stating that the Act passed with a vote of 355 to 4 in the House and 92 to 0 in the Senate).

²³ *See* Andrew Carter & Mary Elizabeth Beetham, *Species Under Siege: Why the Endangered Species Act Is in Congressional Crosshairs*, DEFS. OF WILDLIFE (Mar. 23, 2023), <https://defenders.org/blog/2023/03/species-under-siege-why-endangered-species-act-congressional-crosshairs> [perma.cc/4PCZ-NZAR] (explaining that economic interests and concerns about restrictions on land use are some of the primary reasons why Congress has become increasingly interested in reforming the ESA); Paul Weiland, *Senate Holds Hearing on Endangered Species Act Reform*, NOSSAMAN LLP: ENDANGERED SPECIES L. & POL’Y (Mar. 30, 2026), <https://www.endangeredspecieslawandpolicy.com/senate-holds-hearing-on-ESA-reform> [perma.cc/VT72-ULDK] (describing recent progress in the Senate to pass an amendment to the ESA, noting that “we are closer to significant ESA legislative reform than at any time in the past two decades”). *But see* John Vucetich et al., *Support for the US Endangered Species Act Is High and Steady Over the Past Three Decades*, CONSERVATION LETTERS, June 2025, at 1, 3 (demonstrating that the majority of Americans—about 84%—have supported ESA protections for at least three decades, and that most Americans in 2025 thought the ESA should be even more protective of species).

²⁴ *See* Maya L. Kapoor, *Six Bills That Weaken Species Protections Move in Congress*, HIGH COUNTRY NEWS (Oct. 24, 2017), <https://www.hcn.org/articles/endangered-species-six-bills-that-weaken-the-endangered-species-act-move-through-congress/> [perma.cc/7L6V-LVB8] (describing six bills put forward by Republican lawmakers that threatened to weaken the ESA’s habitat protections in 2017).

²⁵ *See infra* notes 26–65 and accompanying text.

²⁶ *See* DANIEL A. FARBER, JODY L. FREEMAN, ANN E. CARLSON & ROGER W. FINDLEY, *CASES AND MATERIALS ON ENVIRONMENTAL LAW* 191 (7th ed. 2006) (describing the ESA as relatively jargon-free and simple, though not “mild-mannered”).

²⁷ *See* 16 U.S.C. § 1533(a) (prescribing the reasons and process for listing species as endangered or threatened); *Listed Species Summary (Boxscore)* *supra* note 2 (providing numbers of endangered and threatened species found in the United States and around the world). An endangered species is

those funded or authorized by them or carried out on their behalf—are not likely to “jeopardize” the future of threatened and endangered species.²⁸ Section 11 authorizes citizens to bring suits against any person alleged to have violated the Act, as well as against the Secretary of the Interior for failure to perform a nondiscretionary duty.²⁹

Much ESA litigation, including the case law described in Part II, stems from Section 9.³⁰ In deceptively simple language, Section 9 prohibits the “take” of endangered species within the United States or its waters.³¹ To “take,” according to the Act, means “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect” protected wildlife, or attempt such conduct.³² With limited exceptions specified in Section 10—which allows wildlife agencies to issue “incidental take” permits for injury resulting from otherwise legal activities³³—violation of the “no-take” rule exposes individuals to both civil and criminal penalties, as well as injunctive remedies.³⁴

“any species which is in danger of extinction throughout all or a significant portion of its range.” 16 U.S.C. § 1532(6). A threatened species is “any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” *Id.* § 1532(20).

²⁸ See *id.* § 1536(a)(2) (describing requirements for federal agencies to ensure their projects do not disrupt conservation efforts). Section 7’s “no-jeopardy” provision requires consultation with federal wildlife agencies, which then produce a biological opinion studying how listed species might be affected by the action. See *id.* § 1536(b)(3)(A) (ordering federal agencies to conduct a biological assessment on how a proposed action affects a species and its critical habitat).

²⁹ See *id.* § 1540(g) (describing when any person may sue to enforce the ESA). Public interest groups dedicated to preserving species, such as the Center for Biological Diversity, often use this provision to enforce habitat protections. See *The Endangered Species Act*, CTR. FOR BIOLOGICAL DIVERSITY, <https://www.biologicaldiversity.org/campaigns/esa/index.html> [perma.cc/UN3V-TKUV] (explaining the ways that the Center utilizes the ESA to protect species).

³⁰ See Paul Boudreaux, *Understanding “Take” in the Endangered Species Act*, 34 ARIZ. STATE L.J. 733, 735–37 (2002) (comparing the amount of litigation generated by Section 7 and Section 9 of the ESA). Although Section 7 deals only with federal action whereas Section 9 applies to all action, including those undertaken by private individuals, courts sometimes analyze the two sections in ways that blend their statutory requirements. See *Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.*, 698 F.3d 1101, 1106 (9th Cir. 2012) (describing Section 7 and Section 9 as interlocking provisions); Steven P. Quarles, John A. Macleod & Thomas R. Lundquist, *The Unsettled Law of ESA Takings*, 8 NAT. RES. & ENV’T 10, 12 (1993) (“[C]onfusion between [Section 7 and Section 9] infects much of the case law on ESA takings . . .”).

³¹ See 16 U.S.C. § 1538(a)(1)(B) (“[I]t is unlawful for any person subject to the jurisdiction of the United States to . . . take any such species within the United States or the territorial sea of the United States . . .”). Section 9 does not explicitly ban “take” of threatened species; however, Section 4 grants wildlife officials the authority to extend the “take” prohibition to threatened wildlife. *Id.* § 1533(d).

³² *Id.* § 1532(19). The Section 9 “take” prohibition applies to endangered wildlife and fish, but not plants. *Id.* § 1538(a). A separate provision of Section 9, however, forbids removing plant species from federal lands or violating state law plant protections. *Id.* § 1538(b)(2).

³³ See *id.* § 1539 (describing certain exceptions to the “take” prohibition). “Incidental take” permits may be granted only once a landowner has submitted a Habitat Conservation Plan to mitigate a project’s impact on protected species. Boudreaux, *supra* note 30, at 736 n.14.

³⁴ See 16 U.S.C. § 1540 (describing the various penalties for ESA violations and means of enforcement). Expounding on the ESA-as-pit bull metaphor, a former ESA litigator described the Act’s “take” prohibition as the dog’s incisors. See Boudreaux, *supra* note 30, at 733.

B. "Harm" and "Take" in Sweet Home

Despite the definition of "take" provided within the law, Section 9's "no-take" command proved difficult to understand from its inception.³⁵ In 1975, FWS promulgated rules further defining terms contained in the "take" definition.³⁶ "Harm," according to those rules, included acts that resulted in habitat modification or degradation.³⁷ Developers and private landowners balked at this interpretation of "harm," which in their view placed strict limitations on private land use.³⁸

³⁵ See Boudreaux, *supra* note 30, at 738 ("Section 9's take prohibition has proven to be, despite the straightforward command and its statutory definition, extraordinary difficult to apply."); Phil Wyman & Jennifer M. Deming, *How Sweet It Is! – Sweet Home Chapter of Communities for a Great Oregon v. Babbitt*, 26 UWLA L. REV. 71, 92–93 (1995) (describing early commentator reactions to the ESA and speculation as to whether "take" prohibited habitat modification).

³⁶ See Endangered and Threatened Wildlife and Plants; Reclassification of the American Alligator and Other Amendments, 40 Fed. Reg. 44411, 44413 (Sep. 26, 1975) (providing definitions of "harm" and "harass" modified in response to comments on a previous proposed rule). Although U.S. Fish and Wildlife Service (FWS) is the primary agency administering ESA regulations, the National Marine Fisheries Service (NMFS), under the National Oceanic and Atmospheric Administration (NOAA), performs assessments for 165 species, including some fish, corals, and marine mammals. See *Species Directory: ESA Threatened & Endangered*, NOAA FISHERIES, <https://www.fisheries.noaa.gov/species-directory/threatened-endangered?page=0> [perma.cc/4N6R-AV78] (providing a chart of its jurisdiction species).

³⁷ See Endangered and Threatened Wildlife and Plants; Reclassification of the American Alligator and Other Amendments, 40 Fed. Reg. at 44416 (offering its definition of "harm"). The 1975 definition of "harm" provided that:

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

Id. FWS later revised this definition of "harm," recognizing that the phrase "such effects" created ambiguity as to whether habitat modification that did not cause actual death or injury to a protected species would constitute a "take." See Endangered and Threatened Wildlife and Plants; Proposed Redefinition of "Harm," 46 Fed. Reg. 29490, 29491 (June 2, 1981) (proposing a new definition of "harm"); Endangered and Threatened Wildlife and Plants; Final Redefinition of "Harm," 46 Fed. Reg. 54748, 54748 (Nov. 4, 1981) (providing the final definition of "harm").

³⁸ See James R. Rasband, *Priority, Probability, and Proximate Cause: Lessons from Tort Law About Imposing ESA Responsibility for Wildlife Harm on Water Users and Other Joint Habitat Modifiers*, 33 ENV'T L. 595, 603 (2003) (noting that the regulated community was uneasy with the regulations from their inception); see also Rudy R. Lachenmeier, Note, *The Endangered Species Act of 1973: Preservation or Pandemonium?*, 5 ENV'T L. 29, 39 (1974) (discussing the ESA's potential to impose strict restrictions on land use shortly after the Act's birth). Consider the following observation from a law student in 1974 that proved prescient:

The alarming question here is what does "harass" or "harm" mean[]? . . . [I]t is conceivable that the government could argue that destruction of habitat for whatever reason, including logging, could be harassment and harmful to endangered species Consider here that if the spotted owl was determined to be endangered and that if it needs 200 to 300 acres of old-growth Douglas fir per mating pair, how many acres of

In 1995, a facial challenge to the validity of FWS’s regulations reached the Supreme Court in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*.³⁹ The case challenged the regulations as they applied to two birds—the red-cockaded woodpecker, an endangered species, and the northern spotted owl, a threatened species.⁴⁰ Logging companies, landowners, and families living in the Pacific Northwest brought action against the Secretary of the Interior, who oversees FWS, and sought declaratory judgment to invalidate the regulations, claiming they had injured the plaintiffs economically.⁴¹ The United States District Court for the District of Columbia upheld the regulations.⁴² After a divided panel initially affirmed the district court, the District of Co-

timber could be tied up if the latter interpretation was used? Fortunately, the legislative history does not support such a far-reaching interpretation.

Id. at 39.

³⁹ See 515 U.S. 687, 699–700 (1995) (“Thus, [respondents] ask us to invalidate the Secretary’s understanding of ‘harm’ in every circumstance, even when an actor knows that an activity, such as draining a pond, would actually result in the extinction of a listed species by destroying its habitat.”).

⁴⁰ *Id.* at 692. Efforts to protect the habitat of the northern spotted owl (*Strix occidentalis caurina*) have spurred decades of litigation. See, e.g., *Wildlands v. Adcock*, No. 22-cv-00767, 2025 WL 975179, at *1–2 (D. Or. Mar. 31, 2025) (evaluating the sufficiency of the Bureau of Land Management’s (BLM) analysis of habitat impacts from tree thinning and harvesting projects, and noting that the owl is “plummeting toward extirpation—that is, local extinction”); *Or. Nat. Res. Council v. Allen*, 476 F.3d 1031, 1032–33 (9th Cir. 2007) (invalidating an “incidental take” statement authorizing a timber sale that would have damaged owl habitat); *Portland Audubon Soc’y v. Endangered Species Comm.*, 984 F.2d 1534, 1536–37 (9th Cir. 1993) (involving a challenge to a decision by the Endangered Species Committee to grant an exception to the ESA’s “no-jeopardy” prohibition, thus allowing timber sales that might have caused the owl to go extinct). See generally Gary D. Meyers, *Old-Growth Forests, the Owl, and Yew: Environmental Ethics Versus Traditional Dispute Resolution Under the Endangered Species Act and Other Public Lands and Resources Laws*, 18 B.C. ENV’T AFF. L. REV. 623 (1991) (describing the plight of the northern spotted owl and efforts to preserve old growth forest through the ESA). Officials estimate that fewer than 5,200 northern spotted owls remain on federal lands. See Ashley Braun, *It’s the Moment of Truth for the Northern Spotted Owl*, AUDUBON MAG. (2022), <https://www.audubon.org/magazine/its-moment-truth-northern-spotted-owl> [perma.cc/TQ2C-66ZH] (describing urgent efforts to save the owl from extinction). Nevertheless, FWS has declined to reclassify the owl as endangered, claiming the upgrade from threatened is “warranted but precluded by higher priority actions.” *Endangered and Threatened Wildlife and Plants; 12-Month Finding for the Northern Spotted Owl*, 85 Fed. Reg. 81144, 81144 (Dec. 15, 2020). The red-cockaded woodpecker (*Picoides borealis*) was recently downlisted from endangered to threatened. Press Release, U.S. Fish & Wildlife Serv., Interior Department Announces Downlisting of Red-cockaded Woodpecker from Endangered to Threatened (Oct. 24, 2024), <https://www.fws.gov/press-release/2024-10/downlisting-red-cockaded-woodpecker-endangered-threatened> [perma.cc/X4F7-YLTU].

⁴¹ *Sweet Home*, 515 U.S. at 692. Specifically, the plaintiffs claimed that the regulations harmed their livelihoods by placing restrictions on timber harvesting. See *Sweet Home Chapter of Cmty. for a Great Or. v. Lujan*, 806 F. Supp. 279, 282 (D.D.C. 1992) (detailing the plaintiffs’ claims as presented to the district court), *rev’d in part sub nom. Sweet Home*, 515 U.S. 687.

⁴² See *Sweet Home*, 515 U.S. at 693 (noting that the district court instead found that Congress intended to define “take” expansively).

lumbia Court of Appeals later reversed, finding that the word “harm” should only apply to *direct* applications of force against listed plants and animals.⁴³

The Supreme Court rejected the D.C. Circuit’s analysis, holding that the text of the Act supported FWS’s definition.⁴⁴ The Court reasoned that limiting “harm” to direct injury would render other terms in the “take” definition superfluous.⁴⁵ The Court further explained that the dictionary definition of “harm”—meaning to “hurt,” “damage,” or “injure”—would seem to naturally include habitat modification in the context of the ESA.⁴⁶

The Court likewise rejected the plaintiffs’ arguments about Congress’s intent, looking to the Act’s broad purpose of conserving ecosystems across the nation.⁴⁷ The majority, moreover, observed that Section 10 “incidental take” permits, which authorize “take” exceptions when they are not the purpose of an otherwise lawful action, would not make sense if “harm” were defined to exclude impacts on habitat.⁴⁸ Concluding its analysis, the Court deferred to FWS’s interpretation of the statute, opining that Congress entrusted the Secretary of the Interior and FWS with broad discretion to interpret the Act.⁴⁹

⁴³ See *id.* at 694 (explaining that, according to the D.C. Circuit, to count as “harm,” the action must take a describable form similar to “A hit B”). The circuit court believed that Congress could not have intended the ESA to curtail private property rights through habitat protections. *Id.*

⁴⁴ See *id.* at 708 (“The proper interpretation of a term such as ‘harm’ involves a complex policy choice. When Congress has entrusted the Secretary with broad discretion, we are especially reluctant to substitute our views of wise policy for his.”).

⁴⁵ See *id.* at 697–98 (observing that unless “harm” incorporates both direct and indirect injuries, the term could not be distinguished from other words used to define “take”). The court later observed that “harass” also incorporates both direct and indirect actions and effects. *Id.* at 701.

⁴⁶ See *id.* at 697 (finding that, in the context of the Act, the dictionary definition of “harm,” meaning to “to cause hurt or damage to: injure,” would seem to include habitat modification (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1034 (1966))).

⁴⁷ See *id.* at 699 (stating that Congress’s intent in enacting the ESA “was to halt and reverse the trend toward species extinction, whatever the cost” and that this intent was “reflected not only in the stated policies of the Act, but in literally every section of the statute”) (quoting *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978)). The Court further observed that Senate and House reports created before the ESA was enacted stressed that “take” should be defined capaciously. See S. REP. NO. 93-307, at 7 (1973) (asserting that “take” is to be “defined . . . in the broadest possible manner to include every conceivable way in which a person can ‘take’ or attempt to ‘take’ any fish or wildlife”); H.R. REP. NO. 93-412, at 11 (1973) (discussing a broad definition of “take,” which includes harassment and would allow wildlife officials to regulate birdwatching activities that disturbed nesting).

⁴⁸ See *Sweet Home*, 515 U.S. at 700 (explaining that such permits require preparation of a conservation plan that indicates how the applicant will minimize and mitigate impacts on listed species). These conservation plans are now routinely referred to as Habitat Conservation Plans. See *Habitat Conservation Plans*, U.S. FISH & WILDLIFE SERV., <https://www.fws.gov/service/habitat-conservation-plans> [perma.cc/7HTX-HD7Q] (describing the basic features of Habitat Conservation Plans).

⁴⁹ See *Sweet Home*, 515 U.S. at 703 (citing *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984), *overruled by* *Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024)) (concluding that the language of the ESA does not compel the narrow reading of “take” and that, because the Secretary and FWS offered a reasonable interpretation of the Act, the regulation was worthy of deference). See *infra* notes 191–195 and accompanying text for an explanation of *Chevron* deference and how the doctrine was applied in *Sweet Home*.

Though the majority supported the regulations—essentially cementing them into settled law for the next thirty years⁵⁰—not all the Justices agreed that “harm” could encompass changes to habitat.⁵¹ Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, authored a dissent that would, years later, find renewed support.⁵²

Observing the tension between the ESA and private property rights, Justice Scalia argued that interpretations of “harm” and “take” should be limited only to direct and intentional actions that injure protected species—in other words, to hunting.⁵³ In particular, Scalia expressed concern that many routine activities of private landowners, such as farming, ranching, logging, and construction, could be subject to criminal penalties if they accidentally resulted in injury or death to protected wildlife.⁵⁴ The problem with including habitat modification in the definition of “harm,” he claimed, was that it extended liability to actions even when their impacts were unforeseeable or distant in the chain of causality.⁵⁵

Justice Scalia was moreover unconvinced that FWS’s “harm” definition was reasonable, and thus worthy of deference, in part because “take” already had a well-established legal definition—meaning to capture or kill.⁵⁶ Because the

⁵⁰ See Boudreaux, *supra* note 30, at 742 (describing *Sweet Home*’s lasting significance and observing that “*Sweet Home* remains the most thorough judicial statement of interpreting the take prohibition”).

⁵¹ See *Sweet Home*, 515 U.S. at 714 (Scalia, J., dissenting) (“The Court’s holding that the hunting and killing prohibition incidentally preserves habitat on private lands imposes unfairness to the point of financial ruin—not just upon the rich, but upon the simplest farmer who finds his land conscripted to national zoological use. I respectfully dissent.”).

⁵² *Id.*; see Cowan et al., *supra* note 11 (noting that the revisions to ESA regulations rely in large part on Justice Scalia’s thirty-year-old dissent).

⁵³ See *Sweet Home*, 515 U.S. at 718 (Scalia, J., dissenting) (describing “take” as a “a term of art deeply embedded in the statutory and common law concerning wildlife” that applies only to acts done directly and intentionally to animals).

⁵⁴ See *id.* at 721 (voicing disapproval of the idea that strict liability could apply to these routine habitat-modifying activities “no matter how remote the chain of causation and no matter how difficult to foresee”). Justice Scalia suggested that impairment of breeding was one such remote form of injury that should be excluded. *Id.* at 721–22.

⁵⁵ *Id.* at 715 (citing *Palila v. Haw. Dep’t of Land & Nat. Res.*, 852 F.2d 1106, 1108–09 (9th Cir. 1988)). Justice Scalia felt that these concerns were embodied by the outcome reached in *Palila v. Hawaii Department of Land and Natural Resources*, a case decided by the Ninth Circuit in 1988. *Id.* See generally 852 F.2d 1106 (upholding FWS’s broad interpretation of “harm”). FWS, too, felt that the *Palila* cases were wrongly decided, and changed the “harm” definition in part to clarify that habitat modification alone—without death or injury of protected species—does not violate Section 9. See Endangered and Threatened Wildlife and Plants; Final Redefinition of “Harm,” 46 Fed. Reg. 54748, 54749–50 (Nov. 4, 1981) (explaining the changes to “harm” were intended to “prevent the result reached in *Palila*”).

⁵⁶ See *Sweet Home*, 515 U.S. at 717 (Scalia, J., dissenting) (describing “take” as a “term . . . as old as the law itself . . .” meaning to kill or capture when applied to wild animals); see also *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984) (instructing courts to determine if an agency’s interpretation of an ambiguous law is reasonable or permissible before granting the agency deference), *overruled by* *Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024).

regulatory definition of “harm” was, in his view, at odds with the word’s traditional meaning and out of step with the other words used in the ESA to describe “take,” he argued that the Court should not uphold the FWS regulation.⁵⁷

C. Recent Changes to “Harm”

Although Justice Scalia was unable to convince his fellow members of the Court to take his view in *Sweet Home*, he may have had the last laugh.⁵⁸ In July 2026, FWS and NMFS jointly announced that they no longer believed their longstanding definition of “harm” represented the best understanding of “take.”⁵⁹ Citing Justice Scalia’s concern that the definition encompassed indirect and accidental injury to wildlife, the Services rescinded the “harm” regulations, allowing the term to stand on its own within the statute.⁶⁰

⁵⁷ See *Sweet Home*, 515 U.S. at 719–20 (Scalia, J., dissenting) (calling the regulatory definition repugnant to the ordinary understanding of “harm” and noting that “harass, pursue, hunt, shoot, wound, kill, trap, capture, or collect” all suggest affirmative acts, not “acts or omissions that indirectly and accidentally cause injury”). Although an earlier definition of “harm” encompassed both “acts” and “omissions,” the final rule promulgated in 1981 technically excluded omissions. See Endangered and Threatened Wildlife and Plants; Final Redefinition of “Harm,” 46 Fed. Reg. at 54748, 54750 (giving the final meaning of “harm” and noting that “or omission” was deleted from the definition). This did not placate Justice Scalia, who noted that FWS asserted that “‘act’ is inclusive of either commissions or omissions.” *Sweet Home*, 515 U.S. at 716 (Scalia, J. dissenting) (quoting Endangered and Threatened Wildlife and Plants; Final Redefinition of “Harm,” 46 Fed. Reg. 54748, 54750).

⁵⁸ See Rescinding the Definition of “Harm” Under the Endangered Species Act, 91 Fed. Reg. 43300, 433001 (July 14, 2026) (pointing to Justice Scalia’s reasoning in his *Sweet Home* dissent as evidence that the old “harm” definition was not the best definition); see also Joan Biskupic, *It’s Still Antonin Scalia’s Supreme Court*, CNN (Mar. 26, 2025), <https://www.cnn.com/2025/03/26/politics/antonin-scalia-supreme-court-conservative-influence> [perma.cc/MS8D-SBAC] (discussing Justice Scalia’s lasting impact on today’s Supreme Court).

⁵⁹ See Rescinding the Definition of “Harm” Under the Endangered Species Act, 91 Fed. Reg. at 433001 (“We adopt Justice Scalia’s rationale as articulated in *Sweet Home* and conclude that the Services’ regulatory definitions are unlawful, notwithstanding the Court’s prior upholding of the regulatory definition under *Chevron* deference.”). Although NMFS provides its own definition of “harm” in 50 C.F.R. § 222.102, it is substantially the same as the FWS definition codified in 50 C.F.R. § 17.3. *Id.* at 43301 n.6.

⁶⁰ See *id.* at 43301 (“[H]arm,’ like the other nine verbs in the definition of ‘take,’ should be construed to require an ‘affirmative act[] . . . directed immediately and intentionally against a particular animal—not [an] act[] or omission[] that indirectly and accidentally cause[s] injury to a population of animals.’”) (quoting *Sweet Home*, 515 U.S. at 719–20 (Scalia, J., dissenting)). The rule rescinding the “harm” definition took effect on September 14, 2026. *Id.* at 43300. Before the rule was finalized, more than 357,000 comments on the proposed change were submitted. See Rescinding the Definition of Harm Under the Endangered Species Act, REGULATIONS.GOV (Apr. 17, 2025), <https://www.regulations.gov/document/FWS-HQ-ES-2025-0034-0001> [perma.cc/7DFC-UVGA] (displaying 357,699 comments received). According to Earth Justice, at least 150,000 commenters opposed the new rule. See *Over 150,000 Americans Oppose Trump Administration’s Unprecedented Effort to Eliminate Habitat Protections for Vulnerable Wildlife*, EARTH JUST. (May 19, 2025), <https://earthjustice.org/press/2025/over-150000-americans-oppose-trump-administrations-unprecedented-effort-to-eliminate-habitat-protections-for-vulnerable-wildlife> [perma.cc/HP9D-B326] (arguing that opposition to the proposed regulation is not surprising, given the ESA’s broad popularity among Americans).

Under the new regulations, most habitat degradation will likely no longer qualify as a “take.”⁶¹ Only habitat destruction that directly kills or injures endangered or threatened species will be plainly covered by the ESA’s “take” prohibition.⁶²

To make matters worse, an internal FWS memo obtained by wildlife advocates in September suggests the agency intends to enforce the “take” prohibition only when violators’ actions intentionally target protected species.⁶³ While the impacts of the memo are uncertain, environmentalists fear that companies and individuals will feel emboldened to ignore ESA mandates during the current period of legal uncertainty.⁶⁴ Actions posing indirect injury through changes to breeding, feeding, and sheltering may—for the first time in fifty years—lie beyond the reach of the law.⁶⁵

⁶¹ See Rafe Petersen, Elizabeth Leoty Craddock & Daniela de la Rosa, “Harm” Redefined: “Habitat Modification” Could Be Cut from Endangered Species Act Regulations, HOLLAND & KNIGHT (Apr. 23, 2025), <https://www.hklaw.com/en/insights/publications/2025/04/redefining-harm-change-proposes-removing-habitat-modification> [perma.cc/A238-SS2D] (alerting clients about the regulation changes and their potential impacts on companies and landowners).

⁶² See *id.* (writing that the effect of this new rule would be a narrowing of the scope of projects requiring ESA permits). The article further notes, like the majority in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, that the new understanding of “harm” would seem to make other sections of the ESA irrelevant or superfluous. *Id.*; *Sweet Home*, 515 U.S. at 700. For example, Section 10 of the Act allows federal wildlife agencies to issue permits for “incidental take” of protected species affected through otherwise lawful activities. Petersen et al., *supra* note 61. Apart from habitat modification, it is not clear what legal actions might result in an “incidental take.” *Id.*

⁶³ See Catrin Einhorn, *Trump Administration Moves to Gut a Core Endangered Species Protection*, N.Y. TIMES (Sep. 16, 2026), <https://www.nytimes.com/2026/09/16/climate/endangered-species-act-change.html> [perma.cc/L636-GXAL] (noting the unpublished memo may indicate that FWS will issue “incidental take” permits for projects that would normally not qualify for an exception, so long as the project leaders do not intend to injure wildlife); Memorandum from Brian Nesvik, Director, FWS, to FWS Directorate, *Scope of the Endangered Species Act’s “Take” Prohibition Following the Harm Rule (91 Fed. Reg. 43300)* (Sep. 14, 2026), <https://biologicaldiversity.org/programs/government-affairs/pdfs/Scope-of-the-Endangered-Species-Acts-Take-Prohibition-Following-the-Harm-Rule.pdf> [perma.cc/Q2Q3-88LA] (“A vessel that inadvertently strikes a whale has not taken it, because the vessel’s course was not set against the whale. Felling a tree is not a take of the bats roosting in it unless the tree is felled for the purpose of killing or capturing them.”).

⁶⁴ THE DAILY: *The Trump Administration Defangs the Endangered Species Act*, at 15:24 (Apple Podcasts, Sep. 21, 2026) <https://podcasts.apple.com/us/podcast/the-daily/id1200361736?i=1000790912777> (acknowledging that although it is “not totally clear what this memo will mean,” environmental advocates fear the new FWS “take” interpretation “potentially disincentivizes companies, private individuals from having to take any kind of measure to avoid . . . collateral damage to species” when applying for “incidental take” permits).

⁶⁵ See *People for the Ethical Treatment of Animals v. Mia. Seaquarium*, 879 F.3d 1142, 1148 (11th Cir. 2018) (explaining that had the *Sweet Home* Court invalidated FWS’s “harm” regulations, habitat destruction that indirectly resulted in the death of protected wildlife could not be considered a “take”); Petersen et al., *supra* note 61 (noting that the then-proposed rescinded “harm” definition—not yet final at the time—would constitute a sweeping change for federal land and water policy).

II. A FRESH LOOK AT “HARASS”

“Harass” may be fairly characterized as the forgotten sibling of “harm.”⁶⁶ Of the various words used to describe “take” in the text of the ESA, only “harm” and “harass” received specific definitions from FWS.⁶⁷ Yet, whereas “harm” has been scrutinized by federal courts across the nation, “harass” has been largely overlooked.⁶⁸

Over the decades, advocates have periodically encouraged greater use of “harass” in conservation litigation.⁶⁹ Still, most “take” cases that produce federal court opinions continue to rely on “harm” alone.⁷⁰ Why has “harass” failed to catch on?⁷¹

Of the two claims, “harass” would appear to be the easier one to prove.⁷² Although “harm” requires an affirmative act, a project may “harass” a protected species through either an act or omission.⁷³ Moreover, whereas “harm” re-

⁶⁶ See Steven P. Quarles, J. Michael Klise & Thomas R. Lundquist, *The “Take” Prohibition of Section 9 of the Endangered Species Act* (observing that, compared to “harm,” “harass” has garnered little attention from courts and plaintiffs), in *SPECIES PROTECTION AND THE LAW: ALI-ABA COURSE OF STUDY MATERIALS* 83, 83 (2006).

⁶⁷ See 50 C.F.R. § 17.3 (2026) (defining “harm” and “harass” but not “pursue,” “hunt,” “shoot,” “wound,” “kill,” “trap,” “capture,” or “collect”). To “harass,” in the context of ESA litigation, means to engage in “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.*

⁶⁸ See Petersen et al., *supra* note 61 (explaining that “harass” arguably could apply to habitat modification, “although [it] has not been tested because of the definition of ‘harm’”).

⁶⁹ See Quarles et al., *supra* note 66, at 83 (describing interest in broadening the scope of “harass”); see, e.g., Alicia M. Griffin, *Beyond “Harm”: Abandoning the Actual Injury Standard for Certain Prohibited Takings Under the Endangered Species Act by Giving Independent Meaning to “Harassment,”* 52 VAND. L. REV. 1831, 1860 (1999) (advocating for more case law allowing “harass” to serve its own function in Section 9 “take” claims).

⁷⁰ See Quarles et al., *supra* note 66, at 84 (explaining that, although “harass” is often alleged in complaints alongside claims of “harm” to protected species, the “harass” allegation is often dismissed by motion or by failure to argue the claim); see, e.g., *City of Austin v. Kinder Morgan Tex. Pipeline*, 528 F. Supp. 3d 670, 681 n.3 (W.D. Tex. 2021) (declining to address the plaintiffs’ “harass” allegation because their complaint did not allege facts about how the defendants would intentionally or negligently annoy wildlife, and because they did not raise the issue in their response to the defendants’ motion to dismiss).

⁷¹ See Steven P. Quarles, Paul S. Weiland & Brian Ferrasci-O’Malley, *Another Take on “Take”: The Section 9 Prohibition* (noting that, although “harass” poses a temptation, such allegations are usually abandoned before briefing begins), in *ENDANGERED SPECIES ACT: LAW, POLICY, AND PERSPECTIVES* 141, 158–59 (3d ed. 2021).

⁷² See *Hill v. Coggins*, 867 F.3d 499, 511 (4th Cir. 2017) (observing that “the regulatory definition of harass contains requirements that are less demanding for Plaintiffs . . . than are the requirements contained in the regulatory definition of harm”); Quarles et al., *supra* note 66, at 83 (discussing and dismissing advocates’ claims that the difficulties of proving “harm” could be avoided by alleging “harass” instead).

⁷³ Quarles et al., *supra* note 66, at 83; see 50 C.F.R. § 17.3 (2026) (providing the definitions of “harm” and “harass”). *But see* *Sierra Club v. Yeutter*, 926 F.2d 429, 433, 438 (5th Cir. 1991) (holding

quires proof of wildlife injury or death, “harass” merely demands “likelihood” that injury will result from a proposed project.⁷⁴ In reality, fully analyzed “harass” claims—especially successful ones—are few and far between.⁷⁵

Steven P. Quarles, an expert in “take” litigation who has written about this topic for several decades,⁷⁶ argues that “harass” allegations are inappropriate in the habitat modification context.⁷⁷ Over the years, Quarles has repeatedly outlined four grounds to explain the term’s poor track record.⁷⁸ First, the “harass” definition contains a state of mind requirement not found in “harm.”⁷⁹ Second, the causal connections between a proposed action, the wildlife’s “annoyance,” and the resulting changes to normal behavior patterns are often difficult to prove.⁸⁰ Third, FWS intended habitat modification protections to apply only to “harm,” not “harass.”⁸¹ Finally, the plain meaning of the “harass” definition, by omitting mention of “habitat,” precludes its application to habitat destruction.⁸²

that the U.S. Forest Service “harmed” the red-cockaded woodpeckers through the Service’s failure to carry out protective hardwood removal measures, as prescribed by its wildlife management handbook).

⁷⁴ Quarles et al., *supra* note 66, at 83; *see also* Griffin, *supra* note 69, at 1862 n.217 (writing that “harm” further required significant impairment of “essential” behaviors, whereas “harass” merely demands significant disruption to “normal” behavior).

⁷⁵ *See, e.g.,* Marbled Murrelet v. Babbitt, 83 F.3d 1060, 1068 n.5 (9th Cir. 1996) (declining to consider plaintiffs’ “harass” claim after affirming the lower court’s finding of “harm” because the “harm” claim was sufficient to justify the sought injunction); *Am. Bald Eagle v. Bhatti*, 9 F.3d 163, 166 n.4 (1st Cir. 1993) (choosing not to fully evaluate plaintiffs’ “harass” allegation after finding there was no proof that protected bald eagles were eating lead slugs left in deer carcasses abandoned by hunters, and thus no proof that the birds were “harmed”).

⁷⁶ *See* Quarles et al., *supra* note 30, at 11 (describing the state of “take” law before *Sweet Home* was decided in 1995). Quarles and his frequent co-author, Thomas R. Lundquist, are perhaps best known as counsel for the respondents in *Sweet Home*. *See* 515 U.S. 687, 689 (1995) (listing Quarles and Lundquist as counsel); Steven P. Quarles & Thomas R. Lundquist, *The Pronounced Presence and Insistent Issues of the ESA*, 16 NAT. RES. & ENV’T 59, 59 (2001) (introducing themselves as the authors).

⁷⁷ *See* Steven P. Quarles & Thomas R. Lundquist, *Land Use Activities and the Section 9 Take Prohibition* (arguing that “harass” should not be understood to apply to wildlife injury caused by habitat modification), in *ENDANGERED SPECIES ACT: LAW, POLICY, AND PERSPECTIVES* 160, 166–67 (Donald C. Baur & W.M. Robert Irvin eds., 2d ed. 2010); Quarles et al., *supra* note 71, at 158 (same); Quarles et al., *supra* note 66, at 84 (same).

⁷⁸ *See* Quarles et al., *supra* note 66, at 83–84 (assembling all four arguments in the same publication).

⁷⁹ *See id.* (explaining that “harass” requires a showing that the action was conducted intentionally or negligently).

⁸⁰ *See id.* (focusing on the difficulty of proving annoyance); Quarles et al., *supra* note 71, at 158 (noting the challenges of demonstrating the link between action and changes to species behavior).

⁸¹ *See* Quarles et al., *supra* note 66, at 83–84 (arguing that the fact that FWS moved mention of habitat modification from the “harass” definition to the “harm” definition indicates the FWS did not intend “harass” to incorporate injury to species from land use activities).

⁸² *See id.* at 84 (stating the regulations’ “plain language precludes ‘harass’ from reaching wildlife injuries which occur through habitat modification”).

This Part addresses the strength of each of these arguments in turn.⁸³ Even though “harass” remains the underdog claim in Section 9 litigation, it is not quite as weak as Quarles suggests.⁸⁴

*A. Argument: “Harass” Contains a State of Mind
Element That “Harm” Lacks*

Although the “harass” definition contains fewer onerous elements than “harm,” it also requires plaintiffs to show that the “harassing” action was performed “negligently” or “intentionally.”⁸⁵ Quarles argues that this state of mind element—lacking in “harm”—makes “harass” an awkward fit in the context of habitat modification because it is at odds with “incidental take” permits.⁸⁶ He reasons that “incidental takes” are generally permitted only after negotiation with wildlife agencies, which may allow them in accordance with Section 10 of the ESA if the landowner takes certain measures to mitigate environmental damage.⁸⁷ These mitigation steps suggest that individuals seeking “incidental take” permits are acting neither negligently nor with intent to disturb protected wildlife.⁸⁸ The same is not true for “harm,” which imposes liability whether individuals act with care or not.⁸⁹

Quarles’s concern intersects with a wider issue for “harass”—the difficulty of proving intent to cause disruption to wildlife in the habitat modification context.⁹⁰ As one commentator observed, the shopping center developer is un-

⁸³ See *infra* notes 85–210 and accompanying text.

⁸⁴ See THE FEDERALIST SOCIETY, *What’s the “Harm”?* *ESA Rulemaking After Loper Bright*, at 20:01–21:14 (YouTube, Sep. 8, 2025), <https://www.youtube.com/watch?v=fcAkyaFzkqM> (featuring as a panelist law professor Karrigan Börk, who described “harass” as a potentially “meaty hook” for environmentalists looking to block habitat destruction through non-harm forms of “take”).

⁸⁵ See 50 C.F.R. § 17.3 (2026) (defining “harass” to mean “an intentional or negligent act or omission”); Quarles et al., *supra* note 66, at 83 (comparing the elements of proof in “harm” and “harass”).

⁸⁶ See Quarles et al., *supra* note 66, at 84 (explaining that intentional or negligent is “a description that typically does not apply to so-called ‘incidental take’”).

⁸⁷ See *Habitat Conservation Plans*, *supra* note 48 (explaining that non-federal entities may create and enter Habitat Conservation Plans that “describe the anticipated effects of the proposed taking, how those impacts will be minimized and mitigated, and how the conservation measures included in the plan will be funded”). “Incidental take” permits authorize the unintended killing and injuring of animals caused by otherwise legal activity. See 16 U.S.C. § 1539 (providing exceptions to ESA enforcement).

⁸⁸ See *Habitat Conservation Plans*, *supra* note 48 (identifying applicants’ roles in minimizing their impact on species).

⁸⁹ See, e.g., *Nat’l Wildlife Fed’n v. Burlington N. R.R., Inc.*, 23 F.3d 1508, 1509 (9th Cir. 1994) (finding accidental grizzly bear deaths resulting from a spill of corn along railroad tracks “constituted a prohibited ‘taking’ within the meaning of the ESA”); see Boudreaux, *supra* note 30, at 744 (writing that federal courts have rejected any type of intent standard for “take,” describing the “harm” form).

⁹⁰ See MICHAEL J. BEAN, SARAH G. FITZGERALD & MICHAEL A. O’CONNELL, *RECONCILING CONFLICTS UNDER THE ENDANGERED SPECIES ACT: THE HABITAT CONSERVATION PLANNING EXPERIENCE* 42 (1991) (describing the difficulty of bringing a “take” claim in the context of habitat destruction versus in cases of illegal hunting).

likely to be caught boasting about crushing endangered butterfly larvae after clearing the land with bulldozers.⁹¹ On the other hand, the developer *might* be held accountable by a showing that he was *aware* of the insects' presence, and moved forward with the project anyway.⁹² The question is: what precisely does it mean to act "intentionally" or "negligently" in the context of "harass"?⁹³

1. Legislative and Regulatory History of "Intentional" and "Negligent"

Legislative documents published before the ESA was passed suggest Congress intended "harass"—and "take" generally—to be interpreted capaciously.⁹⁴ A House Report released in 1973 defined "take" to include forms of "harassment, whether intentional or not."⁹⁵ The Report also called for a definition of "harass" broad enough to allow FWS to regulate even the activities of overzealous birdwatchers when their viewing habits disrupted birds and nesting behaviors.⁹⁶ FWS heeded Congress's will, promulgating a "harass" definition that explicitly included both "intentional" and "negligent" conduct.⁹⁷

⁹¹ See *id.* (explaining that it would be much easier to successfully prosecute a person charged with illegally shooting a bald eagle because presumably there would be feathers, witnesses, or other circumstantial evidence). On the other hand, there have been some instances where loggers' clear disregard for animal life could be easily inferred from their actions. See *Marbled Murrelet v. Babbitt*, 83 F.3d 1060, 1063 (9th Cir. 1996) (observing that the defendant logging company engaged in surreptitious logging operations on weekends, despite warnings from wildlife officials that such logging would likely result in an illegal "take"); *Marbled Murrelet v. Pac. Lumber Co.*, 880 F. Supp. 1343, 1358 (N.D. Cal. 1995) (describing a party for the defendant lumber company's staff where partygoers threw darts at a target on an image of a marbled murrelet, a threatened species), *aff'd sub nom.* *Marbled Murrelet v. Babbitt*, 83 F.3d 1060 (1996).

⁹² See BEAN ET AL., *supra* note 90, at 42 ("At best, it may only be able to show that the habitat that the defendant cleared was of a type known to support the species and was of sufficient size that it could reasonably be expected to harbor one or more individuals of that species.").

⁹³ See Griffin, *supra* note 69, at 1862 n.220 (describing confusion around the meaning of the terms "intentional" and "negligent" within the "harass" definition); see also Steven G. Davison, *Alteration of Wildlife Habitat as a Prohibited Taking Under the Endangered Species Act*, 10 J. LAND USE & ENV'T L. 156, 181 n.136 (1995) (criticizing FWS for failing to provide a clear definition of these terms, and noting that "intentional" could be defined broadly to mean actions done voluntarily or with a conscious free will—making the term vacuous).

⁹⁴ See S. REP. NO. 93-307, at 7 (1973) (defining 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"); H.R. REP. NO. 93-412, at 11 (1973) (defining "take" broadly).

⁹⁵ H.R. REP. NO. 93-412, at 11.

⁹⁶ See *id.* (describing the broad scope of "harass"); see also Albert Gidari, *The Endangered Species Act: Impact of Section 9 on Private Landowners*, 24 ENV'T L. 419, 458 (1994) (calling the birdwatching illustration "now-famous, but often misunderstood"). Albert Gidari explained that this passage was not meant to suggest that the "hapless birdwatcher would . . . go to jail[,] because the original enforcement section of the ESA demanded willful conduct—that is, specific intent—for criminal penalties. See Gidari, *supra* at 458 (discussing the significance of the birdwatching example).

⁹⁷ See Griffin, *supra* note 69, at 1860 (noting that the state of mind element of the "harass" definition appears to stem directly from the House Report).

The initial 1975 regulations left few clues about the boundaries of “intentional” and “negligent.”⁹⁸ In 1981, however, while discussing proposed changes to the “harm” definition, the agency expounded on the state of mind element of “harass”—describing “intentional” and “negligent” as levels of “fault.”⁹⁹

According to the proposed regulations, fault could be shown—and liability applied—only in cases where the defendant knew or reasonably should have known that a project would likely injure wildlife.¹⁰⁰ Thus, a landowner could avoid liability for harassment by taking reasonable steps to mitigate likely injury to wildlife.¹⁰¹ FWS contrasted “harass” with “harm,” which makes landowners *automatically* liable for habitat modification where actual death or injury is shown.¹⁰² Though FWS did not explicitly define its state of mind requirements, it appeared to equate “intentional” with acting with *knowledge* that one’s conduct (or omission) will likely cause injury to wildlife, and “negligent” with acting when one reasonably *should have known* of that likelihood.¹⁰³

Unfortunately, the final version of the 1981 rules omitted discussion of “intentional” and “negligent,” leaving the public without clear guidelines of

⁹⁸ See Endangered and Threatened Wildlife and Plants; Reclassification of the American Alligator and Other Amendments, 40 Fed. Reg. 44411, 44413 (Sep. 26, 1975) (offering no interpretation of “negligent” or “intentional” in the first final rule defining “harass”).

⁹⁹ See Endangered and Threatened Wildlife and Plants; Proposed Redefinition of “Harm,” 46 Fed. Reg. 29490, 29491 (June 2, 1981) (contrasting “harass” with “harm,” which does not require “an element of fault”).

¹⁰⁰ See *id.* (describing the fault standard of “harass” and its relation to criminal liability, though not directly mentioning civil liability). Importantly, the FWS here explicitly discusses “harass” in terms of changes to habitat. *Id.*; see Griffin, *supra* note 69, at 1862 n.221 (noting that FWS’s explicit mention of using “harass” for habitat modification runs contrary to some scholars’ assertion that the exclusion of “habitat modification” in the definition of “harass” precludes its use in that context). For the significance of this discussion in the proposed regulations, see *infra* notes 178–183 and accompanying text.

¹⁰¹ See Endangered and Threatened Wildlife and Plants; Proposed Redefinition of “Harm,” 46 Fed. Reg. at 29491 (comparing the fault standard in “harass” with the strict liability standard in “harm”). According to commentator Alicia Griffin, this fault or intent requirement is what FWS hoped would keep “harass” conceptually and operatively distinct from “harm.” Griffin, *supra* note 69, at 1862 (“Although the required evidentiary showing of injury for ‘harass’ is much lower than that for ‘harm,’ its intent requirement keeps ‘harass’ from conceptually swallowing ‘harm,’ giving the terms independent significance.”). Instead of making use of this distinction, circuit courts have adjusted the scope of “harm” by tweaking the actual injury requirement, at the expense of a more robust body of “harass” case law. See *id.* at 1863 (calling on courts to utilize “harass” for its intended purpose and abandon the “actual injury standard for claims involving only a threat of future injury”).

¹⁰² See Endangered and Threatened Wildlife and Plants; Proposed Redefinition of “Harm,” 46 Fed. Reg. at 29491 (noting that strict liability would apply, regardless of intent, if death or actual injury of protected wildlife is shown).

¹⁰³ See *id.* (“Because the definition contains an element of fault, [harassment] will not result in criminal liability for habitat modification unless it is shown that the defendant *knew or reasonably should have known* that his actions would be likely to injure wildlife.” (emphasis added)).

the terms’ meaning.¹⁰⁴ Courts and commentators were left, once again, to grapple with the intent requirement on their own.¹⁰⁵

2. Court Analysis of the State of Mind Requirement

Although courts have the final say in interpreting “intentional” and “negligent,”¹⁰⁶ they have devoted very little analysis to the “harass” state of mind requirement—and much less to claims involving habitat modification.¹⁰⁷ For example, in 1999, in *Defenders of Wildlife v. Bernal*, an environmental organization sued to reinstate an injunction halting the construction of a new school, claiming construction would “harass” a population of cactus ferruginous pygmy-owls.¹⁰⁸ The Ninth Circuit declined to reimpose the injunction, affirming the lower court’s finding that construction would not result in a “take.”¹⁰⁹ The court’s “harass” analysis focused on the lack of evidence that the owls’ normal behavioral patterns would be impacted, and ignored the issue of fault altogether.¹¹⁰

That said, at least one court has stated definitively that intentional conduct does not require specific intent to harm protected wildlife.¹¹¹ In 2023, in *Sovereign Iñupiat for a Living Arctic v. Bureau of Land Management*, plaintiffs

¹⁰⁴ See Endangered and Threatened Wildlife and Plants; Final Redefinition of “Harm,” 46 Fed. Reg. at 54748–50 (omitting mention of the “harass” intent requirement). Indeed, the final rule barely mentioned “harass” at all and focused on comments related to the new “harm” definition. *Id.*

¹⁰⁵ See, e.g., Davison, *supra* note 93, at 181 n.136 (attempting to understand what “intentional” means for “harass” and noting that the term has many definitions in other legal contexts).

¹⁰⁶ See 5 U.S.C. § 706 (prescribing the scope of judicial review of agency actions under the Administrative Procedure Act).

¹⁰⁷ See, e.g., *Def. of Wildlife v. Bernal*, 204 F.3d 920, 927 (9th Cir. 2000) (focusing on the lower court’s analysis about proof of likelihood of injury).

¹⁰⁸ See *id.* at 922 (describing the background of the case). Cactus ferruginous pygmy-owls (*Glaucidium brasilianum cactorum*) are a subspecies found in southern Arizona and Texas, as well as Mexico, and are currently listed as threatened. See Endangered and Threatened Wildlife and Plants; Threatened Species Status with Section 4(d) Rule for Cactus Ferruginous Pygmy-Owl, 88 Fed. Reg. 46910, 46910 (July 20, 2023) (providing the final listing status for the pygmy-owl). This tiny raptor—measuring just over six inches tall—was listed as endangered in 1997, but was stripped of its protected status in 2006 to make way for development. See Cactus Ferruginous Pygmy Owl, DEFS. OF WILDLIFE, <https://defenders.org/wildlife/cactus-ferruginous-pygmy-owl> [perma.cc/GMT7-SWLN] (mentioning that Defenders of Wildlife fought for seventeen years to get the pygmy-owl relisted).

¹⁰⁹ See *Bernal*, 204 F.3d at 927 (finding limited proof that construction of the school would impact the owls’ breeding, feeding, and sheltering habits).

¹¹⁰ See *id.* at 924 (mentioning the state of mind element of “harass” only once while quoting the regulatory definition).

¹¹¹ See *Sovereign Iñupiat for a Living Arctic v. Bureau of Land Mgmt.*, 701 F. Supp. 3d 862, 910–11 (D. Alaska 2023) (finding FWS was incorrect in asserting that conduct that incidentally creates a likelihood of injury could not be intentional or negligent, and thus could not “harass” protected wildlife), *aff’d in part, rev’d in part on other grounds sub nom.* *Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.*, 141 F.4th 976 (9th Cir. 2025). This finding seems to refute Quarles’s assertion that a state of mind element is inconsistent with the concept of “incidental take.” See Quarles et al., *supra* note 66, at 84 (arguing that negligent or intentional is “a description that typically does not apply to so-called ‘incidental take’”).

sued to enjoin the Willow Project, an oil production enterprise on public land, alleging that FWS erred in finding that the project would not result in an “incidental take” of polar bears.¹¹² Although FWS acknowledged that the Willow Project would create noise and other disturbances that threatened to disrupt the bears’ normal behaviors,¹¹³ the agency claimed these disturbances could not “harass” the bears—incidentally or otherwise—because the project was not conducted negligently or with specific intent to injure the bear.¹¹⁴ Examining the language of the regulation and the ESA’s legislative history, the District of Alaska concluded that “harass” unambiguously demands only general intent to engage in activities likely to result in injury to animals, not a goal to annoy or disturb protected wildlife.¹¹⁵ Following this decision, FWS issued a memorandum confirming that harassment may be authorized as an “incidental take”

¹¹² See 701 F. Supp. 3d at 899 (noting that plaintiffs further alleged that BLM unlawfully relied on FWS’s assessment about “incidental take”). The polar bear (*Ursus maritimus*) was listed as threatened in 2008 based on findings that declining sea ice could lead to the polar bear becoming endangered in the foreseeable future. Endangered and Threatened Wildlife and Plants; Determination of Threatened Status for the Polar Bear (*Ursus maritimus*) Throughout Its Range, 73 Fed. Reg. 28212, 28212 (May 15, 2008). At the time, environmentalists hoped that the decision would force federal officials to impose limits on greenhouse gas emissions in order to protect the bear. *District Court Poised to Remand Polar Bear Listing to Fish & Wildlife Service*, NOSSAMAN LLP: ENDANGERED SPECIES L. & POL’Y (Oct. 21, 2010), <https://www.endangeredspecieslawandpolicy.com/district-court-poised-to-remand-polar-bear-listing-to-fish-wildlife-service> [perma.cc/QJ2N-QPGK]. To their dismay, the Department of the Interior instead issued a controversial special rule that imposed geographic limits on federal officials’ power to curb greenhouse gas emissions. *Id.*

¹¹³ See *Sovereign Inupiat for a Living Arctic*, 701 F. Supp. 3d at 907 (explaining that the project threatened to displace the polar bears from their typical foraging and resting areas and interrupt their movement patterns). The court noted that polar bears are also protected under the Marine Mammal Protection Act (MMPA), which—like the ESA—prohibits harassment as a form of “take.” *Id.* at 908. MMPA regulations specify levels of harassment, with Level A causing a potential to injure and Level B causing a potential to disturb. *Id.* Although there are parallels between “harass” in the ESA and the MMPA, most Level A harassment is not a “take” under the ESA and only some Level B harassment can be considered a “take.” *Id.*

¹¹⁴ See *id.* at 909 (analyzing FWS’s claim that, because the project would be conducted “with the intent of developing and producing oil and gas and without any intent to annoy, disturb, or harass polar bears,” the proposed action was neither negligent nor intentional under the “harass” regulations). Unfortunately, the court ultimately found no potential for harassment because the plaintiffs failed to prove that disruption from the drilling project would likely cause injury to the bears. *Id.* at 913.

¹¹⁵ See *id.* at 910–11 (“‘Harass’ means an ‘intentional or negligent act or omission which creates [a] likelihood of injury,’ not an intentional or negligent act or omission which *intentionally or negligently* creates a likelihood of injury. ‘Intentional or negligent’ modifies ‘act,’ not ‘likelihood of injury.’” (quoting 50 C.F.R. § 17.3)). Notably, the Alaska District Court applied an analog of *Chevron*’s deference test, reviewing the language of the regulations for ambiguity. See *id.* at 910 (applying the *Chevron*-like test from *Kisor v. Wilkie*, 588 U.S. 558, 575–76 (2019)). There is some question about whether this test survives in the wake of *Loper Bright Enterprises, Inc. v. Raimondo*. See, e.g., *Humboldt All. for Responsible Plan. v. Cal. Coastal Comm’n*, 328 Cal. Rptr. 3d 188, 197 (Dist. Ct. App. 2024) (explaining that, although the Supreme Court did not expressly overrule *Kisor*, the reasoning in *Loper Bright* is arguably irreconcilable with such deference).

under Section 10, endorsing the *Sovereign Inupiat* court’s reasoning about the meaning of “intentional” and “negligent.”¹¹⁶

Establishing general intent to engage in activities that will lead to harassment is not a high bar.¹¹⁷ If evidence that a landowner intended to engage in an act that creates a likelihood of injury to protected wildlife is all that “harass” requires, then Section 7 consultation—which instructs federal agencies authorizing projects to work with wildlife officials to evaluate impact on wildlife—will often establish such intent.¹¹⁸ Publicly available maps of species’ critical habitat can also put landowners on notice.¹¹⁹

B. Argument: “Annoyance” and Its Connection to Disrupted Behavioral Patterns Are Hard to Prove

Recall that “harass” within the definition of “take” means to injure wildlife by “annoying” it, thereby impacting the wildlife’s behavioral patterns.¹²⁰ As it turns out, annoyance, and its relationship to disrupted animal behavior, is surprisingly difficult to demonstrate in court.¹²¹ This Subpart evaluates those difficulties.¹²²

¹¹⁶ See Memorandum from Martha Williams, Director, FWS, to Regional Directors, FWS, Re-scission of the 2018 Principal Deputy Director Memorandum, FWS/AES/067974 (Apr. 22, 2024), https://www.fws.gov/sites/default/files/documents/2024-06/20240412_dm-rescission_2018-take-memo_signed.pdf [perma.cc/AQZ2-V98E] (authorizing “incidental takes,” explaining previous guidance incorrectly characterized “harass” by asserting that “harass” claims could not be permitted under Section 10(a)(1)(B)) (citing *Sovereign Inupiat for a Living Arctic*, 701 F. Supp. 3d at 909–11).

¹¹⁷ See, e.g., *Sovereign Inupiat for a Living Arctic*, 701 F. Supp. 3d at 909, 911 (finding, though implicitly, that an oil company had “general intent to commit acts that create a likelihood for injury” as part of its “intent of developing and producing oil and gas”).

¹¹⁸ See 16 U.S.C. § 1536(b)(3)(A) (requiring federal agencies to conduct a biological assessment on how a proposed action affects a species and its critical habitat whenever they fund or authorize a project); see, e.g., *Sovereign Inupiat for a Living Arctic*, 701 F. Supp. 3d at 905 (finding that plaintiffs had standing to challenge the adequacy of FWS’s biological opinion on the Willow Project’s impact to protected species, as required by Section 7 consultation).

¹¹⁹ See U.S. FISH & WILDLIFE SERV., ENV’T CONSERVATION ONLINE SYS., <https://ecos.fws.gov/ecp/> [perma.cc/FTE6-8LRJ] (providing reports and maps about endangered species and their critical habitat); see also U.S. FISH & WILDLIFE SERV., INFO. FOR PLAN. & CONSULTATION, <https://ipac.ecosphere.fws.gov> [perma.cc/X39P-NSMJ] (providing owners and developers information about critical habitat and species, as well as suggested conservation measures, based on project location, to streamline the Section 7 review process).

¹²⁰ See 50 C.F.R. § 17.3 (2026) (defining “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”).

¹²¹ See Quarles et al., *supra* note 66, at 84 (explaining further that early decisions about “harass” required annoyance to be severe).

¹²² See *infra* notes 123–173 and accompanying text. It is important to note here that “harass” claims take on “a different character when applied to an animal in captivity than when applied to an animal in the wild.” *People for the Ethical Treatment of Animals v. Mia. Seaquarium*, 189 F. Supp. 3d 1327, 1350 (S.D. Fla. 2016) (citing *Captive-Bred Wildlife Regulation*, 63 Fed. Reg. 48634, 48636 (Oct. 13, 1998)). Although courts have found harassment of protected animals when they are subject-

1. Evaluating Animal “Annoyance”

Whereas humans can report their own feelings, scientists must judge animal annoyance through observable behaviors.¹²³ This requires interpretation.¹²⁴ Quarles notes that wildlife biologists appear disinclined to opine in depositions that an action may “annoy” wildlife, perhaps due to the term’s anthropomorphic nature.¹²⁵

Early cases also set the bar for annoyance high.¹²⁶ In the 1993 decision, *United States v. Hayashi*, the defendant, a part-time commercial fisherman, was charged with “harassing” dolphins in violation of the Marine Mammal Protection Act (MMPA), which like the ESA defines “harass” as a type of “take.”¹²⁷ Hayashi had fired two rifle shots into the ocean behind a group of dolphins, hoping to scare them, after they began eating tuna off his fishing line.¹²⁸ An officer reported Hayashi to NMFS.¹²⁹

Because NMFS had not yet issued regulations defining “harass” under the MMPA, the Ninth Circuit turned to the ESA “harass” definition for clarity.¹³⁰

ed to poor living conditions, the standard used in these instances is different. *See People for the Ethical Treatment of Animals v. Lowe*, 2022 U.S. Dist. LEXIS 33379, at *17–18 (W.D. Okla. Feb. 25, 2022) (finding harassment of four lion cubs, including one that died). To bring a successful “harass” claim, a plaintiff must prove the defendant caretaker engaged in animal husbandry practices that did not “meet or exceed the minimum standards for facilities and care under the [Animal Welfare Act],” or that such practices were not generally accepted. *Hill v. Coggins*, 867 F.3d 499, 509–10 (4th Cir. 2017). Because this analysis is not relevant to habitat protection, this Note omits reference to captive animal “harass” cases.

¹²³ *See* J. RUSHEN, *Some Issues in the Interpretation of Behavioral Responses to Stress* (introducing the author’s argument about the problems of interpreting animal behaviors in response to stress), in *THE BIOLOGY OF ANIMAL STRESS: BASIC PRINCIPLES AND IMPLICATIONS FOR ANIMAL WELFARE* 1, 23 (G.P. Moberg & J.A. Mench eds., 2000).

¹²⁴ *See id.* (describing interpretation as the primary hurdle in properly utilizing behavioral markers of stress).

¹²⁵ *See* Quarles et al., *supra* note 66, at 84 (noting that biologists seem more willing to conclude that a project may cause wildlife death or injury). Indeed, literature tends to use the words distress or stress rather than annoyance. *See, e.g.,* Monica Lasky & Sara Bombaci, *Human-induced Fear in Wildlife: A Review*, J. NATURE CONSERVATION, Aug. 2023, at 1, 1–2 (2023) (reviewing scientific literature about how humans, like natural predators, impact wildlife community dynamics by inducing fear).

¹²⁶ *See United States v. Hayashi*, 22 F.3d 859, 865 (9th Cir. 1993) (holding that only “direct and serious” disruptions to normal wildlife behavior suffice for “harass”).

¹²⁷ *See id.* at 860 (providing the background of the case); 16 U.S.C. § 1372(a)(2)(A) (prohibiting “take” of marine mammals in the waters of the United States); *id.* § 1362(13) (“The term ‘take’ means to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal.”).

¹²⁸ *See Hayashi*, 22 F.3d at 861 (noting that the shots did not hit the dolphins, and that the dolphins succeeded in eating tuna off the fishing line). The opinion does not give information about the type of dolphin that was allegedly “harassed.” *Id.* The MMPA provides protection to all marine mammals, regardless of whether they are endangered or not. *See* 16 U.S.C. § 1372(a) (forbidding “take” of any marine mammal).

¹²⁹ *Hayashi*, 22 F.3d at 861.

¹³⁰ *See id.* at 864 (explaining that the NMFS had offered the “harass” definition in 50 C.F.R. § 17.3 as the controlling regulatory definition). Today, the NMFS typically defines harassment as

The court found that “harass” could apply only when a protected animal was engaging in normal—not “abnormal”—activities, and that eating from a fishing line was not part of the dolphins’ typical behavior.¹³¹ Furthermore, the Ninth Circuit held that “harass” may apply only to “direct and serious” disruptions to animal behavior—concluding that shots fired in the dolphins’ direction did not constitute such a disruption.¹³²

Plaintiffs may also struggle to prove annoyance when a protected animal has a demonstrated ability to live near humans.¹³³ In *Bernal*, experts opined that pygmy-owls would likely be “harassed” and “harmed” by the construction and operation of a proposed school, despite the owls’ admittedly high tolerance for human activity.¹³⁴ The Ninth Circuit nevertheless affirmed the district court’s judgment that the evidence of “take” was insufficient in light of contrasting statements about the birds’ behavior.¹³⁵ In justifying its decision, the court recounted an anecdote about an owl that returned to a woman’s property after she chased the bird away, screaming, with a broom.¹³⁶

“any act of pursuit, torment, or annoyance which—(i) has the potential to injure a marine mammal or marine mammal stock in the wild; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns . . .” 16 U.S.C. § 1362(18)(A).

¹³¹ See *Hayashi*, 22 F.3d at 864 (finding that the ESA “harass” definition prohibits significant disruption of normal behavior, and that “[d]eterrence of abnormal marine mammal activity is not proscribed”). The court seemed to define normal behavior in such a way that any human-related disruption to animal behavior, when it involved an isolated event, could not be harassment. See *id.* at 865 (saying that the ESA definition of “harass,” if it applied to isolated interference with abnormal animal behavior, “would lead to absurdity”). The court described “a porpoise intent on swimming into severely contaminated waters, or into the propellers of a motorized boat” as falling into an unreasonably broad understanding of “harass.” *Id.*

¹³² See *id.* at 865 (holding that “only direct and serious disruptions of normal mammal behavior fall under the term ‘harass’”). The court further noted that, even if the dolphins had been scared by the gunshots—as it was unclear if they had reacted—this would not constitute harassment because it did not disrupt the dolphins’ regular behaviors. See *id.* (“Reasonable acts to deter porpoises from eating fish or bait off a fisherman’s line are not criminal under the MMPA.”).

¹³³ See *Defs. of Wildlife v. Bernal*, 204 F.3d 920, 927 (9th Cir. 2000) (concluding that the pygmy-owls would not be “harassed” by building a school near its habitat and noting “that there was evidence that the owl can tolerate and even benefit from human activity”).

¹³⁴ See *id.* at 926 (explaining that experts feared that, despite the birds’ tolerance for humans, the new school could cause the owls to abandon the area).

¹³⁵ See *id.* at 927 (noting that the experts for the plaintiff offered only speculation about the impacts of the school on the owls and made only shallow attempts to support their conclusions with data about the owls or similar birds).

¹³⁶ See *id.* at 926 (explaining further that the neighbor lived close to an operating school that had been built a few years earlier). This chased-by-a-broom example was mentioned with the court’s “harm” analysis but seems to apply equally to the court’s findings about “harass.” See *id.* at 927 (emphasizing the owls’ ability to tolerate people).

2. Evaluating Disruptions to Normal Behavioral Patterns

Equally difficult to prove is the link between the allegedly annoying activity and disruption to wildlife's normal behavioral patterns.¹³⁷ In 2014, in *Alliance for the Wild Rockies v. United States Department of Agriculture*, conservationists challenged a bison management plan that permitted Montana livestock officials to engage in helicopter "hazing"—a practice of flying at low altitudes over herds in order to encourage bison to return to Yellowstone National Park.¹³⁸ The plaintiffs alleged that hazing practices "harassed" protected Yellowstone grizzly bears by displacing bears from critical feeding activities in the spring and summer months.¹³⁹ Although plaintiffs obtained footage of a grizzly bear running away from a helicopter, the Ninth Circuit was unconvinced that the conservationists had provided sufficient proof to show significant disruption to the bears' behavioral patterns.¹⁴⁰ Nothing in the video indicated that the bear had been feeding before it was startled by the helicopter, and the court found no evidence that helicopter pilots continued hazing operations once they realized bears were present.¹⁴¹

Similarly, in 2004, in *Cold Mountain v. Garber*, the Ninth Circuit found that conservationist plaintiffs had failed to establish a causal link between the helicopter hazing and a bald eagle pair's failure to reproduce.¹⁴² Although plain-

¹³⁷ Quarles et al., *supra* note 71, at 158 (explaining that "establishing a link between . . . temporary disturbances and harm to the species frequently will prove impossible").

¹³⁸ See 772 F.3d 592, 595–97 (9th Cir. 2014) (explaining that this practice was intended to keep buffalo herds away from domesticated cattle to reduce the spread of brucellosis, a bacterial disease contagious in both species).

¹³⁹ See *id.* at 605 (explaining the plaintiffs' argument that scientific evidence supported their view that the bears' flight responses to the helicopters amounted to a significant disruption to normal behaviors—not just a temporary response to being startled). Grizzly bears (*Ursus arctos horribilis*) were officially listed as threatened in 1975. Amendment Listing the Grizzly Bear of the 48 Conterminous States as a Threatened Species, 40 Fed. Reg. 31734 (July 28, 1975). Although an estimated fifty thousand grizzlies once roamed across eighteen states, hunting by European settlers reduced their numbers to fewer than eight hundred individuals. See *Ursus Arctos Horribilis*, U.S. FISH & WILDLIFE SERV., <https://www.fws.gov/species/grizzly-bear-ursus-arctos-horribilis> [perma.cc/N5MN-UQHY] (describing the bear's history). Today, at least 1,900 bears live in the contiguous forty-eight states. *Id.*

¹⁴⁰ See *All. for the Wild Rockies*, 772 F.3d at 605 (affirming the district court's decision to grant summary judgment to the federal defendants and dismiss the claim against the Montana livestock officials). Indeed, the court seemed skeptical of the video, writing that it "purportedly" depicted a bear running from a helicopter. *Id.*

¹⁴¹ See *id.* (noting that the videographer did not state if the bear had been feeding before its interaction with the helicopter and explaining that a guide produced by the defendants on reducing the hazing effects on grizzly bears required operations to cease if a grizzly was seen in the area).

¹⁴² See 375 F.3d 884, 890 (9th Cir. 2004) (affirming the district court's decision to grant summary judgment to the defendants, who authorized the helicopter hazing near the bald eagles' nest). The bald eagle (*Haliaeetus leucocephalus*) is an "Endangered Species Act success story." See *Haliaeetus Leucocephalus*, U.S. FISH & WILDLIFE SERV., <https://www.fws.gov/species/bald-eagle-haliaeetus-leucocephalus> [perma.cc/VDZ6-X4R9] (describing the raptors' comeback). Although the bald eagle became the national symbol of the United States in 1792, hunting and habitat loss caused major population declines in the 1800s. *Id.* After World War II, the proliferation of the insecticide dichlorodiphe-

tiffs offered scientific studies showing that the eagles reacted to the helicopters by flying from their perch, there was no data about the effect of aircraft noise on bald eagle breeding.¹⁴³

Nevertheless, when plaintiffs can point to some demonstrated disruption or death—even when questions remain about the cause—courts may be willing to entertain the possibility of harassment.¹⁴⁴ In 2012, in *State v. Cullen*, a New Jersey appellate court drew parallels to the federal ESA to evaluate claims that consultants had “harassed” bald eagles under the state wildlife protection act.¹⁴⁵ A developer hired defendant Cullen, who in turn hired nineteen-year-old Mohin, to monitor the behavior of an eagle pair on an island development site.¹⁴⁶ At one point, Cullen and Mohin set up a tent about two hundred yards from the eagles’ nest, where a young eaglet was growing.¹⁴⁷ When they returned weeks later, the eagles were gone, and the tent—moved by a storm—was only ninety-four feet from the nest.¹⁴⁸ The eaglet was found injured and died shortly thereafter.¹⁴⁹ Applying the FWS definition of “harass,” the court reversed summary judgment for the defendants.¹⁵⁰ Although the eagles were exposed to frequent human activity from helicopters, trucks, and boat traffic,

nyltrichloroethane (DDT) put the eagle in danger of extinction. *Id.* Thanks in large part to Rachel Carson’s 1967 book, *Silent Spring*, DDT was banned. *Id.* The bald eagle was reclassified as threatened in 1995 and finally delisted in 2007. *Id.*

¹⁴³ See *Cold Mountain*, 375 F.3d at 890 (finding the record “bereft of specific evidence linking the Ridge nest failure to the alleged hazing violations”). The Ninth Circuit also commended the district court’s “harass” analysis, which found that other non-hazing related factors may have contributed to the eagles’ failure to reproduce. *Id.* at 890 n.6.

¹⁴⁴ See *State v. Cullen*, 39 A.3d 208, 218 (N.J. Super. Ct. App. Div. 2012) (finding that the plaintiffs had presented evidence to raise a genuine issue of material fact about whether the defendants “harassed” bald eagles).

¹⁴⁵ See *id.* at 216–17 (finding the FWS definition of “harass” appropriate for interpretation of the Endangered and Nongame Species Conservation Act (ENSCA) of New Jersey, which forbids harassment as a type of “take”). The court believed the dictionary definition of “harass”—meaning “to vex, trouble, or annoy”—was too broad, and would subject birdwatchers, campers, and boaters to liability if they wandered to close. *Id.* at 217 (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1031 (1981)).

¹⁴⁶ See *id.* at 212–13 (explaining that Cullen had agreed to consult with the state’s environmental protection department as part of his contract with the developer but never spoke with state officials).

¹⁴⁷ See *id.* at 213–14 (writing that the eaglet had been placed in the nest by state wildlife officials). According to Mohin and Cullen, most of the eagle monitoring took place from nearby shores, not on the island where the nest was located. *Id.* at 213. Mohin explained they set up the tent on the island nest after growing vegetation made it difficult to view the eagles from the shore. *Id.*

¹⁴⁸ See *id.* at 213–14 (noting that the defendants placed the tent on May 27, 2004, and returned on June 10, but that the eagles were gone, according to state officials, by June 4).

¹⁴⁹ *Id.* at 214. The defendants argued that the eaglet probably died from exposure to chemicals because the nesting site was located on a highly contaminated area. *Id.* at 218. The eaglet was found near the nesting tree suffering from poor nutrition, a puncture wound, and a broken bone. *Id.* at 214.

¹⁵⁰ See *id.* at 217–18 (finding ENSCA silent as to the meaning of “harass”).

the court found there was evidence to support a reasonable inference that Cullen and Mohin had caused the eaglet to leave the nest prematurely.¹⁵¹

3. Causation Issues Are Common in “Harm” Claims

The difficulties in linking human action to behavioral changes are not unique to “harass” but are likewise abundant in “harm” claims.¹⁵² When it comes to “harm,” the challenge is linking habitat loss or change to actual death or injury, and determining what level of behavioral impairment constitutes such injury.¹⁵³

Sometimes the connection between habitat loss and harm to species is clear and direct.¹⁵⁴ For example, when loggers cut down trees in which endangered birds nest, or destroy a stream where endangered fish live, issues of causation are unlikely to thwart a “take” finding because the changes to habitat directly impact the species that live in them.¹⁵⁵ Other times, the connection between a proposed action, the resulting changes to habitat, and the impact on the listed species is far from obvious.¹⁵⁶

For example, in 2014, in *Aransas Project v. Shaw*, plaintiffs sued the Texas Commission on Environmental Quality (TCEQ), arguing that TCEQ had “harmed” endangered whooping cranes by failing to properly manage water

¹⁵¹ See *id.* at 218 (finding evidence that “Cullen and Mohin annoyed the eagles to such an extent so as to significantly disrupt their normal behavioral patterns, thereby creating a likelihood of injury”).

¹⁵² See Boudreaux, *supra* note 30, at 743 (explaining that *Sweet Home* left open many questions about the scope of “harm” by raising issues about causation and the level of directness required).

¹⁵³ See Rasband, *supra* note 38, at 610–13 (explaining that there is still considerable uncertainty about the level of proof needed to show injury through impacts to wildlife’s ordinary behaviors).

¹⁵⁴ See *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 713 (1995) (O’Connor, J., concurring) (explaining, by way of example, that draining the pond of an endangered fish would constitute a direct threat to the species).

¹⁵⁵ See, e.g., *Marbled Murrelet v. Babbitt*, 83 F.3d 1060, 1067 (9th Cir. 1996) (finding that a lumber project’s expected negative impacts on bird breeding amounted to “harm” under the ESA); *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 172–73 (1978) (finding that construction of a dam that would cause a stream to be flooded—wiping out a species of fish—would result in a “take”).

¹⁵⁶ See, e.g., *Aransas Project v. Shaw*, 756 F.3d 801, 820 (5th Cir. 2014) (describing the “long chain of causation” between a proposed project and the deaths of whooping cranes). Justice O’Connor took note of this problem in her *Sweet Home* concurrence, but disagreed with Justice Scalia that the “harm” regulations left defendants liable for remote and unpredictable consequences of their actions. See 515 U.S. at 713 (O’Connor, J., concurring) (“The farmer whose fertilizer is lifted by a tornado from tilled fields and deposited miles away in a wildlife refuge cannot, by any stretch of the term, be considered the proximate cause of death or injury to protected species occasioned thereby.”). She viewed traditional notions of proximate cause as the appropriate tool for limiting the scope of “harm,” but she admitted that proximate cause “is not a concept susceptible of precise definition.” *Id.* See generally *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99 (N.Y. 1928) (discussing proximate cause in terms of foreseeability); *Milwaukee & Saint Paul Ry. Co. v. Kellogg*, 94 U.S. 469, 475 (1877) (defining proximate cause in terms of “natural and probable consequence”).

diversion from the San Antonio and Guadalupe River systems.¹⁵⁷ The plaintiffs argued that private parties—authorized by TCEQ—had withdrawn water from the rivers, preventing a sufficient amount of fresh water to flow into the San Antonio Bay.¹⁵⁸ This in turn increased the salinity of the bay and resulted in a smaller population of blue crabs and wolfberries—two staple foods in the cranes’ diet.¹⁵⁹ Ultimately, these factors caused twenty-three cranes to die of emaciation and increased predation.¹⁶⁰

The Fifth Circuit Court of Appeals reversed the lower court’s judgment that the defendants had violated the ESA, holding that the causal connection between TCEQ’s permitting water withdrawal and the crane deaths was too indirect and unforeseeable.¹⁶¹ The case highlights the tricky problem—common to all kinds of “take” claims—of mapping legal principles of causation onto matters involving the natural world.¹⁶²

¹⁵⁷ See 756 F.3d at 806 (appealing an injunction ordered by the district court to stop future permitting of water withdrawal from the rivers). Whooping cranes (*Grus americana*) have become a symbol of the plight of endangered species worldwide. See *Grus Americana*, U.S. FISH & WILDLIFE SERV., <https://www.fws.gov/species/whooping-crane-grus-americana> [perma.cc/587P-82AJ] (explaining the cranes’ conservation history). In 1941, just fifteen whooping cranes remained on Earth. *Id.* Today, nearly seven hundred cranes can be found in the wild. Kevin McAbee & John Conkin, *Whooping Crane Status: 2023 Breeding Season to 2024 Spring Migration*, U.S. FISH & WILDLIFE SERV. (Feb. 1, 2025), https://www.fws.gov/sites/default/files/documents/2025-04/2023-2024-whcr-recovery-activities-report-final-with-appendices_8.pdf [perma.cc/6PG6-9BZA].

¹⁵⁸ See *Aransas Project*, 756 F.3d at 807 (noting that the ESA allows citizen suits to enjoin the actions of any “governmental instrumentality or agency” alleged to have violated the law, citing 16 U.S.C. § 1540).

¹⁵⁹ See *id.* (noting that the reduction in fresh inflow water was accompanied by drought, and that this also decreased the available amount of drinkable water).

¹⁶⁰ See *id.* (explaining that the low food levels caused the cranes to engage in stress behavior, like denying food to younger cranes and flying further in search of food, making them more vulnerable to predators and exacerbating their malnutrition).

¹⁶¹ See *id.* at 823 (“Finding proximate cause and imposing liability on the State defendants in the face of multiple, natural, independent, unpredictable and interrelated forces affecting the cranes’ estuary environment goes too far.”).

¹⁶² See Quarles et al., *supra* note 71, at 157–58 (discussing proximate causation in *Aransas Project*). The scholars observed:

Litigants and courts have encountered continuing difficulty in applying this tort law standard in an environmental and biological context where there is a less firm concept of what a “reasonable person” would consider foreseeable, given the range of understanding of natural systems between experienced scientists and much of the general public.

Id.; see MICHAEL J. BEAN & MELANIE J. ROWLAND, *THE EVOLUTION OF NATIONAL WILDLIFE LAW* 216 (3d ed. 1997) (“The difficulty of transferring this concept from tort law to endangered species conservation is that what is easily foreseeable to those with a modicum of training in natural history may not be foreseen by those who hold widely prevalent, but erroneous, views of ecology and animal behavior.”).

4. “Harass” and Cutting Down Trees

Although the case law for “harass” presents some challenges for litigants, it has already proven successful for a certain kind of habitat modification—timber projects.¹⁶³ Environmentalists have tended to emphasize “harass” when addressing temporary disturbances to wildlife, and have relied primarily on “harm” for permanent and drastic changes to the surrounding ecosystem.¹⁶⁴ Yet, district courts have repeatedly found harassment when projects threaten to destroy trees used for breeding, feeding, and sheltering.¹⁶⁵

In *House v. U.S. Forest Service*, decided in 1997, plaintiffs sued to stop a timber sale that they claimed would “harass” the endangered Indiana bat.¹⁶⁶ Specifically, the plaintiffs argued that the timber sale would destroy roosting areas and ruin the bats’ foraging habitat by reducing the forest canopy.¹⁶⁷ The court granted summary judgment to the plaintiffs, finding that the Forest Service’s own data indicated that the timber harvest would impact the bats’ ability to find insects and places to sleep.¹⁶⁸

¹⁶³ See, e.g., *Cascadia Wildlands v. Scott Timber Co.*, 618 F. Supp. 3d 1038, 1068 (D. Or. 2022) (finding that a timber project would “harass” marbled murrelets), *aff’d by* 105 F.4th 1144 (9th Cir. 2024).

¹⁶⁴ See Quarles et al., *supra* note 71, at 158 (writing that “the harass rule addresses annoying and disruptive effects of persistent noise, light, or motion”). Compare *All. for the Wild Rockies v. U.S. Dep’t of Agric.*, 772 F.3d 592, 605 (9th Cir. 2014) (analyzing the effects of temporary disturbances to grizzly bears from helicopter hazing), and *Fund for Animals v. Fla. Game & Fresh Water Fish Comm’n*, 550 F. Supp. 1206, 1210 (S.D. Fla. 1982) (evaluating a “harass” claim as it applied to temporary aircraft noise), with *Aransas Project*, 756 F.3d at 817–18 (focusing on the “harm,” rather than the “harass” claim as it related to water practices that killed whooping cranes).

¹⁶⁵ See, e.g., *Marbled Murrelet v. Pacific Lumber Co.*, 880 F. Supp. 1343, 1367 (N.D. Cal. 1995) (finding that a timber project would “harass” marbled murrelets by significantly disrupting the birds’ breeding season, as evidenced by precipitous drops in bird detections following an earlier logging project), *aff’d sub nom.* *Marbled Murrelet v. Babbitt*, 83 F.3d 1060 (9th Cir. 1996).

¹⁶⁶ See 974 F. Supp. 1022, 1029–30 (E.D. Ky. 1997) (alleging that the timber sale would “harm” the bats). The Indiana bat (*Myotis sodalis*) was listed as an endangered species in 1967, before the ESA was passed in 1973. See *Endangered Species*, 32 Fed. Reg. 4001, 4001 (Mar. 11, 1967) (listing the Indiana bat in accordance with the Endangered Species Preservation Act of 1966, an ESA precursor). The bats are known for hibernating in dense clusters within caves, known as hibernacula. See *Myotis Sodalis*, U.S. FISH & WILDLIFE SERV., <https://www.fws.gov/species/indiana-bat-myotis-sodalis> [perma.cc/QG82-HNW2] (describing bat behavior). Sadly, due to a range of factors—particularly a disease called white-nose syndrome—the bats’ population today is half of what it was when the bat was listed as endangered. *Id.*

¹⁶⁷ See *House*, 974 F. Supp. at 1030 (explaining that the project was expected to reduce forest canopy in certain areas to about 30%—leaving 70% of canopy space open). The court pointed out that the defendant’s own bat management strategy guide explained that forest suitability for foraging decreased significantly once canopy coverage dropped below 50%. *Id.* at 1030–31. Moreover, the Forest Service planned to cut some types of trees known to provide roosts for bats in the summer. *Id.* at 1032.

¹⁶⁸ See *id.* (holding that “despite the defendants’ attempt to diminish the adverse effects that the timber sale may have on the Indiana bat, the sale may harass and/or harm the roosting habitat of the Indiana bat”).

More recently, in the 2022 opinion for *Cascadia Wildlands v. Scott Timber Co.*, the District of Oregon enjoined a proposed logging project, finding it would both “harass” and “harm” marbled murrelets, a threatened seabird species.¹⁶⁹ Environmental groups alleged the proposed “Benson Snake” timber project would result in a “take” of the seabird by destroying nearly fifty acres of its habitat and by further fragmenting old-growth forest available for nesting.¹⁷⁰ The court found that clearcutting the site would impair the birds’ essential behaviors, such as breeding, by reducing the number of nests and nesting opportunities.¹⁷¹ The court also held that fragmentation of the forest would impact the birds’ breeding patterns by reducing habitat heterogeneity, increasing the amount of forest edge, and creating “sink” habitats.¹⁷² The Ninth Circuit upheld the district court’s injunction in 2024—finding adequate causal connection between the logging project and the “harm” to the murrelets—but did not specifically review the lower court’s “harass” analysis.¹⁷³

¹⁶⁹ See 618 F. Supp. 3d 1038, 1068 (D. Or. 2022) (holding that a logging project would significantly disrupt important behaviors, like breeding), *aff’d* by 105 F.4th 1144 (9th Cir. 2024). The marbled murrelet (*Brachyramphus marmoratus*), an “extremely secretive seabird,” has been the subject of extensive litigation under the ESA for several decades. See *Marbled Murrelet v. Babbitt*, 83 F.3d 1060, 1062, 1067 (9th Cir. 1996) (upholding an injunction of a logging project that would have “harmed” marbled murrelets by impairing their ability to breed). Although the birds spend most of their life at sea, they use mature forests for nesting. *Brachyramphus Marmoratus*, U.S. FISH & WILDLIFE SERV., <https://www.fws.gov/species/marbled-murrelet-brachyramphus-marmoratus> [perma.cc/3Q4W-GTMQ]. Unfortunately for the marbled murrelet, the species population has been declining since the bird was listed. *Id.*

¹⁷⁰ See *Cascadia Wildlands*, 618 F. Supp. 3d at 1066–67 (explaining that the project area was undisputably occupied by marbled murrelets).

¹⁷¹ See *id.* at 1067 (employing the language of “harm” in describing how the logging operation would significantly impair certain essential behavioral patterns before concluding that the project would “harass” the marbled murrelet).

¹⁷² See *id.* (explaining that fragmentation could result in fewer nesting attempts, fewer eggs, and fewer surviving chicks). Fragmentation describes changes to habitat that divide the area into smaller and more isolated pieces, resulting in changes to the character and structure of the land. See Nick M. Haddad et al., *Habitat Fragmentation and Its Lasting Impact on Earth’s Ecosystems*, SCI. ADVANCES, Mar. 2015, at 1, 7 (describing the long-term effects of fragmentation on ecosystem functionality and biodiversity and noting that “[e]xtinction debts are likely to come due”).

¹⁷³ See *Cascadia Wildlands v. Scott Timber Co.*, 105 F.4th 1144, 1159 n.4 (9th Cir. 2024) (“Because we do not disturb the factual findings underlying the district court’s ‘harm’ determination, which alone is sufficient for the issuance of injunction, we do not reach the court’s ‘harassment’ conclusion.”). Holly Eberhard writes that *Cascadia Wildlands* is significant in its recognition that ecological phenomena resulting from human activity—like edge effects—are a form of legally cognizable “harm.” See Holly Eberhard, *Site Fidelity and Legal Harm: How Wildlands v. Scott Timber Reaffirms Protections for Marbled Murrelets Under the ESA*, 52 ECOLOGY L.Q. 529, 538 (2025) (arguing that the decision broadens the scope of “harm”). Though Eberhard’s analysis focused on “harm,” this significance presumably also applies to “harass.” See *id.* at 532 (noting that plaintiffs also alleged that the timber project would “harass” marbled murrelets).

C. Argument: Wildlife Services Intended Habitat Modification to Fall Under “Harm,” Not “Harass”

The drafters of the original 1975 regulations defining types of “take” recognized the potentially far-reaching scope of both “harm” and “harass,” and sought to limit their breadth.¹⁷⁴ Although the proposed definition of “harass” initially included reference to environmental degradation, FWS removed all such discussion of habitat modification and placed it exclusively under “harm” in the final rule.¹⁷⁵ This relocation was intended to limit “takes” by habitat modification only to those that caused actual death or injury.¹⁷⁶ Thus, Quarles argues, the regulatory history of “harass” would seem to preclude its application to habitat changes.¹⁷⁷

1. FWS’s Statements Regarding Habitat Modification and “Harass”

Quarles’s interpretation is inconsistent with the text of FWS’s later proposed regulations.¹⁷⁸ Recall from Subpart A that FWS included a fault or intent requirement in the definition of “harass,” which was explained in the 1981 proposed revisions.¹⁷⁹ A landowner who took steps to reduce the likelihood of disruption through annoyance to wildlife could avoid being criminally liable for “harassing” protected species—assuming he did not cause actual death or injury

¹⁷⁴ See Endangered and Threatened Wildlife and Plants; Reclassification of the American Alligator and Other Amendments, 44 Fed. Reg. 44411, 44413 (Sep. 26, 1975) (describing changes from the proposed definition of “harass” that restrict its application and emphasizing that liability under “harm” requires demonstrating “actual death or injury” to wildlife).

¹⁷⁵ See *id.* (explaining that language identifying habitat modification as a “take” was retained in “harm,” not “harass”).

¹⁷⁶ See *id.* (“By moving the concept of environmental degradation [from the ‘harass’ definition] to the definition of ‘harm,’ potential restrictions on environmental modifications are expressly limited to those actions causing actual death or injury to a protected species of fish or wildlife.”).

¹⁷⁷ See Steven P. Quarles & Thomas R. Lundquist, *When Do Land Use Activities “Take” Listed Wildlife Under ESA Section 9 and the “Harm” Regulation?*, (explaining that the preamble to the 1975 regulations, discussing the translocation of explicit reference to habitat, forecloses hopes of expanding “harass” to apply to habitat modification), in SPECIES PROTECTION AND THE LAW: ENDANGERED SPECIES ACT, BIODIVERSITY PROTECTION, AND INVASIVE SPECIES CONTROL: ALI-ABA COURSE OF STUDY MATERIALS 207, 241 (2005); Quarles et al., *supra* note 66, at 83–84 (same).

¹⁷⁸ See Endangered and Threatened Wildlife and Plants; Proposed Redefinition of “Harm,” 46 Fed. Reg. 29490, 29491 (June 2, 1981) (explaining explicitly how “harass” may be applied to habitat destruction).

¹⁷⁹ See *infra* notes 94–103 and accompanying text.

and thus “harm” any animals.¹⁸⁰ In these very same revisions, FWS explicitly pointed to habitat modification as a potential means of “harassing” species.¹⁸¹

Noticing this inconsistency, commentator Alicia Griffin argues that FWS wrote the “harass” definition intending that it serve as an alternative to “harm” for habitat modification claims.¹⁸² Wildlife officials, she asserts, added a fault requirement to “harass” to serve as the corollary of “actual injury” in “harm,” limiting liability only to cases where fault could be demonstrated.¹⁸³

2. *Loper Bright*, *Chevron*, and “Harm” Precedent

Whatever FWS intended about the meaning of “harass,” one thing is certain: FWS has changed its mind about “harm.”¹⁸⁴ For the first time in fifty years, wildlife services are content to let the term “harm” stand on its own, without explicit reference to habitat protection.¹⁸⁵ Questions now emerge regarding what courts and plaintiffs should make of this change, and how it impacts “harass.”¹⁸⁶

A large body of case law involving “takes” by habitat modification has accumulated since the 1975 regulations introduced “harass” and “harm” in their recognizable forms.¹⁸⁷ After *Babbitt v. Sweet Home Chapter Communities for a Great Oregon* in 1995, the breadth of such cases only increased—

¹⁸⁰ See Endangered and Threatened Wildlife and Plants; Proposed Redefinition of “Harm,” 46 Fed. Reg. at 29491 (“Because the [‘harass’] definition contains an element of fault, it will not result in criminal liability for *habitat modification* unless it is shown that the defendant knew or reasonably should have known that his actions would be likely to injure wildlife.” (emphasis added)).

¹⁸¹ See *id.* (“Thus a private landowner who wishes to *develop land that serves as habitat* for an endangered species may do so if reasonable measures are taken to avoid injury to wildlife.” (emphasis added)); see also Griffin, *supra* note 69, at 1862 n.221 (flagging FWS’s explicit mention of applying “harass” to habitat modification).

¹⁸² See Griffin, *supra* note 69, at 1863 (calling for courts to “breathe life into the statutory term ‘harass’” by narrowing the scope of “harm”).

¹⁸³ See *id.* at 1862–63 (arguing that FWS included different evidentiary and fault requirements in the meaning of “harass” so that it could be employed alongside “harm”).

¹⁸⁴ See Rescinding the Definition of “Harm” Under the Endangered Species Act, 91 Fed. Reg. 43300, 43300 (July 14, 2026) (rescinding the former definition of “harm,” which prohibited “significant habitat modification or degradation”).

¹⁸⁵ See *id.* at 43302 (“In light of their determination of illegality, the Services have determined that the best path forward is to rescind the regulatory definition entirely—instead of keeping part of it—and to refrain from implementing a replacement definition.”).

¹⁸⁶ See Jack Jones & Max Sarinsky, *What Loper Bright and Statutory Stare Decisis Mean for Deregulation*, YALE J. ON REGUL.: NOTICE & COMMENT (June 30, 2025), <https://www.yalejreg.com/nc/what-loper-bright-and-statutory-stare-decisis-mean-for-deregulation-by-jack-jones-max-sarinsky/> [perma.cc/H57N-629P] (noting that there is considerable uncertainty about how courts will interpret the “harm” rule moving forward).

¹⁸⁷ See, e.g., *Marbled Murrelet v. Babbitt*, 83 F.3d 1060, 1068 (9th Cir. 1996) (finding that a lumber project would “harm” threatened seabirds); *Sierra Club v. Yeutter*, 926 F.2d 429, 433, 438 (5th Cir. 1991) (finding that the U.S. Forest Service “harmed” red-cockaded woodpeckers); *Palila v. Haw. Dep’t of Land & Nat. Res.*, 639 F.2d 495, 498 (9th Cir. 1981) (finding “take” from the impacts of game species introduced to the home island of an endangered bird species).

applying “take” not only to logging and development projects, but also to fishing practices, energy production projects,¹⁸⁸ and even climate change.¹⁸⁹ In these cases, courts have consistently cited *Sweet Home* and its affirmation of the “harm” regulations, bound by principles of precedent to promote consistency and predictability.¹⁹⁰

Today, that precedent is vulnerable.¹⁹¹ *Sweet Home* was decided under the doctrine of *Chevron* deference, which instructed courts to defer to agencies’ permissible interpretations of statutes when the text of a law was ambiguous or silent.¹⁹² Courts applied the doctrine to uphold regulations against facial challenges in more than a thousand cases until 2024, when the Supreme Court overruled this precedent in *Loper Bright Enterprises v. Raimondo*.¹⁹³ Under the new standard, courts must find the single best meaning of a law using the ordinary rules of statutory construction.¹⁹⁴ Gone are the days of agency deference.¹⁹⁵

¹⁸⁸ See, e.g., *Strahan v. Cox*, 127 F.3d 155, 164–65 (1st Cir. 1997) (affirming a judgment that ordered Massachusetts authorities to restrict, modify, or eliminate the use of fixed fishing gear in order to protect northern right whales); *Animal Welfare Inst. v. Beech Ridge Energy*, 675 F. Supp. 2d 540, 579–81 (D. Md. 2009) (finding that a wind energy project would “take” endangered bats).

¹⁸⁹ See *Ctr. for Biological Diversity v. U.S. Dep’t of the Interior*, 144 F.4th 296, 314 (D.C. Cir. 2025) (unsuccessfully alleging “take” from the results of increased carbon emissions in the atmosphere).

¹⁹⁰ See Quarles et al., *supra* note 71, at 154 (describing the *Sweet Home* understanding of “harm” as bedrock ESA law and discussing subsequent cases).

¹⁹¹ See Jamie Auslander, Parker Moore, Jonas Reagan & Mariel Tang, *FWS and NMFS Finalize Rescission of ESA “Harm” Definition*, BEVERIDGE & DIAMOND: PUBLICATIONS (July 14, 2026), <https://www.bdlaw.com/publications/fws-and-nmfs-finalize-rescission-of-esa-harm-definition/> [perma.cc/6A9Y-XUJ9] (“Challenges will likely test whether the Services may adopt that narrower reading despite *Sweet Home*’s statutory analysis and *Loper Bright*’s statement that prior decisions applying *Chevron* remain subject to statutory stare decisis.”).

¹⁹² See *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984) (explaining the two steps of the doctrine by instructing courts to determine, first, whether the law is clear or ambiguous on the question at issue, and second, whether the agency’s interpretation of an ambiguous law is reasonable before granting the agency deference), *overruled by Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024); see also Michael R. Blumenthal, Douglas W. Charnas, James William Sandy & David B. Waxman, *The End of Chevron Deference: What Does It Mean, and What Comes Next?*, A.B.A.: BUS. L. (Aug. 16, 2024), https://www.americanbar.org/groups/business_law/resources/business-law-today/2024-august/end-chevron-deference-what-does-it-mean-what-comes-next/ [perma.cc/VN5R-AY7X] (explaining that *Chevron* deference was a cornerstone of administrative law for four decades).

¹⁹³ See Blumenthal et al., *supra* note 192 (writing that *Loper Bright* will have an “immediate and lasting impact” on agency interpretations moving forward); see also Isaiah McKinney, *The Chevron Ball Ended at Midnight, but the Circuits Are Still Two-Stepping by Themselves*, YALE J. ON REGUL.: NOTICE & COMMENT (Dec. 18, 2022), <https://www.yalejreg.com/nc/chevron-ended/> [perma.cc/2P3D-VS9M] (referencing a study that examined more than 1,300 cases decided with *Chevron* deference).

¹⁹⁴ See *Loper Bright Enters.*, 603 U.S. at 400 (describing the duty of courts to engage in their own interpretation of ambiguous law because, “in the business of statutory interpretation, if it is not the best, it is not permissible”).

¹⁹⁵ See *id.* at 412 (“*Chevron* is overruled.”). But see Nowell D. Bamberger, Carmine D. Boccuzzi, Jr. & William Baldwin, *After Chevron: What the Supreme Court’s Loper Bright Decision Changed, and What It Didn’t*, HARV. L. SCH. F. ON CORP. GOVERNANCE (July 18, 2024), <https://corpgov.law.harvard.edu/2024/07/18/after-chevron-what-the-supreme-courts-loper-bright-decision-changed-and->

The wildlife services pointed to this regime change in their elimination of the “harm” definition.¹⁹⁶ Noting that *Sweet Home* had been decided under the *Chevron* doctrine, the services—ironically¹⁹⁷—claimed that their own previous interpretation of “harm,” as well as the Supreme Court’s ruling on that interpretation, could not pass muster.¹⁹⁸

Loper Bright clarifies that decisions reached under *Chevron* deference remain good law.¹⁹⁹ On the other hand, if litigants bring a renewed facial challenge to “harm,” circuit courts may choose to abandon the reasoning of *Sweet Home* and embrace an alternative definition of “harm”—using their own judgment to determine the single best definition.²⁰⁰ Thus, with the advent of

what-it-didnt/ [perma.cc/ED7Y-F9HR] (explaining the limits of *Loper Bright*’s implications and noting that agencies can offer authoritative readings of statutes when clear grants of power by Congress allow them to do so).

¹⁹⁶ See Rescinding the Definition of “Harm” Under the Endangered Species Act, 91 Fed. Reg. 43300, 43301–02 (July 14, 2026) (citing *Loper Bright* as the impetus for changing the “harm” definition and describing the prior regulations as illegal).

¹⁹⁷ See *id.* at 43301 (noting that “under the then-prevailing *Chevron* framework,” the *Sweet Home* Court found the “harm” definition reasonable but did not hold that it was “the only possible such reading”). One might find this argument strange, given that—under *Loper Bright*—agencies’ interpretations of their own regulations hold comparatively little weight. See Jessica R. Graham, *Worth a Double Take: The Removal of “Harm” from the Endangered Species Act*, 52 ECOLOGY L. CURRENTS 15, 18 (2025) (noting that FWS neglected to acknowledge that the *Sweet Home* Court engaged in lengthy analysis of “harm” definition, and did not rely solely on *Chevron* deference); Taylor Mills & Bobby Magill, *Trump Plan to Gut Habitat Protections Tests Loper Bright’s Reach*, BLOOMBERG L. (Apr. 23, 2025), <https://news.bloomberglaw.com/environment-and-energy/trump-plan-to-gut-habitat-protections-tests-loper-brights-reach> [perma.cc/K64Y-YGFH] (writing that the “harm” rescission relies on an overly broad interpretation of the *Loper Bright* decision and arguing that the rule relies on a “plain misreading” of the ESA).

¹⁹⁸ See Rescinding the Definition of “Harm” Under the Endangered Species Act, 91 Fed. Reg. at 43307 (“As the Services stated in the proposed rule, we are undertaking this rescission [sic] because we believe it is compelled by the best reading of the statutory text.”). Jones and Sarinsky caution that wildlife officials’ argument that *Loper Bright* compelled them to reinterpret “harm” is incorrect. Jones & Sarinsky, *supra* note 186. Because cases decided with *Chevron* deference pre-*Loper Bright* remain good law, agencies can choose to keep regulations, even when they are inconsistent with the statute’s best reading. See *id.* (noting that the decision by FWS and NMFS to rescind regulations is a voluntary, not a nondiscretionary decision). Thus, if a final rule is promulgated, it could be set aside for being arbitrary and capricious. *Id.*

¹⁹⁹ See *Loper Bright Enters.*, 603 U.S. at 376 (“By overruling *Chevron*, though, the Court does not call into question prior cases that relied on the *Chevron* framework.”).

²⁰⁰ See Jonathan Remy Nash, *Chevron Stare Decisis in a Post-Loper Bright World*, 110 IOWA L. REV. ONLINE 180, 195–96 (2025) (explaining the lack of clarity around *Chevron* stare decisis and describing the *Sweet Home* case as an example). Nash notes that the *Sweet Home* Court did not speak explicitly as to whether the FWS interpretation of “harm” aligned unambiguously with the ESA. *Id.* If the “harm” regulation were relitigated, courts would have to decide if *Sweet Home* was decided on prong one or prong two of the *Chevron* test. *Id.* The answer may or may not give lower courts considerable leeway in deciding what “harm” means. See *id.* (forecasting that at least some amount of agency deference would be preserved).

Loper Bright, it is unclear how much weight FWS's own understanding of its regulations—new and old—will retain.²⁰¹

*D. Argument: The “Harass” Definition Offers No
Mention of Habitat Modification*

Quarles's fourth argument is the weakest and most easily dismissed.²⁰² It goes as follows: because the “harm” definition explicitly discusses habitat modification, whereas the “harass” definition does not, the plain language of the terms suggests that “harass” cannot apply to alleged “takes” involving habitat destruction.²⁰³ Only “harm” can address changes to habitat.²⁰⁴

The mere fact that the phrase “habitat modification” is missing in the “harass” definition does not obviously *preclude* “harass” from applying to that context.²⁰⁵ Consider the Sarbanes-Oxley Act, which criminalizes the destruction of records and other “tangible objects,” but makes absolutely no mention of fish.²⁰⁶ This lack of mention did not stop federal prosecutors from bringing Sarbanes-Oxley Act charges against a fisherman who illegally caught—and later threw overboard—undersized grouper in the famous *Yates v. United States* case.²⁰⁷ Although the Supreme Court ultimately found that fish were not the sort of tangible objects covered by the Act, the fact that it arrived on the Court's docket is proof that a direct mention of fish was not a prerequisite to the law's use in that context.²⁰⁸

Now that FWS and NMFS have rescinded the “harm” definition, the number of rules stating, in plain language, that “take” may apply to habitat

²⁰¹ See *id.* at 201 (expressing concern that democratic accountability will suffer in the wake of *Loper Bright* because *Chevron* stare decisis will provide different agencies varying levels of discretion in interpreting law—potentially confusing the public).

²⁰² See *infra* notes 203–210 and accompanying text.

²⁰³ Quarles et al., *supra* note 66, at 84.

²⁰⁴ See *id.* at 83 (calling application of “harass” to “takes” resulting from habitat modification a “[s]tretch [t]oo [f]ar”).

²⁰⁵ See *Yates v. United States*, 574 U.S. 528, 540 (2015) (evaluating the applicability of the Sarbanes-Oxley Act to illegal fishing, although this use of the law was not contemplated by members of Congress).

²⁰⁶ See *id.* at 534 (describing *Yates*'s argument that the law's description of tangible objects encompassed computer hard drives and logbooks, but not fish); 18 U.S.C. § 1519 (omitting mention of fish and applying explicitly to “any record, document, or tangible object”).

²⁰⁷ See 574 U.S. at 534 (recounting the government's argument that “tangible object” means “simply something other than a document or record”).

²⁰⁸ See *id.* at 546 (concluding that fish are not tangible objects within the meaning of the Act only after applying rules of statutory construction). Even Quarles and his co-authors acknowledge that “harass” could apply to the habitat modification context when it comes to the disruptive noise from bulldozers and chainsaws. Quarles & Lundquist, *supra* note 77, at 167.

modification has dwindled to zero.²⁰⁹ Does this mean Section 9 litigation over habitat must end?²¹⁰

III. THE FUTURE OF “HARASS”: A CALL FOR A NEW APPROACH TO HABITAT MODIFICATION

The future of Section 9 “take” litigation is uncertain.²¹¹ Yet, habitat destruction remains an existential threat to many of the species that conservationists have worked so hard to protect.²¹² Wildlife advocates will continue to bring “harm” claims even now that the term’s application to habitat modification has been thrown into uncertainty.²¹³ But “harm” cannot do all the work

²⁰⁹ See Price & Myskow, *supra* note 12 (explaining, when the rescission was first proposed, that eliminating the definition of “harm” would also eliminate the habitat protections that come with it); 50 C.F.R. § 17.3 (2026) (providing no other definitions to terms clarifying “take” that include explicit habitat protections).

²¹⁰ Quarles et al., *supra* note 66, at 84 (writing that the plain language of “harass”—and now, presumably, “harm”—precludes its use in habitat modification cases). A reinterpretation of Quarles’s point poses a somewhat harder question: should the fact that FWS left habitat protections out of the “harass” definition encourage courts to interpret “harass” as excluding habitat modification, particularly in a post-*Loper Bright* world? See *id.* (suggesting the “plain language” of “harass” does not encompass changes to habitat). As previously noted, it is not yet clear how much weight agencies’ interpretations will hold in future challenges to “take” regulations. See *supra* Part II.C and accompanying text. Nevertheless, should courts find themselves in a position where they must interpret the ESA for the best definition of “harass,” they have several reasons to find that it prohibits habitat destruction. See Graham, *supra* note 195, at 18–19 (examining the *Sweet Home* interpretation of “harm”). Jessica R. Graham writes that, in discussing the original regulations, the *Sweet Home* Court described three distinct grounds for upholding the “harm” definition apart from *Chevron* deference: first, the ordinary meaning of “harm” encompasses habitat modification; second, the legislature wrote the ESA with the broad purpose of providing “comprehensive protection” to vulnerable species; and third, authorization of “incidental take” permits would not make sense if “harm” did not apply to habitat. *Id.* These grounds apply equally well to “harass.” See *infra* notes 95–97, 111–116, 237–239 and accompanying text (examining, briefly, the legislative history of “harass,” its relationship with “incidental take” permits, and the term’s plain meaning).

²¹¹ Tyson C. Kade, Joseph B. Nelson & Jordan A. Smith, *Administration Proposes Rescinding the Endangered Species Act Regulatory Definition of “Harm,”* NAT’L L. REV. (Apr. 21, 2025), <https://natlawreview.com/article/administration-proposes-rescinding-endangered-species-act-regulatory-definition> [perma.cc/LUR7-QZXU] (discussing possible implications of the rule and noting that uncertainty about the scope of “take” could result in increased litigation challenging applications of the “take” prohibition).

²¹² See Gonçalves-Souza et al., *supra* note 1, at 3–5 (predicting the extinction of more than four thousand amphibian, bird, mammal, and reptile species based on predictions of estimated habitat loss in 2040); Hanski, *supra* note 2, at 248 (explaining the genetic and evolutionary consequences of habitat loss and fragmentation). Hanski explains that reduced and isolated species populations can lead to an extinction vortex, where a “spiral of feedback[] between demographic and genetic factors . . . reinforce each other and eventually lead to extinction.” Hanski, *supra* note 2, at 252.

²¹³ See Chaney, *supra* note 8 (calling on the public to comment on the then-proposed rescission of the “harm” definition). Non-profit organizations dedicated to protecting species are already preparing to fight the change to “harm.” See Rebecca Hays Barho, *Agencies Rescind “Harm” Definition*, NOS-SAMAN LLP: ENDANGERED SPECIES L. & POL’Y (July 21, 2026), <https://www.endangeredspecieslawandpolicy.com/agencies-rescind-harm-definition> [perma.cc/N5F9-ZRJL] (writing that at least six

alone.²¹⁴ It is time to add a second “fang” to the ESA pit bull by further exploring the utility of “harass” in habitat modification suits.²¹⁵ This Part uses the background and analysis from Parts I and II to argue that “harass” allegations are appropriate—and potentially highly effective—as a means of preventing “takes” by habitat destruction.²¹⁶

A. The State of Mind Element of “Harass” Makes It an Attractive, Not Awkward, Fit for Habitat Modification-Based “Takes”

Despite Quarles’s qualms, the state of mind element of “harass” is neither overly burdensome nor incompatible with other sections of the ESA.²¹⁷ The meanings of “intentional” and “negligent” are not at odds with Section 10’s “incidental take” permit requirements because “harass” calls only for a showing of general intent to carry out a project that threatens to injure protected wildlife.²¹⁸ When it comes to large developments involving federal funding or permits, Section 7 requires relevant agencies to determine whether protected species are present.²¹⁹ Thus, any difficulty in proving “harass” is likely to crop up only in cases involving small landowners, who may not stop to consider how their actions affect wildlife.²²⁰

lawsuits have been filed challenging the rulemaking on procedural grounds); *see also* Press Release, Ctr. for Biological Diversity, Lawsuit Seeks Records on Trump’s Efforts to Weaken Habitat Protections for Imperiled Wildlife (June 18, 2025), <https://biologicaldiversity.org/w/news/press-releases/lawsuit-seeks-records-on-trumps-efforts-to-weaken-habitat-protections-for-imperiled-wildlife-2025-06-18/> [perma.cc/2KWP-Y75E] (explaining that the Center for Biological Diversity has filed a lawsuit against the Trump administration for its failure to release public records about the wildlife agencies’ decision to change the “harm” definition).

²¹⁴ *See* Cowan et al., *supra* note 11 (explaining that the change to the “harm” definition will drastically narrow the scope of “take”).

²¹⁵ *See* Griffin, *supra* note 69, at 1863 (arguing that it is time to “breathe life into the statutory term ‘harass’”); *see also* Boudreaux, *supra* note 30, at 733 (describing “take” litigation as the incisors of the ESA pit bull).

²¹⁶ *See infra* notes 217–252 and accompanying text.

²¹⁷ *See supra* notes 85–119 (examining clues as to the precise meaning of the “harass” state of mind requirement).

²¹⁸ *See* Memorandum from Martha Williams, Director, FWS to Regional Directors, FWS, *supra* note 116 (explaining that activities that “harass” species can be permitted under Section 10 of the ESA as “incidental takes” because “intentional” and “negligent” refer to the activity in question, not the likelihood that the activity will create injury) (citing *Sovereign Inupiat for a Living Arctic v. Bureau of Land Mgmt.*, 701 F. Supp. 3d 862, 910–911 (D. Alaska 2023), *aff’d in part, rev’d in part sub nom. Ctr. for Biological Diversity v. Bureau of Land Mgmt.*, 141 F.4th 976 (9th Cir. 2025)).

²¹⁹ *See* 16 U.S.C. § 1536(b)(3)(A) (ordering federal agencies to conduct biological assessments to evaluate projects’ expected impacts on endangered species).

²²⁰ *See* James Tyler Moore, Babbitt v. Sweet Home Chapter of Communities for a Great Oregon: Defining “Harm” Under Section 9 of the Endangered Species Act, 32 IDAHO L. REV. 81, 108 (1995) (criticizing the “harm” definition because, without a state of mind component, it “allows the FWS to impose criminal sanctions on private landowners for virtually any activity that the private landowner desires to undertake because he is ‘harming’ an endangered species through habitat modification; the endangered fauna or flora being of the kind that the private landowner never viewed or knew existed”).

Here, “harass” has an advantage over “harm.”²²¹ Recall that, in his 1995 *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon* dissent, Justice Scalia repeatedly warned that FWS’s “harm” regulations would convert ordinary activities of landowners—farming, construction, roadbuilding, and others—into grounds for criminal liability under Section 9 of the ESA.²²² The issue with extending “harm” to habitat modification, he claimed, was that it limited landowners’ freedom to manipulate their property, where any changes could have distant or unpredictable consequences to wildlife.²²³ Scalia’s concerns have been repeated many times by both scholars and defendant property owners.²²⁴

Whereas courts have attempted to mitigate this problem by reading limitations into the meaning of “harm,” a better solution is to apply “harass” instead.²²⁵ The “harass” definition gives small-scale private landowners the opportunity to avoid punishment for making changes to their property, thereby addressing the repercussions that worried Justice Scalia.²²⁶ Landowners who attempt to mitigate their damage, or who had no way of knowing about the protected species’ presence, can likely escape liability.²²⁷ On the other hand, the standard from *Sovereign Inupiat for a Living Arctic v. Bureau of Land Manage-*

²²¹ See Griffin, *supra* note 69, at 1866 (arguing that the state of mind element of “harass” eliminates some of the rule’s harshness to landowners, as compared to “harm”).

²²² See 515 U.S. 687, 721–22 (1995) (Scalia, J., dissenting) (“A large number of routine private activities—for example, farming, ranching, roadbuilding, construction and logging—are subjected to strict-liability penalties when they fortuitously injure protected wildlife, no matter how remote the chain of causation and no matter how difficult to foresee . . .”). Justice Scalia drew particular attention to the unfairness of the “harm” rule for “the simplest farmer who finds his land conscripted to national zoological use.” *Id.* at 714.

²²³ See *id.* at 715 (“Any ‘significant habitat modification’ that in fact produces that result by ‘impairing essential behavioral patterns’ is made unlawful, regardless of whether that result is intended or even foreseeable, and no matter how long the chain of causality between modification and injury.”).

²²⁴ See, e.g., Moore, *supra* note 220, at 108 (arguing that the “harm” regulations “clearly go[] against the sense of fairness and justice sought to be achieved by the legal system in the United States”); Wyman & Deming, *supra* note 35, at 96–97 (describing what the authors perceived as the dangers of the former “harm” regulations, explaining that “if a farmer innocently, yet intentionally, plows his private fields and by so doing unintentionally disturbs the habitat of an animal protected under the ESA, that farmer faces imprisonment and massive fines”).

²²⁵ See Griffin, *supra* note 69, at 1864–65 (arguing that “harass” should be understood to have a separate character and function from “harm”).

²²⁶ See Endangered and Threatened Wildlife and Plants; Proposed Redefinition of “Harm,” 46 Fed. Reg. 29490, 29491 (June 2, 1981) (explaining that strict liability would only apply if land use resulted in actual death or injury to a protected species, and that landowners can mitigate their liability by taking measures to avoid injury to wildlife).

²²⁷ See *id.* (discussing the state of mind requirements of “harass” as demanding a showing that the plaintiff “knew or reasonably should have known that his actions would be likely to injure wildlife”); *Sovereign Inupiat for a Living Arctic v. Bureau of Land Mgmt.*, 701 F. Supp. 3d 862, 911–13 (D. Alaska 2023) (considering an oil company’s steps to mitigate its impact on polar bears as a factor in its finding that a drilling project would not “harass” the bears), *aff’d in part, rev’d in part sub nom.* *Ctr. for Biological Diversity v. Bureau of Land Mgmt.*, 141 F.4th 976 (9th Cir. 2025).

ment sets the bar low enough to capture landowners and companies who recognize the danger to wildlife and move forward anyway.²²⁸ Thus, “harass” serves as a potentially fairer alternative to “harm”—shielding small landowners who act in good faith while still reaching companies that proceed despite known risks.²²⁹

B. Proving “Annoyance” and Resulting Disruption to Normal Behavioral Patterns May Be Less Burdensome in the Habitat Modification Context

Perhaps the biggest hurdle to reinvigorating “harass” is finding ways to neatly link habitat changes to animal annoyance, and further to changes in behavior.²³⁰ Although this is not an easy task, it is not so different from the challenges confronting litigants in “harm” cases.²³¹ Some of the biggest habitat-based threats to endangered species—such as climate change—involve complex chains of causality that are not easy for courts to assess.²³² Indeed, conservationists have struggled to prove “harm” in suits involving multiple actors or subtle ecological effects.²³³

Nevertheless, successful cases like *House v. U.S. Forest Service* and *Cascadia Wildlands v. Scott Timber Co.* suggest that proving annoyance and causal links to impacted behavioral patterns may be easier in the habitat modification

²²⁸ See *Sovereign Inupiat*, 701 F. Supp. 3d at 910–11 (holding that the “harass” definition calls only for a general intent to engage in an action likely to injure wildlife, not a specific intent to injure wildlife).

²²⁹ See Griffin, *supra* note 69, at 1866 (arguing that “harass” offers a middle path between the harshness of imposing strict liability requirements on landowners and requiring proof of actual death or injury to satisfy “harm”).

²³⁰ See, e.g., *All. for the Wild Rockies v. U.S. Dep’t of Agric.*, 772 F.3d 592, 605 (9th Cir. 2014) (finding insufficient evidence to link helicopter hazing to disturbances in grizzly bear feeding patterns); *Defs. of Wildlife v. Bernal*, 204 F.3d 920, 927 (9th Cir. 2000) (holding that the cactus ferruginous pygmy-owl would not be “harassed” by building a school near its habitat, explaining that the owl tolerates human activity).

²³¹ See Rasband, *supra* note 38, at 600 (offering lessons from tort law as a means of solving “vexing questions surrounding proof of causation” for “harm” claims involving water habitat modification); see, e.g., *Aransas Project v. Shaw*, 756 F.3d 801, 823–24 (5th Cir. 2014) (rejecting the claim that a state agency “harmed” whooping cranes by permitting private users to withdraw water from rivers, leading to crane deaths through indirect and unpredictable effects).

²³² See Matthew Gerhart, *Climate Change and the Endangered Species Act: The Difficulty of Proving Causation*, 36 *ECOLOGY L.Q.* 167, 188 (2009) (“[P]laintiffs face a serious obstacle in showing that a given action is a substantial factor in contributing to a harm caused by climate change.”); see, e.g., *Ctr. for Biological Diversity v. U.S. Dep’t of the Interior*, 144 F.4th 296, 314 (D.C. Cir. 2025) (finding that plaintiffs did not offer enough evidence that challenged oil wells would cause “harm” to listed species just because they would release additional greenhouse gases into the atmosphere, thereby contributing to climate change).

²³³ See Rasband, *supra* note 38, at 618–20 (describing the difficulty of accounting for causation in “harm” claims involving multiple tortfeasors); Eberhard, *supra* note 173, at 535–36 (writing that the law’s preference for conclusive determinations means certain types of probabilistic or inferential scientific evidence, especially about ecological phenomena, are often left out of “take” claim analysis).

context.²³⁴ In cases where a species’ primary breeding, feeding, or sheltering areas have been destroyed or altered, the extraordinarily high bar applied in *United States v. Hayashi* is unlikely to hamper litigants, because the case would concern serious and direct impacts to normal, not “abnormal,” activities.²³⁵ Habitat disruptions are also less likely to be temporary, making disruption to behaviors more visible and measurable, and less subject to the causation issues found in *Alliance for the Wild Rockies v. U.S. Department of Agriculture* and *Cold Mountain v. Garber*.²³⁶

Indeed, when it comes to profound, permanent changes to habitat, future “harass” claims may even prove intuitive to judges.²³⁷ As one law professor recently remarked, it would be pretty annoying and disruptive to find that your home is one day—suddenly—gone.²³⁸ Conservationist litigants should view the clear role that habitat has in supporting normal species behavior as a strength of “harass.”²³⁹

C. The Language of “Harass” Leaves Possibilities Open, Regardless of Wildlife Services’ Views

In the days of *Chevron* deference, courts gave great weight to agencies’ views about how and when their regulations should apply.²⁴⁰ Those days have come to an end.²⁴¹ Today, when agencies replace their regulations with silence,

²³⁴ See *supra* notes 163–173 and accompanying text (describing successful “harass” claims related to timber projects).

²³⁵ See 22 F.3d 859, 865 (9th Cir. 1993) (holding that only direct and serious disruptions to normal wildlife behavior suffice for “harass”). Although the *Hayashi* court viewed dolphins eating from a fishing line as abnormal behavior, actions that destroy ordinary feeding grounds would presumably count as direct and serious disruptions to normal behavior. See *id.* at 864–65 (noting that the underlying concern of the “harass” regulation is protecting animals “as a part of nature”); *House v. U.S. Forest Serv.*, 974 F. Supp. 1022, 1030 (E.D. Ky. 1997) (finding that a timber sale would “harass” bats by damaging their foraging habitat).

²³⁶ Compare *All. for the Wild Rockies v. U.S. Dep’t of Agric.*, 772 F.3d 592, 605 (9th Cir. 2014) (finding a lack of evidence to link temporary helicopter hazing to significant disruption of feeding behaviors among grizzly bears), and *Cold Mountain v. Garber*, 375 F.3d 884, 890 (9th Cir. 2004) (finding lack of proof that temporary helicopters hazing caused a bald eagle pair’s nest to fail), with *Cascadia Wildlands v. Scott Timber Co.*, 618 F. Supp. 3d 1038, 1068 (D. Or. 2022) (holding that a logging project would significantly disrupt important behaviors, like breeding, for at least one hundred years), *aff’d* by 105 F.4th 1144 (9th Cir. 2024).

²³⁷ See *infra* notes 238–239 and accompanying text.

²³⁸ See THE FEDERALIST SOCIETY, *supra* note 84, at 20:48–21:14 (presenting law professor Karrihan Börk, who remarked that “it certainly would annoy me if someone came in and cut my house down and that would probably prevent me from sheltering in my house anymore”).

²³⁹ See *id.* (suggesting that “harass” presents a formidable alternative to “harm”).

²⁴⁰ See Blumenthal et al., *supra* note 192 (describing the end of *Chevron* deference).

²⁴¹ See *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412 (2024) (“*Chevron* is overruled.”); Blumenthal et al., *supra* note 192 (explaining that statutory interpretation now “belongs almost exclusively to the judicial branch”).

courts must find the single best understanding of the applicable statute to fill the gap.²⁴²

The now-uncertain meaning of “harm” brings opportunity.²⁴³ Over the last several decades, judges have largely managed to avoid analysis of the “harass” regulations, relying on the Supreme Court-endorsed law of “harm” instead.²⁴⁴ With the “harm” definition gone, litigants today have the chance to press judges on the distinctions between “harm” and “harass,” especially as courts engage in statutory interpretation of the “harm” rule’s best meaning.²⁴⁵ Some courts may choose to avoid “harm” altogether—as they have often avoided “harass”—and sidestep statutory interpretation in favor of a regulation-based analysis when “harass” and “harm” claims are brought together.²⁴⁶ These opinions would, at the very least, provide much-needed case law elucidating the relationship between “harass” and habitat.²⁴⁷

Although FWS appears ready to reinterpret “take” generally to include only intentional impacts on wildlife—at least internally—the language of the ESA and the existing “harass” regulations do not engender this reading.²⁴⁸ Advocates should continue to press FWS to uphold its nondiscretionary duty to enforce the “take” prohibition as it is currently understood by courts.²⁴⁹ The hard part may be keeping up with the potential flood of assaults on habitat that the government’s new attitude toward “take” could inspire.²⁵⁰

²⁴² See *Loper Bright*, 603 U.S. at 400 (requiring courts to search for the best interpretation of ambiguous statutes).

²⁴³ See *infra* notes 244–247 and accompanying text.

²⁴⁴ See Quarles et al., *supra* note 66, at 83 (writing that “harass” has received little treatment by courts and conservationists).

²⁴⁵ Petersen et al., *supra* note 61 (writing that the relationship between “harass” and habitat modification has remained untested because “harm” explicitly addressed habitat modification under the old regulations).

²⁴⁶ See *Marbled Murrelet v. Babbitt*, 83 F.3d 1060, 1068 n.5 (9th Cir. 1996) (choosing not to consider plaintiffs’ “harass” claim after affirming a finding of “harm,” reasoning that the “harm” claim was sufficient to justify an injunction); *Am. Bald Eagle v. Bhatti*, 9 F.3d 163, 166 n.4 (1st Cir. 1993) (electing to not evaluate plaintiffs’ “harass” allegation after finding no proof of “harm”).

²⁴⁷ See Quarles et al., *supra* note 66, at 84 (writing that “harass” claims are often dropped before the merits of the claim are fully litigated).

²⁴⁸ See Einhorn, *supra* note 63 (describing an internal FWS memo obtained by wildlife advocates that characterizes “take” to apply only to intentional impacts on wildlife, and calling the move an “extraordinary shift in law”).

²⁴⁹ See 16 U.S.C. § 1540(g) (authorizing “any person” to seek an injunction against ESA violators, compel wildlife agencies to enforce the “take” prohibition, or otherwise sue agency officials to perform nondiscretionary duties).

²⁵⁰ See *THE DAILY*, *supra* note 64, at 15:54 (explaining that, for species on the cusp, FWS’s “take” interpretation could “just tip them over” into extinction by disincentivizing damage mitigation measures).

Regardless of how future courts interpret "harm" protections, the future of "harass" remains mostly undetermined.²⁵¹ Plaintiffs should press "harass" claims in habitat cases now, while the law is unsettled, so that courts must define how far the term reaches.²⁵²

CONCLUSION

Habitat destruction remains a pressing problem as ecosystems edge toward collapse. Even now, in the wake of major regulatory change, habitat protections for thousands of species stem mainly from a single word—"harm." It does not have to be this way. Wildlife advocates must look beyond "harm" to other language in the ESA to protect the environment that supports vulnerable species. "Harass" is the most promising option. The lack of case law currently available on "harass" means that conservationist plaintiffs will likely face an uphill battle in the courts. That said, critiques of "harass" as an effective "take" claim are not as strong as once perceived. By building a more robust body of case law treating "harass," conservationists stand to protect habitats against present and future threats.

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²⁵¹ See Quarles et al., *supra* note 66, at 84 (acknowledging the lack of attention given to "harass" by courts and parties thus far).

²⁵² See *supra* notes 243–247 and accompanying text.

