"TAKING" THE ENDANGERED SPECIES ACT: *SWEET HOME CHAPTER OF COMMUNITIES FOR A GREAT OREGON v. BABBITT*

In 1992, several parties with interests in the timber industry of the American Northwest and Southeast became fearful that their activities would run afoul of governmental protection of such species as the northern spotted owl.[1] In an effort to preempt later enforcement actions, these parties brought an action challenging several Fish and Wildlife Service (FWS) regulations promulgated under the Endangered Species Act (ESA or Act).[2] The district court rejected all of their contentions, and summarily dismissed the action.[3] Upon appeal to the Court of Appeals for the District of Columbia Circuit, the district court's decision was affirmed.[4] One issue however, the scope of the ESA's prohibition on "taking," created a division in the D.C. Circuit Court, and their initial affirmation on that issue was not unanimous.[5] Subsequently, on petition for rehearing and having given the government time for response, the court of appeals reversed their view on the scope of "taking" prohibited by the ESA.[6] In their final disposition, the D.C. Circuit Court *held* that the FWS definition of "harm," which included habitat modification in the "taking" prohibition, was neither clearly authorized by Congress nor a "reasonable interpretation" of the statute, and was consequently invalid. The Supreme Court has agreed to hear arguments this spring. *Sweet Home Chapter of Communities for a Great Oregon v. Babbitt,* 17 F.3d 1463 (D.C. Cir. 1994), *cert. granted*, 63 U.S.L.W. 3513 (U.S. 1995).[7]

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1. Sweet Home Chapter of communities for a Great Oregon v. Lujan, 806 F. Supp. 279, 282 (D.D.C. 1992). These parties were characterized by the district court as, "small landowners, small logging companies, and families allegedly dependent on the forest products industry in the Pacific Northwest and in the Southeast . . . ." *Id.*

2. *Id.*

3. *Id.* at 287.

4. Sweet Home Chapter of Communities for a Great Oregon v. Babbitt, 1 F.3d 1 (D.C. Cir. 1993), *opinion modified on rehearing by* Sweet Home Chapter of Communities for a Great Oregon v. Babbitt, 17 F.3d 1463 (D.C. Cir. 1994).

5. *Id.* at 1464.

6. *Id.*

7. *Rehearing and rehearing en banc denied,* Sweet Home Chapter of Communities for a Great Oregon v. Babbitt, 30 F. 3d 190 (D.C. Cir. 1994).

When Richard Nixon signed the ESA[8] into law in December of 1973, he hailed it as an "important step" towards the protection of an "irreplaceable part of our national heritage—threatened wildlife."[9] At the time of enactment, the ESA was "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation."[10] Even so, few could have envisioned the dynamic life of the legislation in the years to come, and fewer still could have predicted the wide impact it was to have on private sector as well as government actions.

Section 9 of the ESA, codified at 16 U.S.C. § 1538, contains the primary prohibitive provision of the Act, making it "unlawful for any person subject to the jurisdiction of the United States to . . . take any such [endangered] species . . . ."[11] The term "take" under the ESA is defined as, "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."[12]

Several of the terms used in the statutory definition of take are themselves fairly broad, and required further definition to clearly delineate the prohibited actions. Accordingly, the FWS defined the broadest element, harm, as, "an act which actually kills or injures wildlife."[13] The FWS regulation continued, by way of illustration, stating "[s]uch act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering."[14]

In the ESA's early years, the dispute over what constituted harm focused on the issue of whether the harm inflicted had to be directed to an individual member of a species or whether it could be generally adverse to the species' survival without individual injury.[15] The District Court of Hawaii, in *Palila v. Hawaii Department of Land and Natural Resources*

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8. 16 U.S.C. §§ 1531-44 (1988 & Supp. V 1993).

9. RICHARD LITTELL, ENDANGERED AND OTHER PROTECTED SPECIES: FEDERAL LAW AND REGULATION 10 (1992) (quoting Presidential Statement on Signing S. 1983 into Law, 10 Weekly Comp. Pres. Doc. 2 (Dec. 28, 1973)).

10. Tennessee Valley Auth. v. Hill, 437 U.S. 153, 180 (1978).

11. 16 U.S.C. § 1538 (a)(1) (1988 & Supp. V 1993).

12. *Id.* § 1532(19).

13. 50 C.F.R. § 17.3 (1994).

14. *Id*.

15. This trend continues in the modern era: *see, e.g.*, Brian L. Kuehl, *Conservation Obligations Under The Endangered Species Act: A Case Study of the Yellowstone Grizzly Bear*, 64 U. COLO. L. REV. 607, 624-26 (1993).

(Palila I),[16] took the broader of these two views, and held that "harm" under section 9 included harm to the species' habitat.[17] This broad interpretation was affirmed on appeal by the Ninth Circuit.[18]

The Interior Department Solicitor described the Ninth Circuit's holding as a demonstration of the "substantial confusion over the distinction between habitat modifications and takings."[19] In fact, the holding prompted the Interior Department to adopt the current version of the regulation, allowing "harm" to encompass habitat modification only where it "actually kills or injures wildlife."[20] That the added specificity failed to substantially reduce the confusion is demonstrated by the case known as *Palila II*.[21] On substantially similar facts to *Palila I*, the court "rejected the notion that section 9 requires evidence of death or injury to specific individual members of a protected species . . . [i]nstead, the court found that the concept of harm should be applied to a species as a whole."[22] The district court's decision in *Palila II* was also affirmed by the Ninth Circuit,[23] and has since been followed.[24]

The nation's highest judicial authority has never directly reviewed the scope of the prohibition against "harm" to a species. In *Tennessee Valley Authority v. Hill*,[25] however, the Supreme Court considered the history of the ESA, and concluded that the Act was intended to curb species extinction, "whatever the cost."[26] The scope of the FWS "harm" definition was specifically cited by the Court as an example of this broad protection.[27]

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16. 471 F. Supp. 985 (D. Haw. 1979).

17. *Id.* at 995.

18. Palila v. Hawaii Dep't of Land and Natural Resources, 639 F.2d 495 (9th Cir. 1981).

19. LITTELL, *supra* note 9, at 34, (citing 46 Fed. Reg. 29,492 (1981)); *see also* Oliver A. Houck, *The Endangered Species Act and its Implementation by the U.S. Department of Interior and Commerce*, 64 U. COLO. L. REV. 277, 352 (1993).

20. LITTELL, *supra* note 9, at 34 (quoting 46 Fed. Reg. 54,748 (1981)).

21. Palila v. Hawaii Dep't of Land and Natural Resources, 649 F. Supp. 1070 (D. Haw. 1986).

22. DANIEL J. ROHLF, THE ENDANGERED SPECIES ACT: A GUIDE TO ITS PROTECTIONS AND IMPLEMENTATION 64 (1989).

23. 852 F.2d 1106 (9th Cir. 1988).

24. *See,* Sierra Club v. Lyng, 694 F. Supp. 1260, 1270-71 (E.D. Tex. 1988) (holding that timber management activities constituted "harm" under ESA), *aff'd in part, vacated in part sub nom.* Sierra Club v. Yeutter, 926 F.2d 429 (5th Cir. 1991).

25. 437 U.S. 153, 172-73 (1978) (halting a $100 million dam project because of the "harm" it would do in altering the habitat of the snail darter, a three-inch fish).

26. *Id.* at 184.

27. *Id.* at 184-85. The Supreme Court's decision states that:

In the noted case, the Court of Appeals for the District of Columbia undertook its own analysis of the FWS definition of "harm."[28] For the purposes of statutory construction, the D.C. Circuit Court looked to *Chevron U.S.A. Inc. v. Natural Resources Defense Council*,[29] where the Supreme Court delineated a two-prong test for the review of an agency's statutory construction.[30] Under that test, a court first must consider whether or not the intended construction was explicitly addressed by the enabling act.[31] If congressional intent is clear, such intent resolves the matter.[32] If not, however, a court may not create its own reading, but rather must consider whether the agency's interpretation is "a permissible construction of the statute."[33] The majority in *Sweet*

> The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost. This is reflected not only in the stated policies of the Act, but in literally every section of the statute. All persons, including federal agencies, are specifically instructed not to take endangered species, meaning that no one is "to harass, harm, [FN 30] pursue, hunt, shoot, wound, kill, trap, capture, or collect" such life forms.

Id. (quoting 16 U.S.C. §§ 1532(14) (1976).

Footnote 30 in the above passage explicitly measured the scope of "harm," saying:

> The Secretary of the Interior has defined the term "harm" to mean "an act or omission which actually injures or kills wildlife, including acts which annoy it to such an extent as to significantly disrupt essential behavioral patterns, which include, but are not limited to, breeding, feeding or sheltering; *significant environmental modification or degradation which has such effects is included within the meaning of 'harm.*'"

Id. at 184 n.30 quoting 50 C.F.R. § 17.3 (1976) (alteration in original).

28. Sweet Home Chapter of Communities for a Great Oregon v. Babbitt, 17 F.3d 1463, 1464 (D.C. Cir. 1994), *cert. granted*, 63 U.S.L.W. 3513 (U.S. 1995).

29. 467 U.S. 837 (1984).

30. *Id.* at 842-43.

31. *Id.* at 842.

32. *Id.* at 842-43.

33. This test is clearly laid out in the text of the *Chevron* opinion:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Chevron, 467 U.S. at 842-43 (footnotes omitted).

Home rejected the government's contentions that the FWS definition was authorized by the original Act and that even if not authorized, the 1982 amendments validated or ratified the definition.[34] The court instead found, "that the Service's definition of 'harm' was neither clearly authorized by Congress nor a 'reasonable interpretation' of the statute."[35]

To determine if the first prong of the *Chevron* test had been satisfied, the D.C. Circuit Court looked to the legislative history of the ESA.[36] The legislative history, as construed by the majority, revealed "the intention to assign the primary task of habitat preservation to the government"[37] in the section of the ESA which deals with land acquisition.[38] The D.C. Circuit Court found in the record that an early version of the "take" definition before the Senate had included the language, "destruction, modification, or curtailment of [a species'] habitat or range."[39] The alteration of this definition through the legislative process persuaded the court that Congress had considered but rejected the inclusion of habitat modification under the definition of "take."[40]

The *Sweet Home* court also rejected the government's contentions that the 1982 amendments to the ESA either rendered the agency definition "reasonable" under *Chevron* by altering the context of "take," or "constituted a ratification of the regulation" by implicit endorsement of a congressional subcommittee.[41] The first theory rests on the implementation by amendment of permits to allow "incidental"

It is not, however, entirely clear that the *Chevron* standard should apply at all in this instance. In the denial of suggestion for rehearing en banc, Chief Judge Mikva, Judge Silberman, and Judge Wald were troubled by the use of the *Chevron* standard, saying: "the *Chevron* presumption—that Congress has delegated to the administrating agency primary authority to reconcile ambiguities in statutory language—may not apply when the statute contemplates criminal enforcement." Sweet Home Chapter of Communities for a Great Oregon v. Babbitt, 30 F.3d 190, 194 (D.C. Cir. 1994) (Silberman, J., dissenting) (citing United States v. Thompson/Center Arms Co., 112 S. Ct. 2102, 2110 & nn.9 & 10 (1992) (plurality opinion)).

34. *Sweet Home*, 17 F.3d at 1464.

35. *Id.* (citing Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837, 842-43 (1984)).

36. *Id*. at 1466.

37. *Id*.

38. 16 U.S.C. § 1534 (1988 & Supp. V 1993).

39. *Sweet Home,* 17 F.3d at 1467 (alteration in original) (quoting *Endangered Species Act of 1973: Hearings on S. 1592 and S. 1983 Before the Subcomm. on Environment of the Senate Comm. on Commerce*, 93d Cong., 1st Sess. 27 (1973)).

40. *Id.* at 1467, (quoting John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank, 114 S. Ct. 517, 526 (1993) ("In rejecting the Service's understanding of 'take' to encompass habitat modification, 'we are mindful that Congress had before it, but failed to pass, just such a scheme.'")).

41. *Id.* at 1467.

takings.[42] This implies that permitless incidental takings are prohibited under the Act.[43] In the D.C. Circuit Court's view, however, it did not follow "that such incidental takings include the habitat modifications embraced by the Service's definition of 'harm.'"[44]

The second theory, that silence on the definition of "harm" coupled with certain awareness by the subcommittee of that definition constitutes ratification or implicit approval, was similarly rejected by the D.C. Circuit Court.[45] They recognized that on several occasions, inaction had been viewed as approval or ratification.[46] However, the D.C. Circuit Court suggested that precedential standards have established that inaction is generally not an effective guide.[47] Unfortunately, the D.C. Circuit Court declined to reconcile or resolve the disparity between the two positions.[48] The majority found that the overall legislative intent in drafting and enacting the ESA tended to favor the exclusion of habitat modification from the definition of "taking."[49]

Further, the D.C. Circuit Court found the agency definition to be unreasonable because the context of the word "harm" in the statute and the principle of *noscitur a socis* favor a narrow reading of "harm" which does not include habitat modification.[50] The terms surrounding "harm"

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42. *Sweet Home,* 17 F.3d at 1467 (citing 16 U.S.C. 1539(a)(1)(B) (1988 & Supp. V 1993)).

43. *Id*.

44. *Id*. The majority opinion argues that such incidental takings may arise out of the more clear verbs in the definition of "take." The court stated, "[t]he trapping of a nonendangered animal, for example, may incidentally trap an endangered species." *Id*.

45. *Id.* at 1468-72.

46. *Id*. at 1471-72 (citing Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 846 (1986); United States v. Riverside Bayview Homes, 474 U.S. 121, 137 (1985); Bob Jones Univ. v. United States, 461 U.S. 574, 600-02 (1983); United States v. Bd. of Comm'rs of Sheffield, Alabama, 435 U.S. 110, 134 (1978) ("When a Congress that re-enacts a statute voices its approval of an administrative or other interpretation thereof, Congress is treated as having adopted that interpretation, and this Court is bound thereby.")).

47. *Sweet Home,* 17 F.3d at 1471-72 (citing *Bob Jones Univ*., 461 U.S. at 600 ("Non-action by Congress is not often a useful guide . . . .")). The court also refers to their own decision in the State of Ohio v. U.S. Dep't of the Interior, 880 F.2d 432, 458-459 (D.C. Cir. 1989) *reh'g denied*, 897 F.2d 1151 (D.C. Cir. 1989) ("[T]he acquiescence-by-reenactment rule is not applicable to a situation where the regulations violate the original statutory language and where Congress' decision not to amend the relevant statutory provisions evidently stems from a belief that the provisions have been clear all along."). *Sweet Home,* 17 F.3d at 1471.

48. *Sweet Home*, 17 F.3d at 1472.

49. *Id.*

50. *Id.* at 1465-66 (quoting Jarecki v. G.D. Searle & Co., 367 U.S. 303, 307 (1961) ("The maxim *noscitur a socis*, that a word is known by the company it keeps, while not an inescapable rule, is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress.")).

in the statute are "harass, . . . pursue, hunt, shoot, wound, kill, trap, capture, or collect."[51] All of these, in the eyes of the circuit court, "involve a substantially direct application of force, which the Service's concept of forbidden habitat modification altogether lacks."[52]

Summarizing the majority's analysis, Judge Williams wrote that the FWS definition of "harm" was, "neither clearly authorized by Congress nor a 'reasonable interpretation' of the statute."[53] Further, the circuit court found that no subsequent congressional action had supplied the missing authority.[54] Accordingly, the regulation "defining 'harm' to embrace habitat modification," was held invalid.[55]

The *Sweet Home* decision has wide implications for the future enforcement of the Endangered Species Act.[56] First, the holding removes passive offenses on the part of the private sector, which has the effect of significantly reducing the burden on individuals while leaving the ESA's strenuous requirements of government intact. Second, the *Sweet Home* decision creates a rift between the D.C. Circuit and the Ninth Circuit. The Ninth Circuit set an early standard in *Palila I*[57] and has affirmed the holding that habitat modification constitutes a taking under the ESA.[58] Moreover, the Ninth Circuit has found the FWS regulation defining "harm" to embrace habitat modification to be a reasonable interpretation of the statute per *Chevron*.[59] The irony of *Sweet Home,* in light of this split, is that the region which prompted the action and the organization bringing it are both within the territory of the environmentally protective Ninth Circuit.[60]

Persuasive authority aside, the D.C. Circuit's holding is curious in light of the fact that the Supreme Court itself concluded that the legislative history of the ESA supports the idea that the Act was intended

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51. 16 U.S.C. § 1532(19) (1988 & Supp. V 1993).

52. *Sweet Home*, 17 F.3d at 1465.

53. *Id*. at 1464.

54. *Id.*

55. *Id*. at 1472.

56. The implications of the D.C. Circuit Court ruling may be especially profound at a time when the Act is coming up for reauthorization, and facing stiff opposition. For a succinct discussion of the battle between ESA proponents and opponents, *see* Stephen M. Meyer, *The Final Act*, THE NEW REPUBLIC, August 15, 1994, at 24.

57. 639 F.2d 495, 497-98 (9th Cir. 1981).

58. *Palila II,* 852 F.2d at 1107-08.

59. *Id.*

60. An action for enforcement by the FWS, governed by the Ninth Circuit standard, would very likely have achieved an opposite result.

to curb species extinction, "whatever the cost." Further, the court specifically cited the scope of the FWS harm definition as an example of this broad protection.[61] The Supreme Court's application in *Tennessee Valley Authority v. Hill*,[62] halting a $100 million dam project because of the "harm" it would do in altering the habitat of the snail darter, a three-inch fish,[63] appears to constitute a very clear finding of congressional approval/ratification directly contrary to the D.C. Circuit Court's finding.[64]

Chief Judge Mikva's dissent in *Sweet Home* raises still more concerns regarding the majority's application of the *Chevron* standard; specifically, Judge Mikva questioned the majority's apparent assignation of the burden of proving reasonableness on the agency.[65] The *Chevron* court held that under the reasonableness examination, "[t]he court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding."[66] Yet the *Sweet Home* court, according to Judge Mikva, "[d]espite the command of *Chevron*, . . . substitutes its own favorite reading of the Endangered Species Act for that of the agency."[67]

Environmental law is, as is any law, influenced greatly by policy concerns.[68] The discord between the Ninth and D.C. Circuits demonstrates very clearly two predominant and opposing concerns in Endangered Species Act litigation. On the one hand, the law seeks to protect wildlife in danger of extinction and preserve biodiversity. This is generally viewed as favorable because endangered species are viewed as public goods, difficult to value, but irreplaceable.[69] Without government intervention, individuals have "no incentive to take action to protect a species, since others cannot be prevented from enjoying the benefits of

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61. *See supra* note 27 and accompanying text.

62. 437 U.S. 153 (1978).

63. *Id*. at 172-73.

64. The government's argument that congressional review without change in this instance amounts to ratification has been echoed by other commentators. *See, e.g.,* Houck, s*upra* note 19, at 353 ("The application of section 9 to habitat destruction has also been ratified by legislation.").

65. *Sweet Home*, 17 F.3d at 1473 (Mikva, C.J., dissenting).

66. *Chevron*, 467 U.S. at 843 n.11.

67. *Sweet Home*, 17 F.3d at 1474 (Mikva, C.J., dissenting).

68. *See* STEVEN LEWIS YAFFEE, PROHIBITIVE POLICY: IMPLEMENTING THE FEDERAL ENDANGERED SPECIES ACT 5-6 (1982).

69. JOHN C. RYAN, WORLDWATCH PAPER 108, LIFE SUPPORT: CONSERVING BIOLOGICAL DIVERSITY 49 (ED AYRES, ED., 1992).

their protective actions."[70] On the other hand, the law seeks to protect individual autonomy and economic prosperity, as "[t]hose who own private lands see no reason why they should not be able to develop it [sic] and view any uncompensated restrictions on that right as an unconstitutional taking."[71]

For those who view the ESA as an encroachment on individual liberty, *Sweet Home* is a beacon paving the path away from previous encroachments upon constitutional safeguards of liberty. For those who value the preservation of biodiversity and welcomed the Endangered Species Act, *Sweet Home* represents significant regress in what was once, "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation."[72] For all concerned, it raises a great deal of uncertainty as to the current state of federal law on "taking" under the ESA.

Judge Williams' majority opinion notes, "[t]he potential breadth of the word 'harm' is indisputable."[73] The court's opinion in *Sweet Home* has rendered it somewhat more moot—a regrettable result where the weight of precedent and the sanction of the Supreme Court stand squarely behind the FWS regulation and its inclusion of habitat modification as a "taking" under section 9 of the ESA. *Sweet Home* is an unfortunate instance of several judges sitting in the most urban circuit of the United States choosing business and economics over preservation and biodiversity, disregarding precedent and misreading congressional intent to create an unnecessary and undesirable rift in our appellate courts. In one broad stroke of the pen, the *Sweet Home* court has severely undermined the ESA's restraining effect on private action and made the long-term efficacy of the Act as uncertain as the survival of those species it seeks to protect. The Supreme Court would do well to look to its own earlier application of the ESA when it takes up *Sweet Home* in the weeks ahead.

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70. YAFFEE, *supra* note 68, at 17.

71. David P. Berschauer, *Is The "Endangered Species Act" Endangered?*, 21 SW. U. L. REV. 991, 1005 (1992).

72. Tennessee Valley Auth. v. Hill, 437 U.S. 153, 180 (1978).

73. *Sweet Home*, 17 F.3d at 1464 (quoting Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2897 (1992) ("the distinction between 'harm-preventing' and 'benefit-conferring' regulations is often in the eye of the beholder.")).