Rethinking the Irreparable Harm Factor in Wildlife Mortality Cases

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Introduction

In the wake of *Tennessee Valley Authority v. Hill*, the renowned Supreme Court decision in which the Court held that the Endangered Species Act (ESA) strictly prohibited any federal action that would cause the extinction of a species, Congress amended the ESA to provide for exemptions from the law. The amended statute provided that a committee of high-ranking government officials had the authority to grant exemptions from the statute, even if such actions would jeopardize the survival of a listed species. This committee has earned the nickname the “God Squad” because of its ability to decide the fate of a species. For better or for worse, U.S. courts are also often called upon to “play God” in deciding whether to enjoin actions that would cause the mortality of wildlife. This article considers how courts should best approach this tremendous responsibility.

Animal rights and environmental organizations often turn to the courts to prevent the proposed government-sanctioned killing of wildlife. For example, in April 2008, U.S. District Court Judge Michael Mosman denied a motion for a preliminary injunction that would have stopped the pending lethal removal of about thirty California sea lions (“sea lions”) feasting on salmon at Bonneville Dam in the Columbia River. The States of Oregon, Washington, and Idaho had received authorization from the federal government earlier in the year to enact dramatic control measures, including capturing and killing the “repeat offender” sea lions that had not been deterred by other control measures, in order to protect the salmon, which are listed as threatened species under the ESA. Shortly afterwards, the Humane Society of the United States (Humane Society) and several individual plaintiffs filed a lawsuit for injunctive relief, *Humane Society of the U.S. v. Gutierrez*, claiming that the federal government’s approval of the program violated the National Environmental Policy Act (NEPA) and the Marine Mammal Protection Act (MMPA), and was “arbitrary and

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3 CRAIG N. JOHNSTON, WILLIAM F. FUNK, & VICTOR B. FLATT, LEGAL PROTECTION OF THE ENVIRONMENT 646 (2d ed. 2007).
5 Although the killing of marine mammals is generally prohibited by the Marine Mammal Protection Act, there is an exception within the statute that allows for the Secretary of Commerce to authorize the “intentional lethal taking” of “individually identifiable” marine mammals that are having a “significant negative impact” on the recovery of threatened or endangered salmon. The Secretary found that the program had met this exception, and granted the authorization. Marine Mammal Protection Act, 16 U.S.C. § 1389(b)(1) (2000).
6 Memorandum in Opposition to Motion for Preliminary Injunction at 2-5, Humane Soc’y of the U.S. v. Gutierrez, No. 08-0357-MO (D.Or. Apr. 9, 2009) [hereinafter Fed. Def.’s Memo].
7 Humane Soc’y of the U.S. v. Gutierrez, 527 F.3d 788 (9th Cir. 2008).
capricious” under the Administrative Procedure Act (APA). They also filed a motion for a preliminary injunction, seeking to halt the program from taking effect until their case could be heard on the merits.⁸

Courts employ a balancing test in which they weigh four factors in order to decide whether to grant preliminary injunctions. The “balancing” factors are (1) the likelihood that the moving party will succeed on the merits of the lawsuit; (2) the likelihood that a failure to issue a preliminary injunction will cause irreparable harm to the plaintiff’s interests; (3) the balance of hardships of issuing an injunction on both parties; and (4) the effect that granting the injunction will have on the public interest.⁹ Although courts weigh all four factors, the sine qua non of preliminary injunctive relief is that the plaintiff must establish that the failure to issue an injunction would result in the likelihood of irreparable harm to its interests.¹⁰ In their arguments on the preliminary injunction in Humane Society, both parties argued that the balance of hardships tipped in their favor and that they would suffer irreparable harm should they lose. The Humane Society argued that its members’ personal enjoyment of the sea lions that frequent the dam area would be irreparably harmed if any of the sea lions were killed.¹¹ On the other hand, the government argued that the issuance of an injunction would irreparably harm the listed salmon because without lethal removal, the sea lions would continue to impact the already vulnerable fish.¹²

Judge Mosman concluded that the plaintiffs had not met their burden of establishing the likelihood of irreparable harm, because “[t]he [only] harm that plaintiffs rely on is the harm of individual plaintiffs in their individual relationships with specific sea lions,”¹³ and “that’s an argument that proves too much.”¹⁴ In other words, he reasoned that the harm to plaintiffs’ relationships to individual sea lions, in the absence of other demonstrated harms, was not sufficient to establish that the program would result in irreparable harm to their interests. Critical to his decision was the fact that the sea lions at issue were part of a large, thriving population of California sea lions in the region, so the plan would not affect “sea lions as a fungible viewing quantity on the lower Columbia” because only a small percentage of that population would be removed.¹⁵ Based upon his application of this “irreparable harm” factor and the

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¹⁰ See Daniel Riesel, Preliminary Injunctions and Stays Pending Appeal in Environmental Litigation 442 (ALI-ABA Course of Study, No. SN085, 2008).
¹¹ See Plaintiffs’ Memo, supra note 8, at 26–28.
¹³ See Transcript of Oral Argument, supra note 4, at 33.
¹⁴ Id. at 34.
¹⁵ Id. at 33.
other preliminary injunctive factors, Judge Mosman denied the preliminary injunction.\textsuperscript{16}

Just days after Judge Mosman’s decision, the Ninth Circuit Court of Appeals granted the Humane Society’s emergency motion for a stay pending appeal of the district court’s decision and ordered that the sea lion removal plan cease to take effect pending an expedited appeal.\textsuperscript{17} The court disagreed with Judge Mosman’s conclusion on the issue of irreparable harm, stating that “the lethal taking of the California sea lions is, by definition, irreparable.”\textsuperscript{18} Although the court also concluded that the granting of an injunction would constitute irreparable harm to the salmon populations,\textsuperscript{19} it found that the balance of hardships tipped in favor of the plaintiffs because the size of the salmon run for the year was predicted to be unusually large, diminishing the sea lions’ overall impact.\textsuperscript{20} Thus, it granted the emergency stay pending appeal.\textsuperscript{21}

In November 2008, in deciding the case on the merits, Judge Mosman granted the government’s motion for summary judgment, holding that the program did not violate the provisions of NEPA or the MMPA and that the government’s authorization of the program was not otherwise “arbitrary and capricious.”\textsuperscript{22} The Humane Society appealed the decision, and again sought a stay pending appeal so the program could not take effect in the spring of 2009. However, this time the Ninth Circuit denied the stay.\textsuperscript{23} As a result, in the spring of 2009, the states have killed at least seven sea lions, and captured at least seven others to be transferred to zoos or marine parks to live in captivity.\textsuperscript{24} However, because the Humane Society appeal is still pending before the Ninth Circuit, the long term fate of the program—and numerous sea lions that continue to hunt at Bonneville Dam—remains uncertain.

This article seeks to address how courts should decide preliminary injunctions in difficult cases like this one. The differences between the district and appellate courts’ analyses of irreparable harm in Humane Society raise important and relevant questions about how courts, in determining whether to issue preliminary injunctions in cases involving wildlife mortality, characterize and analyze irreparable harm. These cases establish that courts may differ significantly in deciding what interests to consider, and the weight various

\textsuperscript{16} See id. at 37.
\textsuperscript{17} See Humane Soc’y of the U.S. v. Gutierrez, 527 F.3d 788 (9th Cir. 2008).
\textsuperscript{18} Id. at 790.
\textsuperscript{19} Id.
\textsuperscript{20} Id.
\textsuperscript{21} Id.
\textsuperscript{22} Humane Soc’y of the U.S. v. Gutierrez, No. CV 08-357-MO, slip op. (D.Or. Nov. 25, 2008), 2008 WL 5111106.
interests should be given, in the irreparable harm analysis. Judge Mosman determined that plaintiffs had not met their burden of establishing irreparable harm because the harm they relied upon was very individualized; the Ninth Circuit, however, held that the plaintiffs had met this burden because the taking of sea lions is, by definition, irreparable. These differences illustrate that courts’ analyses of irreparable harm can vary considerably depending on how they characterize the relevant harm.

This article is divided into three parts. Part I explores how federal courts have defined and analyzed the issue of irreparable harm in cases similar to *Humane Society*, in which plaintiffs seek preliminary injunctions to prevent the killing of wildlife until their cases can be heard on the merits. I argue that in analyzing irreparable harm in these cases, courts have generally focused on four types of “harm” that would flow from the action plaintiffs seek to enjoin: (1) the overall impacts to wildlife species or populations; (2) harm to individual members of a threatened or endangered species; (3) harm to the environment as a whole; and (4) harm to plaintiffs’ aesthetic interests in viewing the wildlife that will be killed. In Part II, I assert that reform is needed in this area of the law for two primary reasons. First, basing the analysis of irreparable harm on plaintiffs’ aesthetic interests is inherently flawed; the approach contradicts the principle that preliminary injunctions are an “extraordinary remedy” and also can undermine the policies underlying environmental statutes. Second, the other three approaches, while not inherently flawed, are problematic because they fail to rely upon any fundamental theory about how they should be applied. As a result, courts deciding these cases—even within the same circuit—have often been inconsistent. Because of these problems, I argue that all four approaches should be replaced with a single, uniform standard for analyzing irreparable harm.

In Part III, I propose a new model directing courts to define the scope and nature of the harm to be considered by looking to the “primary purpose” of the statute at issue. This approach has a number of benefits, including providing consistency, allowing congressional intent to inform the irreparable harm analysis, and ensuring that plaintiffs’ specific interests do not undermine the public interest or the goals of environmental laws. According to this framework, if the proposed action causes harms that are encompassed by the “primary purpose” of the statute, such an action would likely result in irreparable harm. To clarify how courts should apply this standard, I apply it to three statutes—the Endangered Species Act, the Marine Mammal Protection Act, and the National Environmental Policy Act. It is important to note that this standard is meant to replace only the current approaches for analyzing irreparable harm, not the entire traditional four-factor test for injunctive relief. As a result, even if a

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court finds irreparable harm under the proposed standard, it retains the flexibility to weigh this finding against the other relevant factors for deciding preliminary injunctions, including whether the injunction would serve the public interest.

I. Current Approaches Utilized by Courts in Analyzing Irreparable Harm

U.S. courts apply a uniform test for deciding preliminary injunctions, in which they weigh the following four factors: (1) the probability of plaintiff’s success on the merits; (2) the likelihood of irreparable harm to the plaintiff; (3) the balance of hardships between the parties; and (4) the public interest.\(^{28}\) Irreparable harm is often referred to as the “\textit{sine qua non}” of interlocutory relief because despite courts’ discretion to weigh the above factors as they see fit, “[some] showing of irreparable harm is a prerequisite for the issuance of a preliminary injunction in any case.”\(^{29}\) Thus, to gain preliminary injunctive relief, a plaintiff must establish that not only that her interests will be harmed during the time between the preliminary injunction motion and a full trial on the merits, but also that such harm will be “irreparable.”

The Supreme Court has defined “irreparable” harm as that which, at the conclusion of the trial, cannot be adequately compensated by a monetary award or other forms of recovery available at law.\(^{30}\) It has also stated that “[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, \textit{i.e.}, irreparable.”\(^{31}\) However, the Court has also emphasized that there should be no presumption of irreparable harm in environmental cases; rather, courts should use their discretion to determine the existence of irreparable harm on a case-by-case basis.\(^{32}\) As a result, courts have utilized a wide variety of approaches to determining whether particular actions that affect the environment constitute irreparable harm.\(^{33}\)

One area in which the differences among courts in evaluating irreparable harm has been especially pronounced is in cases involving preliminary injunctions that seek to stop the lethal removal of wildlife, such as \textit{Humane Society}. As the cases described below demonstrate, U.S. courts have varied considerably in determining whether the taking of animals constitutes

\(^{32}\) See id.
\(^{33}\) See Riesel, supra note 10, at 451 (“[N]o . . . clear rule on what constitutes irreparable harm has emerged from the post-Gambell cases, and as a consequence the burden faced by a movant in these cases varies greatly across courts.”).
irreparable harm for purposes of granting preliminary injunctions. The cases are organized according to four broad categories: (1) those that base the analysis of irreparable harm on impacts to entire species or populations of wildlife (the “Frizzell rule approach”); (2) those that base irreparable harm on harm to the environment generally (the “environmental harm approach”); (3) those that base the analysis on harm to a few individual animals that are part of listed species (the “endangered species approach”); and (4) those that analyze irreparable harm solely by considering the harm to plaintiffs’ aesthetic interests in viewing animals (the “aesthetic injury approach”). The following section will describe these approaches.

A. The “Frizzell Rule” Approach

Many courts, in analyzing whether to preliminarily enjoin actions that involve the killing of wildlife, have focused on whether the action at issue would harm overall species or populations of animals. This standard was established by a 1975 D.C. Circuit case, Fund for Animals v. Frizzell. In this case, plaintiffs moved for a preliminary injunction against federal regulations that allowed for hunting of certain species of protected migratory birds until their NEPA claims against the regulations could be considered. Plaintiffs argued that the “destruction and loss of wildlife” resulting from the allowance of hunting on the refuges demonstrated irreparable harm. However, the government argued that the level of hunting allowed by the regulations would have no long-term impact on the overall bird populations, and thus that the plaintiffs had failed to demonstrate the requisite irreparable harm. The court agreed with the government, stating:

We cannot accept [plaintiffs’] extreme contention that the loss of only one bird is sufficient injury to warrant a preliminary injunction; rather, a proponent of such an injunction must raise a substantial possibility that the harvest of excessive numbers of these waterfowl will irretrievably damage the species. To equate the death of a small percentage of a reasonably abundant game species with irreparable injury without any attempt to show that the well-
being of that species may be jeopardized is to ignore the plain meaning of the word. 39

Although it is obvious that hunted birds themselves would be killed and thus irreparably harmed, the court nevertheless concluded that the plaintiffs had not met their burden of establishing irreparable harm because they could not establish that the bird species on the whole would be harmed. 40 Throughout this article, I will refer to the principle that harm must impact an entire species or population of wildlife as the “Frizzell rule.” Several other courts have followed the “Frizzell rule” in concluding that actions that would kill wildlife, but not impact the wildlife species or population as a whole, would not result in irreparable harm. 41 In each of these cases, because plaintiffs failed to meet the burden of establishing irreparable harm, the courts ultimately denied the motions for preliminary injunctions.

B. The Environmental Impacts Approach

Other courts have based their analyses of irreparable harm on whether actions that would cause the mortality of wildlife would harm the overall health of the ecosystems or human environments in general. I will call this the “environmental impacts approach.” In Greater Yellowstone Coalition v. Flowers, 42 the Tenth Circuit used this approach in considering whether to preliminarily enjoin a proposed golf course development that the plaintiffs claimed violated the Clean Water Act. 43 Plaintiffs established that the development would cause the loss of three out of four bald eagle nests and twelve juvenile bald eagles before the case could be heard on the merits, and therefore would cause irreparable harm. 44 The district court relied on the “Frizzell rule” to deny the injunction, holding that because the development did not impact the entire

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39 Id. at 987 (emphasis added).
40 See id.
41 See, e.g., Water Keeper Alliance v. U.S. Dep’t of Defense, 271 F.3d 21 (1st Cir. 2001) (rejecting the plaintiff’s assertion that the “death of even a single member of an endangered species” was sufficient to justify granting injunctive relief, and stating that in the absence of a more concrete showing of probable deaths during the interim period and a showing of how these deaths may impact the species, the district court’s conclusion that the plaintiff failed to show potential for irreparable harm was not an abuse of discretion); Fund for Animals v. Lujan, 962 F.2d 1391 (9th Cir. 1992) (finding no irreparable harm would ensue from the lethal removal of bison that had migrated outside of federal park boundaries because the bison had been able to repopulate after significant past reduction efforts and because the herd size was in excess of its historic population); S. Utah Wilderness Alliance v. Thompson, 811 F.Supp. 635 (D. Utah 1993) (finding no irreparable harm in considering a motion to preliminarily enjoin the lethal control of coyotes, because “the coyote population will remain viable”).
42 321 F.3d 1250 (10th Cir. 2003).
43 Id. at 1252.
44 Id. at 1256, 1258-61.
population of bald eagles, the plaintiffs had not met their burden of establishing irreparable harm.\textsuperscript{45} The Tenth Circuit, however, reversed the district court’s holding on that issue.\textsuperscript{46} It reasoned that because plaintiffs were challenging the issuance of a permit under the Clean Water Act, the court should consider the purpose of that statute to define the “harm” for purposes of analyzing irreparable harm, stating that

\begin{quote}
[the] language [of regulations enacted pursuant to the Clean Water Act] does not differentiate between harm to individual animals and harm to the species as a whole: rather, it looks to the impact on the “aquatic ecosystem.” . . . [E]liminating bald eagles from the Snake River area would certainly have an “adverse impact on the aquatic ecosystem,” as bald eagles are an important part of that ecosystem.\textsuperscript{47}
\end{quote}

The court concluded that because the development in question would negatively affect the aquatic ecosystem as a whole, plaintiffs were not required to make a showing that the project would have a significant negative impact on the entire bald eagle population.\textsuperscript{48} Based upon this reasoning, the court found that the plaintiffs had demonstrated their requisite showing of irreparable harm.\textsuperscript{49} Other courts have defined harm in terms of harm to the human environment. For example, in \textit{Fund for Animals v. Lujan},\textsuperscript{50} the Ninth Circuit considered a motion for a preliminary injunction to halt the proposed government-sanctioned killing of bison that plaintiffs claimed was in violation of NEPA. Although the court held that the plaintiffs’ aesthetic interests in viewing the bison were sufficient to establish standing, it did not consider plaintiffs’ aesthetic interests in its analysis of irreparable harm in weighing the preliminary injunction factors.\textsuperscript{51} Rather, it focused nearly all of the discussion of irreparable harm on the risk that brucellosis, a disease spread by bison, posed to cattle and human health.\textsuperscript{52} It concluded that “[t]he Fund has failed to demonstrate that the 1990 bison management plan will result in irreparable harm to the human environment,” and ultimately denied the preliminary injunction.\textsuperscript{53}

\begin{footnotes}
\item[45] Id. at 1256.
\item[46] Id. at 1257-58. However, the court did not overturn the district court’s denial of a preliminary injunction, but rather remanded the case back to the district court to have it consider other factors (the balance of harms and the public interest) that it had not considered in its initial opinion. \textit{Id.} at 1262.
\item[47] Id. at 1257–58.
\item[48] Id.
\item[49] Id.
\item[50] 962 F.2d 1391 (9th Cir. 1992).
\item[51] Id. at 1396–97, 1400-01.
\item[52] Id. at 1400–01.
\item[53] Id. at 1402 (emphasis added).
\end{footnotes}
C. The Endangered Species Approach

In Greater Yellowstone Coalition, discussed above, the Tenth Circuit refused to apply the “Frizzell rule” requiring harm to a total population of animals to the bald eagles. It distinguished the case before it from Frizzell based upon the fact that in Frizzell, the wildlife at issue were part of a “reasonably abundant game species,” whereas bald eagles were listed as a threatened species under the ESA. Numerous other courts, utilizing what this article will subsequently refer to as the “endangered species” approach, have declined to apply the “Frizzell rule” in cases in which the action at issue would affect members of endangered or threatened species. These courts have emphasized that because of the high priority Congress placed on protecting endangered species in the ESA, harm to just a few members of an endangered species is often irreparable. For example, in a 1991 case a district court considered whether the proposed killing of between three and nine grizzly bears, a threatened species, would constitute irreparable harm. It held that “[i]n light of [the] Congressional mandate [to prioritize the protection of endangered species], the loss even of the relatively few grizzly bears that are likely to be taken through a sport hunt during the time it will take to reach a final decision in this case is a significant, and undoubtedly irreparable, harm.”

However, courts are divided about whether plaintiffs who establish that only a small number of endangered or threatened species will be killed have automatically shown irreparable harm. In Tennessee Valley Authority v. Hill, mentioned in the Introduction, the Supreme Court held that because the ESA clearly manifested an intent on the part of Congress to protect endangered species at nearly all costs, courts’ equitable discretion is restricted when an action threatens the survival of an endangered species. It stated that the “language, history, and structure” of the ESA indicate “beyond doubt” that “Congress intended endangered species to be afforded the highest of priorities.”

However, despite this precedent, there has been significant disagreement among lower federal courts about whether actions that would kill individual members of an endangered species always satisfy the irreparable harm element for

54 See Greater Yellowstone Coal. v. Flowers, 321 F.3d 1250 (10th Cir. 2003).
55 Id. at 1256-57.
56 See, e.g., Nat’l Wildlife Fed’n v. Burlington N. R.R., 23 F.3d 1508, 1512 n.8 (9th Cir. 1994) (holding that the threat of extinction of a species is not necessary to merit injunctive relief).
58 Id. at *8.
60 Id. at 194.
61 Id. at 174. In Burlington Northern Railroad, the Ninth Circuit referred to this portion of the Supreme Court’s opinion and stated that it meant that Congress had determined “that the balance of hardships and the public interest tips heavily in favor of protected species.” See Burlington, 23 F.3d at 1511.
preliminary injunctions.\textsuperscript{62} For example, in \textit{Loggerhead Turtle v. County Council of Volusia County},\textsuperscript{63} the district court held that “any threatened harm [to an endangered species] is \textit{per se} irreparable harm,”\textsuperscript{64} and that “[a]ny taking and every taking—even of a single individual of the protected species,” constitutes irreparable harm.\textsuperscript{65} However, in \textit{Water Keeper Alliance v. U.S. Department of Defense},\textsuperscript{66} the First Circuit held that the district court did not abuse its discretion in concluding that the “death of . . . a single member of an endangered species” did not constitute irreparable harm in the preliminary injunction analysis.\textsuperscript{67} I will return to the discussion of how courts evaluate harm to endangered species in Part III of this Article in applying the proposed framework to cases brought under the Endangered Species Act.

\textbf{D. The Aesthetic Injury Approach}

The fourth general approach employed by U.S. courts in deciding irreparable harm is what this article will term the “aesthetic injury approach.” In these cases, courts considered only the plaintiffs’ specific aesthetic interests in viewing wildlife as relevant to the irreparable harm analysis.\textsuperscript{68} Before discussing the injunction cases, however, it is important to review briefly how aesthetic injuries became recognized as cognizable legal injuries for standing purposes. This is so because courts using the “aesthetic injury” approach to analyzing irreparable harm draw upon standing law to define the relevant injuries.

Plaintiffs invoking environmental laws have often relied on injury to their aesthetic interests to establish the “injury in fact” element of standing. The first case to establish this principle was \textit{Sierra Club v. Morton},\textsuperscript{69} in which the Supreme Court held that plaintiffs’ aesthetic and recreational interests were cognizable legal interests, which, if harmed, established the requisite “injury in fact” element of standing.\textsuperscript{70} In \textit{Japan Whaling Association v. American Cetacean Society}, the Court expanded the doctrine of aesthetic and recreational interests to specifically include plaintiffs’ interests in viewing, photographing, and studying wildlife.\textsuperscript{71} It held that plaintiffs who enjoyed viewing and studying whales had

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\footnotesize{\begin{itemize}
\item \textsuperscript{62} See Animal Welfare Inst. v. Martin, 588 F. Supp. 2d 70, 102-06 (D.Me. 2008), for a detailed discussion of the various approaches taken by federal courts on this issue.
\item \textsuperscript{63} 896 F. Supp. 1170 (M.D. Fla. 1995).
\item \textsuperscript{64} \textit{Id.} at 1178.
\item \textsuperscript{65} \textit{Id.} at 1180 (emphasis in original).
\item \textsuperscript{66} 271 F.3d 21 (1st Cir. 2001).
\item \textsuperscript{67} \textit{Id.} at 34.
\item \textsuperscript{68} For the purpose of simplicity, I refer to these interests collectively throughout this Article as plaintiffs’ aesthetic interests in viewing wildlife. However, this term is meant to encompass interests such as photographing wildlife and viewing wildlife while hiking and engaging in other outdoor recreational activities.
\item \textsuperscript{69} 405 U.S. 727 (1972).
\item \textsuperscript{70} \textit{Id.} at 734-40.
\item \textsuperscript{71} 478 U.S. 221 (1986).
\end{itemize}}
standing to bring a lawsuit to enjoin alleged violations of international whaling agreements. The Court stated that “[plaintiffs] undoubtedly have alleged a sufficient ‘injury in fact’ in that the whale watching and studying of their members will be adversely affected by continued whale harvesting.” Several lower courts have subsequently granted plaintiffs standing to challenge actions that would harm their aesthetic interests in viewing wildlife.

Although the notion that aesthetic interests are cognizable legal interests is rooted in standing doctrine, some courts have used injury to plaintiffs’ aesthetic interests as a basis for defining and analyzing irreparable harm in the preliminary injunction context. Two cases decided by the U.S. District Court for the District of Columbia, Fund for Animals v. Espy and Fund for Animals v. Clark, are illustrative of this approach. In both cases, the plaintiffs sought preliminary injunctions to prevent the proposed killing of bison before their claims for violations of NEPA could be considered on the merits. Additionally, none of the actions challenged by the plaintiffs in either case posed a threat to the overall bison populations, and the bison were neither threatened nor endangered. However, in arguing for injunctive relief, plaintiffs claimed that their aesthetic interests in viewing the bison would be irreparably harmed by the proposed actions, both in being forced to witness the “slaughter” of the bison and in losing the opportunity to view individual bison to which they had become attached. In both cases, the district court upheld these arguments, finding that the plaintiffs had met their burden of showing irreparable harm and ultimately granting the preliminary injunctions. In Espy, the court wrote that [e]ach of [the plaintiffs] enjoys the . . . bison in much the same way as a pet owner enjoys a pet, so that the sight, or even the

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72 Id. at 230 n.4.
73 Id.
74 See, e.g., Fund for Animals v. Lujan, 962 F.2d 1391, 1396-97 (9th Cir. 1992) (holding that plaintiffs who had an aesthetic interest in viewing free-roaming bison had standing to challenge government program to kill members of the herd); Humane Soc’y v. Hodel, 840 F.2d 45, 52 (D.C. Cir. 1988) (holding that plaintiffs’ aesthetic interests in viewing birds met the injury in fact requirement to establish standing in a suit challenging hunting on wildlife refuges); Fund for Animals v. Norton, 281 F. Supp. 2d. 209, 221-22 (D.D.C. 2003) (finding that plaintiffs had established standing to challenge eradication of invasive mute swans in Chesapeake Bay region because the reduction in the swan population would impact plaintiffs’ viewing opportunities).
77 In Espy, the action involved the capture and slaughter of between ten and sixty bison out of a herd of 2400; in Clark, thirty-five to forty out of 435 animals would be hunted. Espy, 814 F. Supp. at 144-45; Clark, 27 F. Supp. at 10, 15.
78 See Espy, 814 F. Supp. at 151; Clark, 27 F. Supp. 2d. at 14.
79 See Espy, 814 F. Supp. at 151; Clark, 27 F. Supp. 2d. at 14.
contemplation, of treatment in the manner contemplated . . . would inflict [irreparable] aesthetic injury upon the . . . plaintiffs.\textsuperscript{80}

Similarly, the Clark court relied on the Espy holding to find irreparable harm to plaintiffs’ aesthetic interests, stating that “the aesthetic injury the individual plaintiffs would suffer from seeing or contemplating the bison being killed in an organized hunt leads the court to conclude that the plaintiffs have carried their burden of demonstrating the presence of an irreparable harm should the court not grant injunctive relief.”\textsuperscript{81} Thus, in both cases, the court measured irreparable harm solely from the perspective of the plaintiffs’ aesthetic interests.\textsuperscript{82}

In Fund for Animals v. Norton,\textsuperscript{83} the District Court for the District of Columbia again focused solely on the plaintiffs’ aesthetic interests in considering whether plaintiffs had met their burden of establishing irreparable harm.\textsuperscript{84} In this case, plaintiffs, claiming violations of NEPA and the Migratory Bird Treaty Act,\textsuperscript{85} moved to preliminarily enjoin the government’s grant of a depredation permit to allow the State of Maryland to take lethal measures to control mute swans, an invasive species that was threatening ecosystem health in the Chesapeake Bay region.\textsuperscript{86} The court held that the plaintiffs had met their burden of establishing the existence of substantial irreparable harm if the depredation plan were to take effect, inasmuch as their “abilit[ies] to view, interact with, study, and appreciate mute swans will be affected by defendants’ actions, and therefore irreparable harm to their aesthetic interests will ensue.”\textsuperscript{87} Further, it emphasized that the “question of irreparable injury does not focus on the significance of the injury, but rather, whether the injury, irrespective of its gravity, is irreparable—that is whether there is any adequate remedy at law.”\textsuperscript{88} Based upon these findings, the court granted the motion for a preliminary injunction.\textsuperscript{89} As in Espy and Clark, the Norton court concluded that the plaintiffs had established the necessary showing of irreparable harm despite their failure to present evidence showing that the proposed control plan would result in harm to the total swan population or the ecosystem as a whole.\textsuperscript{90}
Part II will address the reasons this approach undermines both the goals of injunctive relief and the policies underlying wildlife and environmental protection statutes.

II. A Case for Reform

U.S. courts have taken varied and often conflicting positions about whether, and under what circumstances, actions that threaten to kill wildlife establish the requisite irreparable harm necessary for preliminary injunctive relief. As discussed above, courts have utilized four general approaches to analyzing irreparable harm in wildlife mortality cases, focusing on (1) harm to overall wildlife populations or species; (2) harm to ecosystems and/or human environments; (3) harm to members of threatened or endangered species; and (4) harm to plaintiffs’ aesthetic interests in viewing animals.91

The Supreme Court has not attempted to bring order to this confusion. As a result, even within individual circuits, courts have applied different approaches in similar factual situations, leading to a lack of clarity about what standard will be applied in a given case. The lack of a clear, uniform standard harms the reliance interests of potential litigants, undermines principles of fairness, and leads to conflicting precedents within circuits.

Further, the current situation is in need of reform for reasons that go beyond the lack of a predictable approach. First, the “aesthetic interest” focus is inherently flawed because it undermines both the principle of injunctive relief as an “extraordinary remedy” and the policies underlying environmental statutes. Second, the other three approaches, while not inherently flawed, are problematic because they lack any coherent theory that will help courts sort out the conflicting values and interests that often arise when injunctions are sought, especially in the environmental protection context. about which approach should be applied in particular circumstances. For these reasons, it is important to develop a new standard to replace all four current approaches. The problems with the current system, as well as the need for a new standard, will be discussed in greater detail below.

A. Inherent Flaws Within the Aesthetic Injury Approach

1. This approach undermines the notion of injunctive relief as an “extraordinary remedy.”

Defining irreparable harm solely by considering a plaintiff’s aesthetic interests can undermine the intended purpose of injunctive relief as an extraordinary remedy. The Supreme Court has repeatedly emphasized that preliminary injunctions are an “extraordinary remedy never awarded as of

91 See supra text accompanying note 9.
right.” 92 In Weinberger v. Romero-Barcelo, the Court stated, “[i]n exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction.” 93 In its recent decision in Winter v. Natural Resources Defense Council, the Court again emphasized this principle, stating that “[i]ssuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.” 94

In contrast, injury in fact is a requirement that every plaintiff must fulfill to bring a lawsuit in federal court. 95 If establishing “injury in fact” for standing automatically also establishes the injury required for a preliminary injunction, courts will be required to grant such relief unless they find that the injury is not “irreparable.” Depending on the meaning of “irreparable,” the remedy might no longer be extraordinary in practice. The concern is real because, as one commentator has observed, “[w]hether a particular act is irreversible depends on how it is characterized.” 96 As mentioned above, the Supreme Court has stated that “irreparable” harm is that which cannot be adequately compensated by a

93 See Romero-Barcelo, 456 U.S. at 312.
94 See Winter, 129 S.Ct. at 375–76 (emphasis added).
96 See Cass R. Sunstein, *Irreversible and Catastrophic*, 91 CORNELL L. REV. 841, 860-61 (2006). Although Sunstein uses the term “irreversible” and the standard for preliminary injunctions is whether a particular harm is “irreparable,” the same principle applies to both words. In his article, Sunstein argues for the adoption of a “Irreversible Harm Precautionary Principle” in certain cases that would cause irreversible harm to the environment, so that “an irreversible decision must clear a higher [legal] hurdle than a reversible one.” Id. at 859. However, Sunstein recognizes that an important limitation on this concept is the highly malleable notion of irreversibility, stating,

> [f]rom one point of view, no clear line separates the reversible from the irreversible. The question is not whether some effect can be reversed, but instead at what cost; areas that have been developed or otherwise harmed can often be returned to their original state, even if at considerable expense. Lost forests, for example, can be restored. But for the Irreversible Harm Precautionary Principle, there is a more serious conceptual difficulty, which is that whether a particular act is irreversible depends on how it is characterized. Any death, of any living creature, is irreversible, and those who invoke irreversibility do not intend the notion of irreversible harm to apply to each and every mortality risk. . . . Environmentalists who are concerned about irreversibility must have something far more particular in mind. They must mean something like a large-scale alteration in environmental conditions, one that imposes permanent, or nearly permanent, changes on those subject to them. But irreversibility in this sense is not a sufficient reason for a highly precautionary approach.

*Id.* at 860–61.
monetary award or other forms of recovery available at law. In cases involving plaintiffs’ subjective aesthetic interests, the characterization of injuries as “irreparable” is especially malleable. Thus, if a plaintiff’s injury in fact is defined broadly enough, courts can find irreparable harm in nearly any proposed action. If this occurs, the goal of preliminary injunctions as an extraordinary remedy is undermined.

For example, consider the court’s decision in Espy that the “sight, or even the contemplation, of treatment [of bison] in the manner contemplated . . . would inflict [irreparable] aesthetic injury upon the . . . plaintiffs.” In that case, plaintiffs claimed that even if they did not personally witness the bison being killed, they would be injured by the mere thought that any of the bison they enjoyed viewing were being killed. They also argued that because such an injury was not compensable in money damages, it was “irreparable.” However, if courts were to universally follow this principle, plaintiffs could establish irreparable harm in nearly all cases involving wildlife mortality merely by alleging that they experienced emotional pain through contemplating animals being killed. If it is this easy for people who view animals to establish irreparable harm, injunctive relief will no longer be extraordinary.

2. The “aesthetic injury” approach can undermine environmental policies.

The second problem with the “aesthetic injury” approach is that it can undermine the goals underlying environmental statutes. This is problematic because in deciding motions for injunctive relief, courts are bound to consider and advance the underlying goals of the statutes being invoked in a particular case. One way to do this is to consider the goals of the statute in weighing the “public interest” prong in the four-factor test. According to this approach, if issuing an injunction is contrary to the public interest even upon a showing of irreparable harm, courts should not grant the injunction. However, courts utilizing the aesthetic injury approach have failed to use the public interest factor—and the underlying statutory goals—to refuse to grant injunctions despite their findings of irreparable harm. As a result, they have granted

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97 See Romero-Barcelo, 456 U.S. at 312.
99 Id.
100 Id.
101 However, these plaintiffs would still have to meet the injury in fact requirements for standing articulated in Lujan, meaning they must have an actual, concrete interest in viewing such animals, must have visited the areas where the animals were threatened in order to view them, and must plan to do so again. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 562-67 (1998).
102 See, e.g., Amoco Prod. Co. v. Vill. of Gambell, 480 U.S. 531, 544-46 (1987) (holding that an injunction was improper because the conduct enjoined would not adversely affect “subsistence uses” of land, which was the ultimate goal of Congress in enacting the statute at issue).
103 See infra text accompanying notes 106-109, discussing the Norton court’s failure to consider the underlying goals of NEPA in evaluating the public interest factor. Similarly, neither
preliminary injunctions that conflict with the underlying goals of the statutes being invoked. If granting a preliminary injunction conflicts with the goals of the statute at issue, courts are not acting in accordance with their duty of interpreting the law in accordance with congressional intent.

The failure of the “aesthetic injury” approach to consider statutory goals is especially problematic in cases in which the actions that plaintiffs are seeking to enjoin would actually benefit the natural environment. For example, in Fund for Animals v. Norton, the mute swans that the plaintiffs enjoyed viewing were an invasive, highly abundant species that was decimating the native ecosystem in the Chesapeake Bay. The plaintiffs’ lawsuit was based on NEPA, but they “did not assert . . . that any environmental harm would result from [the] removal of 525 mute swans from the Chesapeake Bay. . . .” However, the court nonetheless upheld the plaintiffs’ assertions of irreparable harm based solely upon their aesthetic interests in viewing the swans. Additionally, the court did not use the public interest factor to “check” its finding of irreparable harm. Rather, it only cited the public’s interest in ensuring that government agencies comply with NEPA as a reason for determining that the injunction was in the public interest. Curiously, it also recognized that “defendants identified an equally strong public interest in preservation and restoration of Chesapeake Bay and its natural and commercial resources,” but nevertheless found that the public interest favored the plaintiffs.

Similarly, in Humane Society, the plaintiffs alleged only harm to their aesthetic interests, rather than harm to the marine ecosystem as a whole. They presented evidence that indicated that the removal of such a small percentage of the otherwise thriving population of sea lions would harm the larger ecosystem. Further, many scientists supported the taking. The National Marine Fisheries Service granted the permits to allow the states to take the sea lions pursuant to Section 120 of the MMPA only after a task force comprised of representatives from the scientific, conservation, fishing, and recreational interests concluded that the sea lions were having a significant negative impact on the recovery of

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104 See Cucuzzella, supra note 86, at 110–11.
105 Id. (emphasis added).
107 Id. at 237.
108 Id.
109 Id.
110 See generally Plaintiffs’ Memo, supra note 8.
111 Pursuant to Section 120 of the MMPA, the National Marine Fisheries Service may authorize the “lethal taking” of sea lions where “individually identifiable” animals are having a “significant negative impact” on the decline or recovery of listed salmon and steelhead. Marine Mammal Protection Act, 16 U.S.C. §§ 1389(a), (b)(1)(A) (2000).
declining salmonid species in the Columbia River Basin.\footnote{112} (Significantly, of the eighteen members of the task force, seventeen members agreed on the committee’s recommendation—with the sole dissenting member representing the Humane Society.\footnote{113}) The overwhelming consensus was that the sea lion removal plan would have an overall positive impact on the ecosystem by protecting endangered salmon.

The contradictions inherent in the outcome and reasoning of both of the aforementioned cases is that in each case, plaintiffs’ claims were brought under NEPA, a statute formulated to “prevent or eliminate damage to the environment.”\footnote{114} However, the actions the plaintiffs sought to preliminarily enjoin would have prevented considerable environmental damage from occurring—e.g., the continued degradation of the Chesapeake Bay ecosystem in \textit{Norton} and the recovery of listed salmon in \textit{Humane Society}. Thus, the preliminary injunctions plaintiffs sought would ultimately have an overall negative impact on the environment, in spite of NEPA’s goals. As one commentator stated (discussing \textit{Norton}),

“[t]he problem . . . lies with the contradictions between the Funds’ arguments . . . on the one hand, and the policy objectives of NEPA, on the other. . . . Juxtaposed with the minimal and speculative harm that these Fund members may have suffered if the 525 mute swans were removed, was the very real and severe harm that the swans have caused, and would continue to cause, the Bay. . . . Thus, when viewed specifically within the context of a NEPA suit, the severity of the competing harms involved in this case tipped decidedly towards the environmental harms . . .\footnote{115}"

The approach outlined in the following section will solve this problem by placing the irreparable harm analysis within the context of the larger statutory framework. Under the new approach, the irreparable harm in NEPA cases is evaluated based upon an action’s impact on the environment as a whole, not plaintiffs’ subjective and often narrowly defined interests. The next section will

\begin{itemize}
  \item See Cucuzzella, \textit{supra} note 86, at 110–13.
\end{itemize}
discuss the reasons why the other three approaches utilized by courts in evaluating irreparable harm in wildlife mortality cases are also problematic. Further, it will argue that along with the aesthetic injury approach, these approaches should be replaced with the proposed standard described in Part III.

B. **Problems with Courts’ Utilization of the Other Approaches**

As discussed in Part I, in addition to the “aesthetic injury” approach, the other three approaches utilized by courts in evaluating irreparable harm in wildlife mortality cases have focused on harm to overall wildlife species or populations (the “Frizzell rule” approach),\(^\text{116}\) harm to ecosystems or human environments (the “environmental harm” approach),\(^\text{117}\) and harm to members of threatened or endangered species (the “endangered species” approach).\(^\text{118}\) Unlike the aesthetic injury approach, these approaches are not inherently flawed, but they are nevertheless problematic because they fail to rely upon a coherent theory about when they should be applied in given circumstances. In other words, courts have failed to articulate a clear standard specifying when one approach should be used over another. Thus, with few exceptions,\(^\text{119}\) courts seemingly apply the various approaches at random, without explanation as to why certain harms are relevant in particular cases and others are not.\(^\text{120}\) The Supreme Court has not addressed the issue, and, at the appellate level, even when circuit courts have addressed the issue, the courts have not established clear standards as to the application of these approaches.\(^\text{121}\) The lack of a clear, uniform standard harms the reliance interests of potential litigants, undermines principles of fairness, and leads to conflicting precedents within circuits.

These problems are amplified when the same circuit applies different approaches in factually similar cases without providing any explanation for such distinctions. For example, the Ninth Circuit applied fundamentally different approaches in analyzing the irreparable harm factor in *Lujan* and *Humane Society*,

\(^{116}\) For a description of cases utilizing this approach, see *supra* Part I.A.

\(^{117}\) For a description of cases utilizing this approach, see *supra* Part I.B.

\(^{118}\) For a description of cases utilizing this approach, see *supra* Part I.C.

\(^{119}\) The major exception to this statement is in cases utilizing the “endangered species approach.” Almost all courts recognize that there is a lower standard for irreparable harm for actions that threaten to harm a listed vs. non-listed species, although significant differences exist as to the exact standard that should be applied. For a discussion of these differences, see *supra* text accompanying notes 59-67.

\(^{120}\) Of the cases discussed in Part I, the only court to discuss the reason why it considered the harm that it did in the irreparable harm analysis was the Tenth Circuit in *Greater Yellowstone Coalition*. See *Greater Yellowstone Coal. v. Flowers*, 321 F.3d1250, 1257–58 (10th Cir. 2003).

\(^{121}\) For example, in *Greater Yellowstone Coalition*, the Tenth Circuit utilized the “environmental harm” approach, basing its analysis of irreparable harm on the goals of the statute. However, it did not hold that the harm in such analyses should *always* be based on the goals of a particular statute. Likewise, neither the Supreme Court nor any appellate circuit has articulated when certain approaches should be used over others. See *supra* text accompanying notes 42-49.
Despite the cases’ factual similarities. Both cases involved challenges to government efforts to control populations of wildlife that were neither threatened nor endangered.\textsuperscript{122} The plaintiffs in both cases established standing based on their members’ aesthetic interests in viewing the animals.\textsuperscript{123} However, the Ninth Circuit analyzed irreparable harm in each case very differently, ultimately leading it to reach opposite conclusions about whether to grant injunctive relief. In \textit{Humane Society}, it concluded that “the lethal taking of the California sea lions is, by definition, irreparable,” without regard to the number of animals that were being killed or the overall impact on the environment.\textsuperscript{124} Consequently, it granted plaintiffs’ motion for injunctive relief.\textsuperscript{125} Yet in \textit{Lujan}, the court based its analysis of irreparable harm not on the plaintiffs’ aesthetic interests or harm to individual animals, but on findings that the management plan would harm neither the “human environment” nor the total population of the bison.\textsuperscript{126} Thus, it concluded that plaintiffs had not met their burden of showing irreparable harm and denied the preliminary injunction.

This lack of consistency within an individual circuit is problematic because “[t]he requirement of consistency . . . is fundamental . . . for legal systems at large. It has strong intuitive appeal to our sense of justice, and is intertwined with the notion of fairness.”\textsuperscript{127} Most disturbing, however, is that the ways in which the Ninth Circuit characterized irreparable harm in these seemingly similar cases ultimately led it to reach opposite conclusions about whether the actions plaintiffs sought to enjoin would result in irreparable harm, and ultimately whether to issue or deny the preliminary injunctions. Although the Ninth Circuit may have had important reasons for distinguishing the cases and applying different approaches to the irreparable harm analyses,\textsuperscript{128} its failure to clearly articulate any reasons for such distinctions raises suspicions that its “irreparable harm” analyses ultimately rested upon its view of how the motions for preliminary injunctions should be decided, rather than a uniform legal standard.

Legal inconsistency also harms the interests of potential litigants and other interested parties. For example, state or federal agency actors in the Ninth Circuit can only guess as to what standard the court will use to determine

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\item \textsuperscript{122} As discussed above, \textit{Humane Society} involved an effort by the federal government to conduct lethal control measures on sea lions in the Columbia River, whereas \textit{Lujan} involved a plan that allowed for the hunting of bison that had migrated outside of the boundaries of Yellowstone National Park. \textit{See supra} text accompanying notes 17-21 and 50-53.
\item \textsuperscript{123} \textit{See} Plaintiffs’ Memo, \textit{supra} note 8, at 26-28; \textit{Fund for Animals, Inc. v. Lujan}, 962 F.2d 1391, 1395-97 (9th Cir. 1992).
\item \textsuperscript{124} \textit{Humane Soc’y of the U.S.} \textit{v. Gutierrez}, 527 F.3d 788, 790 (9th Cir. 2008).
\item \textsuperscript{125} \textit{Id.}
\item \textsuperscript{126} \textit{See Lujan}, 962 F.2d at 1402.
\item \textsuperscript{127} Yoav Dotan, \textit{Making Consistency Consistent}, 57 \textit{ADMIN. L. REV.} 995, 1000 (2005).
\item \textsuperscript{128} For example, sea lions enjoy federal protection under the MMPA, while bison are not protected under any federal statute.
\end{itemize}
whether a particular lethal wildlife control program they may propose would result in irreparable harm. It harms the reliance interests of potential plaintiffs seeking to enjoin wildlife control programs in evaluating whether they can demonstrate the requisite showing of irreparable harm necessary for preliminary injunctive relief. Finally, it offers no guidance to lower courts in deciding these difficult cases.

For these reasons, the current approaches taken by courts in this area do not provide a suitable framework for analyzing irreparable harm, and, along with the aesthetic injury approach, should be replaced by the standard described in the following section. However, as the discussion below will reveal, not all elements of these approaches should be abandoned. The proposed standard utilizes elements of each approach, but also provides a larger framework that determines how courts should consider irreparable harm under particular circumstances.

III. A New Standard for Analyzing Irreparable Harm

To replace the four approaches described above, courts should adopt a uniform standard to analyze irreparable harm in wildlife mortality cases that considers irreparable harm based upon the “primary goals” of the statutes forming the basis for the lawsuit. In order to determine the “primary goals” of a statute, courts should consider the language of a statute, and, to a limited extent, its legislative history. If the proposed action would result in harm to an interest protected by the primary goals of a given statute, such an action will generally constitute irreparable harm.

A single, uniform approach would solve the problems discussed in Part II in several ways. First, it replaces the “aesthetic injury” approach with a standard that advances, rather than undermines, both the goals of injunctive relief and policies underlying environmental statutes. Second, by linking the harms to be considered with a statute’s primary goals, it provides courts with guidance about the appropriate factors to consider in evaluating irreparable harm in particular situations. Third, it provides a consistent standard in an area of law in which courts have previously been inconsistent, thus promoting fairness and enabling individuals and courts to more easily predict whether particular actions that kill wildlife would result in irreparable harm.

Before describing the standard in detail, it is important to note that the proposed standard may not be consistent with the Supreme Court’s current definition of “irreparable harm,” which is harm that cannot be adequately compensated by a monetary award or other forms of recovery available at law.129 In this context, however, the Court’s definition is problematic because, as discussed above, plaintiffs may claim that the death of any animal that they enjoy

viewing would harm them in a way that is not compensable in money damages, thus setting the bar extremely low for making a showing of irreparable harm. Thus, in wildlife mortality cases, the Supreme Court should articulate a definition of irreparable harm that frames the notion of irreparable harm not on plaintiffs’ subjective interests, but on the underlying goals of the statutes plaintiffs seek to enforce.

A. Considering the “Primary Goals” of Statutes

Under the standard I propose, courts should look to the primary goals of a given statute to define the scope and nature of the harm to be considered in the irreparable harm analysis. Using the overarching statutory framework to guide decisions on injunctive relief is not a new concept. The two analyses must be linked because, as one commentator has stated, “[t]o consider interests irrelevant to the final decision at the preliminary stage will only increase the cost of the litigation and undermine the substantive law.” 130 The Supreme Court has emphasized that the purpose and language of a statute is critical to determining the scope of equitable discretion afforded to courts in cases filed under that statute.131 Lower federal courts have also focused on the purpose of the statute when determining the existence of irreparable harm, such as the Tenth Circuit’s consideration of “harm to the aquatic ecosystem” in evaluating the irreparable harm factor in Greater Yellowstone Coalition v. Flowers.132 Indeed, as one commentator has stated, “[t]here seems to be no way to decide how to characterize injuries without looking at the harms that the underlying legal provision is aimed to prevent.”133

In this vein, in considering a motion for a preliminary injunction in a case filed under a given statute, a court should first ask, “What is the harm the statute is designed to prevent?” Another way of asking this question is, ‘What are the ‘primary goals’ of the statute?’ Evidence of such “primary goals” can generally be found in the language of the statute itself,134 although legislative history and case law can also be informative. Once the court has defined the “primary goals” 

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132 See Greater Yellowstone Coal. v. Flowers, 321 F.3d 1250, 1257-58 (10th Cir. 2003). The court stated that “[i]t would be preferable to base the determination of irreparable harm on the statutes that actually form the basis of plaintiffs’ claims.” Id. at 1257; see also Nat’l Wildlife Fed’n v. Burford, 835 F.2d 305, 337 (D.C. Cir. 1987) (noting that the concept of “harm,” for the purpose of analyzing irreparable harm, “is of course defined in terms of the evil that the particular statute was designed to prevent.”).
134 See, e.g., Romero-Barcelo, 456 U.S. at 314-15 (looking to the language of the Federal Water Pollution Control Act to establish its ultimate purpose, “to restore and maintain the . . . integrity of the Nation’s waters,” and determining that the failure to grant a preliminary injunction would not undermine this purpose).
of a statute, it should then determine whether the “harms” alleged by plaintiffs are encompassed by those goals. Only harms that are within the scope of a statute’s primary goals should be considered in the analysis for irreparable harm. Once the court has identified the harms to be considered, it should determine whether the particular action plaintiffs seek to enjoin would cause such harms during the relevant time period, and whether, in light of the statutory scheme, such harm is irreparable.

Defining the “primary goals” of a statute will not only allow the court to identify the scope of the harm to consider in the irreparable harm analysis, but it will also allow the court to define the extent of harm that may be irreparable in a given circumstance. For example, a lesser showing of harm is required to establish irreparable harm for a species of wildlife that is afforded special protection by a statute than for a species afforded no statutory protections.

To clarify this concept, I offer the following examples of how the statutory purpose can define the relevant harm and its scope under three environmental statutes: the Endangered Species Act (ESA), the Marine Mammal Protection Act (MMPA), and the National Environmental Policy Act (NEPA).


The primary goal of the ESA is to “provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved [and] to provide a program for the conservation of such endangered species . . .” Thus, the harm the statute was intended to guard against is the loss of endangered species and the habitats upon which they depend. Section 7 of the Act provides that federal agencies must take steps to “insure” that any actions authorized, funded, or carried out by those agencies are “not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species . . .” As such, if a particular action would cause a decline in an endangered or threatened species at the population or species level, or destroy critical habitat for an endangered species, it would obviously cause the harm of the kind that the ESA was designed to prevent. Because endangered species are, by definition, “in danger of extinction,” harm of that nature would be irreparable.

Although it is apparent from the language of Section 7 that Congress

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135 See, e.g., Sierra Club v. Marsh, 872 F.2d. 497, 502-03 (1st Cir. 1989) (“[T]he kinds of ‘harms’ that are relevant [in the preliminary injunction context], and that may be ‘irreparable,’ will be different according to each statute’s structure and purpose.”).


140 Id. § 1536(a)(2) (2000).

141 Id. § 1532(6) (2000).
meant to prohibit harm to an endangered species at the population and species levels, the question remains whether wildlife mortality that does not impact an entire population or species, but only several animals within a population of an endangered species, constitutes irreparable harm. For example, as discussed above, in Loggerhead Turtle, the district court held that “any threatened harm [to any member of an endangered species] is per se irreparable harm;”\textsuperscript{142} whereas the First Circuit explicitly rejected this notion in Water Keeper Alliance v. U.S. Dept. of Defense.\textsuperscript{143} Regardless of which view one takes on this issue, in looking at the provisions of the statute, it is apparent that Congress placed an extremely high value on protecting individual animals that are part of an endangered species. For example, Section 9 of the Act makes it unlawful for any person to “take”\textsuperscript{144} any member of an endangered species.\textsuperscript{145} Additionally, the requirements within the ESA for obtaining an exemption from the prohibition on takings for both government agencies and individuals are extremely stringent, which provides further evidence that Congress placed a high value on protecting individual members of listed species.\textsuperscript{146}

In Animal Welfare Institute v. Martin,\textsuperscript{147} the court held that whether harm to an individual member of an endangered species is “irreparable” depends on a case-by-case determination. It stated,

[T]ension [exists] between the uncompromising “death of one member” view in Loggerhead Turtle and the broader “species as a whole” view in Water Keeper. But, the Court does not view these cases as establishing impenetrable boundaries. The issue, it would seem, is more nuanced. The Court accepts the principle that the death of a single animal could constitute a violation of the ESA that would call for the full exercise of a court’s injunctive authority, and at the same time, there may be circumstances where the death of one member is an isolated event that would not call for judicial action.\textsuperscript{148}

The proposed framework supports this more nuanced approach. By examining the purpose of the ESA, it is apparent that Congress intended to protect against both the elimination of entire species and populations of animals

\textsuperscript{142} Loggerhead Turtle v. County Council of Volusia County, 896 F.Supp. 1170, 1178 (M.D. Fla. 1995); see supra text accompanying notes 63-65.

\textsuperscript{143} See supra text accompanying notes 66-67.

\textsuperscript{144} In the context of the ESA, the term “take” means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. See 16 U.S.C. § 1532(19) (2000).

\textsuperscript{145} See id. § 1538(a)(1)(B).

\textsuperscript{146} See id. § 1539.

\textsuperscript{147} 588 F. Supp. 2d 70 (D. Me. 2008).

\textsuperscript{148} Id. at 106.
and the taking of individual animals. However, it also recognized, by providing for exceptions to the individual take provisions, that under some circumstances other policy goals may outweigh the goal of protecting all individual members of endangered species.

In light of the emphasis Congress placed in the ESA on preventing harm to individual animals as well as to entire species, there should be a presumption that actions that would result in the loss of any members of endangered species would cause irreparable harm. However, under certain circumstances, the death of individual members of an endangered species should not constitute per se irreparable harm. Yet the fact that an animal is protected by the ESA significantly reduces the burden on the plaintiff in establishing that an act likely to result in the death of that animal is irreparable harm. In summary, because the ESA has placed such a high value on protecting endangered species above other interests, harm to members of such species should generally be considered irreparable harm.


Although, like the ESA, the MMPA is designed to protect vulnerable species, there are significant differences between the objectives of the statutes that are relevant in analyzing irreparable harm. The primary objective of the MMPA is to “maintain the health and stability of the marine ecosystem.” Further, the statute mandates that “[marine mammal] species and population stocks should not be permitted to diminish beyond the point at which they cease to be a significant functioning element in the ecosystem of which they are a part, and, consistent with this major objective, they should not be permitted to diminish below their optimum sustainable population.” Further, the term “optimum sustainable population” means, with respect to any population stock, the number of animals which will result in the maximum productivity of the population or the species. Thus, the primary harms that Congress intended to prevent in enacting the MMPA are harms to overall marine mammal populations and harm to the marine ecosystems of which they are a part.

Although the MMPA includes a general prohibition on the taking and import of individual marine mammals, it also authorizes the Secretary of Commerce to “issue permits which authorize the taking or importation of any marine mammal” in numerous circumstances. Additionally, Congress has created numerous exceptions within the statute to the takings prohibitions on individual animals, such as for incidental takings by commercial fisherman and for marine mammals that are having a significant negative effect on salmon.

150 Id. § 1361(2).
151 See id. § 1362(9).
152 See id. §1374(a).
153 See, e.g., id. §§ 1371(a)(2), 1389(b)(1).
Thus, unlike the ESA, the MMPA places less emphasis on protecting individual animals than on preventing harm to overall populations of marine mammals. Therefore, there should only be a presumption of irreparable harm in MMPA cases when an action threatens to impact an entire population of marine mammals or the health of the marine ecosystem as a whole. Actions that would only cause the death of individual marine mammals should not be afforded a presumption of proof of irreparable harm.

Additionally, the MMPA places a high priority on protecting members of “depleted” populations of marine mammals. A species is “depleted” when it is below the optimum sustainable population or listed as endangered or threatened under the ESA. The MMPA gives special protections, beyond those afforded to other mammals covered under the statute, to members of depleted species. For example, if a species is depleted, the Secretary of Commerce usually cannot issue a permit for a taking of a member of that species. Thus, under the proposed framework, when a marine mammal is part of a species or population that is “depleted,” the taking of a few individuals should raise a presumption of irreparable harm, similar to within the ESA framework.

In summary, in considering irreparable harm under the MMPA, a court first should focus on whether the particular action would cause irreparable harm to the population of marine mammals or the marine ecosystem as a whole. If the action would cause this kind of harm to occur, it will almost certainly be irreparable harm. Additionally, if the action would cause harm to individual members of a “depleted” species, the death of a limited number of animals may also be sufficient to constitute irreparable harm.

Judge Mosman’s denial of the preliminary injunction seeking to halt the killing of sea lions in *Humane Society*, in which plaintiffs raised MMPA and NEPA challenges, reflects this approach. He concluded that because the sea lions in question were part of a species of marine mammals that was well populated, plaintiffs had not met their burden of establishing irreparable harm. His decision was overturned by the Ninth Circuit, but under the proposed standard, his decision was correct because it focused on harm to the overall population of sea lions, which is the primary goal of the MMPA.


NEPA’s “primary goals” are to “[t]o declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; [and] to enrich the understanding of the ecological systems and natural resources

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154 See id. §1371(a)(3)(b).
155 Id. § 1362(1).
156 See id. § 1371(a)(3)(b).
157 See Transcript of Oral Argument, supra note 4, at 33-37.
NEPA also requires that all agencies of the Federal Government shall “include in every recommendation or report on proposals for . . . major Federal actions significantly affecting the quality of the human environment, a detailed statement . . . on the environmental impact of the proposed action.”

Although NEPA affords procedural, rather than substantive, environmental protections, courts have nevertheless emphasized that “the harm at stake in a NEPA violation is a harm to the environment.” However, unlike the ESA and MMPA, in which the primary harms the statutes intend to prohibit are relatively easy to identify, defining the scope and nature of the primary harm to be considered under NEPA is much more challenging. This is largely because the “primary goals” of the statute are very broad, and may come into conflict with each other. For example, efforts to “prevent or eliminate damage to the environment and biosphere” may conflict with the goal of “stimulat[ing] the health and welfare of man.” However, as explained below, courts can nevertheless use these goals to guide them in their analyses of irreparable harm.

Under the proposed standard, when analyzing harm to animals in a case filed under NEPA, courts should consider whether the action plaintiffs seek to enjoin would cause irreparable harm to any of the interests protected by NEPA’s primary goals, including the natural environment, human health and welfare, and efforts to promote the “productive and enjoyable harmony” between the two. In analyzing whether there is irreparable harm to the natural environment, courts should seek to determine whether a particular action threatens wildlife that are a valuable component of a natural ecosystem in a given area. If so, such an action will generally conflict with NEPA’s primary goals and cause irreparable harm. This evaluation should be based upon scientific information about whether such actions would jeopardize the overall population of wildlife or the health of the ecosystem in which they are a part. On the other hand, if the scientific consensus is that a wildlife species is having an overall negative impact on a given ecosystem, as was the case with mute swans in Norton, lethally removing these animals would not undermine the goals of NEPA, and thus should not constitute irreparable harm.

Likewise, if an action threatens to kill wildlife that are important to human welfare, such an action may also undermine one of the primary goals of

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159 Id. § 4332(C).
160 Sierra Club v. Marsh, 872 F.2d 497, 504 (1st Cir. 1989).
162 Id.
163 See, e.g., Greater Yellowstone Coal. v. Flowers, 321 F.3d 1250 (10th Cir. 2003) (holding that a project that would kill several adult and juvenile bald eagles would negatively impact the aquatic ecosystem of the area, and thus result in irreparable harm).
164 In this manner, the analysis for determining “irreparable harm” under NEPA is similar to that proposed for non-depleted species under the MMPA.
NEPA. Although the statute does not specifically define the “welfare of man,” other language in the statute indicates that this term broadly encompasses a broad range of “social, economic, and other requirements of present and future generations of Americans.” Based upon this goal, if an action threatens to kill wildlife that are important for recreational or symbolic purposes, the court may conclude that such an action would cause irreparable harm to the “welfare of man” even if the ecosystem as a whole is not likely to be negatively affected. Within this broader purpose, the statute also states the goal of assuring “for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings.” In this manner, plaintiffs’ aesthetic interests in viewing animals may be a factor in defining irreparable harm in NEPA cases. However, under the proposed standard, this interest must be balanced against the other “primary purposes” of NEPA, including protecting the natural environment, in analyzing irreparable harm. Thus, if a particular action would result in harm to plaintiffs’ aesthetic interests, but would benefit the ecosystem, a court must decide whether the harm to plaintiffs’ aesthetic interests is significant enough to outweigh any potential environmental benefits of the proposed action.

In summary, courts should consider two primary interests in evaluating irreparable harm under NEPA: harm to the environment and harm to human welfare. Courts should rely on credible scientific evidence to determine whether a particular action involving the lethal removal of wildlife would result in irreparable harm to a particular ecosystem, or, alternatively, improve ecosystem health. Because the advancement of human welfare is also a “primary goal” of NEPA, courts should determine whether actions that would cause wildlife mortality would harm human welfare. While the aesthetic interests of plaintiffs may be interests encompassed by this goal, courts considering this interest should balance it against NEPA’s other goal of protecting ecosystem health.

B. The Public Interest Factor: Providing Flexibility to Courts

As a final note, it is important to emphasize that the framework above only applies to courts’ analyses of irreparable harm, which is only one factor in the four-factor test for deciding preliminary injunctions. The Supreme Court has stated that “[t]he award of an interlocutory injunction by courts of equity has never been regarded as strictly a matter of right, even though irreparable injury may otherwise result to the plaintiff.” Indeed, even if a court establishes that an action that kills wildlife would result in irreparable harm under the proposed standard, it should nevertheless decline to issue a preliminary injunction if the

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165 42 U.S.C. § 4331(a).
166 Id. § 4321.
167 Id. § 4331(b)(2).
168 Courts may also conduct such balancing between competing statutory goals when considering the “public interest” factor in the four-step test for preliminary injunctions.
other traditional factors—the likelihood of success on the merits, balance of the hardships, and the effect on the public interest—weigh against awarding preliminary relief.

The recent Supreme Court decision in Winter v. Natural Resources Defense Council provides an example of the court finding irreparable injury, but nevertheless denying injunctive relief. In that case, the Supreme Court considered whether to uphold the Ninth Circuit’s issuance of an injunction to halt certain Navy underwater training exercises using high intensity sonar until the plaintiffs’ claims for violations of numerous environmental statutes, including NEPA and the ESA, could be heard on the merits.\(^{170}\) Although the court acknowledged that the plaintiffs had established possible irreparable harm to “ecological, scientific, and recreational interests that are legitimat[e],”\(^{171}\) it held that “such injury is outweighed by the public interest and the Navy’s interest in effective, realistic training of its sailors.”\(^{172}\) In Winter, the Court used its equitable discretion to deny injunctive relief despite a finding of the likelihood of irreparable harm. Similarly, even if a court determines that a particular action would result in irreparable harm under the proposed framework, it may still use its discretion to deny relief if the other factors in the balancing test so dictate.

Despite the fact that the public interest factor provides a potential “check” on a finding of irreparable harm, it is important to emphasize that this does not eliminate the need for the proposed framework for evaluating irreparable harm. Under the framework, courts must consider statutory goals during the irreparable harm analysis, rather than only during the analysis of the “public interest” prong. This is important because courts often weigh a variety of factors in the public interest prong, and there is no assurance that they will consider the goals of the statute in considering the public interest. Further, because a showing of irreparable harm is the sine qua non of injunctive relief, the framework provides that the statutory goals inform this critical step in the analysis, rather than the only the public interest prong, which is a balancing factor. The failure to consider statutory goals at the “irreparable harm” stage denies courts an entire body of information that can help inform whether particular harm is, in essence, “irreparable.” For example, it does not allow a court to take into account whether the animals at issue are part of an endangered or threatened species, whether the damage will impact an entire population of animals, or the overall positive or negative impact of those animals on the ecosystem they inhabit.

\(^{171}\) Id. at 377.
\(^{172}\) Id. at 376.
Conclusion

U.S. courts have failed to develop a consistent approach to analyzing irreparable harm in deciding motions for preliminary injunction in cases involving wildlife mortality. They have utilized a wide variety of approaches in defining and evaluating irreparable harm in these cases. Such cases can be divided into four broad categories: 1) cases considering the impacts an action has on overall species or populations of wildlife (the “Frizzell rule” approach); 2) cases considering the harm to the environment in general (the “environmental impacts” approach); 3) cases considering harm to individual members of endangered species (the “endangered species” approach); and 4) cases that consider the impacts of an action on plaintiffs’ aesthetic interests in viewing wildlife (the “aesthetic injury” approach).

Each of these approaches fails to provide an appropriate legal framework for analyzing irreparable harm in wildlife mortality cases. The “aesthetic injury” approach is inherently flawed for two primary reasons. First, considering only plaintiffs’ aesthetic interests can undermine the notion of the preliminary injunction as an “extraordinary remedy” because it essentially allows courts to find irreparable harm in nearly every situation in which an animal may be killed. Such an approach would therefore undermine the Supreme Court’s view that preliminary injunctions should only be issued in extraordinary circumstances. Second, this approach can undermine the goals of environmental statutes because plaintiffs aesthetic interests in wildlife may not be consistent with the underlying policies of environmental laws. For example, in Fund for Animals v. Norton, the court found that plaintiffs had established irreparable harm based on harm to their aesthetic interests, despite significant scientific evidence establishing that a failure to control the mute swans would negatively impact the Chesapeake Bay ecosystem.173 Ironically, the plaintiffs claims were brought under NEPA, a statute aimed at protecting the environment.

In addition to the aesthetic injury approach, the other approaches courts utilize in considering irreparable harm are also problematic in that they do not rest upon a coherent theory for when they should be utilized. As a result, courts often apply them seemingly at random, without providing an explanation of why some harms are relevant and others are not. For example, in the Humane Society and Lujan cases, the Ninth Circuit failed to articulate why it considered the loss of individual animals as per se irreparable harm in one case, but not in the other. Such inconsistencies undermine both reliance interests and fundamental notions of fairness.

To replace the flawed approaches discussed above, courts should adopt the standard outlined in Part III, which requires them to consider the primary goals of the statutes giving rise to plaintiffs’ causes of action to define and analyze irreparable harm. This approach provides a number of benefits,

173 See supra text accompanying notes 83-89.
including placing the irreparable harm analysis within the larger statutory framework, giving credence to congressional findings regarding the definition of harm in particular contexts. It also gives courts flexibility and guards against situations in which individual interests might jeopardize the broader public interests that the statute at issue is meant to protect.

In analyzing irreparable harm under the Endangered Species Act, courts should consider the harm from the perspective of impact on the entire species or population, as well as impacts on individual animals. If a particular action would irreparably harm overall populations or species of animals, the court should find irreparable harm. There should also be a presumption of irreparable harm in cases in which an action will kill individual members of a listed species, because of the emphasis Congress placed in the Endangered Species Act on protecting individual members of endangered species. In evaluating harm under the Marine Mammal Protection Act, courts should consider whether the action would harm the overall species or population of marine mammals, because that is the primary focus of that statute. However, if a species of marine mammals is depleted, courts may consider impacts on individual members of that species as a basis for finding irreparable harm. In assessing motions for preliminary injunctions brought under the National Environmental Policy Act, courts should consider whether actions would harm both natural ecosystems and human welfare. Courts may consider plaintiffs’ aesthetic interests in this analysis, but they must be balanced against NEPA’s other goal of protecting natural ecosystems.

Finally, under the new standard, courts must still weigh a finding of irreparable harm against the other factors traditionally considered in deciding preliminary injunctions, including whether granting the injunction would ultimately advance the public interest. This new standard would provide courts that are charged with the responsibility of “playing God” and deciding animal mortality cases with an approach to analyzing irreparable harm that best balances the interests of animal protection, human welfare, and congressionally mandated environmental policies.