AN ENDANGERED THEORY: VICARIOUS LIABILITY UNDER THE ENDANGERED SPECIES ACT

BY

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Who exactly can be held responsible for "taking" a member of a species protected by the Endangered Species Act (ESA)? Since the ESA's enactment, this simple question, when brought before courts, invariably yields complex answers. Can a reckless boater be held liable for taking an endangered Hawaiian monk seal, assuming the boater knows that species is endemic to the area? Perhaps, yes. Does this conclusion differ regarding the entity responsible for providing that person with a boating license in the first place?

As the degree of causation and connection to the "take" becomes more remote, the lines of liability become blurred. This concept is solidified by a series of cases exploring issues similar to the questions posed above. The theory of ESA vicarious liability has expanded and contracted over time. Recently, its use has dwindled and its efficacy has come into question. To determine whether this fringe source of liability will have any place in the future of ESA jurisprudence, lessons must be learned from the past.

This Comment will attempt to draw out distinct themes from the small litany of cases on ESA vicarious liability. Further, those themes will be applied to other statutory regimes that operate to protect valued species, namely the Migratory Bird Treaty Act and the Bald and Golden Eagle Protection Act. In the end, some clarity will be shed on whether ESA vicarious liability has retained its viability or whether, all told, it is nearing its own extinction.

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I. INTRODUCTION

In the domain of endangered and threatened species protection, liability is a lynchpin issue for those seeking to enforce the Endangered Species Act (ESA)[1] against potentially responsible individuals.[2]

The theory of governmental and municipal vicarious liability attached to ESA violations by regulated parties has experienced fluctuating popularity among citizen plaintiffs in ESA cases. As this analysis will show, the theory has steadily declined in effectiveness since its inception in the late 1980s. ESA vicarious liability applies fittingly to situations in which a member of a threatened or endangered species is harmed or "taken" by an indiscrete or untraceable entity in the course of performing an activity subject to some degree of government oversight.[3] In such cases, rather than bring suit against a random boater responsible for colliding with an endangered manatee, or an indiscernible landowner who applied a pesticide that subsequently destroyed a threatened ferret population, plaintiffs may instead choose to pursue claims against the governmental entity charged with regulating the activity. In such cases, the governmental defendant is often responsible for

1 Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2012).

2 Devon Lea Damiano, *Licensed to Kill: A Defense of Vicarious Liability Under the Endangered Species Act*, 63 DUKE L.J. 1543, 1588 (2014) (concluding that vicarious liability plays a critical role in enforcing ESA regulations).

3 *See, e.g.*, Sierra Club v. Yeutter, 926 F.2d 429, 438–39 (5th Cir. 1991) (concluding that, when selling timber to industry, the U.S. Forest Service's failure to comply with preservation requirements resulted in a "taking" of the red-cockaded woodpecker).

approving the legality of, or providing a permit for, the detrimental activity that ostensibly resulted in the ESA violation.[4]

The following is a synopsis of cases that have contributed to the evolution of ESA vicarious liability and have served as vehicles for the theory.[5] The anatomy of the theory has changed over time, so several distinct periods in its growth will be considered. First, this Comment will discuss the cases from which the theory originated. Second, emphasis will shift to several cases that applied sophisticated versions of ESA vicarious liability and offered detailed explanations of its function. Then, modern day applications of the theory will be used to illustrate its current potency or, depending on interpretation, lack thereof. Finally, the Bald and Golden Eagle Protection Act[6] and the Migratory Bird Treaty Act[7] will be considered for their potential viability as hosts for theories that parallel ESA vicarious liability.

II. THE GENESIS OF ESA VICARIOUS LIABILITY

Two cases are usually cited as the supposed source of ESA vicarious liability: *Defenders of Wildlife v. EPA* (*Defenders*)[8] and *Sierra Club v. Yeutter* (*Yeutter*).[9] The *Defenders* court held that the decision of the U.S. Environmental Protection Agency (EPA) to register certain pesticides for permissible use rendered it liable, as those same pesticides resulted in takes of protected species.[10] Similarly, the *Yeutter* court held the U.S. Forest Service (USFS) liable for takes resulting from private timber harvesting activities carried out pursuant to a plan created by the agency.[11]

A. Liability Rooted in the Implications of Agency Actions

Defenders, a 1989 ESA case brought in the Eighth Circuit, received special attention due to the court's treatment of an oft-repeated agency argument—that plaintiffs are limited to seeking damages and injunctive relief from agencies only under a controlling statute. In *Defenders*, relief would have been limited to deregistration of strychnine as a usable pesticide under the controlling statute, the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA),[12] and *not* the ESA.[13] The Eighth Circuit specifically

4 *See, e.g.*, *id.* at 431 (determining that the U.S. Forest Service was responsible for oversight of a permit for timber removal that threatened the endangered red-cockaded woodpecker's habitat).

5 The phrase "ESA vicarious liability" is not necessarily the accepted title of this theory; it is simply a placeholder for the various monikers under which this theory operates. Most, if not all, of the pertinent cases do not explicitly use the same term.

6 Bald and Golden Eagle Protection Act, 16 U.S.C. §§ 668–668c (2012).

7 Migratory Bird Treaty Act, 16 U.S.C. §§ 703–712 (2012).

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

9 926 F.2d 429 (5th Cir. 1991).

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

11 *Yeutter*, 926 F.2d at 438–39.

12 Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136–136y (2012).

rejected that position and held that FIFRA "does not exempt EPA from compliance with the ESA requirements when EPA registers pesticides."[14] Based on this, the court held that the ESA citizen suit provision permits plaintiffs to sue EPA to enjoin alleged violations of the ESA, even when agency actions comply with pertinent FIFRA provisions.[15]

Defenders formed clearly drawn precedent. It allowed plaintiffs to impute ESA liability onto agencies even in a situation where a third party had actually committed the take.[16] In *Defenders*, EPA was performing a normal agency function: registering a pesticide under, and in compliance with, FIFRA. The implications of *Defenders*, then, contribute to and go well beyond *Yeutter's* basic premise that agencies can be liable under the ESA for effectively prescribing activities likely to result in a take. On balance, *Defenders* showed that agencies can be held liable under the ESA when a completely independent third party actually commits the take in question, so long as the agency sanctioned the take in some way.[17]

B. Liability for Agency Activity That Has Resulted in Past ESA Violations

In *Yeutter*, the Fifth Circuit upheld a district court decision imposing ESA liability on USFS.[18] The court used simple reasoning to apply well-explored ESA principles to a somewhat novel situation.[19] The *Yeutter* court effectively increased the ambit of ESA pleading requirements from demanding party-specific allegations to allowing nebulous arguments against tentatively connected entities.[20] Given this new breadth of permissible allegations, vicariously liable governmental entities were brought into the fray.[21]

In reviewing the plaintiffs' challenge to the lower court's decision, the Fifth Circuit considered and relied upon the fact that district courts have authority to enjoin agencies from outright violations of ESA's Section 7.[22] However, a primary source of contention in *Yeutter* derived from the fact that the agency was not in literal violation of Section 7. Instead, USFS was

13 Wash. Toxics Coal. v. EPA, 413 F.3d 1024, 1032 (9th Cir. 2005).

14 *Id.* at 1032 (citing *Defenders*, 882 F.2d at 1299).

15 *Id.* at 1032.

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

17 For further discussion of the importance of this case in holding an agency vicariously liable for a third party action, see Valerie J. M. Brader, *Shell Games: Vicarious Liability of State and Local Governments for Insufficiently Protective Regulations under the ESA*, 45 NAT. RESOURCES J. 103, 105 (2005).

18 *Yeutter*, 926 F.2d 429, 438–40 (5th Cir. 1991).

19 *Id.* at 439 n.16.

20 *See id.* at 432 (describing the consulting relationship between the U.S. Fish and Wildlife Service and USFS, and plaintiff's complaint as including challenges to USFS's general timber management and even-aged harvest practices).

21 *See id.* at 432–33, 439 (affirming the district court's finding that USFS's lumber management caused a decline in the red-cockaded woodpecker population, an endangered species).

22 *Id.* at 439.

simply sanctioning planning methods that were allegedly resulting in takes.[23] The Fifth Circuit, after considering imposing an injunction for direct violations, determined that "the court may enjoin the agency from *continuing activity that has resulted in past violations*."[24] By doing this, the Fifth Circuit extended its reach just slightly past the actual to the vicarious violators, and held USFS liable, thereby fundamentally changing the scope of ESA claims going forward.

With this established, and because the agency was actively approving and promulgating plans with measurable effects on endangered species, the Fifth Circuit determined that agency approval itself was an ESA violation.[25] This was the first of many subsequent changes to the basic nature of ESA liability. It was also the origin of ESA vicarious liability.

III. Evolution of ESA Vicarious Liability

After *Defenders* and *Yeutter* set the stage for successful ESA vicarious liability claims against governmental entities, a host of subsequent cases inched the jurisprudence closer to a pure version of ESA vicarious liability. Most notable among these are *Strahan v. Coxe* (*Strahan*),[26] *Loggerhead Turtle v. Volusia County Council* (*Loggerhead Turtle*),[27] *United States v. Town of Plymouth, Massachusetts*,[28] and, more recently, *Animal Protection Institute v. Holsten* (*Holsten*).[29]

A. The Reasoning and Statutory Basis of ESA Vicarious Liability

In 1997's *Strahan*, claims were brought under both the ESA and the Marine Mammal Protection Act.[30] The violation in question stemmed from a Massachusetts regulatory scheme, imposed by the Massachusetts Division of Marine Fisheries (DMF), which licensed and authorized gillnet and lobster pot fishing.[31] The First Circuit reviewed a lower court's finding that DMF's regulations violated the ESA. In doing so, the court cited *Yeutter*, among other cases, and ultimately reached a parallel conclusion.[32]

After reciting a litany of ESA vicarious liability case law, including many cases mentioned in this analysis, the First Circuit opined on the advancement and acceptance of the theory. Initially, it noted that the district court found DMF vicariously liable and had based its conclusions on "two provisions of the ESA read in conjunction. The first relates to the definition

23 *Id.* at 433.

24 *Id.* at 439 (emphasis added).

25 *Id.* at 438–39.

26 127 F.3d 155 (1st Cir. 1997).

27 148 F.3d 1231 (11th Cir. 1998).

28 6 F. Supp. 2d 81 (D. Mass. 1998). This case will not be considered due to its extensive similarities to *Loggerhead Turtle*.

29 541 F. Supp. 2d 1073 (D. Minn. 2008).

30 Marine Mammal Protection Act of 1972, 16 U.S.C. §§ 1361–1423h (2012).

31 *Strahan*, 127 F.3d at 159, 163.

32 *Id.* at 163.

of the prohibited activity of a 'taking,' *see* § 1538(a)(1)(B), and the second relates to the solicitation or causation by a third party of a prohibited activity, such as a taking, *see* § 1538(g)."[33] In the following statement, the First Circuit fashioned a concise summary of the basis for ESA vicarious liability:

> The [ESA] not only prohibits the acts of those parties that directly exact the taking, but also bans those acts of a third party that bring about the acts exacting a taking. We believe that . . . a governmental third party pursuant to whose authority an actor directly exacts a taking of an endangered species may be deemed to have violated the provisions of the ESA.[34]

Functionally, *Strahan* was a direct product of its predecessor cases—primarily *Defenders* and *Yeutter*. The court's opinion, as illustrated above, practically parroted the teachings of those cases but clarified their lessons and offered a cognizable explanation of this emergent theory.

B. Broader Application of ESA Vicarious Liability Resulting in Outright Failure

In the initial few cases in which ESA vicarious liability was employed against governmental entities, clear trends were created and clearer lines were formed. The rule created by the First Circuit in *Strahan* illustrates that fact.[35] However, when applied with a wider scope—to entities other than federal governmental bodies and in situations other than plans with measured endangered species impacts—the effectiveness of the theory wanes. This was evinced in *Loggerhead Turtle*.[36]

In the mid-1990s, Loggerhead sea turtles were allegedly being harmed by artificial beachfront lights in Volusia County, Florida.[37] Female members of this threatened species[38] would approach beaches to nest and instinctively turn away due to the mistaken belief that the lights were actually the moon, thus disturbing the turtles' orientation and trajectory—both of which rely in part on the moon's alignment.[39] Conversely, the turtles' hatchlings were said to be instinctively attracted to the lights and would waddle further inland

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33 *Id.* An additional, more innocuous, aspect of this point is the fact that the ESA defines "person" to include "any State, municipality, or political subdivision of a State." 16 U.S.C. § 1532(13) (2012). This extends the "take" prohibition to state and local governments through the statutory language found in ESA Section 9(a)(1): "with respect to any endangered species of fish or wildlife listed pursuant to section 1533 of this title it is unlawful for any *person* subject to the jurisdiction of the United States to . . . take any such species within the United States or the territorial sea of the United States." 16 U.S.C. § 1538(a)(1)(B) (emphasis added).

34 *Strahan*, 127 F.3d at 163.

35 *See supra* note 31 and accompanying text.

36 *Loggerhead Turtle*, 148 F.3d 1231, 1242 (11th Cir. 1998).

37 *Id.* at 1231–32.

38 NOAA FISHERIES, *Loggerhead Turtle (Caretta caretta)*, http://www.nmfs.noaa.gov/pr/species/turtles/loggerhead.htm (last visited Sept. 17, 2014) (listing as threatened a distinct population segment of a turtle species located in the South Atlantic Ocean).

39 *Loggerhead Turtle*, 148 F.3d at 1235.

rather than toward the shore, resulting in unnatural death.[40] This culminated in *Loggerhead Turtle*, a 1998 Eleventh Circuit case that once again redefined the notions of traditional ESA liability.

Loggerhead Turtle featured an example of ESA vicarious liability founded upon alleged "inadequate regulation."[41] The Eleventh Circuit found that Loggerhead sea turtles ostensibly had standing to bring allegations of harmfully inadequate regulation of beachfront lighting.[42] The court then remanded the case, ordering the district court to consider whether an ESA violation occurred.[43] On remand, though, the district court found the county's lighting regulations satisfactory in the sense that they actually addressed and attempted to control beachfront lighting issues.[44] Additionally, the court concluded that lighting ordinances proposed by the County Council of Volusia, however ineffective, were not responsible for the recorded takings and that the lighting itself was the actual culprit.[45] "The true violators, the persons responsible for illuminating the beaches, [we]re not before th[e] Court" and thus vicarious liability would not extend to Volusia County.[46]

Some critics attack the *Loggerhead Turtle* decision based on the court's questionable finding of "exclusive power to regulate" beachfront lighting in the County Council of Volusia, which seemingly imputes liability.[47] Beyond that, however, the importance of *Loggerhead Turtle* is found in its lesson on standing. To reiterate, the Eleventh Circuit reviewed the complaints based on ESA vicarious liability, accepted the theory's general premise, conferred standing on the harmed animal and the environmental interests to pursue the claims, and remanded the case for the district court to review the regulations.[48]

Loggerhead Turtle came extremely close to being a watershed case on ESA vicarious liability. The situation was simple: the injury was particularized and cognizable, the cause was proximate, and redressability was satisfied—standing was therefore met on all of the relevant fronts.[49] The regulations at issue, however, were not sufficiently lax to justify the finding of an ESA violation.[50] Had the County Council of Volusia simply approved

40 *Id.*

41 *Id.* at 1249.

42 *Id.* at 1250–51.

43 *Id.* at 1257.

44 Loggerhead Turtle v. Cnty. Council of Volusia (*Loggerhead*), 92 F. Supp. 2d 1296, 1308–09 (M.D. Fla. 2000); J.B. Ruhl, *State and Local Government Vicarious Liability Under the ESA*, 16 NAT. RESOURCES & ENV'T 70, 72 (2001) (citing *Loggerhead*, 92 F. Supp. 2d. at 1306) ("The county, in other words, did 'not permit an act otherwise unlawful . . . or license an act in expressly a manner likely to result in an ESA violation.'") Had the regulations been crafted differently, it seems *Loggerhead* would be a prime example of inadequate regulatory framework opening the door to ESA liability.

45 *Loggerhead*, 92 F. Supp. 2d at 1308.

46 *Id.*

47 Brader, *supra* note 17, at 122.

48 *Loggerhead Turtle*, 148 F.3d at 1251–53, 1258.

49 *Id.* at 1247, 1249, 1255.

50 *Loggerhead*, 92 F. Supp. 2d at 1308.

the use of the lights that caused the harm, precedent would likely have been set (at least in the Eleventh Circuit) that would have influenced future usage of ESA vicarious liability. All of this is to say that, following *Loggerhead Turtle*, the climate was ripe for broad success in the realm of ESA vicarious liability claims. However, as subsequent cases eventually revealed, the theory itself teetered on a precarious jurisprudential ledge.

C. The Modern Understanding of ESA Vicarious Liability

Recent cases in which plaintiffs have attempted to employ ESA vicarious liability tend to show all of the signs of a faltering legal theory. Generally, it seems that courts are no longer comfortable holding governmental third parties and municipal regulators responsible for approving or failing to disapprove activities that allegedly result in takes of endangered species.

Holsten was a 2008 District of Minnesota case that involved trapping and snaring authorizations published by the Minnesota Department of Natural Resources (DNR).[51] The authorizations allegedly resulted in several takes of an endangered species, the Canada Lynx.[52]Among other issues, ESA vicarious liability played a central role in *Holsten.* In analyzing relevant case law, the court quoted several integral aspects of *Defenders*, *Strahan*, and other key cases.[53] The *Holsten* court noted "where government regulation leaves private parties free to act in ways that do not pose a threat to endangered and threatened species, other courts have not held the governmental agency liable."[54] To meet that requirement, and render the agency exempt from ESA vicarious liability, the third party conduct in question must be an "independent intervening cause."[55] As with vicarious liability itself, this is a fundamental concept of tort law used to sever the chain of liability. "Independent intervening cause" is rooted in common law and is loosely defined as a cause, "the operation of which is not stimulated by a situation created by the actor's conduct. An act of a human being or animal is an independent force if the situation created by the actor has not influenced the doing of the act."[56]

To clarify, if a governmental entity authorizes a private person to act and a subsequent take occurs at the hands of an unauthorized third party, then the governmental entity did not violate the ESA.[57] Notwithstanding this exception to liability, the *Holsten* court held the government to a stringent standard in applying ESA vicarious liability.

51 Animal Prot. Inst. v. Holsten, 541 F. Supp. 2d 1073, 1073 (D. Minn. 2008).
52 *Id.* at 1076.
53 *Id.* at 1078–81.
54 *Id.* at 1079.
55 *Id.*
56 RESTATEMENT (SECOND) OF TORTS § 441 cmt. c (1965).
57 *See Holsten*, 541 F. Supp. 2d at 1078–79.

After recounting prior precedent, the *Holsten* court expounded the finer points of ESA vicarious liability.[58] It stated that determining whether to hold governmental entities liable "depends on whether a risk of taking exists if [the parties actually committing the take] comply with all applicable laws and regulations, *not* whether it is possible to avoid a taking if the laws and regulations are followed."[59] The court clarified and illustrated the importance of this distinction using an analogy drawn by the First Circuit in *Strahan*:

> [W]hereas it is possible for a person licensed by Massachusetts to use a car in a manner that does not risk the violations of federal law . . . it is not possible for a licensed commercial fishing operation to use its gillnets or lobster pots in the manner permitted by the Commonwealth *without risk* of violating the ESA by exacting a taking.[60]

Taken to its logical conclusion, this test and its accompanying analogy presented a difficult burden for governmental entities charged with ESA vicarious liability.

Unsurprisingly, the *Holsten* plaintiffs were ultimately successful. The court granted the plaintiffs' motions for summary judgment and injunctive relief.[61] DNR was required to take all necessary action to ensure no further takings of the Canada Lynx.[62] This order, in addition to other requirements anticipating future trapping authorizations, served to limit any further government-authorized takes of the species.

IV. Modern ESA Vicarious Liability Cases

After several years of case law virtually devoid of the ESA vicarious liability theory, two recent district court cases opined on claims attempting to harness the theory. The first was *Cascadia Wildlands v. Kitzhaber* (*Cascadia*),[63] a case brought in the District Court of Oregon in November of 2012.[64] The second was *WildEarth Guardians v. Lane* (*WildEarth*),[65] a District Court of New Mexico case decided in December of 2012.[66] *Cascadia* involved ESA claims regarding the marbled murrelet, a globally endangered species.[67] *WildEarth* involved claims invoking ESA third-party liability to protect a non-endangered, experimental, nonessential species.[68]

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58 *Id.* at 1079–80.

59 *Id.* at 1079 (emphasis added).

60 *Id.* at 1079–80 (quoting *Strahan*, 127 F.3d at 164) (emphasis added in *Holsten* to original).

61 *Id.* at 1081.

62 *See* WildCat Conservation Legal Aid Soc'y, Summary of Federal Case Law 1 (2009), *available at* http://wcclas.org/images/forms/Federal_Case_Law.pdf.

63 911 F. Supp. 2d 1075 (D. Or. 2012).

64 *Id.*

65 No. Civ. 12-118, 2012 WL 6019306, at *1 (D.N.M. Dec. 3, 2012).

66 *Id.*

67 *Cascadia*, 911 F. Supp. 2d at 1078.

68 *WildEarth*, 2012 WL 6019306, at *8.

These cases illustrate that ESA vicarious liability is a diffuse theory with many intangible components and moving parts. These cases also clarify several themes: 1) when ESA vicarious liability is applied, it is almost never referred to under the same moniker—among others, it can be called "proximate cause," "government liability," and "third-party liability;" 2) ESA vicarious liability rests on statutory construction specific to the ESA, which detracts from its use in the context of other statutory schemes with even slightly different structures; and 3) ESA vicarious liability is waning in popularity and efficacy. This last point is perhaps a result of the very few situations to which it is applicable. It is equally probable that the theory simply does not have the teeth that plaintiffs hope for when pursuing claims under the ESA, or other animal protection statutes.

These opinions do not clearly expand or retract the ESA vicarious liability theory. Instead, they employ novel analyses and reveal new aspects of the theory. More importantly, though, the ESA vicarious liability claims were ultimately dismissed in both cases.[69] Although these cases are not considered binding, their treatment of the subject is critical in identifying the current jurisprudence on this subject and the likely outcome of future claims attempting to employ the theory. With these considerations in mind, *Cascadia* and *WildEarth* will next be analyzed.

A. Dismissal of Recent ESA Vicarious Liability Claims

In *Cascadia*, amidst a situation strikingly similar to that of *Yeutter*,[70] Cascadia Wildlands commenced a citizen suit against three primary governmental entities: the Oregon Board of Forestry, the State Land Board, and the District Foresters.[71] The claims all alleged multiple takes of the marbled murrelet, an endangered nesting sea bird that used inland forests where the various defendants had engaged in planning activities.[72]

The claims alleged: 1) the state interests were taking the marbled murrelets by auctioning timber sales; 2) "'approval, adoption, and implementation' of forest management plans and policies which call for increased logging in the state forests" resulted in takes; and 3) one of the defendants had adopted a policy, based on the management plans, that was resulting in extensive takes.[73]

Employing the relatively recent changes to pleading standards resulting from the landmark civil procedure cases *Bell Atlantic Corp. v. Twombly* (*Twombly*)[74] and *Ashcroft v. Iqbal* (*Iqbal*),[75] the court made short work of

69 *Id.* at *26; *Cascadia*, 911 F. Supp. 2d at 1087–88.

70 *Yeutter* also involved an endangered nesting bird that was threatened by logging practices. *See Yeutter*, 926 F.2d 429, 431 (5th Cir. 1991).

71 *Cascadia*, 911 F. Supp. 2d at 1075.

72 *Id.* at 1078.

73 *Id.* at 1079.

74 550 U.S. 544 (2007).

75 556 U.S. 662 (2009). Both *Twombly* and *Iqbal* deal with motions to dismiss for failure to state a claim for which relief can be granted made under Fed. R. Civ. P. 12(b)(6). Read in conjunction, the two decisions have resulted in significantly higher pleading standards than

some of the claims.[76] Further, citing pure legislative immunity, the court summarily dismissed the claim against the Oregon Board of Forestry for its policy adoptions, listed above as the third claim.[77]

Moving to the State Land Board—the primary locus of ESA vicarious liability in this case—the court began a "proximate cause" analysis to determine the strength of the remaining claims.[78] The court clarified that the allegations against the State Land Board were primarily those listed above as the first claim.[79] The court then explained, citing to *Strahan*, that "state officials can indeed be liable for directly authorizing third-party activities, such as logging, that are likely to result in tak[ings]."[80] The court acknowledged that plaintiffs asked it to "find that the State Lands is liable by authorizing a third party, in this case the Board of Forestry and Department of Forestry, to authorize a fourth party (private loggers) to conduct activities which are likely to cause take."[81] The problem, however, was that the *Cascadia* plaintiffs failed to specify any misconduct on behalf of the State Land Board.[82] The court summarily found that plaintiffs failed to present a direct relation between the injury asserted (the take) and the injurious conduct alleged (the various approvals).[83] Notably, the *Cascadia* court seemed to want from plaintiffs allegations of actual and demonstrable misconduct on behalf of the accused agency before construing its actions as ESA violations.[84] This approach, without question, suggests a raised bar for successful ESA vicarious liability claims.

On balance, the *Cascadia* opinion appears to indicate that judicial perception of ESA vicarious liability may have shifted along with the federal pleading standards. That is to say, as the jurisprudential belt has tightened and claims have become more closely scrutinized, the viability of ESA vicarious liability has diminished. If plaintiffs are unable to allege clear governmental misconduct proximately resulting in a take, their claims may be freely dismissed just as they were in *Cascadia*.

those used prior to 2007. The application of these heightened pleading standards to ESA vicarious liability situations is potentially debilitating for these claims, which already rest on loose connections between the various purportedly responsible entities. Complaints must allege "enough facts to state a claim for relief that is plausible on its face." *Twombly*, 550 U.S. at 570. In addition to that, bare assertions that constitute a "formulaic recitation of the elements" of a claim are not entitled the usual assumption of truth. *Iqbal*, 556 U.S. at 681. See Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal*: A Double Play on the Federal Rules of Civil Procedure*, 60 Duke L.J. 1 (2010) for more information on the effects of these court decisions on civil litigation.

76 *Cascadia*, 911 F. Supp. 2d at 1085, 1087.

77 *Id.* at 1081–83.

78 *Id.* at 1084.

79 *Id.* at 1084–85.

80 *Id.* at 1085.

81 *Id.*

82 *Id.*

83 *Id.*

84 *Id.*

B. ESA Vicarious Liability Claim in the Context of a Non-Endangered Species

In a complicated opinion on yet another motion to dismiss an ESA claim against an allegedly vicariously liable governmental entity, the court in *WildEarth* considered claims for injunctive relief against the New Mexico State Game Commission (NMSGC) for its authorization of trapping in ranges occupied by the Mexican Gray Wolf.[85] At the time, the Mexican Gray Wolf was considered an "experimental, nonessential" (ENE) species.[86] Such species are subject to a "special rule" that exempts them from normal take prohibitions.[87] Essentially, "unavoidable and unintentional" wolf takings are not ESA violations, even in the context of trapping, so long as "due care was exercised to avoid taking a wolf."[88] The court clarified this point, stating:

> In addition, a motorist driving within the [Mexican Wolf Experimental Population Area] at night and with due caution, might accidentally strike and kill a wolf when it suddenly and unexpectedly darts from a position of cover and crosses the road. If this take was unavoidable and accidental, there is no violation of the special rule.[89]

After setting the above framework, the court considered the factual foundation for the claims against NMSGC and ultimately held that "[e]ven if Defendants could be said to have indirectly participated in the take of a Mexican Gray Wolf by their regulatory actions alone, the complaint fails, on its face, to demonstrate Defendants 'caused' an unlawful take."[90] In the same section, the court considered the plaintiff's invocation of ESA vicarious liability. However, the court found the situation distinguishable from the various popular ESA vicarious liability cases cited by the plaintiffs.[91] Noting that the cases with successful ESA vicarious liability claims involved actually endangered or threatened species, rather than ENE species, the *WildEarth* court dismissed the claims.[92]

With respect to modern trends in general ESA liability, *WildEarth* is highly informative due in no small part to its succinct dismissal of ESA vicarious liability claims regarding a non-endangered species. Although the court freely acknowledged that ENE species are entitled to some ESA protections, it determined that ESA vicarious liability claims solely apply to endangered and threatened species.[93] This attempt to plead ESA vicarious

85 *WildEarth*, No. CIV. 12-118, 2012 WL 6019306, at *1 (D.N.M. Dec. 3, 2012).

86 *Id.* at *5.

87 *Id.*

88 *Id.* at *6 (citing 50 C.F.R. § 17.84(k)(15) (2014)).

89 *Id.*

90 *Id.* at 15.

91 *Id.* at 15–16 (distinguishing many of the cases already covered in this analysis, including *Defenders*, *Strahan*, *Yeutter*, *Loggerhead Turtle*, and others).

92 *Id.*

93 *Id.* at 8, 10, 15, 16.

liability to punish the take of an unlisted species was both novel and, ultimately, unsuccessful.[94]

V. Vicarious Liability in the Context of Other Animal Protection Acts

With the above analysis of ESA vicarious liability theory in mind, several questions remain. First, will this theory continue to break ground and extend away from the ESA to other, similar statutory regimes? Second, will agencies faced with these claims internalize impacts of potential judgments against them, or will they externalize associated costs and obligations such that responsibility is effectively redirected to private interests? Third, and perhaps most importantly, can vicarious liability in the context of protected species extend to specific non-ESA statutes, namely the Bald and Golden Eagle Protection Act (BGEPA) and the Migratory Bird Treaty Act (MBTA)?

While any answer to the above questions is speculative, the recent ESA vicarious liability cases that address this subject suggest that ESA vicarious liability will not extend to other similar statutory regimes. Specifically, without setting definite precedent, *WildEarth* shows that courts considering this theory may limit ESA vicarious liability claims only to endangered and threatened species.[95] Even though claims invoking other species-protection laws were raised in other key ESA vicarious liability cases, those claims universally addressed species simultaneously protected by the ESA.

The second question, whether agencies will internalize or externalize costs associated with ESA vicarious liability claims, does not yield a simple answer, and begs independent analysis. Accordingly, potential governmental response to these claims likely varies from case to case and agency to agency.

However, the third question of whether vicarious liability can extend to protected species under a statute other than the ESA warrants immediate consideration and readily presents a tentative answer. This is because the BGEPA and the MBTA (collectively, "the Bird Acts") can be distinguished in several significant respects from the ESA, suggesting that claims based on a theory unique to the ESA do not apply with equal force.

While the Bird Acts are not strictly analogous to one another,[96] they are both sufficiently different from the ESA such that ESA vicarious liability does not translate cleanly to either. Subtleties in the Bird Acts may make only negligible differences in a potential ESA vicarious liability-like claim made in purely MBTA or BGEPA situations, so this analysis will paint with a broad brush—making slight distinctions only where particularly relevant.

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94 *Id.* at 15–16.

95 *Id.*

96 *See, e.g.*, United States v. Corbin Farm Serv., 444 F. Supp. 510, 535 (E.D. Cal. 1978). Some commentators have drawn out differences in the Bird Acts at length. *See, e.g.*, M. Lanier Woodrum, Comment, *The Courts Take Flight: Scienter and the Migratory Bird Treaty Act*, 36 Wash. & Lee L. Rev. 241, 252 n.107 (1979) (analyzing judicial treatment of scienter requirements in the Bird Acts).

A. Statutory Differences Between the Bird Acts and the ESA Foreclose Vicarious Liability

Although not clearly denoted by the cases cited above, much of the impetus for extending liability for ESA violations to governmental entities derives from the ESA's loose intent requirements and a statutory extension of liability to governmental entities.[97] In order for a government agency to be liable under the ESA, it simply must "cause to be committed" the acts resulting in a taking.[98] As illustrated above,[99] this language has been interpreted to bring government entities into the ESA's ambit.

The BGEPA, on the other hand, includes no third party language and likely does not create government exposure to vicarious liability. Instead, it imposes strict consequences on "whoever" shall knowingly take a covered eagle.[100] "Whoever," as defined in the BGEPA, "includes . . . associations, partnerships, and corporations."[101] This narrow language, although subject to interpretation, logically seems to exclude third parties in its provision considering a direct subject and a direct action. Accordingly, the BGEPA's language probably does not create a claim for vicarious liability.

The MBTA, although arguably more equivocal than the BGEPA, also omits third parties. The MBTA renders it unlawful to, among other things, take migratory birds or their parts.[102] Arguments that the MBTA may have third-party reach likely derive from its less confined language in the alternatives to take—for instance, it is unlawful to "cause to be shipped," "cause to be transported," or "cause to be carried" any migratory bird.[103] However, all of the other forbidden activities inarguably omit third parties. Even the "cause to be" language ostensibly refers not to those *enabling* the act of shipping or carrying, but seems to refer instead to those *coordinating* that act. This can be readily distinguished from language, like in the ESA, which includes government entities responsible for providing permits, as those entities are certainly not coordinating the permitted activity.[104]

The BGEPA has more stringent intent requirements than the ESA. It requires parties to prove, at the very least, knowledge or wanton disregard.[105] Government actors in the ESA vicarious liability cases were not held to such high requirements, and it is presumably a rare situation that a plaintiff can show a governmental entity has reached that bar. Further, persons denied from taking eagles under BGEPA are also defined to include associations,

97 *See supra* Part III.A.

98 16 U.S.C. § 1538(g) (2012).

99 *See supra* Part III.A.

100 16 U.S.C. § 668(a) (2012).

101 *Id.* § 668c.

102 *Id.* § 703(a).

103 *Id.*

104 Along the lines of this argument, scholars have similarly debated the intent requirements attached to the MBTA. *See, e.g.*, Woodrum, *supra* note 96, at 241 (construing the MBTA's scienter requirement, or lack thereof, as a wide-open topic for scholarly debate).

105 16 U.S.C. § 668(a).

partnerships, and corporations.[106] While this list is certainly not exhaustive, it notably excludes any mention of governmental entities. This distinction is important, as the ESA specifically includes governmental entities.[107]

To be successful in a suit for an ESA violation, a plaintiff "need only show that the defendant had knowledge of his actions constituting the taking."[108] As is evinced by the cases considered throughout this analysis, the ESA's relatively loose intent standard very likely contributed, even indirectly, to governmental entities being found vicariously liable under the ESA.[109] To be clear, governmental entities in ESA vicarious liability cases usually do not themselves exact taking, yet they are nonetheless found knowledgeable having consciously approved actions likely to result in one.[110]

B. Absence of Citizen Suit Provision in the Bird Acts Undermines ESA Vicarious Liability Application

Another highly relevant fact, and one that may foreclose potential vicarious liability under the Bird Acts altogether, is their notable exclusion of citizen suit provisions. A clear trend in the ESA cases analyzed above is the lack of governmental entities as plaintiff parties. This is because ESA vicarious liability claims have been almost exclusively filed by citizen groups.[111]

The ESA is famous for its highly inclusive citizen suit provision,[112] which stands in stark contrast to the narrow enforcement provisions found in the Bird Acts. The BGEPA restricts enforcement to the Secretary of the Interior and certified delegates.[113] The MBTA similarly provides enforcement authority only to officials of the Interior.[114]

This is not to say that citizen groups have no recourse in the context of the Bird Acts, as the D.C. Circuit has explicitly held that such groups can enforce limitations against federal agencies using civil injunctions brought under the Administrative Procedure Act (APA).[115] However, injunctions under the APA operate simply to stymie the permitting process rather than

106 *Id.* § 668c.

107 *See id.* § 1532(13).

108 Rebecca F. Wisch, *Detailed Discussion of the Bald and Golden Eagle Protection Act*, ANIMAL L. LEGAL & HIST. CTR., 2002, *available at* http://www.animallaw.info/articles/ddusbg epa.htm (examining the history, text, and legal issues of the BGEPA).

109 For more on the issue of intent in the context of the ESA, see *United States v. McKittrick*, 142 F.3d 1170, 1176–77 (9th Cir. 1998).

110 *Strahan*, 127 F.3d 155, 163–64 (1st Cir. 1997).

111 *See, e.g.*, Auto. Parts Rebuilders Ass'n v. EPA, 720 F.2d 142, 161 (D.C. Cir. 1983) (reviewing a set of petitions brought by various sectors of the automotive industry challenging EPA regulations); *see also* Nat'l Tank Truck Carriers, Inc. v. EPA, 907 F.2d 177, 180 (D.C. Cir. 1990) (reviewing petitions brought by tank truck carriers challenging EPA regulations).

112 16 U.S.C. § 1540(g) (2012).

113 *See id.* § 668b(a).

114 *See id.* § 706.

115 *See* Humane Soc'y v. Glickman, 217 F.3d 882, 886–88 (D.C. Cir. 2000).

implicate federal agencies in actual regulatory violations, which is a requirement in the context of citizen suits invoking ESA vicarious liability.[116]

C. ESA Vicarious Liability in Pure ESA, Hybrid ESA, and Non-ESA Claims

As illustrated above, the ESA vicarious liability theory has been employed in both pure ESA cases and in conjunction with different animal protection statutes, but not in cases without ESA-protected species. The theory's successful or near successful application in *Yeutter*, *Holsten*, and *Loggerhead Turtle*—all pure ESA cases—show that it actually has teeth. When other statutes are invoked alongside ESA claims, such as the Marine Mammal Protection Act in *Strahan*, the theory is functionally unchanged.

With that established, cases where the ESA is *not* invoked have yet to yield the application of this theory, at least with regard to this particular series of cases. *WildEarth Guardians v. Lane* had many elements similar to a hypothetical non-ESA case in which ESA vicarious liability is used. As described above, the animal at issue in *WildEarth*, the Mexican Gray Wolf, was protected under a "special rule" rather than listed as endangered or threatened. That special rule, incidentally, was still a product of the ESA. However, the ESA vicarious liability claim failed in *WildEarth* even though *WildEarth* involved ESA protections. This was due in large part to the different rules regarding endangered or threatened species and ENE species. Though it is a small bit of evidence, *WildEarth* suggests that ESA vicarious liability claims applied to purely BGEPA or MBTA situations have a significant chance of failing. While *WildEarth*—a district court case—is not binding precedent, it may serve as an effective beacon in a hypothetical non-ESA cases involving ESA vicarious liability.

VI. CONCLUSION

The above synopsis reveals ESA vicarious liability's fractured and inconsistent history. A few subtle themes emerge from the cases: 1) the theory applies almost exclusively to ESA cases and is relatively nonexistent in others; 2) governmental entities face differing degrees of liability depending on the exact nature of their action or approval; and 3) the theory is recently wavering in use and potency.

Suffice it to say, this Comment produces no definitive answers to whether ESA vicarious liability will gain potential relevance and success in the future, whether the theory can be successfully applied in the context of the MBTA or the BGEPA alone, or whether citizen groups will even *attempt* to apply this theory going forward. However, this analysis does illustrate that the jurisprudential evolution of ESA vicarious liability has set a skeptical tone.

116 *See, e.g.*, Ctr. for Biological Diversity v. Pirie, 191 F. Supp. 2d 161, 163, 177–78 (D.D.C. 2002) (holding the U.S. military's killing of migratory birds without a permit violated the MBTA and the APA).