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Restoring Tradition: The Inapplicability of *TVA v. Hill's* Endangered Species Act Injunctive Relief Standard to Preliminary Injunctive Relief of Non-Federal Actors

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Pacific Legal Foundation
Program for Judicial Awareness^{*}

**Restoring Tradition: The Inapplicability of *TVA v. Hill*'s Endangered
Species Act Injunctive Relief Standard to Preliminary Injunctive
Relief of Non-Federal Actors^{**}**

Brandon M. Middleton^{***}

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ABSTRACT

While traditional equitable analysis requires the balancing of harms with affected parties and the assessment of the public interest when considering preliminary injunctive relief, courts have largely declined to do so in Endangered Species Act litigation. This unique approach stems from the Supreme Court's landmark 1978 Endangered Species Act decision, *TVA v. Hill*. More recent Supreme Court decisions, however, suggest that *TVA* should not be read so broadly, and that the traditional approach to preliminary injunctions offers no exception. This article examines the development of the *TVA*'s preliminary injunctive relief approach in the lower courts. It then discusses why this approach is inapplicable when plaintiffs in Endangered Species Act cases seek to enjoin non-federal actors. The inapplicability of *TVA*'s injunctive relief standard to non-federal actors is based on *TVA* itself as well as recent Supreme Court decisions that have emphasized the importance of traditional equitable principles. As a matter of policy, this article also discusses why the balancing of harms and consideration of the public interest for non-federal actors offers a more sensible approach for property owners as well as for endangered species.

*There is no power the exercise of which is more delicate, which requires greater caution, deliberation, and sound discretion, or more dangerous in a doubtful case, than the issuing of an injunction*¹

¹ Bonaparte v. Camden & A.R. Co., 3 F. Cas. 821 (C.C.D.N.J. 1830) (No. 1617).

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I. INTRODUCTION

Faced with an Endangered Species Act (hereinafter “ESA”) lawsuit,² the cost of complying with a citizen plaintiff’s³ demands is no doubt one of the first things that comes to a defendant’s mind.⁴ And yet,

² See Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1543 (2006).

³ Section 11(g) of the ESA provides that “any person may commence a civil suit on his own behalf . . . to enjoin any person, including the United States and any other governmental instrumentality or agency . . . who is alleged to be in violation of any provision of this [Act] or regulation issued under the authority thereof.” *Id.* § 1540(g). “Person” is defined to include “an individual, corporation, partnership, trust, association, or any other private entity,” as well as “any officer, employee, agent, department, or instrumentality of the Federal Government, of any State, municipality, or political subdivision of a State” and “any State, municipality, or political subdivision of a State.” *Id.* § 1532(13); see also *TVA v. Hill*, 437 U.S. 153, 180-88 (1978) (“Citizen involvement was encouraged by the Act, with provisions allowing interested persons to petition the Secretary to list species a species as endangered or threatened and to bring civil suits in United States district courts to force compliance with any provision of the Act.” (citations omitted) (citing 16 U.S.C. §§ 1533(c)(2), 1540(c), (g))). This article deals mainly with ESA suits against non-federal actors and the requirements that are necessary for an ESA preliminary injunction against a non-federal actor.

⁴ Non-federal actors are most affected by § 9’s “take” prohibition, see 16 U.S.C. § 1538(a)(1), and by the requirement that activities on privately owned designated critical habitat where there is a federal nexus must undergo § 7, see *id.* § 1536(a)(2), consultation. See generally Robert Meltz, *Where the Wild Things Are: The Endangered Species Act and Private Property*, 24 ENVTL. L. 369, 372-85 (2004) (noting that “Section 9’s prohibitions apply to private and public land, and apply regardless of whether critical habitat has been designated,” while “[S]ection 7’s impact on the private landowner occurs only when there is a federal nexus-e.g., when development cannot occur without issuance of a federal wetlands permit”). Violators of the ESA are subject to significant civil and criminal penalties, including incarceration. See 16 U.S.C. § 1540(a), (b). Property owners are well aware of what the ESA means for land use and development. See, e.g., Jonathan H. Adler, *Back to the Future of Conservation: Changing Perceptions of Property Rights & Environmental Protection*, 1 N.Y.U. J. L. & LIBERTY 987, 996 (2005) (“In effect, the ESA granted endangered species a lien or easement that trumps the conflicting rights of the land’s title-holder. As a result, the ESA barred landowners from building homes, planting crops, or making other land-use modifications that could alter species’ habitat.” (footnote call number omitted)); Jeremy Brian Root, *Limiting the Scope of Reinitiation: Reforming Section 7 of the Endangered Species Act*, 10 GEO. MASON L. REV. 1035, 1036 (2002) (noting that § 7 offers “a powerful incentive to enjoin hundreds

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well before the merits of a complaint are decided, the defendant can expect to face a motion for a preliminary injunction in which the plaintiff will argue that the economic impacts of an injunction are “irrelevant” and that in ESA cases, economic hardship “is simply not a factor the court is permitted to consider in granting an injunction.”⁵

Alleging the irrelevancy of economic impacts is consistent with decisions and articles that suggest that the balancing of harms and consideration of the public interest should be foreclosed in ESA preliminary injunctive relief cases.⁶ Under this argument, language within the Supreme Court’s landmark ESA decision, *TVA v. Hill*,⁷ prevents courts from using traditional equitable discretion in ESA cases and mandates that the public interest always favors the imposition of an injunction.⁸ For example, the Ninth Circuit has cited *TVA* in holding that

of site-specific projects through a single programmatic injunction”); Jonathan F. Tross, *Insuring Against the Snail-Darter: Insurance for Land Use and the Endangered Species Act*, 11 CONN. INS. L.J. 471, 471-72 (2005) (noting that “[t]he discovery of an endangered species on a property can profoundly impact on the manner in which the property may be utilized” and suggesting that “it is not unreasonable to expect that many landowners would be interested in insuring against such a risk through . . . ‘endangered species insurance’”).

⁵ See, e.g., Plaintiffs’ Motion in Limine to Exclude Testimony of Alleged Economic Impact of Injunction at 4, *Seattle Audubon Soc’y v. Sutherland*, No. C06-1608MJP (W.D. Wash. May 25, 2007), 2007 WL 5042359; see also *Animal Prot. Inst. v. Martin*, 511 F. Supp. 2d 196, 197 (D. Me. 2007) (noting that the plaintiff moved “in limine to limit the Court’s consideration of the traditional balance of hardships factor” and contended that “the balance of hardships is not an appropriate factor under the ESA”).

⁶ See, e.g., *Nat’l Wildlife Fed’n v. Burlington N. R.R.*, 23 F.3d 1508 (9th Cir. 1994); Frederico Cheever, *Butterflies, Cave Spiders, Milk-Vetch, Bunchgrass, Sedges, Lilies, Checker-Mallows and Why the Prohibition Against Judicial Balancing of Harm Under the Endangered Species Act is a Good Idea*, 22 WM. & MARY ENVTL. L. & POL’Y REV. 313 (1998).

⁷ 437 U.S. 153 (1978).

⁸ See Cheever, *supra* note 6, at 314 (“[T]he orthodoxy [of *TVA*] makes sense. The Endangered Species Act . . . cannot tolerate judicial balancing of species harm and economic dislocation while still honoring the purpose of the statute—the preservation and recovery of protected species and the ecosystems on which they depend.”); see also Patrick Parenteau, *Citizen Suits Under the Endangered Species Act: Survival of the Fittest*, 10 WIDENER L. REV. 321, 333-34 (2004) (The author compares the traditional rule for obtaining injunctive relief with the *TVA v. Hill* rule and concludes that under the

“[t]he ‘language, history, and structure’ of the ESA demonstrates Congress’ determination that the balance of hardships and the public interest tips heavily in favor of protected species.”⁹

However, it is far from clear that *TVA*’s instruction that the ESA should be used “to halt and reverse the trend toward species extinction, whatever the cost”¹⁰ applies to anything but the limited facts of that case.¹¹ Moreover, such a mandate stands in sharp contrast to the Supreme Court’s recent reminder in *Winter v. Natural Resources Defense Council*¹² that courts must balance the equities and factor in public interest considerations when fashioning preliminary injunctive relief.¹³ These assessments are important hallmarks of preliminary injunctive relief and may not be considered “in only a cursory fashion,” even when a movant seeks to protect ecological, scientific, and recreational interests, such as the prevention of injury to marine mammals.¹⁴

While *Winter* arose under the National Environmental Policy Act,¹⁵ the decision reaffirmed traditional notions of equity¹⁶ and held that

ESA, “[a] court must issue an injunction when it is necessary to effectuate the will of Congress. Under the ESA, the balance of hardships has already been struck in favor of preserving endangered species.”)

⁹ *Burlington N. R.R.*, 23 F.3d at 1511 (quoting *TVA*, 437 U.S. at 174).

¹⁰ *TVA*, 437 U.S. at 184.

¹¹ See *infra* Part III.

¹² 129 S. Ct. 365 (2008).

¹³ See *id.* at 374; see also Jonathan Cannon, *Environmentalism and the Supreme Court: A Cultural Analysis*, 33 *ECOLOGY L.Q.* 363, 413-14 (2006) (“At least since the onset of the industrial revolution, equity rules have required that in issuing an injunction a court must not only consider the irreparability of harm to the plaintiff and the adequacy of legal remedies but must also undertake a ‘balancing of the utilities.’ The court weighs the interests of the parties and makes an assessment of the overall public interest. Consideration of the costs of injunctive relief as well as the benefits advances equity’s purpose to ensure reason and justice in particular cases.”).

¹⁴ See *Winter*, 129 S. Ct. at 377-78.

¹⁵ At issue in *Winter* was a district court’s injunction of the Navy’s sonar training exercises off the coast of southern California. *Id.* at 373. Specifically, the district court enjoined the Navy to shut down the military training exercises upon spotting a marine mammal within 2200 yards of a vessel. *Id.* Both the district court and the Ninth Circuit held that a preliminary injunction was appropriate given in part the likelihood that the Navy had violated the NEPA by failing to prepare an environmental impact statement for

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a plaintiff seeking a preliminary injunction “must establish . . . that the balance of equities tips in his favor, and that an injunction is in the public interest.”¹⁷ These are two of the four inquiries for a plaintiff seeking preliminary relief, and both proved fatal for the environmental plaintiffs in *Winter*.¹⁸ It was particularly clear that the public interest analysis favored the vacatur of the Ninth Circuit’s controversial injunction against the Navy:

The public interest in conducting training exercises with active sonar under realistic conditions plainly outweighs the [ecological, scientific, and recreational] interests

the training exercises. *Id.* at 374. NEPA requires in part that federal agencies “to the fullest extent possible” prepare an environmental impact statement for “every . . . major Federal action[] significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C) (2006). While the Court’s opinion noted that likelihood of success on the merits is one requirement for a preliminary injunction, its analysis dealt mainly with the latter three parts of the test for preliminary injunctive relief: likelihood of irreparable harm in the absence of preliminary relief, the balance of hardships, and public interest considerations. *See Winter*, 129 S. Ct. at 374-81 (“[W]e do not address the underlying merits of plaintiffs’ claims.”).

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A preliminary injunction is an extraordinary remedy never awarded as of right. In each case, courts “must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.” “In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction.”

Winter, 129 S. Ct. at 376-77 (citations omitted) (citing *Munaf v. Geren*, 128 S. Ct. 2207, 2218-19 (2008)) (quoting *Amoco Prod. Co. v. Gambell*, 480 U.S. 531, 542 (1987) and *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982)); *see also id.* at 381 (“An injunction is a matter of equitable discretion; it does not follow from success on the merits as a matter of course. . . . [T]he balance of equities and consideration of the public interest[] are pertinent in assessing the propriety of any injunctive relief, preliminary or permanent.”) (citing *Romero-Barcelo*, 456 U.S. at 313 and *Amoco Prod. Co.*, 480 U.S. at 546 n.12)).

¹⁷ *Id.* at 374 (citing *Amoco Prod. Co.*, 480 U.S. at 542).

¹⁸ *See id.* at 374, 378 (“[W]e conclude that the balance of equities and consideration of the overall public interest in this case tip strongly in favor of the Navy.”).

advanced by the plaintiffs. Of course, military interests do not always trump other considerations, and we have not held that they do. In this case, however, the proper determination of where the public interest lies does not strike us as a close question.¹⁹

Under *Winter*, then, the fact that there are environmental interests involved does not preclude a court from considering other interests when deciding on preliminary injunctive relief.²⁰ Likewise, as this article will demonstrate, there are several other reasons why the traditional requirements of balancing the equities and factoring in the public interest²¹ apply when considering preliminary relief against non-federal actors under the ESA, notwithstanding *TVA*.²² Supreme Court decisions suggest that *TVA* is a narrow decision and that traditional equitable

¹⁹ *Id.* at 378. Notwithstanding the injunction, some commentators had expressed displeasure that a lawsuit against the Navy had even been filed in the first place. See, e.g., David Nieporent, *When Whale It End?*, OVERLAWYERED, May 17, 2007, <http://overlawyered.com/2007/05/when-whale-it-end> (“Of course environmental groups are the ones filing these repeated lawsuits, but in the big picture, the blame for this situation should be laid at the feet of Congress, which passes vague environmental laws which create broad standing allowing infinite numbers of random bystanders to sue without having to suffer tangible personal harm.”).

²⁰ See PLF Liberty Blog, *Supreme Court to Lower Courts: Environmental Interests are not the Only Ones to Consider*, <http://plf.typepad.com/plf/2008/11/supreme-court-to-lower-courts-environmental-interests-are-not-the-only-ones-to-consider.html> (Nov. 12, 2008, 22:46 PST).

²¹ See *Winter*, 129 S. Ct. at 374 (citing *Munaf*, 128 S. Ct. at 2218-19; *Amoco Prod. Co.*, 480 U.S. at 542; and *Romero-Barcelo*, 456 U.S. at 311-12); see also Thomas R. Lee, *Preliminary Injunctions and the Status Quo*, 58 WASH. & LEE L. REV. 109, 130 (2001) (noting that preliminary relief should be granted only if “it appear[s] that greater damage would arise to the plaintiff by withholding the injunction, in the event of the legal right proving to be in his favor, than to the defendant by granting the injunction in the event of the injunction proving afterwards to have been wrongly granted” (alteration in original) (quoting WILLIAM KERR, A TREATISE ON THE LAW AND PRACTICE OF INJUNCTIONS IN EQUITY 209-10 (1st ed. 1867))); David S. Schoenbrod, *The Measure of an Injunction: A Principle to Replace Balancing the Equities and Tailoring the Remedy*, 72 MINN. L. REV. 627, 636 (1988) (discussing the basic doctrine of balancing the equities).

²² See *infra* Part III.

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discretion should be abandoned only in very limited circumstances.²³ Traditional equitable discretion is also proper because it puts constitutionally-protected property rights on par with the statutorily-protected rights of endangered species.²⁴ Courts that issue preliminary injunctions without balancing the hardships or considering public interest factors may truly harm the economic well-being of society and provide less incentive for property owners to protect endangered species.²⁵

This article will further discuss these issues after having first examined the cases that have addressed ESA preliminary injunctions against private and state actors. This article will then demonstrate that exercising traditional equitable discretion in these cases is not only appropriate given the federal courts' current and traditional equity jurisprudence, it is also the best way to appropriately account for all interests, including those of endangered species.

II. THE ESA, INJUNCTIONS, AND THE ABANDONMENT OF TRADITIONAL EQUITABLE PRINCIPLES

A. *TVA v. Hill is the Leading Case for the Abandonment of Traditional Equitable Principles under the ESA*

TVA pitted a nearly-complete federal dam project against a nearly-extinct species of fish—there was little question that the completion of the federal dam project would either eradicate the entire population of snail darters or at the very least destroy the snail darter species' critical habitat.²⁶ The issue, however, was whether the ESA was flexible enough

²³ See, e.g., *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 669-71 (2007); *Amoco Prod. Co.*, 480 U.S. at 543; *Romero-Barcelo*, 456 U.S. at 312-13.

²⁴ See *infra* Part III.

²⁵ See *infra* Part III.

²⁶ See *TVA v. Hill*, 437 U.S. 153, 171-72 (1978). Professor Zygmunt J.B. Plater was the lead environmental attorney in *TVA* and has authored several articles on the decision. See, e.g., Zygmunt J.B. Plater, *In the Wake of the Snail Darter: An Environmental Law Paradigm and Its Consequences*, 19 U. MICH. J.L. REFORM 805 (1986); Zygmunt J.B. Plater, *Endangered Species Act Lessons Over 30 Years, and the Legacy of the Snail Darter, a Small Fish in a Pork Barrel*, 34 ENVTL. L. 289 (2004); Zygmunt J.B. Plater,

to allow the Tennessee Valley Authority's project to proceed despite the violation of § 7 of the ESA.²⁷

While environmental groups argued that courts of equity are required to enjoin federal projects under such circumstances, it was not clear that Congress intended the ESA to divest courts of traditional equitable flexibility, especially considering that Congress continued to appropriate money towards the dam project after having learned of the danger it presented to the snail darter species.²⁸ As Chief Justice Burger noted in his majority opinion, "[i]t may seem curious to some that the

Tiny Fish Big Battle: 30 Years After TVA and the Snail Darter Clashed, the Case Still Echoes in Caselaw, Politics, and Popular Culture, TENN. B.J., April 2008, at 14.

Interestingly, soon after the *TVA* decision was issued, several other populations of snail darters were discovered throughout the Tennessee River Valley, and the species was reclassified from endangered to threatened; the designation of the species' critical habitat was also rescinded. See Final Rule Reclassifying the Snail Darter (*Percina tanasi*) From an Endangered Species to a Threatened Species and Rescinding Critical Habitat Designation, 49 Fed. Reg. 27,510 (July 5, 1984) (to be codified at 50 C.F.R. pt. 17).

²⁷ At the time of the *TVA* decision, § 7 required that federal agencies consult with the Secretary of the Interior in order to "insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of [an] endangered species and threatened species or result in the destruction or modification of habitat of such species which is determined . . . to be critical." 16 U.S.C. § 1536 (1976), amended by Act of Nov. 10, 1978, Pub. L. No. 95-632, § 3, 92 Stat. 3752. Although there have been some revisions to the statutory language of § 7, federal agencies are still required to consult with either the U.S. Fish and Wildlife Service or the National Marine Fisheries Service on proposed actions. See 16 U.S.C. § 1536(a)(2) (2006). For more on how § 7's requirements can impact non-federal actors, see *supra* note 4.

²⁸ *TVA*, 437 U.S. at 166; see *id.* at 192-94. In refusing to enjoin completion of the Tellico Dam, the district court had held that "[a]t some point in time a federal project becomes so near completion and so incapable of modification that a court of equity should not apply a statute enacted long after inception of the project to produce an unreasonable result. Where there has been an irreversible and irretrievable commitment of resources by Congress to a project over a span of almost a decade, the Court should proceed with a great deal of circumspection." *Hill v. TVA*, 419 F. Supp. 753, 760 (E.D. Tenn. 1976), *rev'd*, 549 F.2d 1064 (6th Cir. 1977) (citation omitted). Accordingly, the district court further held that the ESA "does not operate in such a manner as to halt the completion of this particular project." *Id.* at 763. See generally Matthew D. McCubbins & Daniel B. Rodriguez, *Canonical Construction and Statutory Revisionism: The Strange Case of the Appropriations Canon*, 14 J. CONTEMP. LEGAL ISSUES 669 (2005).

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survival of a relatively small number of three-inch fish among all the countless millions of species extant would require the permanent halting of a virtually completed dam for which Congress has expended more than \$100 million.”²⁹ The potential to stop such an important project that had continued to receive funding from Congress and to do so on behalf of one species was seen as a paradox.³⁰

Nonetheless, the Court held that a permanent injunction was required under the circumstances.³¹ Examining the language of § 7 of the ESA,³² the Court declared that “[i]t has not been shown . . . how TVA can close the gates of the Tellico Dam without ‘carrying out’ an action that has been ‘authorized’ and ‘funded’ by a federal agency. Nor can we understand how such action will ‘insure’ that the snail darter’s habitat is not disrupted.”³³ Accordingly, despite the curiosity and paradoxical nature of enjoining a major federal project for the survival of “a relatively small number of three-inch fish,” the Court concluded that “the Endangered Species Act require[d] precisely that result.”³⁴

Not only did Chief Justice Burger suggest that the plain language of § 7 required that result, he also opined that the intent behind the entire ESA was clear: “The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost.”³⁵ Similarly, “the plain language of the Act, buttressed by its

²⁹ *TVA*, 437 U.S. at 172.

³⁰ *Id.* (“The paradox is not minimized by the fact that Congress continued to appropriate large sums of public money for the project, even after congressional Appropriations Committees were apprised of its apparent impact upon the survival of the snail darter.”).

³¹ *Id.* at 172-73.

³² *See supra* note 27.

³³ *TVA*, 437 U.S. at 173.

³⁴ *Id.* at 172-73. One case comment contends that “the virtual unanimity of support for the ESA suggests that Congress did not anticipate subsequent controversies between the ESA and human endeavors,” but that “[i]his congressional failure to anticipate controversy, however, should not prevent courts from applying the ESA to reach controversial outcomes.” Kevin D. Batt, Comment, *Above All, Do No Harm: Sweet Home and Section Nine of the Endangered Species Act*, 75 B.U. L. REV. 1177, 1183 & n.31 (1995) (footnote call number omitted).

³⁵ *TVA*, 437 U.S. at 184. Professors William N. Eskridge, Jr., and John Ferejohn have called Chief Justice Burger’s decision in *TVA* “the greatest statutory opinion of his

legislative history, shows clearly that Congress viewed the value of endangered species as ‘incalculable.’”³⁶

In response to Justice Powell’s dissent that pointed to the continued Congressional funding of the dam project and urged “a permissible construction [of the ESA] that accords with some modicum of common sense and the public weal,”³⁷ Chief Justice Burger offered the following:

[I]s that our function? We have no expert knowledge on the subject of endangered species, much less do we have a mandate from the people to strike a balance of equities on the side of the Tellico Dam. Congress has spoken in the plainest of words, making it abundantly clear that the

career,” with the language on “[t]he plain intent of Congress in enacting” the ESA as the “most excellent [part of] the Chief’s opinion.” William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1244 (2001). Eskridge and Ferejohn contend that “[t]he breadth of the ESA as applied is even more striking in its effect on other federal laws. If there was any doubt that the statute’s bar to federal programs that harmed endangered species and their habitats needed to be taken seriously, it was laid to rest in the famous case of *TVA v. Hill*.” *Id.* But see Damien Schiff, *Nothing New Under the Sun: The Minimalism of Chief Justice Roberts and the Supreme Court’s Recent Environmental Law Jurisprudence*, 15 MO. ENVTL. L. & POL’Y REV. 1, 35-37 (2007). In his article, Schiff discusses the Supreme Court’s opinion in *National Association of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007), in which the Court decided that mandatory federal actions are not subject to the § 7 consultation requirement, *id.* at 673, and notes that “environmental groups argued that *TVA* required federal agencies to make species and habitat preservation the federal government’s foremost goal, and cited to language in the Court’s opinion to that effect. But the majority rejected that broad reading largely on the grounds that *TVA* dealt only with a discretionary federal action and not . . . a nondiscretionary federal action.” Schiff, *supra* note 35, at 37.

³⁶ *TVA*, 437 U.S. at 187. The Court also observed that “[a]s it was finally passed, the Endangered Species Act of 1973 represented the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.” *Id.* at 180.

³⁷ *Id.* at 196 (Powell, J., dissenting). Justice Powell’s dissenting opinion was joined by Justice Blackmun. *Id.* at 195. For Justice Powell, common sense meant refraining from enjoining the Tellico Dam project. See *id.* at 206 (“[A]t some stage of a federal project, and certainly where a federal project has been completed, the agency no longer has a reasonable choice simply to abandon it.”).

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balance has been struck in favor of affording endangered species the highest of priorities³⁸

Justice Rehnquist also dissented and argued that the district court in the *TVA* litigation acted well within its authority in refusing to enjoin the completion of the dam.³⁹ Relying on the Court's decision in *Hecht Co. v. Bowles*,⁴⁰ he pointed out that district courts are unable to engage in traditional equitable balancing only in limited circumstances: “[I]f Congress desired to make such an abrupt departure from traditional equity practice as is suggested, it would have made its desire plain.”⁴¹ The

³⁸ *Id.* at 194 (majority opinion). This language leads many scholars to argue that *TVA* prevents courts from conducting the traditional equitable exercises of balancing the harms and considering the public interest. See, e.g., STANFORD ENVTL. LAW SOC'Y, THE ENDANGERED SPECIES ACT 213-14 (2001) (suggesting that the “highest of priorities” language means that “[i]n other words, Congress ‘foreclosed normal equitable balancing incident to the issuance of injunctive relief’” (quoting Arthur D. Smith, *Programmatic Consultation Under the Endangered Species Act: An Anatomy of the Salmon Habitat Litigation*, 11 J. ENVTL. L. & LITIG. 247, 317 (1996))); see also Parenteau, *supra* note 8, at 334 (“The Court [in *TVA*] ruled that Congress explicitly removed the federal judiciary’s traditional equitable authority to balance competing interests in deciding whether to issue injunctions under the ESA. The Court said that the ‘language, history, and structure of the legislation under review here indicates beyond doubt that Congress intended endangered species to be afforded the highest of priorities.’” (footnote call number omitted)).

³⁹ *TVA*, 437 U.S. at 211 (Rehnquist, J., dissenting).

⁴⁰ See *id.* at 211-13 (citing *Hecht Co. v. Bowles*, 321 U.S. 321 (1944)).

⁴¹ *Id.* at 212 (alteration in original) (quoting *Hecht Co.*, 321 U.S. at 329-30). In *Weinberger v. Romero-Barcelo*, the Court held that a district court was not required to issue an injunction prohibiting Naval operations in light of a violation of the CWA. 456 U.S. 305, 320 (1982) (“[A] major departure from the long tradition of equity practice should not be lightly implied. . . . Rather than requiring a district court to issue an injunction for any and all statutory violations, the [CWA] permits the district court to order that relief it considers necessary to secure prompt compliance with the Act.”). In so doing, the Court reaffirmed *Hecht Co.*’s holding that the statutes should be construed “in favor of that interpretation which affords a full opportunity for equity courts to treat enforcement proceedings . . . in accordance with their traditional principles, as conditioned by the necessities of the public interest which Congress has sought to protect.” *Id.* at 320 (alteration in original) (internal quotation marks omitted) (quoting *Hecht Co.*, 321 U.S. at 330).

majority's decision was, according to Justice Rehnquist, a "sharp[] retreat[] from the principle of statutory construction announced in *Hecht Co.*," and the district court's conclusion that the interest of the snail darter was "one side of the balance [that] was more than outweighed by equally significant factors" was not an abuse of discretion.⁴²

But the majority's decision overturned this balancing and, in so doing, provided a powerful language that "plac[ed] the goal of 'revers[ing] the trend toward species extinction' above considerations of cost, and explicitly precluded courts from engaging in traditional equitable balancing in determining whether to issue an injunction in the face of a violation of the Act."⁴³ However, as the analysis below will explain, this "majestic" language⁴⁴ persists not only in the face of violations of the ESA, but it can also be found in case law involving a significantly different scenario than was at issue in *TVA*: preliminary injunctive relief against non-federal actors.

⁴² *TVA*, 437 U.S. at 212-13 (Rehnquist, J., dissenting). According to Professor Plater, Justice Rehnquist's dissenting opinion suggests that he "concluded that the [district] court . . . had an unlimited ability to override the [Endangered Species Act]." Zygmunt J.B. Plater, *Statutory Violations and Equitable Discretion*, 70 CAL. L. REV. 524, 554 (1982). Rather than being concerned with the *ability* (unlimited or otherwise) to override the ESA, Justice Rehnquist seems to have been concerned with the *absolute* duty to ensure ESA compliance: "I choose to adhere to *Hecht Co.*'s teaching: '[A] grant of jurisdiction to issue compliance orders hardly suggests an absolute duty to do so under any and all circumstances. We cannot but think that if Congress had intended to make such a drastic departure from traditions of equity practice, an unequivocal statement of purpose would have been made.'" *TVA*, 437 U.S. at 212 (Rehnquist, J., dissenting) (alteration in original) (emphasis omitted) (quoting *Hecht Co.*, 321 U.S. at 329). In any event, as Professor Cheever notes, Justice Rehnquist's dissent in *TVA* "has never developed any significant following among the lower federal courts." Cheever, *supra* note 6, at 313.

⁴³ Cheever, *supra* note 6, at 316 (alteration in original) (footnote call number omitted).

⁴⁴ See PLF Liberty Blog, *A Critique of TVA v. Hill*, <http://plf.typepad.com/plf/2008/06/a-critique-of-tva-v-hill.html> (June 16, 2008, 20:45 PST).

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B. *The Ninth Circuit's Foreclosure of Traditional Equitable Balancing in All ESA Injunctions*

i. *Sierra Club v. Marsh* and the Expansion of *TVA* in the Federal Context

Nearly ten years after the Supreme Court's decision in *TVA*, the Ninth Circuit in *Sierra Club v. Marsh* issued an injunction against the Army Corps of Engineers (hereinafter "Corps"), preventing the Corps from completing a flood control project after questions arose as to a key assumption underlying the Corps' project.⁴⁵ While the Corps had agreed to provide mitigation lands for the endangered California least tern and light-footed clapper rail,⁴⁶ it encountered unexpected difficulty in acquiring 188 acres of marsh that the County of San Diego had promised to provide.⁴⁷ Despite the unlikelihood that the county would be able to continue abstaining from compliance with the terms of the agreement it entered into with the Corps,⁴⁸ the Ninth Circuit held that

⁴⁵ See *Sierra Club v. Marsh*, 816 F.2d 1376, 1389 (9th Cir. 1987) (holding that "if an agency plans to mitigate its project's adverse effects on an endangered species by acquiring habitat and creating a refuge, it must insure the creation of that refuge before it permits destruction or adverse modification of other habitat").

⁴⁶ The Corps entered into this agreement after it was recommended by the U.S. Fish and Wildlife Service, which concluded that the mitigation measures would "provide the minimally acceptable loss compensation requirements needed to protect and maintain wetland habitat and endangered species." *Sierra Club*, 816 F.2d at 1379 (internal quotation marks omitted).

⁴⁷ *Id.* at 1379-80. Although the County of San Diego "promised to transfer the mitigation lands within one year in consideration for the [Corps] commencing construction of the flood control channel," it failed to perform and entered into an escrow agreement that "reserved seven easements in the mitigation lands, which both the [Corps] and FWS contend[ed] would reduce or eliminate the land's value as habitat for the endangered species." *Id.* at 1380.

⁴⁸ The Corps argued that it had "no obligation to halt construction until the *Sierra Club* or the County establish[ed] that the [Corps] will more likely than not lose its cross claim against the County." *Id.* at 1385. The Ninth Circuit was unconvinced, responding that the Corps' actions "fall far below insuring that the project is not likely to jeopardize the continued existence of the birds." *Id.* (emphasis omitted).

the risk that the COE might not prevail must be borne by the project, not by the endangered species. Similarly, any delay caused by the County's breach must be of construction, not of mitigation. Congress clearly intended that the COE give "the highest of priorities" and the "benefit of the doubt" to preserving endangered species such as the tern and the rail.⁴⁹

Indeed, the Supreme Court's interpretation of the ESA in *TVA* was instructive in a broad context: "In Congress's view . . . the balance of hardships and the public interest tip heavily in favor of endangered species. We may not use equity's scales to strike a different balance."⁵⁰ Thus, while the Ninth Circuit was aware that requiring reinitiation of consultation may "delay the public's enjoyment of the project's benefits and may significantly increase the costs," the court concluded that "regardless of any consequences of delay, the ESA requires this result."⁵¹ Less than a year later, the Ninth Circuit affirmed *Sierra Club's* holding

⁴⁹ *Id.* at 1386 (quoting *TVA v. Hill*, 437 U.S. 153, 174 (1978)).

⁵⁰ *Id.* at 1383 (citation omitted) (citing *TVA*, 437 U.S. at 187-88).

⁵¹ *Id.* at 1389. In a footnote, the court suggested that "[e]ven if we had applied the traditional test for preliminary injunctions, we would hold that the district court clearly erred in balancing the hardships to the respective parties." *Id.* n.13. It is difficult to understand how ruling in favor of the Corps would be a clear error in balancing the hardships; the court's subsequent analysis in this footnote appears to be based on *TVA's* standard, not on traditional balancing: "We are aware of the difficult decision that faced the district court: 'If the court grants the injunction, the combined projects, twenty years in the planning, come to a grinding halt.' Although we do not denigrate the court's concern with the expense and inconvenience to the public an injunction would cause, Congress has decided that these losses cannot equal the potential loss from extinction." *Id.* (citing *TVA*, 437 U.S. at 172-73). The court's injunction was to continue "until the [Corps] conforms its project to the requirements of section 7(a)(2)" of the ESA. *Id.* Major Craig E. Teller later cited *Sierra Club* in his analysis that "Section 7(a)(2) affords powerful protection of listed species and their habitats . . . and is a major constraint on [their] actions. It forces installations—in all their activities—to evaluate the direct and indirect effects of their actions and of other 'interrelated' and 'interdependent' federal, state, and private actions on the survival and recovery of listed species." Major Craig E. Teller, *Effective Installation Compliance with the Endangered Species Act*, 1993 ARMY LAW. 5, 12 (1993).

and noted that in enacting the ESA, “Congress removed from the courts their traditional equitable discretion in injunction proceedings.”⁵²

ii. *National Wildlife Federation v. Burlington Northern R.R. and the Expansion of TVA in the Non-Federal Context*

The Ninth Circuit extended the unique ESA injunctive relief standard to preliminary injunctions of non-federal actors in *National Wildlife Federation v. Burlington Northern R.R.*⁵³ In *Burlington Northern*, a train derailment in northwest Montana led to the spill of a massive amount of corn on and around Burlington Northern (hereinafter “BN”) rail tracks.⁵⁴ This spill attracted grizzly bears (a threatened species under the ESA) near the tracks, and several bears subsequently had fatal encounters with BN trains.⁵⁵

The National Wildlife Federation sued BN and moved for a preliminary injunction that would require a reduction of BN trains’ operating speed near derailment sites, a feasibility study, and an incidental take permit under § 10 of the ESA.⁵⁶ BN contended that such an injunction was unnecessary, as it had already spent nearly ten million dollars to prevent future derailments.⁵⁷

Citing *TVA* and *Sierra Club*, the court held that the

⁵² *Friends of the Earth v. United States*, 841 F.2d 927, 933 (9th Cir. 1988) (discussing preliminary and permanent injunctive relief under the National Defense Authorization Act of 1987, comparing the NDAA to the ESA, and holding that “[a]s in *TVA v. Hill*, an examination of the language, history, and structure of the NDAA demonstrates that Congress intended that no construction [of Naval homeports] should commence prior to issuance of all required permits”). The Ninth Circuit most recently affirmed *Sierra Club* and *Friends of the Earth* in *National Wildlife Federation v. National Marine Fisheries Service*, 422 F.3d 782, 793-94 (9th Cir. 2005).

⁵³ See 23 F.3d 1508 (9th Cir. 1994).

⁵⁴ *Id.* at 1510.

⁵⁵ *Id.*

⁵⁶ *Id.* For more on incidental take permits under the ESA, see *infra* note 102.

⁵⁷ See *Burlington N. R.R.*, 23 F.3d at 1510 n.3.

traditional test for preliminary injunctions . . . is not the test for injunctions under the Endangered Species Act. In cases involving the ESA, Congress removed from the courts their traditional equitable discretion in injunction proceedings of balancing the parties' competing interests. The 'language, history, and structure' of the ESA demonstrates Congress' determination that the balance of hardships and the public interest tips heavily in favor of protected species.⁵⁸

The Ninth Circuit most recently affirmed *Burlington Northern* in 2005, once again opining that "[t]he traditional preliminary injunction analysis does not apply to injunctions issued pursuant to the ESA."⁵⁹ District courts throughout the Ninth Circuit have applied *Burlington Northern's* tipped-scale standard in considering preliminary injunctive relief against non-federal actors.⁶⁰

⁵⁸ *Id.* at 1510-11 (citations omitted) (citing *TVA v. Hill*, 437 U.S. 153, 174 (1978); *Friends of the Earth v. U.S. Navy*, 841 F.2d 927, 933 (9th Cir. 1988); and *Sierra Club v. Marsh*, 816 F.2d 1376, 1383 (9th Cir. 1987)). Despite precluding equitable balancing and public interest considerations, the court concluded that a preliminary injunction was unnecessary, as there was "no clear evidence that the BN operations will result in the deaths of members of a protected species, as in *TVA*." *Burlington N. R.R.*, 23 F.3d at 1512. In particular, the court noted that "after spending nearly \$10,000,000 in cleanup and rebuilding costs, BN will have as great an incentive as NWF to minimize bear mortality from its operations, with or without a court order." *Id.* at 1513.

⁵⁹ *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 422 F.3d 782, 793 (9th Cir. 2005) (citing *Burlington N. R.R.*, 23 F.3d at 1510).

⁶⁰ *See, e.g.*, *Seattle Audobon Soc'y v. Sutherland*, No. C06-1608MJP, 2007 WL 2220256, at *14 (W.D. Wash. Aug. 1, 2007); *Pac. Rivers Council v. Brown*, No. CV 02-243-BR, 2003 WL 21087974, at *2 (D. Or. April 21, 2003). Even before *Burlington Northern*, the District of Hawaii had concluded that Hawaii's multiple use policy of protecting endangered species and at the same encouraging sport hunting on its lands conflicted with the ESA, which "does not allow a 'balancing' approach for multiple use considerations." *Palila v. Haw. Dep't of Land & Natural Res.*, 649 F. Supp. 1070, 1081 (D. Hawaii 1986). Accordingly, Judge King enjoined Hawaii to remove Mouflon sheep from an endangered bird's (the Palila) habitat: "[T]he presence of mouflon sheep in numbers sufficient for sport-hunting is harming the Palila. They degrade the mamane ecosystem to the extent that there is an actual present negative impact on the Palila population that threatens the continued existence and recovery of the species. Once this

C. *The First Circuit Adopts Burlington Northern's Application of TVA's Injunctive Relief Standard to ESA Cases Involving Non-Federal Actors*

The First Circuit has followed the Ninth Circuit's decision in *Burlington Northern* and has abandoned the traditional approach to preliminary injunctions in ESA cases.⁶¹ At the same time, the balance of hardships and the public interest appears to tip less heavily in favor of protected species in the First Circuit than it does in the Ninth Circuit.⁶²

In *Strahan v. Coxe*,⁶³ the First Circuit considered a district court's preliminary injunction of Massachusetts' officials under the ESA.⁶⁴ The plaintiff in *Strahan* had sought "a preliminary injunction ordering the Commonwealth to revoke licenses and permits it had issued authorizing gillnet and lobster pot fishing and barring the Commonwealth from issuing such licenses and permits in the future" until it had received incidental take permits under the ESA.⁶⁵ Included in the district court's injunction were orders for the officials to apply for an incidental take permit for Northern right whales, to prepare a proposal to restrict fixed-fishing gear in the whales' critical habitat off the Massachusetts coast, and to establish a Whale Working Group in order to engage in substantive discussions with the environmental plaintiff, Strahan.⁶⁶

The Massachusetts' officials appealed the issuance of these orders, and, in particular, sought to avoid any dialogue with Strahan, as this would result in irreparable harm to Massachusetts given "the contentious relationship between the parties."⁶⁷ The First Circuit responded:

determination has been made, the Endangered Species Act leaves no room for balancing policy considerations, but rather requires me to order the removal of mouflon sheep from Mauna Kea." *Id.* at 1082.

⁶¹ See, e.g., *Strahan v. Coxe*, 127 F.3d 155 (1st Cir. 1997).

⁶² See *infra* Part II.C.

⁶³ 127 F.3d 155 (1st Cir. 1997).

⁶⁴ *Id.*

⁶⁵ *Id.* at 158.

⁶⁶ *Id.*

⁶⁷ *Id.* at 171.

Although it is generally true in the preliminary injunction context that the district court is required to weigh and balance the relative harms to the non-movant if the injunction is granted and to the movant if it is not, in the context of ESA litigation, that balance has been answered by Congress' determination that the "balance of hardships and the public interest tips heavily in favor of protected species."⁶⁸

Accordingly, the fact that forced dialogue between Strahan and the Massachusetts' officials created an "unwanted relationship" was of little concern to the First Circuit, and the district court's preliminary injunction orders under the ESA were upheld.⁶⁹

⁶⁸ *Id.* (citation omitted) (quoting *Nat'l Wildlife Fed'n v. Burlington N. R.R.*, 23 F.3d 1508, 1510 (9th Cir. 1994)). A later court decision indicates that Massachusetts was within reason to be concerned over being required to engage in dialogue with Strahan. *See Strahan v. Pritchard*, 473 F. Supp. 2d 230, 234-35 (D. Mass. 2007) ("[T]he plaintiff appears *pro se* perhaps to the detriment of his own cause. While Strahan demonstrates an admirable facility with the law and a true passion for whale conservation, his lack of formal legal training and sometimes abrupt courtroom demeanor have handicapped the prosecution of his claims. Although the Court has repeatedly advised him that he would be well-served to retain counsel, he has declined to do so but is, nevertheless, entitled to his day in court. The Court has done its best to accommodate the plaintiff's presentation and to evaluate the evidence that has been presented in a haphazard manner.").

⁶⁹ *See Coxe*, 127 F.3d at 170-71. For an interesting analysis of the First Circuit's decision in *Strahan*, see Jonathan Adler, *Judicial Federalism and the Future of Federal Environmental Regulation*, 90 IOWA L. REV. 377, 428-34 (2005). Professor Adler critiqued the First Circuit's implicit holding that "states have an obligation to administer state regulatory programs so as to implement the federal ESA, even though the activities to be regulated are themselves already illegal under federal law." *Id.* at 429. According to Adler, "[t]his seems to contravene the holding of [*New York v. United States*] that 'even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts.'" *Id.* (quoting *New York v. United States*, 505 U.S. 144, 166 (1992)). Professor Adler further suggested that "[i]t is not clear upon what basis the legal obligation to enforce [the ESA's take] prohibition can be transposed onto a state merely because it elects to adopt a licensing scheme for state waters" and notes that "[i]f the state refrained from regulating gillnet and lobsterpot fishing altogether, the only way to

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The First Circuit later clarified its ESA preliminary injunctive relief standard in *Water Keeper Alliance v. United States Department of Defense*.⁷⁰ The injunction sought by the plaintiffs in *Water Keeper Alliance* would have stayed military exercises near a Puerto Rican island.⁷¹ The First Circuit noted that, although the circumstances in *Coxe* and *Burlington Northern* required that the endangered species be given “the utmost consideration, we do not think that they can blindly compel our decision in this case because the harm asserted by the Navy implicates national security and therefore deserves greater weight than the economic harm” in *Coxe* and *Burlington Northern*.⁷² Likewise, “[t]he effect of a preliminary injunction on the public interest is directly tied to its impact on both military preparedness and the endangered and threatened species,” so that “the district court did not abuse its discretion in finding that the public interest weighed in favor of denying a preliminary injunction.”⁷³

Although *Water Keeper Alliance* concerned a federal actor, district courts in the First Circuit post-*Water Keeper Alliance* have refused to abstain from *any* balancing or public interest considerations for non-federal actors, notwithstanding *Coxe*’s declining to consider the interest of the non-movant. For instance, in *Strahan v. Pritchard*,⁷⁴ the District Court of Massachusetts stated that “[a] thorough analysis of the effect of the requested relief on the public interest . . . is neither warranted nor appropriate.”⁷⁵ However, the court refused to grant the “extraordinarily broad relief” sought by the plaintiff,⁷⁶ due to the “obvious detrimental

mandate state enforcement of an anti-take prohibition would be to commandeer state officials.” *Id.*

⁷⁰ 271 F.3d 21 (1st Cir. 2001).

⁷¹ *Id.* at 24.

⁷² *Id.* at 34 (citing *Coxe*, 127 F.3d at 171 and *Burlington N. R.R.*, 23 F.3d at 1510).

⁷³ *Id.* at 35.

⁷⁴ 473 F. Supp. 2d 230 (D. Mass. 2007).

⁷⁵ *Id.* at 240

⁷⁶ In order to effectively protect numerous species of endangered whales, the plaintiffs in *Pritchard* requested, in part, that the court enjoin Massachusetts officials “from all further licensing of fixed fishing gear and require all persons currently using fixed fishing gear to immediately remove such gear from coastal waters.” *Id.* Although fixed fishing gear was known to lead to the entanglement of whales, the court declined adopt the plaintiff’s suggestion due to a preventive regulation requiring sinking line in state waters, as

impact that such an order would have on the Massachusetts fishing industry” and because “the requested injunction would be devastating to the livelihood of fishermen and to the survival of their communities.”⁷⁷ Accordingly, the court issued orders that “ensure[d] the temporary monitoring of the threat posed to endangered whales by fixed fishing gear without unduly disrupting the commercial fishing industry.”⁷⁸

Similarly, the District of Maine has opined that, although “the balance of hardships and the public interest tips heavily in favor of protected species,” “the advantage given to the endangered species is not necessarily dispositive, and . . . the presumption is rebuttable.”⁷⁹ Since some courts have not entirely “excluded consideration of the hardship to

“entanglements will become less frequent after the imposition of the new regulation. Because injunctive relief may be granted only upon a showing that the alleged activity will ‘actually’ (as opposed to ‘potentially’) cause harm to endangered animals, an injunction at this time is not warranted.” *Id.* at 239 (citing *Am. Bald Eagle v. Bhatti*, 9 F.3d 163, 166 (1st Cir. 1993)). The Supreme Court has recently confirmed that the mere possibility of harm is insufficient to satisfy the irreparable harm inquiry of injunctive relief. *Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365, 375-76 (2008) (“Issuing 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.” (citing *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam))).

⁷⁷ *Pritchard*, 473 F. Supp. at 240.

⁷⁸ *Id.* at 241. For further indication that the District of Massachusetts uses a slightly less-tipped scale for ESA preliminary injunctive relief than courts in the Ninth Circuit, see *Strahan v. Holmes*, 595 F. Supp. 2d 161 (D. Mass. 2009). Although the plaintiff in *Holmes* sought a *permanent* injunction of a commercial lobster fisherman, the court’s analysis illustrates that the District of Massachusetts will factor harm to the defendant and the public in *any* injunctive relief case, preliminary or permanent: “[N]otwithstanding the fact that under the ESA the ‘balance of hardships . . . tips heavily in favor of protected species,’ Strahan has failed to satisfy the third requirement for a permanent injunction. The hardship that would be imposed upon Holmes by an injunction, i.e. being prevented from pursuing his livelihood, far outweighs the relatively remote possibility of harm resulting from any future entanglements of whales in his fishing gear.” *Id.* at 165-66 (alteration in original) (citation omitted) (quoting *Nat’l Wildlife Fed’n v. Burlington N. R.R.*, 23 F.3d 1508, 1511 (9th Cir. 1994)).

⁷⁹ *Animal Prot. Inst. v. Martin*, 511 F. Supp. 2d 196, 197-98 (D. Me. 2007) (quoting *Stahan v. Cox*, 127 F.3d 155, 171 (1st Cir. 1997)).

defendants or the effect of the impact on the public interest,”⁸⁰ the court in *Animal Protection Institute v. Martin* declined to conclude that “the impact of an injunction on economic and other interests is inadmissible as a matter of law.”⁸¹

D. *District Courts Do Not Apply a Uniform Standard for Preliminary Injunctive Relief of Non-Federal Actors under the ESA*

Aside from the First and Ninth Circuits, no other circuits have specifically addressed the standard for preliminary injunctions against non-federal actors under the ESA. However, two district court decisions with opposite conclusions on this issue are worth mentioning.⁸²

The first is *Loggerhead Turtle v. County Council*,⁸³ in which the Middle District of Florida was asked to preliminarily enjoin the enforcement of a county and beachfront illumination ordinance as well as to enjoin Volusia County from permitting vehicles on its beaches at night, in order to protect Loggerhead sea turtles and Green sea turtles.⁸⁴ The county argued that the court should consider “the devastating effect” an injunction would have on the county.⁸⁵ The court declined to do so, holding that the “balancing of affected ‘economic and social enterprises’”

⁸⁰ *Id.* at 199 (citing *Alabama v. U.S. Army Corps of Eng’rs*, 441 F. Supp. 2d 1123, 1132 (D. Ala. 2006); *Am. Rivers v. U.S. Army Corps of Eng’rs*, 271 F. Supp. 2d 230, 249 (D.D.C. 2003); and *Hamilton v. City of Austin*, 8 F. Supp. 2d 886, 894 n.14 (W.D. Tex. 1998)).

⁸¹ *Id.* Two years after ruling in *Animal Protection Institute*, Judge Woodcock declined to address the issue of *Winter’s* effect on *TVA’s* balancing standard in similar litigation. See *Animal Welfare Inst. v. Martin*, 668 F. Supp. 2d 254, 273 n.18 (D. Me. 2009).

⁸² On the desirability of uniform standards for preliminary injunctions, see Hon. Morton Denlow, *The Motion for a Preliminary Injunction: Time for a Uniform Federal Standard*, 22 REV. LITIG. 495, 532-33 (2003) (“It is difficult for attorneys to counsel their clients and predict the way a judge may rule when the legal principles on which the court must base its discretion are unclear, ambiguous, and rife with contradiction. The most the attorney can predict is that the judge will apply the principles of the circuit in which the case is pending.”).

⁸³ 896 F. Supp. 1170 (M.D. Fla. 1995).

⁸⁴ *Id.* at 1172.

⁸⁵ *Id.* at 1178.

was appropriate in the context of an incidental take permit, but not for a court:

If Congress had wanted the federal courts to undertake a similar balancing of interests, it could have enacted such legislation. Such language is notably absent from the Endangered Species Act, and this absence gains increased significance from the fact that Congress has first-hand knowledge of the severe economic and social consequences which may be incurred as a result of this lack of balancing.⁸⁶

Given this analysis, the burden on plaintiffs seeking a preliminary injunction was minimal, requiring only a showing “(1) that the wildlife at issue is protected under the Endangered Species Act, and (2) that there is a reasonable likelihood that the defendant will commit future violations of the Endangered Species Act.”⁸⁷ While it was undisputed that the sea turtles at issue in *Loggerhead Turtle* were protected under the ESA, the plaintiffs could only show that the county’s permitting of vehicles on the

⁸⁶ *Id.* at 1179 (citing *TVA v. Hill*, 437 U.S. 153, 180 (1978)). In a recent ESA case involving a non-federal actor, the District of Maryland cited *TVA* in enjoining construction of wind turbines due to threats to the endangered Indiana bat. See *Animal Welfare Inst. v. Beech Ridge Energy, L.L.C.*, 675 F. Supp. 2d 540, 561 (D. Md. 2009). The court in *Beech Ridge Energy* made a passing reference to the ability to balance the hardships. See *id.* at 581 (“Congress, in enacting the ESA, has unequivocally stated that endangered species must be afforded the highest priority, and the FWS long ago designated the Indiana bat as an endangered species. By the same token, Congress has strongly encouraged the development of clean, renewable energy, including wind energy. . . . The two vital federal policies at issue in this case are not necessarily in conflict.”) However, the court felt it was necessary to protect against potential harm to the individual bats, neglecting to consider whether the alleged future ESA violations posed a population-level threat on the species. See Posting of Brandon Middleton to PLF Liberty Blog, *The Two Big Problems with the Indiana Bat Decision*, <http://plf.typepad.com/plf/2009/12/the-two-big-problems-with-the-indiana-bat-decision.html> (Dec. 23, 2009, 13:46 PST).

⁸⁷ *Loggerhead Turtle*, 896 F. Supp. at 1180 (citing *Nat’l Wildlife Fed’n v. Burlington N. R.R.*, 23 F.3d 1508, 1510-11 (9th Cir. 1994)).

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beach might result in takes of the species, leaving the lighting ordinance free from an injunction.⁸⁸

In *Hamilton v. City of Austin*,⁸⁹ the Western District of Texas was much more receptive to public interest considerations. The plaintiffs in *City of Austin* sought to preliminarily enjoin the cleaning of Barton Springs Pool in order to protect an endangered species of salamander.⁹⁰ Due to its reliance on natural spring water, the pool was susceptible to the build-up of silt and algae.⁹¹ When city officials sought to clean up the silt and algae for the protection of swimmers, the plaintiffs claimed that the stress of the clean-up process would be too much for the endangered salamander to handle.⁹²

Notably, the court refused to follow the Ninth Circuit's decision in *Sierra Club* and abandoned traditional equitable principles.⁹³ Further, not only did the plaintiffs fail to show a substantial likelihood of success on the merits or any evidence of irreparable harm, the court found that "the

⁸⁸ *Id.* at 1180-83. *Loggerhead Turtle* is also noteworthy for its holding that "[a] species protected under the Endangered Species Act has standing to sue 'in its own right' to enforce the provisions of the Act." *Id.* at 1177 (quoting *Marbled Murrelet v. Pac. Lumber Co.*, 880 F. Supp. 1343, 1346 (N.D. Cal. 1995)); see also Katherine A. Burke, *Can We Stand for It? Amending the Endangered Species Act with An Animal-Suit Provision*, 75 U. COLO. L. REV. 633, 638 (2004) ("An animal-suit provision in the ESA would be consistent with both the legislative intent and the regulatory focus of the [Endangered Species] Act . . ."). But see Matthew Armstrong, *Cetacean Community v. Bush: The False Hope of Animal Rights Lingers On*, 12 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 185, 196 (2006) ("[D]oes Congress have the legislative authority to bestow a cause of action on animals? . . . Considering recent Supreme Court limitations on Congress' powers under the Commerce Clause, it is unlikely that Congress could justify an animal-suit statute."). See generally Joanna B. Wymyslo, *Standing for Endangered Species: Justiciability Beyond Humanity*, 15 U. BAL. J. ENVTL. L. 45, 47 (2007) (noting that "animals have been granted standing in multiple [ESA cases] in the past, albeit inconsistently" and arguing that "the express congressional authorization of animal standing under the ESA may be more of a clarification of the ambiguities contained in the citizen suit provision rather than a radical leap into new jurisdictional territories").

⁸⁹ 8 F. Supp. 2d 886 (W.D. Tex. 1998).

⁹⁰ *Id.* at 889.

⁹¹ *Id.* at 891.

⁹² *Id.* at 891-92.

⁹³ *Id.* at 894.

harm to the defendants and the public interest also weigh heavily against granting the injunction. . . . It would be quite a tragedy if a swimmer drowned or was injured because the pool could not be cleaned due to the 'stress' caused to Salamanders by moving them during cleaning."⁹⁴

III. THE LIMITS OF *TVA* AND WHY ITS INJUNCTIVE RELIEF STANDARD IS INAPPLICABLE TO ESA CASES INVOLVING NON-FEDERAL ACTORS

A. *The Case for a Narrow Reading of TVA in the Context of Non-Federal Actors*

As the foregoing demonstrates, the lower courts' abandonment of traditional equitable principles when considering preliminary injunctive relief against non-federal actors stems from the Ninth Circuit's holding that "the balance of hardships and the public interest tips heavily in favor of protected species."⁹⁵ This holding, in turn, is based on *TVA*'s admonition that endangered species are to be afforded "the highest of priorities."⁹⁶

The point of *TVA*, however, was not to establish the ESA as a super-statute that triumphs over traditional notions of equity in each and every circumstance.⁹⁷ Instead, *TVA* served to put federal agencies on

⁹⁴ *Id.* at 894-97. At the beginning of his memorandum opinion and order, Judge Sparks poetically opined his displeasure that a suit had been brought to cease the cleaning of Barton Springs, "a true Austin shrine, A hundred years of swimming sublime [T]oday, Austin's citizens get away with a rhyme; But, the truth is, they might not be so lucky the next time. The Endangered Species Act in its extreme makes no sense. Only Congress can change it to make this problem past tense." *Id.* at 888.

⁹⁵ *Nat'l Wildlife Fed'n v. Burlington N. R.R.*, 23 F.3d 1508, 1511 (9th Cir. 1994) (citing *TVA v. Hill*, 437 U.S. 153, 174 (1978)).

⁹⁶ *See id.* (citing *TVA*, 437 U.S. at 174 ("[T]he language, history, and structure of the legislation under review here indicates beyond doubt that Congress intended endangered species to be afforded the highest of priorities.")); *see also* John Earl Duke, Note, *Giving Species the Benefit of the Doubt*, 83 B.U. L. REV. 209, 249 (2003) ("[C]ourts unhesitatingly follow the dictum of *TVA v. Hill* . . ."). *See generally* Cheever, *supra* note 6, at 315-19.

⁹⁷ *TVA*'s introductory paragraph makes it clear that the Court was concerned with the unique circumstances of the case – that "the operation of a virtually completed federal

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notice of its special obligations under § 7 of the ESA.⁹⁸ After all, the injunction issued in *TVA* was based on the “irreconcilable conflict between operation of the Tellico Dam and the explicit provisions of § 7.”⁹⁹ Indeed, much of the Court’s analysis was based on the plain language of § 7, rather than on the ESA as a whole.¹⁰⁰

While it is true that Chief Justice Burger wrote that “the balance has been struck in favor of affording endangered species the highest of priorities,” this prioritization was meant to address the unique legal issue of *TVA*: “[W]hether the Endangered Species Act of 1973 requires a court to enjoin the operation of a virtually completed federal dam . . . [which] would eradicate an endangered species.”¹⁰¹

dam . . . would eradicate an endangered species.” *TVA*, 437 U.S. at 156; *see also id.* at 172 (“[T]wo questions are presented: (a) Would TVA be in violation of the [ESA] if it completed and operated the Tellico Dam as planned? (b) If TVA’s actions would offend the Act, is an injunction the appropriate remedy for the violation?”). *See generally* Brief Amicus Curiae of Pacific Legal Foundation in Support of Petitioners at 6, *Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365 (2008) (No. 07-1239), 2008 WL 3851620.

⁹⁸ *See TVA*, 437 U.S. at 193-94.

⁹⁹ *Id.* at 193.

¹⁰⁰ *See id.* at 172 (“One would be hard pressed to find a statutory provision whose terms were any plainer than those in § 7 of the Endangered Species Act.”); *id.* at 185 (noting that “the legislative history undergirding § 7 reveals an explicit congressional decision to require agencies to afford first priority to the declared national policy of saving endangered species” as well as “a conscious decision by Congress to give endangered species priority over the ‘primary missions’ of federal agencies”); *see also* Cannon, *supra* note 13, at 417 (“The Court’s analysis is tightly focused on ascribing congressional intent in establishing the priority for species in Section 7.”).

¹⁰¹ *TVA*, 437 U.S. at 156, 194. One interesting aspect of *TVA* is Justice Stevens’ decision to join the majority opinion. *See* Kenneth A. Manaster, *Justice Stevens, Judicial Power, and the Varieties of Environmental Litigation*, 74 *FORDHAM L. REV.* 1963, 1989-92 (2006). One week after the decision was issued, Stevens wrote “I am inclined to think . . . that the kind of policy choices that are inevitably involved can usually be handled more effectively by a legislative, executive, or administrative body. A central point of the Chief Justice’s fine opinion in the snail darter case was that the underlying issue was not one that we should decide.” *Id.* at 1991 (quoting Letter from Justice John Paul Stevens to Kenneth A. Manaster (June 23, 1978) (on file with Professor Manaster)). Given Justice Stevens’ preference for legislative, executive, and administrative bodies to make difficult environmental policy decisions, it seems odd that he had little trouble with enjoining *TVA*’s attempt to complete Tellico Dam; given the decision to enjoin the dam project, it

Although the decision is filled with majestic language, little was said as to how courts should balance the equities when faced with a non-federal defendant.¹⁰² If this decision was meant to divest federal courts of traditional equity jurisdiction in each and every circumstance, one would expect this result to be based on more than just dicta.

B. Back to Basics: The Supreme Court Has Limited the Scope of TVA and Emphasized the Importance of Traditional Equitable Principles

The Supreme Court confirmed this narrow reading of *TVA* in 2007. In *NAHB v. Defenders of Wildlife*,¹⁰³ the Court considered whether the Environmental Protection Agency (hereinafter “EPA”) could avoid § 7 consultation when it transferred authority over discharges into the nation’s waters pursuant to the Clean Water Act (hereinafter “CWA”).¹⁰⁴ Environmentalists argued that simply because the EPA was authorized by statutory criteria to conduct transfers, this did not exempt the EPA from consultations with the U.S. Fish and Wildlife Service on whether a transfer would jeopardize an endangered species.¹⁰⁵

seems likewise odd that Justice Stevens believed that the Court was not deciding the underlying issue. *Cf. TVA*, 437 U.S. at 172 (“It may seem curious to some that the survival of a relatively small number of three-inch fish among all the countless millions of species extant would require the permanent halting of a virtually completed dam for which Congress has expended more than \$100 million. The paradox is not minimized by the fact that Congress continued to appropriate large sums of public money for the project, even after congressional Appropriations Committees were apprised of its apparent impact upon the survival of the snail darter.”).

¹⁰² The ESA distinguishes federal from non-federal actors. See *Animal Welfare Inst. v. Martin*, 588 F. Supp. 2d 70, 95 (D. Me. 2008) (discussing 1982 amendments to ESA that “allow non-federal actors to apply for a permit to engage in the otherwise prohibited taking of protected species under limited circumstances”). For more on § 10(a)(1)(B) incidental take permits for non-federal entities, see STANFORD ENVTL. LAW SOC’Y, *supra* note 38, at 130-31 and 16 U.S.C. § 1539(a)(1)(B) (2006).

¹⁰³ 551 U.S. 644 (2007).

¹⁰⁴ *Id.* at 649. For more on § 7 of the ESA, see *supra* note 4. For an overview of the *NAHB* decision, see Malori Dahmen, Note, *CWA and the ESA: Nine is a Party, Ten is a Crowd*, 29 ENERGY L.J. 703 (2008).

¹⁰⁵ See *NAHB*, 551 U.S. at 655.

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Under the broad reading of *TVA*, consultation would seem to have been required given the instruction “to halt and reverse the trend toward species extinction, whatever the cost.”¹⁰⁶ As the Ninth Circuit noted in holding that § 7 consultation was required, *TVA*’s “analysis of the legislative history of the ESA confirms that the authority conferred on agencies [by § 7] to protect listed species goes beyond that conferred by agencies’ own governing statutes,” such as the CWA’s governance of the EPA.¹⁰⁷

The Supreme Court, however, was not convinced and reversed the Ninth Circuit in holding that non-discretionary actions like the EPA’s National Pollutant Discharge Elimination System were not subject to § 7 consultations.¹⁰⁸ With respect to *TVA*, its holding that § 7 “contained ‘no exemptions’ and reflected ‘a conscious decision by Congress to give endangered species priority over the ‘primary missions’ of federal agencies’” offered “no occasion to answer the question presented” in

¹⁰⁶ See *TVA*, 437 U.S. at 184.

¹⁰⁷ *Defenders of Wildlife v. EPA*, 420 F.3d 946, 964-65 (2005). Central to this article’s argument that *TVA*’s injunctive relief standard is inapplicable in cases where the defendant is a non-federal actor is that *TVA* concerned only § 7 of the ESA, which does not apply to non-federal actors. Even before the Supreme Court reexamined § 7 in *NAHB*, scholars had argued that *TVA*’s impact on § 7 itself was limited. See, e.g., Steven G. Davison, Comment, *Federal Agency Action Subject to Section 7(A)(2) of the Endangered Species Act*, 14 MO. ENVTL. L. & POL’Y REV. 29, 48 (2006) (noting that *TVA* only addressed “the issue of whether appropriations for the Tellico Dam after the enactment of [S]ection 7 amended or partially repealed that section of the ESA”). One other scholar also correctly noted that the Ninth Circuit’s *Defenders of Wildlife v. EPA* decision had improperly expanded the scope of § 7. See Mary Beth Hubner, Note, *Defenders of Wildlife v. EPA: Reconciling the Endangered Species Act and Clean Water Act or Further Confusing the Statutory Overlap?*, 17 VILL. ENVTL. L. J. 433, 451 (2006) (“The Ninth Circuit’s holding that EPA must engage in ESA [S]ection 7 endangered species consultation when assessing state permitting applications is inconsistent with the EPA’s statutory duty under the plain language of the CWA and the CWA’s explicit purpose.”).

¹⁰⁸ *NAHB*, 551 U.S. at 673 (“Since the transfer of NPDES permitting authority is not discretionary, but rather is mandated once a State has met the criteria set forth in § 402(b) of the CWA, it follows that a transfer of NPDES permitting authority does not trigger § 7(a)(2)’s consultation and no-jeopardy requirements.”).

NAHB.¹⁰⁹ “*TVA v. Hill* thus supports the position . . . that the ESA’s no-jeopardy mandate applies to every discretionary agency action—regardless of the expense or burden its application might impose. But that case did not speak to the question of whether § 7(a)(2) applies to non-discretionary actions, like the one at issue here.”¹¹⁰ This analysis suggests that the instruction “to halt and reverse the trend toward species extinction, whatever the cost”¹¹¹ was not to be taken globally, but instead was specific only to the unique legal circumstances presented in *TVA*.¹¹²

Although Justice Stevens dissented and concluded that the EPA was not exempt from § 7 consultation, he seemed to similarly indicate that the special balancing established in *TVA* was applicable only to federal actors.¹¹³ As he wrote, *TVA* “explained at length why § 7 imposed obligations on ‘all federal agencies’ to ensure that ‘actions authorized,

¹⁰⁹ *Id.* at 670 (citing *TVA*, 437 U.S. at 173, 185, 188).

¹¹⁰ *Id.* at 671 (emphasis omitted).

¹¹¹ *TVA*, 437 U.S. at 184.

¹¹² One scholar notes the Court in *NAHB* dismissed the relevance of *TVA*. See Katherine Mapes, Comment, National Association of Homebuilders v. Defenders of Wildlife, 32 HARV. ENVTL. L. REV. 263, 269 (2008). If *TVA* was not relevant to the Court’s decision in *NAHB*, both of which concern the application of § 7, it is difficult to understand why *TVA* should be applicable to ESA cases that do not concern § 7. See Sam Coleman, Note, *Constraining the Extent of Section 7 of the Endangered Species Act: National Association of Homebuilders v. Defenders of Wildlife*, 12 GREAT PLAINS NAT. RESOURCES J. 86, 102 (2007) (noting that the majority in *NAHB* “cabined the bold and sweeping language of *TVA v. Hill*” and that “*TVA v. Hill* never considered whether section 7 applied to non-discretionary federal agency actions”). Some commentators argue that Justice Alito’s majority opinion in *NAHB* ignored *TVA*. See, e.g., Lynn Doiron, Note, National Ass’n of Homebuilders v. Defenders of Wildlife: *The Supreme Court Narrows the Scope of the ESA*, 21 TUL. ENVTL. L.J. 111, 119 (2007) (“The Court did not overturn *TVA*; in fact, the Court tried to ignore it completely.”); Joe Schlotzhauer, Note, *An Uncivil Action: The Supreme Court Dilutes the Endangered Species Act*, 15 MO. ENVTL. L & POL’Y REV. 415, 432 (2008) (“While the Supreme Court had previously held in [*TVA v. Hill*] that ‘endangered species are supposed to take priority over the “primary missions” of federal agencies,’ the [*NAHB*] majority ignored this imperative.”). On the contrary, rather than ignore *TVA*, the majority in *NAHB* explained quite clearly why *TVA* was inapplicable. Moreover, such analyses are based on the assumption that *TVA*’s “highest of priorities” language is applicable in each and every circumstance under the ESA; *NAHB* indicates this assumption is misguided.

¹¹³ See *NAHB*, 551 U.S. at 674–80 (Stevens, J., dissenting).

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funded, or carried out by them do not jeopardize the continued existence of endangered species.”¹¹⁴ The messages of *TVA* were that “Congress intended the ESA to apply to ‘all *federal* agencies’ and to all ‘actions authorized, funded, or carried out by them’” and that “the ESA has ‘first priority’ over all other *federal* action.”¹¹⁵

To be clear, courts that foreclose traditional equitable analysis in ESA cases against non-federal actors cite *TVA*’s declaration that “the language, history, and structure” of the ESA indicate that “Congress intended endangered species to be afforded the highest of priorities,” opining that that message is broadly applicable to every ESA-related issue, not just what was before the Court in *TVA*.¹¹⁶ If this were so, the question presented in *NAHB* should have been an easy one, and the Court should have required the EPA to engage in § 7 consultation in order to afford endangered species “the highest of priorities.”¹¹⁷ Yet this did not happen, and only Justice Breyer pointed to this language in the dissent.¹¹⁸

¹¹⁴ *Id.* at 675 (quoting *TVA*, 437 U.S. at 173).

¹¹⁵ *Id.* (citing *TVA*, 437 U.S. at 173, 185) (emphasis added); see also Coleman, *supra* note 112, at 104 (“To the extent that *TVA v. Hill* correctly interpreted section 7 of the ESA as a singular, far-reaching mandate for federal agencies, Justice Stevens’ dissent in [*NAHB*] more faithfully upholds the intent of Congress.”).

¹¹⁶ See, e.g., *Nat’l Wildlife Fed’n v. Burlington N. R.R.*, 23 F.3d 1508, 1511 (9th Cir. 1994) (“In cases involving the ESA, Congress removed from the courts their traditional equitable discretion in injunction proceedings of balancing the parties’ competing interests. The ‘language, history, and structure’ of the ESA demonstrates Congress’ determination that the balance of hardships and the public interest tips heavily in favor of protected species.” (quoting *TVA*, 437 U.S. at 174)).

¹¹⁷ See *TVA*, 437 U.S. at 174; cf. *Defenders of Wildlife v. EPA*, 420 F.3d 946, 964-65 (9th Cir. 2005), *rev’d*, *NAHB v. Defenders of Wildlife*, 551 U.S. 664 (2007).

¹¹⁸ See *NAHB*, 551 U.S. at 699 (Breyer, J., dissenting) (“[W]e have held that the Endangered Species Act changed the regulatory landscape, ‘indicat[ing] beyond doubt that Congress intended endangered species to be afforded the *highest* of priorities.’” (alteration in original) (quoting *TVA*, 437 U.S. at 174)). While the Court in *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon* referred to *TVA*’s instruction that the intent behind the ESA “was to halt and reverse the trend towards species extinction, whatever the cost,” it was careful to point out that the ESA’s purpose was relevant only in the context of the respondents’ facial claim that the Interior Secretary’s “harm” regulation was not reasonable. See *Babbitt v. Sweet Home Chapter of Cmty. for a Greater Or.*, 515 U.S. 687, 699-700 (1995) (internal quotation marks omitted) (quoting

Just as the Court has emphasized the narrow circumstances of *TVA*, so too has it reminded lower courts that they should not depart from traditional principles of equity without clear direction from Congress.¹¹⁹ This rule is applicable in most instances of equity jurisdiction,¹²⁰ including environmental cases, and adds further support to the notion that courts considering ESA preliminary injunctive relief against non-federal actors should engage in the traditional balancing of the equities and consideration of the public interest.¹²¹

TVA, 437 U.S. at 184). As the Court indicated, “Respondents advance[d] strong arguments that activities that cause minimal or unforeseeable harm will not violate the Act as construed in the ‘harm’ regulation,” but they “presented a facial challenge to the regulation.” *Id.* at 699. “Thus, they 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. Given Congress’ clear expression of the ESA’s broad purpose to protect endangered and threatened wildlife, the Secretary’s definition of ‘harm’ is reasonable.” *Id.* at 699-700. Conversely, in the context of preliminary injunctive relief of non-federal actors, although there is no doubt from reading *TVA* that “the ESA’s broad purpose [is] to protect endangered and threatened wildlife,” the Court has never indicated that this purpose should trump all other considerations in each and every circumstance. *See id.*¹¹⁹ *See Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. at 376-77 (“A preliminary injunction is an extraordinary remedy never awarded as of right. In each case, courts ‘must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.’ ‘In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction.’” (citation omitted) (quoting *Amoco Prod. Co. v. Vill. of Gambell, Alaska*, 480 U.S. 531, 542 (1987) and *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982))).

¹²⁰ *See Grupo Mexicano de DeSarrolo v. Alliance Bond Fund*, 527 U.S. 308, 322 (1999) (“We do not question the proposition that equity is flexible; but in the federal system, at least, that flexibility is confined within the broad boundaries of traditional equitable relief.”).

¹²¹ For more on preliminary injunctive relief and its rationale, see John Leubsdorf, *The Standard for Preliminary Injunctions*, 91 HARV. L. REV. 525 (1978) and John Leubsdorft, *Preliminary Injunctions: In Defense of the Merits*, 76 FORDHAM L. REV. 33 (2007).

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In *Amoco Production Co. v. Village of Gamble*,¹²² for instance, the Court noted “the well-established principles governing the award of equitable relief in federal courts.”¹²³ Included within these principles was that

a court must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief. Although particular regard should be given to the public interest, “[t]he grant of jurisdiction to ensure compliance with a statute hardly suggests an absolute duty to do so under any and all circumstances [W]e do not lightly assume that Congress has intended to depart from established principles. . . . ‘Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court’s jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied.’”¹²⁴

The statutes that have restricted federal courts’ equity jurisdiction are clear on this point. For example, the Court in *Weinberger v. Romero-Barcelo*¹²⁵ pointed out the difference between the CWA’s general grant of

¹²² 480 U.S. 531 (1987) (holding that courts must engage in a traditional equitable analysis when considering a preliminary injunction under the Alaska National Interest Lands Conservation Act, 16 U.S.C. § 3210(a) (2006)).

¹²³ *Id.* at 542 (citing *Romero-Barcelo*, 456 U.S. at 311-13).

¹²⁴ *Id.* (alterations in original) (quoting *Romero-Barcelo*, 456 U.S. at 313). In a footnote, the Ninth Circuit had cited *TVA* for the assertion that “only the issuance of a preliminary injunction to compel compliance with the requirements of section 810 [of the ANILCA] can uphold Congressional intent.” *People of Village of Gambell v. Hodel*, 774 F.2d 1414, 1426 n.2 (9th Cir. 1985), *rev’d in part, vacated in part, Amoco Prod. Co.*, 480 U.S. 531 (citing *TVA*, 437 U.S. at 194). The Supreme Court, however, ruled that such an expansive interpretation of *TVA* was erroneous and noted that the injunction in *TVA* was issued “in order to preserve the snail darter . . . and it was conceded that completion of the dam would destroy the critical habitat of the snail darter.” *Amoco Prod. Co.*, 480 U.S. at 543 n.9.

¹²⁵ 456 U.S. 305 (1982) (holding that the Clean Water Act does not foreclose the exercise of equitable discretion). Just as in *Amoco Production Co.*, the Court in

authority to federal courts to hear civil actions seeking injunctive relief and the CWA's "rule of immediate cessation" that directs the EPA director to "seek an injunction to restrain immediately discharges of pollutants he finds to be presenting 'an imminent and substantial endangerment to the health of persons or to the welfare of persons.'" ¹²⁶

No such provision exists within the ESA, however. The arguments in favor of abandoning traditional equitable relief are instead based on *TVA*, which, as noted above, dealt with narrow factual and legal issues. ¹²⁷ Without an explicit provision mandating the restriction of federal courts' traditional equity jurisdiction, courts considering preliminary injunctive relief under the ESA must abide by the general rule as stated in *Winter*, that

[i]n each case, courts "must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." "In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunctive relief." ¹²⁸

Romero-Barcelo limited *TVA* to the facts of that case. See *Romero-Barcelo*, 456 U.S. at 314 ("It was conceded in *Hill* that completion of the dam would eliminate an endangered species by destroying its critical habitat."); see also Cannon, *supra* note 13, at 418 ("The Court's opinion [in *TVA*] might be read to suggest that injunctive relief is mandatory in any action to enforce a regulatory prohibition of the sort present in most environmental statutes. In *Weinberger v. Romero-Barcelo*, however . . . the Court made clear that this was not what it meant. . . . [T]he Court [in *Romero-Barcelo*] reasserted its capacity—and will—not only to identify outcomes giving questionable priority to environmental concerns, as it had done in *TVA*, but to avoid them through the exercise of judicial good sense" (footnote call number omitted)).

¹²⁶ *Romero-Barcelo*, 456 U.S. at 317 (citing 33 U.S.C. § 1364(a) (Supp. IV 1976)).

¹²⁷ See *supra* Part III.A.

¹²⁸ *Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365, 376-77 (2008) (quoting *Amoco Prod. Co.*, 480 U.S. at 542 and *Romero-Barcelo*, 456 U.S. at 312); see also Erwin Chemerinsky, *Court Sets Higher Hurdle for Preliminary Injunctions*, TRIAL, Jan. 2009, at 58, 59 ("[T]his strict approach to preliminary injunctions could apply in all cases where plaintiffs seek this type of equitable relief. Defendants in federal court may start calling

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Moreover, the balance of equities and consideration of public interest “are pertinent in assessing the propriety of *any* injunctive relief, preliminary or permanent.”¹²⁹ *Winter* confirms that federal courts should be “quite hesitant to tip the scales of equity automatically in favor of one party or another,” including in instances where preliminary injunctive relief of a non-federal actor is being considered.¹³⁰

Although *Burlington Northern* and its progeny hold otherwise, *TVA* is silent, or at the very least ambiguous, as to whether its analysis and emphasis on protecting endangered species “whatever the cost” are applicable to non-federal actors.¹³¹ Until there is further direction either from Congress or the Supreme Court itself on ESA preliminary injunctive relief against non-federal actors, courts should narrowly interpret *TVA* by

upon [*Winter*], even in matters having nothing to do with sonar testing, whales, or environmental law.”).

¹²⁹ *Winter*, 129 S. Ct. at 381 (emphasis added).

¹³⁰ PLF Liberty Blog, Supreme Court to Lower Courts: Environmental Interests are not the Only Ones to Consider, *supra* note 20; see AM. BAR ASS’N, ENVIRONMENT, ENERGY, AND RESOURCES LAW: THE YEAR IN REVIEW 56 (2008) (noting that *Winter* “undoubtedly will affect the ESA preliminary injunction doctrine”).

¹³¹ Notably, the Eastern District of California has recently held that *TVA* does not foreclose the traditional balancing of hardships in all circumstances, even in cases involving federal actors. In *The Consolidated Salmonid Cases* and *The Consolidated Delta Smelt Cases*, urban and agricultural water users sought to preliminarily enjoin the federal government’s ESA water delivery restrictions that had been issued for the purported benefit of several fish species. The court held in favor of the water users, based in part on the effect the water cutbacks had on basic human welfare, including the destruction of permanent crops, fallowed lands, destruction of family and entity farm businesses, and social disruption and dislocation, such as increased property crimes and intra-family crimes of violence, and increased unemployment leading to hunger and homelessness. The court, however, also noted that injunctive relief could not be issued if such relief would jeopardize listed species. See *The Consolidated Salmonid Cases*, No. 1:09-cv-01053-OWW-DLB, slip op. at 126-27 (E.D. Cal. May 18, 2010) (“No case, including *TVA v. Hill*, which concerned the competing economic interest in the operation of a hydro-electric project, expressly addresses whether the ESA precludes the balancing of harms to humans and the human environment under the circumstances presented here. . . . Congress has not nor does *TVA v. Hill* elevate species protection over the health and human safety of humans.”); *The Consolidated Delta Smelt Cases*, No. 1:09-cv-00407-OWW-DLB, slip op. at 118-19 (E.D. Cal. May 27, 2010) (same).

conducting the traditional balancing of harms and consideration of the public interest.

C. Applying the Traditional Injunctive Relief Standards to Non-Federal Actors under the ESA: Better for Property Owners, Better for Species

For property owners, the ESA is a major concern.¹³² Under § 9, landowners are prohibited from “taking” listed species.¹³³ Under this provision, not only is it illegal for landowners to take endangered species as the term “take” has historically been understood, but they must also prevent any harm to listed species, including making changes to species’ habitat.¹³⁴ This broad proscription can often pose a significant hurdle in landowners’ ability to make beneficial use of their property.¹³⁵

The effect of § 9 on landowners is a primary reason for skepticism of the ESA.¹³⁶ As one author has noted, “[b]y shifting the burden of species conservation to private property owners, the ESA has caused people to fear species conservation instead of encouraging property owners to become part of the solution by conserving species on their own property.”¹³⁷ The fact that landowners are left uncompensated for any endangered species protections they choose to implement on their land further exacerbates this dilemma.¹³⁸

Fear of the consequences arising from endangered species habitat on private property is also justified by the judicial practice of automatically tipping the scales of equity in favor of endangered species.¹³⁹ This rule has encouraged plaintiffs seeking preliminary relief

¹³² See Meltz, *supra* note 4, *passim*.

¹³³ See 16 U.S.C. § 1538 (2006).

¹³⁴ See *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687 *passim* (1995).

¹³⁵ See Diana Kirchheim, Comment, *The Endangered Species Act: Does ‘Endangered’ Refer to Species, Private Property Rights, the Act Itself, or All of the Above?*, 22 SEATTLE U. L. REV. 803 *passim* (1999).

¹³⁶ See *id.* at 805.

¹³⁷ *Id.*

¹³⁸ See, e.g., Adler, *supra* note 4, at 997-1001.

¹³⁹ See *supra* Part III.

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against non-federal actors to argue that the economic impacts of an injunction are “irrelevant” and that any Fifth Amendment taking resulting from an injunction “is not germane to the ‘take’ issue . . . because any economic hardship posed by compliance with the ESA is simply not a factor the court is permitted to consider in granting an injunction.”¹⁴⁰

On the contrary, given the constitutional protection afforded to property rights,¹⁴¹ any economic impacts resulting from an injunction on the use of property would seem to be quite relevant. Indeed, all else being equal, one might suppose that the balance of interests might presumptively favor the property owner, with the environmental advocate having the burden to prove the requisite necessity for an injunction.¹⁴²

But, as courts are “destined to be players as they define the line between public goal and constitutional right,”¹⁴³ and as courts currently presume protection of the former has precedence over the latter, merely restoring equitable balance towards the property rights would seem to be appropriate. Allowing for a full balancing of harms and consideration of

¹⁴⁰ See Plaintiffs’ Motion in Limine to Exclude Testimony of Alleged Economic Impact of Injunction, *supra* note 5, at 4.

¹⁴¹ See U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation.”).

¹⁴² Of course, “[t]raditional property rights sometimes collide with other constitutionally protected rights, requiring the courts to strike a balance between competing values.” JAMES W. ELY, JR., *THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS* 167 (3d ed. 2007). But property rights should not be afforded less protection in injunctive relief analyses, either by reason of the ESA or any other legislative enactment. See *id.* at 174 (“If individuals or enterprises have only those property rights that legislators choose to recognize, then property ownership is simply a matter of legislative sufferance. No other important rights are treated in such a cavalier fashion. Lawmakers often seek to benefit segments of society at the expense of property owners.”); see also TIMOTHY SANDEFUR, *CORNERSTONE OF LIBERTY: PROPERTY RIGHTS IN 21ST-CENTURY AMERICA* 112 (2006) (noting that “[i]n virtually every area of the law, from asset forfeiture laws to environmental regulations to the rules governing building permits and how to file lawsuits, private property is treated, in Chief Justice Rehnquist’s phrase, like ‘a poor relation,’ a second-class member of the Bill of Rights” and arguing that “whether their goals are laudable or not, officials must learn to respect the private property rights of people who do not share their vision, or who do not want to bear the whole cost of providing a benefit to the public” (footnote call number omitted)).

¹⁴³ Meltz, *supra* note 4, at 417.

public interest would in no way preclude an injunction against non-federal defendants.¹⁴⁴ Moreover, by ensuring a full consideration of all relevant interests, the ESA will be less of a perverse incentive for non-federal actors to protect endangered species and will not be as likely to result in non-federal actors withholding pertinent information on endangered species.¹⁴⁵

IV. CONCLUSION

Several courts have held that the equitable traditions of balancing the parties' harms and considering the public interest have no place when it comes to preliminary injunctions under the ESA. Yet, as the case from which this principle is derived is a narrow one, so too should the principle itself be limited. Courts that apply *TVA*'s injunctive relief standard to preliminary injunctions against non-federal actors read *TVA* too broadly. Instead, courts should more fully examine the limited circumstances of *TVA* and note how the Court has recently limited the application of *TVA*. Moreover, courts should restore equitable tradition in ESA preliminary injunctive relief cases against non-federal actors because the Supreme Court has affirmed the traditional approach to preliminary injunctive relief and because doing so would better reflect the relationship between the statutory protection afforded to endangered species and the constitutional protection afforded to property rights.

¹⁴⁴ See *Amoco Prod. Co. v. Vill. of Gambell, Alaska*, 480 U.S. 531, 545 (1987) ("Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at the least of long duration, *i.e.*, irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment.").

¹⁴⁵ See Jonathan H. Adler, *Money or Nothing: The Adverse Environmental Consequences of Uncompensated Land Use Controls*, 49 B.C. L. REV. 301, 332 (2008) ("The threat of land use regulation under statutes like the ESA . . . discourages private landowners from disclosing information and cooperating with scientific research on their land, further compromising species conservation efforts.").