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Takings of Wildlife under the Endangered Species Act After *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*

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**TAKINGS OF WILDLIFE UNDER THE
ENDANGERED SPECIES ACT AFTER *BABBITT*
v. *SWEET HOME CHAPTER OF COMMUNITIES*
FOR A GREAT OREGON**

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I. INTRODUCTION

The Supreme Court's recent decision in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*¹ rejected a facial challenge to the United States Fish and Wildlife Service's (FWS) regulation² which prohibits (under the taking provision³ of the Endangered Species Act (the ESA or Act)) significant modification of wildlife habitat that kills or injures members of species protected under the Act. Yet, the decision failed to answer a number of questions that may arise where the FWS's regulation is applied to particular factual circumstances. Because a majority of the Justices held that habitat modification only violates the FWS's regulation when it proximately causes death or injury to members of a wildlife species protected under the Act, lower courts are now required to resolve various issues involving what constitutes "injury" to a protected species. These issues include whether injury can occur when habitat modification impairs breeding, feeding, sheltering, or other essential behavior of members of a protected wildlife species or only when habitat modification causes physical injury to an individual animal that is a member of a protected wildlife species.

State endangered species statutes and regulations are affected by the FWS's regulation and the Supreme Court's *Sweet Home Chapter* decision

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1. — U.S. —, 115 S. Ct. 2407 (1995).
2. 50 C.F.R. § 17.3 (1995).
3. 16 U.S.C. § 1538(a)(1)(B) (1994). See *infra* note 10.

because section 6(f) of the federal ESA prohibits "any State law or regulation respecting the taking of an endangered or threatened species . . . [from being] less restrictive than prohibitions"⁴ in any regulation which implements the Act. State statutes and regulations prohibiting the taking of a species of wildlife protected under the FWS's taking regulation must be at least as restrictive as the FWS's regulation. However, a taking prohibition under a state endangered species statute or regulation need not be interpreted the same way as the FWS's regulation is interpreted by a lower federal court or a court of another state.

This article will analyze the Supreme Court's *Sweet Home Chapter* decision and discuss how the FWS's regulation, held facially valid in that decision, should be interpreted.⁵ This article will also discuss how taking prohibitions in state endangered species statutes and regulations should be interpreted under this decision.

II. HABITAT PROTECTION AND THE ESA

The ESA seeks to prevent endangered species⁶ and threatened species⁷ of fish and wildlife from becoming extinct, and to increase populations of endangered and threatened species to levels that make it unnecessary to list and protect them under the Act. Protection of the habitats of endangered and threatened species of fish and wildlife from destruction or significant detrimental alteration is one method used by the federal government to achieve these goals. These habitats are protected under the Act because "the survival of individual wild animals, as well as species of wildlife, is dependent upon habitat, which provides wildlife with food, shelter, protection (from human and animal predators), breeding sites, and sites for rearing and nesting their young."⁸

4. 16 U.S.C. § 1535(f) (1994).

5. For a discussion of the history of the FWS's takings regulation and of the District Court's and Court of Appeals' decisions in the *Sweet Home Chapter* litigation, see Steven Davison, *Alteration of Wildlife Habitat as a Prohibited Taking Under the Endangered Species Act*, 10 J. LAND USE & ENVTL. L. 155 (1995).

6. An endangered species is defined under the ESA as "any species . . . in danger of extinction throughout all or a significant portion of its range" other than certain insect pests. 16 U.S.C. § 1532(6) (1994).

7. A threatened species is defined under the ESA as "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." 16 U.S.C. § 1532(20).

8. Davison, *supra* note 5, at 156.

One method used by Congress under the Act to protect endangered species is to make it illegal, unless a permit has been obtained, for any person⁹ to “take” any endangered species of fish or wildlife within the United States.¹⁰ Although the phrase to “take any such species” under section 10 of the Act might be interpreted to mean that a prohibited taking can occur only when all members of a species are taken¹¹ or only when at least several members of a species are taken,¹² section 9 has been interpreted by the courts as prohibiting “any taking and every taking—even of a single

9. “Person” is defined under the ESA to mean:

an individual, corporation, partnership, trust, association, or any other private entity; or any officer, employee, agent, department or instrumentality of the Federal Government, of any State, municipality, or political subdivision of a State, or of any foreign government; any State, municipality, or political subdivision of a State; or any other entity subject to the jurisdiction of the United States.

16 U.S.C. § 1532(13) (1994).

10. 16 U.S.C. § 1538(a)(1)(B). Section 9(a)(1)(B) of the ESA provides:

Except as provided in sections 1535(g)(2) and 1539 of this title, 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—

(B) take any such species within the United States or the territorial sea of the United States.

Id. The habitat of a species protected under the ESA can be preserved through the acquisition of wildlife habitat by the federal government under section 5, 16 U.S.C. § 1534 (1994) and through a directive to federal agencies under section 7(a)(2), *id.* § 1536(a)(2), not to authorize, fund or carry out any action likely to result in the destruction or adverse modification of any habitat of a threatened or endangered species that has been designated as critical by the federal government. *See Davison, supra* note 5, at 175-78.

11. *See Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, — U.S. —, 115 S. Ct. 2407, 2413 n.10 (1995) (“the statutory text . . . forbids not taking ‘some creature’ but ‘tak[ing] any [endangered] species’— a formidable task for even the most rapacious feudal lord.”).

12. The Supreme Court’s reference to the FWS’s definition of “harm” encompassing “habitat modification that results in actual injury or death to *members* of an endangered or threatened species,” *id.* at 2412-14 (emphasis added), has been the basis for an argument that the Supreme Court “only upheld the legality of the ‘harm’ regulation when a land use activity would cause the demise of several members of a listed wildlife species” and “that the loss of one individual or a few individuals in a growing or stable population, which thereby retards recovery, is not ‘harm.’” Steven P. Quarles et al., *Sweet Home and the Narrowing of Wildlife “Take” Under Section 9 of the Endangered Species Act*, 25 ENVTL. L. REP. 10003, 10009-10 (Envtl. L. Inst. 1996).

individual of the protected species.”¹³ This taking prohibition, as drafted, applies throughout the United States and is applicable to takings of endangered species that occur on privately owned land, as well as to takings that occur on public lands owned by federal, state, or local governments. Furthermore, the FWS has promulgated a regulation¹⁴ which the courts have upheld¹⁵ that makes it illegal to “take” a threatened species of fish or wildlife.

A person who commits a prohibited taking of even one animal that is listed as endangered or threatened species is subject under the ESA to federal civil¹⁶ and criminal penalties¹⁷ (fines or imprisonment, or both). In addition, ongoing conduct by a person that constitutes a prohibited taking in violation of the Act is subject to an injunction. An injunction is issued by a federal district court in a suit brought by either the United States Attorney General¹⁸ or by private citizens or organizations who have standing to sue under the citizen suit provision¹⁹ of the ESA.²⁰

The ESA defines “take” to mean “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”²¹ Exercising authority under the ESA to “promulgate such regulations as may be appropriate to enforce” the Act,²² the FWS in 1981 adopted a regulation to protect endangered and threatened species from being killed or injured by alteration of their habitat. This regulation defines “harm” under the ESA’s definition of take to mean:

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13. *Loggerhead Turtle v. County Council of Volusia County*, 896 F. Supp. 1170, 1180 (M.D. Fla. 1995) (emphasis added). See *Sweet Home Chapter of Communities for a Great Oregon v. Babbitt*, 1 F.3d 1, 5 (D.C. Cir. 1993), *modified on other grounds*, 17 F.3d 1463 (D.C. Cir.), *reh'g denied*, 30 F.3d 190 (D.C. Cir. 1994), *rev'd*, — U.S. —, 115 S. Ct. 2407 (1995) (stating that habitat modification constitutes “harm” when it “causes ascertainable physical injury or death to an individual member of a listed species.”).
 14. 50 C.F.R. § 17.31(a) (1993).
 15. *Sweet Home Chapter of Communities for a Great Oregon v. Babbitt*, 1 F.3d 1 (D.C. Cir. 1993), *modified on other grounds*, 17 F.3d 1463 (D.C. Cir.), *reh'g denied*, 30 F.3d 190 (D.C. Cir. 1994), *rev'd on other grounds*, — U.S. —, 115 S. Ct. 2407 (1995).
 16. 16 U.S.C. § 1540(a)(1) (1994).
 17. *Id.* § 1540(b)(1).
 18. 16 U.S.C. § 1540(e)(6).
 19. *Id.* § 1540(g)(1)(A).
 20. The ESA’s enforcement provisions are discussed in Davison, *supra* note 5, at 170-75. See also Quarles et al., *supra* note 12, at 10008-09, 10012-14.
 21. 16 U.S.C. § 1532(19) (1994).
 22. *Id.* § 1540(f).

an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife [that is an endangered or threatened species] by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering.²³

This regulation has been strongly opposed by the timber industry and land developers because it may prohibit the cutting of timber or other development of private or public land. However, it is the only mechanism available under the ESA to regulate the alteration of wildlife habitat when timber cutting or other development is undertaken on private lands by private persons not acting pursuant to a federal permit, license, or grant.²⁴ Because over sixty percent of the habitat of 247 animal species listed as endangered or threatened under the Act are located on non-federal lands,²⁵ this regulation is an important part of the federal government's program to protect and restore endangered and threatened species under the ESA.

The prohibitions under the ESA and the FWS's regulations are not absolute and inflexible. The FWS is authorized to issue permits in certain circumstances allowing the taking of an endangered or threatened species that otherwise would be prohibited under the ESA. The incidental taking

23. 50 C.F.R. § 17.3 (1995).

24. See Davison, *supra* note 5, at 175-78. Section 7(a)(2), 16 U.S.C. § 1536(a)(2), of the ESA only protects wildlife habitat from actions authorized, funded, or carried out by a federal administrative agency and only when the habitat modification may either cause a protected species to become extinct or will destroy or adversely modify habitat designated as critical by the federal government. *Id.*

However, under the taking prohibition of section 9 of the ESA, "it is irrelevant . . . whether the 'taking' at issue involves a critical habitat or not." *Loggerhead Turtle v. County Council of Volusia County*, 896 F. Supp. 1170, 1180 (M.D. Fla. 1995). Section 9 can also be violated even if a protected species will not be threatened with extinction as a result of the taking. See *Palila v. Hawaii Dept. of Land & Natural Resources (Palila II)*, 649 F. Supp. 1070, 1077 (D. Haw. 1986), *aff'd.*, 852 F.2d 1106 (9th Cir. 1988) (holding that the population of an endangered species does not have to "dip closer to extinction before the [takings] prohibitions of section 9 come into force"). In addition, section 9 applies to actions of private persons that are not authorized, funded, or carried out by a federal administrative agency, thus reaching private conduct not subject to regulation under section 7. See *Sierra Club v. Babbitt*, 65 F.3d 1502, 1512 (9th Cir. 1995) ("when a wholly private action threatens imminent harm to a listed species the appropriate safeguard is through § 9, 16 U.S.C. § 1538, and not § 7, 16 U.S.C. § 1536.").

Furthermore, although the FWS has adopted a regulation, 50 C.F.R. § 17.3, that defines "harass" for purposes of the Act's taking prohibition, the FWS did not intend for its definition of harass to regulate habitat modification (because its definition of harm does so). See 40 Fed. Reg. 44,413 (Sept. 26, 1975). See also Davison, *supra* note 5, at 180.

25. NATIONAL RESEARCH COUNCIL, SCIENCE AND THE ENDANGERED SPECIES ACT 61 (1995).

provision in section 10 of the Act²⁶ is frequently invoked to allow a person to modify wildlife habitat when that action otherwise would be prohibited under the ESA as a taking. This provision authorizes the FWS to issue permits allowing a taking of endangered species of fish or wildlife provided such a taking is incidental to an otherwise lawful activity and is not for the purpose of taking a protected species.²⁷ Such incidental taking permits can be issued by the FWS upon a finding that: 1) the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild; and 2) the permittee implements a Habitat Conservation Plan (HCP) to minimize and mitigate, to the maximum extent practicable, the impacts of the permitted incidental taking. At present, however, a landowner faces considerable delay and expense in seeking an incidental taking permit that would allow the owner to develop his or her land in a way that would modify the habitat of an endangered or threatened species of fish or wildlife to an extent that a prohibited taking of that species would occur.²⁸

III. SWEET HOME CHAPTER LITIGATION

In *Sweet Home Chapter*, a coalition representing the timber industry challenged the validity of the FWS's harm regulation, to the extent it prohibited habitat modifications as a taking under section 9. The plaintiffs represented interests in property inhabited by the threatened northern spotted owl and the endangered red-cockaded woodpecker. The timber industry sued, contending that the harm regulation interfered with their livelihood because modification of the owl or woodpecker's habitat by logging activities would expose them to potential "take" liability.

26. 16 U.S.C. § 1539(a)(1)(B) (1994).

27. The FWS has extended this incidental taking permit provision to threatened species of fish and wildlife. 50 C.F.R. § 17.32(b) (1995).

28. In March 1995, the Secretary of Interior, Bruce Babbitt, announced a policy that allows landowners to incidentally take threatened species (but not endangered species) of wildlife protected under the ESA when doing certain development activities on their land. Such activities, either individually or cumulatively, have lasting effects on the likelihood of the species' survival and recovery. This policy authorized: (1) development activities on a parcel of land occupied by a single household and used only for residential purposes; (2) one-time development activities that affect five acres of land or less of contiguous property, provided that the property was acquired before the date on which the species occupying the parcel was listed as endangered or threatened; and (3) development activities identified by FWS as having negligible effects on the survival of the threatened species. Beth S. Ginsberg, Babbitt v. Sweet Home Chapter of Communities for a Great Oregon: *A Clarion Call for Property Rights Advocates*, 25 ENVTL. L. REP. 10478, 10484 (Envtl. L. Inst. 1995).

In 1994, the United States Court of Appeals for the District of Columbia, by a 2-1 vote, held that this regulation (that defines "harm" and "take" to include habitat modification) was invalid.²⁹ The court held that the regulation was neither clearly authorized by Congress nor a reasonable interpretation of the ESA. In the opinion, Judges Stephen Williams and David Sentelle invalidated the FWS's definition of harm on the grounds that a prohibited taking under the ESA can only occur by a perpetrator's direct application of force against the animal taken. The FWS's inclusion of habitat modification within its definition of harm facially invalidated the definition because habitat modification never involves the direct application of force against an animal.

On January 6, 1995, the United States Supreme Court granted the federal government's petition for certiorari³⁰ to decide whether the FWS's regulation defining harm to include "significant habitat modification . . . that actually kills or injures wildlife" is facially invalid, i.e., whether the regulation is invalid in every circumstance involving modification of wildlife habitat.³¹ On June 29, 1995, Justice Stevens delivered the opinion for a majority of six Justices with three Justices (Scalia, Rehnquist and Thomas) dissenting.³² In a reversal, the Court held that the FWS's regulation defining "harm" is a

29. *Sweet Home Chapter of Communities for a Great Oregon v. Babbitt*, 17 F.3d 1463 (D.C. Cir. 1994), *reh'g denied*, 30 F.3d 190 (D.C. Cir. 1994), *rev'd*, — U.S. —, 115 S. Ct. 2407 (1995).

30. *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 17 F.3d 1463 (D.C. Cir. 1994), *cert. granted*, — U.S. —, 115 S. Ct. 714 (Jan. 6, 1995) (No. 94-859).

31. *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, — U.S. —, 115 S. Ct. 2407, 2414 (1995).

The Supreme Court, however, did not address the issue of whether the FWS's definition was facially void for vagueness. *Id.* at 2410 n.3. The court of appeals rejected this facial challenge to the FWS's definition of harm. *Sweet Home Chapter of Communities for a Great Oregon v. Babbitt*, 1 F.3d 1, 3-5 (D.C. Cir. 1993), *modified on other grounds*, 17 F.3d 1463 (D.C. Cir. 1994), *reh'g denied*, 30 F.3d 190 (D.C. Cir. 1994), *rev'd*, — U.S. —, 115 S. Ct. 2407 (1995). See Davison, *supra* note 5, at 208-11.

32. *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, — U.S. —, 115 S. Ct. 2407 (1995).

reasonable interpretation of an ambiguous provision of the ESA³³ under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*³⁴ The Court agreed with the FWS that a developer could “take” a species by modifying habitat and concluded that the FWS’s interpretation of harm to include habitat modification was reasonable for five reasons. First, it ruled that the ordinary dictionary definition of the word harm supported the FWS’s construction.³⁵ Justice Stevens found that “harm” meant “to injure,”³⁶ and stated that this definition “naturally encompasses habitat modification that results in injury or death to members of an endangered or threatened species.”³⁷ The majority reasoned that the dictionary definition of harm does not limit the word to direct application of force against protected species because “the dictionary definition does not include the word ‘directly’ or suggest in any way that only direct or willful action that leads to injury constitutes ‘harm’.”³⁸ Justice Stevens added that:

Moreover, unless the statutory term “harm” encompasses indirect as well as direct injuries, the word has no meaning that does not duplicate the meaning of other words that [section] 3 uses to define

33. 115 S. Ct. at 2416. The majority rejected respondent’s argument that “the rule of lenity should foreclose any deference to the Secretary’s interpretation of the ESA because the statute includes criminal penalties.” *Id.* at 2416 n.18.

Davison, *supra* note 5, at 205-38, which was published before the Supreme Court’s decision in *Sweet Home Chapter*, concluded that the FWS’s definition of harm under the ESA should be upheld under *Chevron* as a reasonable interpretation of ambiguous provisions of the ESA, based on slightly different reasoning than that subsequently used by the Supreme Court. Because that article analyzes in depth the issues of whether the ESA is clear or ambiguous with respect to whether “take” and “harm” under the ESA can include habitat modification, and whether the FWS’s definition of harm is reasonable in light of the ESA’s purposes, provisions and legislative history, this article will not analyze those issues.

For arguments that the ESA clearly makes the FWS definition of harm invalid and that the FWS definition of harm is invalid under *Chevron* as an unreasonable interpretation of the ESA, see Brief of Amici Curiae Nationwide Public Projects Coalition (CO), Brazos River Authority (TX), Granite Construction Co. (CA), Helix Water District (CA), Rancho California Water District (CA), Semitropics Water District (CA), West San Bernadino County Water District (CA), Metropolitan Denver Water Authority (CO), Drake Homes, Inc. (CA), Metropolitan Water Providers (CO), Wheeler-Ridge Maricopa Water Storage District (CA), the City of Safford (AZ), The Villages of Ocean Beach and Saltaire (NY), and The Fire Island Association (NY) filed in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, — U.S.—, 115 S. Ct. 2407 (1995).

34. 467 U.S. 837 (1984).

35. 115 S. Ct. at 2412-13.

36. *Id.* at 2412 (citing WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1034 (1966)).

37. 115 S. Ct. at 2412-13.

38. *Id.* at 2413 (footnote omitted).

duplicate the meaning of other words that [section] 3 uses to define "take." A reluctance to treat statutory terms as surplusage supports the reasonableness of the Secretary's interpretation.³⁹

Second, the Court held that the "harm" regulation naturally fits within the ESA's broad purposes to protect habitat and ecosystems of endangered and threatened species.⁴⁰ Third, Justice Stevens was persuaded that the 1982 enactment of the ESA's incidental taking provision⁴¹ reflected Congress' understanding that section 9 prohibits "indirect as well as deliberate takings" and "that activities not intended to harm an endangered species, such as habitat modification," could rise to the level of a "take."⁴² Fourth, Justice Stevens found support for the FWS's interpretation of harm in three specific sections of the ESA: the definition of "take;"⁴³ section 5⁴⁴ (which expressly authorizes the federal government to acquire land to protect wildlife habitat); and section 7⁴⁵ (which regulates activities of federal agencies).⁴⁶ Fifth, Justice Stevens found sufficient evidence in the ESA's legislative history to support the FWS's interpretation.⁴⁷

39. *Id.* (citation omitted).

40. *Id.* at 2413-14.

41. 16 U.S.C. § 1539(a)(1)(B)(1994). *See supra* notes 26-28 and accompanying text.

42. 115 S. Ct. at 2414.

43. 16 U.S.C. § 1532(19) (1994).

44. *Id.* § 1534.

45. *Id.* § 1536. The pertinent substantive provision of section 7 is found in section 7(a)(2), *id.* § 1536(a)(2), which provides in pertinent part:

Each federal agency shall . . . insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary . . . to be critical.

"Critical habitat" is defined as habitat that is "essential to the conservation of the species," *id.* § 1532(5)(A)(i), (ii), with conservation defined as "to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary." *Id.* § 1532(3).

46. 115 S. Ct. at 2414-16.

47. *Id.* at 2416-18. Justice Stevens held that the ESA's legislative history "make[s] clear that Congress intended 'take' to apply broadly to cover indirect as well as purposeful actions," and "support the Secretary's interpretation that the term 'take' in section 9 reached far more than the deliberate actions of hunters and trappers." *Id.* at 2416. For a discussion of the legislative history of the ESA discussed by Justice Stevens (and Justice Scalia) in *Sweet Home Chapter*, *see* Davison, *supra* note 5, at 205, 212-14, 232-33.

In explaining the Court's fourth reason for sustaining the FWS's definition of harm, Justice Stevens found that the court of appeals made three errors in determining that harm "must refer to a direct application of force because the words around it do."⁴⁸ Justice Stevens asserted that the court of appeals' first error was its flawed premise that the other words used in the ESA's definition of take involved a direct application of force. He pointed out that several of the words used in the ESA to define harm ("especially 'harass,' 'pursue,' 'wound,' and 'kill'") do not require direct application of force.⁴⁹ Justice Stevens also concluded that the court of appeals erred in finding that a "take" requires intent or purpose, stating that a "knowing" action is enough to violate the Act.⁵⁰ Finally, Justice Stevens found that the court of appeals erroneously applied the doctrine of *noscitur a sociis* ("a word is known by the company it keeps.")⁵¹ He stated that the lower court applied the doctrine contrary to Congress' intent to give "harm" an independent meaning "distinct from the functions of the other verbs used to define 'take.'"⁵²

Justice Stevens, as part of his fourth reason for upholding the FWS's definition of harm, also rejected the respondent's argument that Congress intended section 5 of the ESA to be the exclusive means to prevent harmful habitat modification on private lands. Section 5 can provide "for protection of habitat before the seller's activity has harmed any endangered animal, whereas the Government cannot enforce the [section] 9 prohibition until an animal has actually been killed or injured."⁵³ He added that "the Secretary [of the Interior] may also find the [section] 5 authority useful for preventing

48. 115 S. Ct. at 2414 (footnote omitted).

49. *Id.* at 2414-15.

50. *Id.* at 2415. Justice Stevens apparently was referring to the ESA's provisions for civil and criminal penalties for persons who "knowingly violate" the Act, 16 U.S.C. § 1540(a)(1), (b)(1), to which he had referred earlier in his opinion. 115 S. Ct. at 2412 n.9, 2414 n.13.

51. *Id.* at 2411.

52. *Id.* at 2415.

53. 115 S. Ct. at 2415.

modification of land that [has] not yet, but may in the future, become habitat for an endangered or threatened species."⁵⁴

Justice Stevens also stated several reasons why section 7 of the ESA should not alter the Court's holding:

The [section] 7 directive applies only to the Federal Government, whereas the [section] 9 prohibition applies to "any person." Section 7 imposes a broad, affirmative duty to avoid adverse habitat modifications that [section] 9 does not replicate, and [section] 7 does not limit its admonition to habitat modification that "actually kills or injures wildlife." Conversely, [section] 7 contains limitations that [section] 9 does not, applying only to actions "likely to jeopardize the continued existence of any endangered or threatened species," . . . and to modifications of habitat that has been designated "critical" pursuant to [section] 4 Any overlap that [section] 5 or [section] 7 may have with [section] 9 in particular cases is unexceptional, . . . and simply reflects the broad purpose of the Act set out in [section] 2⁵⁵

His remark about section 9's overlap with sections 5 and 7 implicitly refuted Justice Scalia's dissent that "Congress' explicit prohibition of habitat modification in . . . section [7] would bar the inference of an implicit prohibition of habitat modification in . . . section [9]."⁵⁶ In addition, Justice Stevens' remark also refutes Justice Scalia's observation that section 9 should not apply to habitat modification because a violation of section 7(a)(2)'s prohibition against destruction or adverse modification of designated critical habitat always will constitute a prohibited taking under section 9.⁵⁷

54. *Id.* Justice Stevens also concluded that statements by Representative Sullivan, the House floor manager, about the endangered species bills enacted as the ESA do not "even [suggest] that [section] 5 would be the Act's exclusive remedy for habitat modification by private landowners or that habitat modification by private landowners stood outside the ambit of [section] 9. Respondent's suggestion that these statements identified [section] 5 as the ESA's only response to habitat modification contradicts their emphasis elsewhere on the habitat protections in [section] 7." *Id.* at 2417 n.19.

55. *Id.* at 2415-16 (footnote omitted).

56. *Id.* at 2425 (Scalia, J., dissenting).

57. Specifically, Justice Scalia argued: "As 'critical habitat' is habitat 'essential to the conservation of the species,' adverse modification of 'critical' habitat by a federal agency would also constitute habitat modification that injures a population of wildlife [in violation of section 9's taking prohibition]." *Id.* at 2426. See *infra* notes 70-74 and accompanying text.

Justice Stevens concluded:

[w]hen it enacted the ESA, Congress delegated broad administrative and interpretive power to the Secretary The proper interpretation of a term such as "harm" involves a complex policy choice. When Congress has entrusted the Secretary with broad discretion, we are especially reluctant to substitute our views of wise policy for his In this case, that reluctance accords with our conclusion, based on the text, structure, and legislative history of the ESA, that the Secretary reasonably construed the intent of Congress when he defined "harm" to include "significant habitat modification or degradation that actually kills or injures wildlife."⁵⁸

Justice O'Connor concurred on the basis of two understandings. First, "the challenged regulation is limited to significant habitat modification that causes actual, as opposed to hypothetical or speculative, death or injury to identifiable protected animals."⁵⁹ Second, "even setting aside difficult questions of scierter, the regulation's application is limited by ordinary

58. 115 S. Ct. at 2418. Justice Stevens also stated, in the final paragraph of his opinion, that:

In the elaboration and enforcement of the ESA, the Secretary and all persons who must comply with the law will confront difficult questions of proximity and degree; for, as all recognize, the Act encompasses a vast range of economic and social enterprises and endeavors. These questions must be addressed in the usual course of the law, through case-by-case resolution and adjudication.

Id. See *Loggerhead Turtle v. Volusia County Council*, 896 F. Supp. 1170, 1179 (M.D. Fla. 1995) (holding that the Court's reference in this passage to "economic and social enterprises" did not authorize a court to balance and consider economic and social interests and consequences in deciding a motion for a preliminary injunction in a suit alleging a prohibited taking in violation of section 9 of the Act).

59. 115 S. Ct. at 2418 (O'Connor, J., concurring).

principles of proximate causation, which introduces notions of foreseeability.”⁶⁰

Justice Scalia argued that the definition of “take” under section 9 of the ESA should encompass only “affirmative conduct intentionally directed against a particular animal or animals.”⁶¹ He argued that the FWS’s definition of harm violated the ESA and was invalid under the *Chevron* doctrine because of three features: 1) it prohibits habitat modification that is merely the cause-in-fact of death or injury to wildlife, without regard to intent or foreseeability, “no matter how long the chain of causality between modification and injury;”⁶² 2) it applies to omissions as well as to acts;⁶³ and 3) “it encompasses injury inflicted, not only upon individual animals, but upon populations of the protected species.”⁶⁴ Justice Scalia contended that “take” under the ESA “describes a class of acts (not omissions) done directly and intentionally (not indirectly and by accident) to particular animals (not populations of animals).”⁶⁵

Justice Scalia also argued that the FWS’s definition of harm provided a definition of “take” under section 9 inconsistent with the meaning of “take” used in other sections of the ESA.⁶⁶ However, he did not consider the possibility that these other sections of the ESA may use “take” in a narrower sense than section 9 does because these other sections are intended to address problems presented only by specific types of takings. For example, the Native American subsistence exemption may address only deliberate, inten-

60. *Id.* Justice O’Connor’s analysis of these two understandings are analyzed at *infra* notes 105-106, 110-20, 143-44, 150-52, 154-59, and accompanying text.

Justice O’Connor believed that these two understandings (or “limitations”) call into question *Palila v. Hawaii Dept. of Land and Natural Resources* (Palila II), 852 F.2d 1106 (9th Cir. 1988) (*see* Davison, *supra* note 5, at 198-205). 115 S. Ct. at 2418 (O’Connor, J., concurring). Her reasoning in support of these contentions is discussed at *infra* notes 154-60 and accompanying text. Despite these concerns, she concurred with the majority “because there is no need to strike a regulation on a facial challenge out of concern that it is susceptible of erroneous application, . . . and because there are many habitat-related circumstances in which the regulation might validly apply.” 115 S. Ct. at 2418.

61. *Id.* at 2424 (Scalia, J., dissenting).

62. *Id.* at 2421.

63. 115 S. Ct. at 2422.

64. *Id.*

65. *Id.* at 2423.

66. 115 S. Ct. at 2425. The other sections of the ESA to which Justice Scalia referred in this argument were the forfeiture provision in 16 U.S.C. § 1540(e)(4)(B); the Native American subsistence exemption in 16 U.S.C. § 1539(e)(1)(A); and the prohibition in 16 U.S.C. § 1538(a)(D) of the possession, sale and transport of species taken in violation of the ESA.

tional takings of protected species by Alaskan Indians and Eskimos for subsistence purposes because Congress decided that only those persons' cultural traditions and circumstances justified deliberate takings of protected species for subsistence purposes.⁶⁷ Justice Scalia also asserted that habitat modification should not be considered a taking under section 9 of the ESA because the forfeiture provision⁶⁸ does not explicitly provide for forfeiture of "plows, bulldozers, and backhoes" that modify wildlife habitat.⁶⁹ However, he did not consider the possibility that "plows, bulldozers, and backhoes" may be encompassed within section 11(e)(4)(B)'s phrase "other equipment . . . used to aid in the taking" of protected species. This phrase might be interpreted, however, to limit forfeiture of equipment to that used for the purpose of deliberately taking protected species, thus excluding earthmoving equipment that did not modify wildlife habitat for the purpose of deliberately killing or injuring protected wildlife.

Justice Scalia also argued that section 9's taking prohibition should not apply to habitat modification because such an interpretation makes section 9 duplicative of section 7's critical habitat provision.⁷⁰ He asserted that:

Congress' explicit prohibition of habitat modification in . . . section [7] would bar the inference of an implicit prohibition of habitat modification in . . . section [9] [I]t would be passing strange for Congress carefully to define 'critical habitat' as used in § 1536(a)(2), but leave it to the Secretary to evaluate, willy-nilly, impermissible 'habitat modification' (under the guise of 'harm') in § 1538(a)(1)(B).⁷¹

However, Justice Scalia failed to note that the FWS's definition of harm under section 9 does provide a standard for determining when habitat modification will be found to be a taking in violation of section 9. Justice Scalia also failed to consider that section 7 only applies to actions undertaken by federal agencies, or to private actions that use federal funds or have a federal permit or license—whereas section 9 can apply to private conduct not

67. 16 U.S.C. § 1539(e)(1)(A) (1994).

68. *Id.* § 1540(e)(4)(B).

69. 115 S. Ct. at 2425 (Scalia, J., dissenting).

70. *Id.* at 2425-26. *See supra* notes 56-57 and accompanying text. Section 7(a)(2)'s critical habitat provision, and section 3's definition of "critical habitat," are set forth in *supra* note 45.

71. 115 S. Ct. at 2425-26 (Scalia, J., dissenting).

involving federal funds, permits or licenses.⁷² The FWS's definition of harm under section 9 of the ESA therefore is significant because it is the only regulation under the ESA restricting development of private property which modifies the habitat of protected species of wildlife when no federal permit, license, or funding is involved in the development. Furthermore, Justice Scalia did not consider that section 7 only applies when an entire species is threatened with extinction or when the habitat of a species that would be altered or destroyed has been specifically designated as "critical" by the Secretary of Interior.⁷³ In addition, critical habitat has been designated for only eighty-three of the 781 species listed under the ESA as endangered or threatened. Justice Scalia also failed to note that even if both sections 7(a)(2) and 9 of the ESA may, in certain factual circumstances, prohibit the modification of wildlife habitat, Congress is permitted to regulate (and even criminally punish) particular conduct under two different sections of a statute.⁷⁴

Justice Scalia also argues that "the problem of habitat destruction on private lands was to be solved principally by the land acquisition program of [section] 1534," and that statements by the Senate and House floor managers of the endangered species bills enacted as the ESA indicated that "habitat modification and takings . . . were viewed as different problems, addressed by different provisions of the Act."⁷⁵ However, as noted in the majority opinion, there is no language in section 5 of the ESA or in the ESA's legislative history that indicates that Congress intended land acquisitions under section 5 to be the exclusive means of protecting wildlife habitat on private lands.⁷⁶ In fact, as also noted by the majority, modification of wildlife habitat can be regulated under section 7 of the ESA (as well as under section 9).⁷⁷

Justice Scalia concluded that contrary to the majority's view, the FWS's definition of harm was not supported either by the legislative history of the

72. See Davison, *supra* note 5, at 176. However, a government agency or department may commit a taking in violation of section 9 (as well as violate section 7) when it issues a permit or license, or grants funds, to another person, when that person's governmentally-permitted or funded activity causes a prohibited taking in violation of section 9. See *id.* at 186-87; but see Quarles et al., *supra* note 12, at 10013.

73. See Davison, *supra* note 5, at 176-78.

74. See *id.* at 223-24.

75. 115 S. Ct. at 2427 (Scalia, J., dissenting).

76. *Id.* at 2415.

77. *Id.*

ESA⁷⁸ or by Congress' enactment in 1982 of the ESA's incidental taking provision.⁷⁹ By stating in his analysis of the ESA's legislative history that "the enacted text is . . . clear,"⁸⁰ Justice Scalia appears to imply that the ESA is clear and unambiguous as to the Act's definition of "take." If such was the case, the *Chevron* doctrine would direct a court to decide the case *de novo* and not defer to the administrative agency's interpretation of the statute.⁸¹ Consequently, Justice Scalia's dissent might be interpreted as deciding *de novo* that the ESA clearly and unambiguously invalidates the FWS's definition of harm under section 9 to include habitat modification,⁸² or that the FWS's definition of harm is invalid under the *Chevron* doctrine as an unreasonable interpretation of an ambiguous statute.⁸³

IV. INTERPRETATION OF "TAKE," "HARM," AND "INJURE" AFTER SWEET HOME CHAPTER

Although a six-Justice majority upheld the FWS's definition of "harm," a majority of the Justices did not resolve several other issues that can arise in determining if a particular modification of wildlife habitat constitutes a prohibited taking.

A. *Mens Rea Element*

Neither the ESA's definition of take nor the FWS's definition of harm explicitly includes a mental state or *mens rea* element, but it has been argued that a mental state element should be imputed into the definition of "take" and "harm." The majority held that the court of appeals erred in reading "a requirement of intent or purpose into the words used to define 'take,'

78. 115 S. Ct. at 2426-28 (Scalia, J., dissenting).

79. *Id.* at 2428-29.

80. *Id.* at 2427.

81. See Davison, *supra* note 5, at 202-03, 229-30.

82. However, Davison, *supra* note 5, at 234-35, argues that the ESA is ambiguous as to whether the ESA's taking prohibition encompasses habitat modification.

83. Near the beginning of his dissenting opinion, Justice Scalia stated that "in my view petitioners must lose—the regulation must fall—even under the test of *Chevron*, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843, so I shall assume that the Court is correct to apply *Chevron*. See *ante*, at 2415-2416, and n. 18." 115 S. Ct. at 2421 (Scalia, J., dissenting). He did not specifically identify which test under *Chevron* he was referencing, but the parts of the majority opinion he cited referred to the *Chevron* doctrine of judicial deference to a reasonable administrative agency interpretation of ambiguous statutory provisions. *Id.*

[because] it ignored [section] 9's express provision that a 'knowing' action is enough to violate the Act."⁸⁴ However, section 9(a)(1)(B)'s taking provision⁸⁵ does not explicitly require a "take" to be knowing in order to be unlawful in violation of section 9. The majority probably meant to refer to the "knowingly violate" language in the civil and criminal penalty provisions of section 11⁸⁶ of the ESA, to which the Court had referred earlier.⁸⁷ The majority, however, did not define a "knowing" action, other than to note that "Congress added 'knowingly' in place of 'willfully' in 1978 to 'make criminal violations of the act a general rather than a specific intent crime.'"⁸⁸ Prior to the Court's decision, lower federal courts defined "knowingly," for purposes of the ESA's criminal penalties,⁸⁹ as a "general intent," requiring only that a person's action has been voluntary and intentional and not due to accident or mistake.⁹⁰ These courts held that a "knowing" violation of the ESA's taking prohibitions does not require knowledge by the violator of the particular species or subspecies of the animal taken, that the species taken was listed under the ESA as endangered or threatened, or that the ESA applied to the lands where the taking occurred.⁹¹

By stating that a "knowing" action is sufficient to violate the ESA, the majority rejected Justice Scalia's dissent that a "take" must involve "affirmative conduct intentionally directed against a particular animal or animals."⁹² Justice Scalia, although requiring a prohibited taking to be purposeful in this sense, would essentially define the *mens rea* element of

84. *Id.* at 2415.

85. 16 U.S.C. § 1538(a)(1)(B) (1994).

86. 16 U.S.C. § 1540(a)(1), (b)(1).

87. 115 S. Ct. at 2412 n.9, 2414 n.13.

88. *Id.* at 2412 n.9 (quoting H.R. Conf. Rep. No. 95-1804, 26 (1978)). As noted by the majority, 115 S. Ct. at 2412 n.9, the ESA also imposes civil penalties of up to \$25,000 per violation upon a person who knowingly violates [section] 9's taking prohibition or the FWS's implementing regulations. 16 U.S.C. § 1540(a)(1) (1994). In addition, the ESA provides for a civil penalty of up to \$500 for any other violation of [section] 9 or the FWS's implementing regulations. *Id.* This latter provision does not explicitly include a *mens rea* element. The majority declined to decide whether a *mens rea* element should be imputed to this provision, stating that "the proper case in which we might consider whether to do so in the [section] 9 provision for a \$500 civil penalty would be a challenge to enforcement of that provision itself, not a challenge to a regulation that merely defines a statutory term." 115 S. Ct. at 2412 n.9.

89. 16 U.S.C. § 1540(b)(1) (1994).

90. *United States v. Billie*, 667 F. Supp. 1485, 1493 (S.D. Fla. 1987); *United States v. St. Onge*, 676 F. Supp. 1044, 1045 (D. Mont. 1988).

91. *Billie*, 667 F. Supp. at 1492-94; *St. Onge*, 676 F. Supp. at 1044, 1045. See Davison, *supra* note 5, at 170-72.

92. 115 S. Ct. at 2424 (Scalia, J., dissenting).

“take” the way lower courts have defined “knowing” for purposes of the ESA’s criminal provisions. He argued that a prohibited “take” is purposeful and subject to the lower civil penalties under the ESA when a “hunter shoots an elk in the mistaken belief that it is a mule deer,”⁹³ even if the hunter did not know that the elk is a protected species under the ESA.⁹⁴ He argued, however, contrary to the approach followed by the lower courts (but without citing or discussing these lower court decisions), that a person would not “knowingly” violate the ESA’s taking prohibitions unless the person knew “what sort of animal” he or she was taking.⁹⁵

The Supreme Court’s decision consequently will require lower courts to determine what mental state, if any, must be present in order for a prohibited taking in violation of section 9 to occur. If the majority’s reference to a “‘knowing’ action” is interpreted as establishing a mental state element for a “take,” courts will have to decide whether to define “knowing” the way lower courts have defined “knowing” in criminal prosecutions under the ESA, or the way Justice Scalia defines the term in his dissent.⁹⁶ If the majority’s reference to “knowing” violations of the Act is interpreted as referring to the provisions of section 11 rather than section 9 of the ESA, courts will have to decide how to interpret “knowing” in section 11 enforcement actions—again having to choose between the lower court definition and Justice Scalia’s definition.

B. Omissions

Although the FWS’s definition of harm explicitly refers only to acts, the definition may be interpreted to apply to omissions involving a breach of legal duty, as well as to affirmative acts. Justice Scalia argued that the FWS’s definition of harm violated the ESA because it prohibits omissions, as well as affirmative acts, that actually kill or injure wildlife.⁹⁷ Neither the majority opinion nor Justice O’Connor’s concurring opinion addressed this issue.

93. *Id.* at 2425.

94. *Id.*

95. *Id.*

96. In her concurring opinion, Justice O’Connor stated that she did not believe that it was necessary to decide if the ESA created a strict liability regime for prohibited takings. *Id.* at 2420 (O’Connor, J., concurring). She did suggest, however, that she believed the FWS’s definition of “harm” applied to “indirect (i.e., not purposeful)” conduct. *Id.* at 2419 n.*.

97. 115 S. Ct. at 2422 (Scalia, J., dissenting).

Justice Scalia acknowledged that the FWS interpreted its definition of harm under section 9 to prohibit omissions that actually kill or injure wildlife.⁹⁸ He also stated that the federal government's brief for petitioner argued that the FWS's definition of harm applied to omissions, but only when a person had a legal duty to act.⁹⁹ He argued, however, that the ESA's statutory definition of "harm" requires "affirmative conduct intentionally directed against a particular animal or animals."¹⁰⁰ In addition, there are other reasons to uphold the FWS's interpretation of its definition of harm as encompassing omissions. First, the ESA does not explicitly limit the ESA's taking prohibitions to affirmative acts. Next, there are reasonable arguments in support of extending the taking prohibitions to omissions that involve a breach of a legal duty that causes death or injury to wildlife species protected under the ESA.¹⁰¹ The FWS's interpretation of its definition of harm as encompassing omissions may be upheld under the *Chevron* doctrine on the grounds that it is a reasonable interpretation of an ambiguous provision of the ESA.

C. Causation

Although Justice Scalia argues that the FWS's definition of harm under section 9 of the ESA prohibits habitat modification that is "the cause-in-fact of death or injury to wildlife . . . , regardless of whether that result is intended or even foreseeable, and no matter how long the chain of causality between modification and injury,"¹⁰² the majority held that the FWS's definition of harm is subject to "ordinary requirements of proximate causation and foreseeability . . . [and] 'but for' causation."¹⁰³ However, the majority did not explain how proximate causation and foreseeability should be defined. In her concurrence, Justice O'Connor agreed that "the regulation's application is limited by ordinary principles of proximate causation, which introduces notions of foreseeability."¹⁰⁴ She asserted that "[i]ndeed, by use of the word 'actually,' the regulation clearly rejects

98. *Id.* (citing 46 Fed. Reg. 54,748, 54,750 (1981)). See Davison, *supra* note 5, at 187-89.

99. 115 S. Ct. at 2422 (Scalia, J., dissenting). See Davison, *supra* note 5, at 188-89.

100. 115 S. Ct. at 2424 (Scalia, J., dissenting).

101. See Davison, *supra* note 5, at 188-89.

102. 115 S. Ct. at 2421 (Scalia, J., dissenting).

103. *Id.* at 2414 n.13.

104. *Id.* at 2418 (O'Connor, J., concurring).

speculative or conjectural effects, and thus itself *invokes* principles of proximate causation.”¹⁰⁵

1. *Causation-in-Fact*

In order to prevail “in a civil tort case, a plaintiff is required to prove that the defendant’s tortious conduct was both the cause-in-fact of the plaintiff’s injury and the proximate cause of the plaintiff’s injury.”¹⁰⁶ The traditional “but for” test for causation-in-fact was held to be required by the FWS’s definition of harm. The “but for” test requires proof that the plaintiff’s injury would not have occurred but for the defendant’s conduct. However, many courts today apply the substantial factor test, a less rigorous test for causation-in-fact. Under the substantial factor test, a defendant’s conduct is the cause-in-fact of the plaintiff’s injury if the conduct was a substantial factor in causing the plaintiff’s injury.¹⁰⁷ The majority makes no reference to the alternative substantial factor test, but states that the words other than “actually” in the FWS’s definition of harm obviously require “but for” causation.¹⁰⁸ The ESA’s purposes might have been better effectuated if the FWS’s definition of harm had been interpreted as permitting causation-in-fact to be satisfied either by the traditional “but for” test or by the modern, less demanding substantial factor test. However, because the FWS did not identify which test it intended to be used to establish causation-in-fact under its definition of “harm,” the Court’s selection of the traditional “but for” test is understandable.

2. *Proximate Causation and Foreseeability*

As noted earlier, the majority indicated that ordinary requirements of proximate causation and foreseeability are to be applied in interpreting the FWS’s definition of harm. Justice O’Connor similarly argued that there was no indication that Congress “intended to dispense with ordinary principles of proximate causation” in enacting section 11¹⁰⁹ of the ESA and that she:

105. *Id.* at 2420 (emphasis added).

106. *See Davison, supra* note 5, at 191 n.178 (citing Bert Black and David H. Hollander, Jr., *Unravelling Causation: Back to the Basics*, 3 U. Balt. J. Envtl. L. 1, 1-2 (1993)).

107. *Id.* (citing Black at 5-6.).

108. 115 S. Ct. at 2414 n.13.

109. 16 U.S.C. § 1540 (1994) (penalties and enforcement).

would not lightly assume that Congress . . . has dispensed with this well-entrenched principle. In the absence of congressional abrogation of traditional principles of causation, then, private parties should be held liable under [section] 1540[(a)](1) only if their habitat-modifying actions proximately cause death or injury to protected animals.¹¹⁰

Disagreeing with Justice Scalia's contention¹¹¹ that the FWS's definition of harm requires only causation-in-fact (but not proximate causation or foreseeability), Justice O'Connor asserted that "[t]he regulation, of course, does not contradict the presumption or notion that ordinary principles of causation apply here. Indeed, by use of the word 'actually,' the regulation clearly rejects speculative or conjectural effects, and thus itself *invokes* principles of proximate causation."¹¹²

She then noted that "proximate causation is not a concept susceptible of precise definition," but "normally eliminates the bizarre."¹¹³ In addition, proximate causation alternatively has been characterized in functionally equivalent terms of foreseeability (natural and probable consequences) and duty, and that "proximate causation depends to a great extent on considerations of the fairness of imposing liability for remote consequences."¹¹⁴ She postulated, as a situation that would satisfy any formulation of proximate causation, a hypothetical where a "landowner who drains a pond on his property, killing endangered fish in the process."¹¹⁵ On the other hand, "[t]he farmer whose fertilizer is lifted by tornado from tilled fields and deposited miles away in a wildlife refuge cannot, by any stretch of the term, be considered the proximate cause of death or injury to protected species occasioned thereby."¹¹⁶ She also implied that Justice Scalia's hypothetical "farmer who tills his field and causes erosion that makes silt run into a nearby river which depletes oxygen and thereby [injures] protected fish,"¹¹⁷ would not be the proximate cause of the injury to the fish under the foreseeability element of the FWS's definition of harm. Prior to referencing this hypothetical, she stated that the foreseeability element in the definition

110. 115 S. Ct. at 2420 (O'Connor, J., concurring).

111. *Id.* at 2421 (Scalia, J., dissenting).

112. *Id.* at 2420 (emphasis added) (O'Connor, J., concurring).

113. *Id.* (citation omitted).

114. 115 S.Ct. 2420 (O'Connor, J., concurring).

115. *Id.*

116. *Id.*

117. *Id.*

“would appear to alleviate some of the problems noted by the dissent.”¹¹⁸ In light of widespread knowledge of the harm caused by pollution from non-point source runoff, many people might argue that the injury to the fish in the hypothetical was a foreseeable result of the farmer tilling his field (at least if the farmer failed to use accepted soil conservation and best management practices to minimize erosion).

Although the FWS’s use of the word “actually” in its definition of harm may indicate that the FWS intended only to require causation-in-fact, the majority’s decision implies a proximate causation—foreseeability element and thus interjects considerations of fairness (through foreseeability requirements) into the application of the FWS’s harm regulation. This implied element of proximate causation may help to reduce political opposition in Congress to the ESA and its taking prohibitions. Reduced political opposition to the ESA may save the ESA from amendments that weaken or repeal the Act’s taking prohibitions. Until such legislative amendments of the ESA are adopted, “[t]he task of determining whether proximate causation exists in the limitless fact patterns sure to arise is best left to lower courts.”¹¹⁹

D. *Definition of Injure*

The majority did not explicitly discuss how the phrase “injures wildlife” in the FWS’s definition of harm should be interpreted. Justice O’Connor’s concurring opinion and Justice Scalia’s dissenting opinion, however, address the issue at length, but take contradictory positions on several issues involving the interpretation of the term “injures.”

The FWS does not define “injures” in its definition of harm. Consequently, a number of questions have arisen as to how the term “injures” should be defined. These questions include whether it means only physical injury to particular, individual animals (and, if so, whether physical injury must be serious or permanent, or both), or whether it can also be defined to encompass non-physical injuries (for example, impairment of essential behavioral patterns, such as breeding, feeding, or sheltering). Although Justices Scalia and O’Connor discussed whether “injures” includes only injury to particular, individual animals, or also includes injury to a population of a protected species, the majority did not address this issue.

118. *Id.*

119. 115 S. Ct. at 2420 (O’Connor, J., concurring).

injury. These results were reached despite the fact that the FWS's commentary accompanying their 1981 redefinition of harm indicates that the requirement of actual death or injury necessitates "proven injury"¹²¹ (a.k.a. actual adverse effects¹²²) and excludes actions which potentially threaten injury to members of a protected species.¹²³ This commentary might be interpreted as expressing an intent to make the definition of "harm" inapplicable to actions that only threaten to cause death or injury to animals in the future. The commentary's requirement for "proven injury" and the commentary's exclusion of actions that potentially cause injury were noted by Justice O'Connor.¹²⁴ Likewise, the commentary's exclusion of actions that potentially cause injury was cited by Justice Scalia.¹²⁵ None of the Justices explicitly addressed whether the FWS's exclusion of actions potentially causing injury means that section 9 does not prohibit actions that threaten only to cause future death or injury to members of a protected species.

In *Forest Conservation Council v. Rosboro Lumber Co.*,¹²⁶ however, the United States Court of Appeals for the Ninth Circuit held that the FWS's definition of "harm" should be interpreted (at least in a citizen suit under the ESA seeking an injunction) to apply to an action that presents an imminent threat of future injury to protected wildlife. Consequently, the Ninth Circuit ruled that habitat modification that is reasonably certain in the future to injure a pair of threatened northern spotted owls is actual injury within the meaning of the FWS's definition of harm and a prohibited "take" in violation of section 9 of the ESA.¹²⁷ Although *Rosboro Lumber Co.* was decided before the Supreme Court's *Sweet Home Chapter* decision, the Ninth Circuit later held, in *Murrelet v. Babbitt*,¹²⁸ that the Supreme Court's *Sweet Home Chapter* decision did not nullify *Rosboro Lumber Co.*'s holding that a

121. 46 Fed. Reg. 54,749 (1981).

122. *Id.* at 54,750.

123. *Id.* at 54,749.

124. 115 S. Ct. at 2419 (O'Connor, J., concurring) ("[T]he Service says that the regulation has no application to speculative harm, explaining that its insertion of the word 'actually' was intended 'to bulwark the need for proven injury to a species due to a party's actions'." 46 Fed. Reg. at 54,749; *see also id.* (approving language that "Harm covers actions . . . which actually (as opposed to potentially), cause injury.").

125. 115 S. Ct. at 2430 (Scalia, J., dissenting). He states that "by the use of the word 'actually,' the regulation clearly rejects speculative or conjectural effects, and . . . [t]he injury must be 'actual' as opposed to 'potential' '[A]ctually' defines the requisite *injury*, not the requisite *causality*." *Id.* (emphasis added).

126. 50 F.3d 781 (9th Cir. 1995).

127. *Id.*

128. 1996 WL 227326 (9th Cir. 1996).

definition of "harm" should be interpreted (at least in a citizen suit under the ESA seeking an injunction) to apply to an action that presents an imminent threat of future injury to protected wildlife. Consequently, the Ninth Circuit ruled that habitat modification that is reasonably certain in the future to injure a pair of threatened northern spotted owls is actual injury within the meaning of the FWS's definition of harm and a prohibited "take" in violation of section 9 of the ESA.¹²⁷ Although *Rosboro Lumber Co.* was decided before the Supreme Court's *Sweet Home Chapter* decision, the Ninth Circuit later held, in *Murrelet v. Babbitt*,¹²⁸ that the Supreme Court's *Sweet Home Chapter* decision did not nullify *Rosboro Lumber Co.*'s holding that a showing of a future injury to an endangered or threatened species is actionable under the Act.¹²⁹ The court reached this conclusion without discussing the fact that *Sweet Home Chapter* neither discusses the *Rosboro Lumber Co.* decision nor the issue of whether "harm" can be interpreted to include an action that only threatens to cause death or injury in the future to members of a protected species.

Nevertheless, the Ninth Circuit in *Murrelet* concluded that the Supreme Court's emphasis in the *Sweet Home Chapter* decision on the need for actual death or injury of a protected animal did not "limit injunctive relief under the ESA to past violations."¹³⁰ They reasoned that the Supreme Court found that the Act's taking prohibition, which establishes "a duty to avoid harm that habitat alteration will cause,"¹³¹ is reasonable. The court therefore concluded that the *Sweet Home Chapter* decision supports its position that "a reasonably certain threat of imminent harm to a protected species is sufficient for issuance of an injunction under section 9 of the ESA."¹³²

In *Rosboro Lumber Co.*, the Ninth Circuit interpreted the term "actually" in the FWS's definition of harm to exclude actions that only caused habitat modification without causing death or injury of protected wildlife, but "not . . . to foreclose claims of an imminent threat of injury to wildlife."¹³³ In addition, the court held that the FWS's exclusion of actions threatening a potential injury excludes only actions that involve a possibility of causing an

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127. *Id.*
128. 1996 WL 227326 (9th Cir. 1996).
129. *Id.*
130. *Id.* at *5.
131. 115 S. Ct. at 2412.
132. 1996 WL 227326, at *5.
133. 50 F.3d at 784.

"injury that may or may not occur," not actions that create "an *imminent threat* of death or injury."¹³⁴ The Ninth Circuit thus concluded that the FWS's use of the terms "actually" and "potentially" was meant only "to specify the degree of certainty that harm would befall a protected species as opposed to the timing of the injury."¹³⁵

The Ninth Circuit further reasoned that any ambiguity as to whether Congress intended "harm" to be interpreted in this manner "is resolved by looking to the underlying purpose of the ESA," which is "to *conserve* endangered species." Therefore, "Congress' overriding purpose in enacting the ESA indicates that it intended to allow citizen suits to enjoin an imminent threat of harm to protected wildlife."¹³⁶ The court reached its holding because of a concern that the contrary would weaken the ESA by allowing members of a protected species to be injured (taken) despite such injury being imminent and reasonably certain to occur. The court noted that such injury "can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable."¹³⁷ If an action that imminently threatens to kill or injure members of a protected species cannot be enjoined as a violation of section 9, then the only remedy under the ESA would be to impose civil or criminal penalties for a violation of section 9 *after* protected wildlife is killed or injured. Although the threat of civil or criminal penalties may deter a person from undertaking an action that threatens to kill or injure wildlife in the future, issuing an injunction to prevent that action from occurring better serves the ESA's purpose of conserving endangered and threatened species of wildlife.

The citizen suit provision¹³⁸ and the United States Attorney General's enforcement provision¹³⁹ of the ESA only authorize suits "to enjoin any person who is alleged to be in violation" of the Act or regulations issued under the Act. Still, the Ninth Circuit in *Rosboro Lumber Co.* relied on the ESA's legislative history to infer that Congress intended to authorize citizens and the Attorney General to obtain an injunction in suits brought under these provisions against an action that creates an imminent threat of future death

134. *Id.* at 784-85 (citation omitted)(emphasis added).

135. *Id.* at 785, 787.

136. *Id.* at 787.

137. *Id.* (quoting *Amoco Production Co. v. Gambell*, 480 U.S. 531, 545 (1987)).

138. 16 U.S.C. § 1540(g) (1994).

139. *Id.* § 1540(e)(6).

or injury to members of a protected species even if the action has caused no past or present injury to members of a protected species.¹⁴⁰

Because the Supreme Court's *Sweet Home Chapter* decision did not address the issue of whether the FWS's definition of harm can apply to actions that only threaten to cause future death or injury to members of a protected species, courts in future cases will have to decide whether the *Rosboro Lumber Co.* decision is a correct interpretation of harm.¹⁴¹ If another jurisdiction rejects the Ninth Circuit's *Rosboro Lumber Co.* decision and holds that an action only threatening to cause future death or injury to members of a protected species cannot be enjoined under section 9 of the ESA, the only remedy available will be the imposition of civil and criminal penalties *after* the action causing death or injury has taken place.

The FWS's definition of harm not only fails to indicate whether it includes the threat of future death or injury, but also fails to define the term "injures." However, as Justice O'Connor emphasized in *Sweet Home*

140. 50 F.3d at 785-86 (quoting H.R. Rep. No. 412, 93rd Cong., 1st Sess. 19 (1973) and S. Rep. No. 418, 97th Cong., 2d Sess. 24 (1982)). The Ninth Circuit, however, left open the issue of whether an action that met its definition of harm would be subject to civil or criminal monetary penalties under 16 U.S.C. § 1540(a) or (b) for a "knowing violation" of the Act or regulations issued under the Act. 50 F.3d at 786 n.3.

The Ninth Circuit also found that prior court decisions "support its conclusion that Congress intended to authorize plaintiffs to enjoin an imminent threat of injury to protected species." *Id.* at 786. The court interpreted its decision in *Palila v. Hawaii Department of Land & Natural Resources (Palila II)*, 852 F.2d 1106 (9th Cir. 1988) (*see Davison, supra* note 5, at 198-205), as upholding issuance of an injunction under the ESA against prospective harm to members of a protected species. 50 F.3d at 786. The Ninth Circuit read *American Bald Eagle v. Bhatti*, 9 F.3d 163 (1st Cir. 1993), as interpreting the terms "actually" and "potentially" in the FWS's redefinition of harm as specifying "the *degree of certainty* that injury would befall a protected species, as opposed to the *timing* of the injury," 50 F.3d at 787 (emphasis added); and quoted the statement in *Bhatti*, 9 F.3d at 166, that "[c]ourts have granted injunctive relief only [if] the alleged activity has actually harmed the species or . . . will actually, as opposed to potentially, cause harm to the species." *Id.* (emphasis added). The Supreme Court's decision in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49 (1987) (dealing with the Clean Water Act's citizen suit provision, 33 U.S.C. § 505) was interpreted in *Rosboro Lumber Co.* as not having addressed the issue of "whether citizen suits can be maintained for claims of only future violations, and in no way implied that such claims are not actionable." 50 F.3d at 787. The Ninth Circuit in *Rosboro Lumber Co.* also supported its holding by citing, at *id.* at 787, *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978), but failed to note that the Supreme Court's decision in that case was based upon section 7 of the Act, not section 9's taking prohibition.

141. *See, e.g., Loggerhead Turtle v. Volusia County Council*, 896 F. Supp. 1170, 1180 (M.D. Fla. 1995) discussed the decision in *Rosboro Lumber* and held that "the future threat of a [sic] even [a] single taking is sufficient to invoke the authority of the Act." The court in *Loggerhead Turtle* consequently held that a preliminary injunction could be issued under the ESA against a person whose "conduct is reasonably likely to result in any 'taking' of [a] protected species." *Id.*

Chapter,¹⁴² this statement might be interpreted either as implying: 1) that the FWS's definition of harm includes indirect physical injury as well as direct physical injury to an individual animal; or 2) that the FWS's definition of harm includes injury to a population of a protected species, as well as injury to individual animals.¹⁴³ Yet another possible interpretation is that the statement means that "injure" can encompass harm or adverse effects other than direct physical injury. The FWS's commentary states that its amended definition of harm eliminates the misperception "that significant habitat destruction which could be shown to injure protected wildlife through the impairment of its essential behavioral patterns was not subject to the Act," and that "[d]eath or injury . . . may be caused by impairment of essential behavioral patterns which can have significant and permanent effects on a listed species."¹⁴⁴ These statements can also be interpreted as indicating that the FWS intended "injure" to include impairment of essential behavioral patterns, such as breeding, feeding, or sheltering, as well as physical injury.¹⁴⁵ Alternatively, these statements might be interpreted as not defining "injure," but as only indicating that injury *can be caused* by impairing essential behavioral patterns. In addition, the FWS's reference to "significant and permanent effects" might be interpreted either as indicating that injury can occur *only* when significant and permanent effects are caused, or alternatively, as only indicating that causing significant and permanent effects are sufficient (but not necessary) to injure a protected species. Courts in future cases will have to decide which of these is the proper interpretation of "take" under section 9 and "harm" and "injure" under the FWS's definition of harm.

In *Sweet Home Chapter*, Justice Scalia takes the position that a prohibited taking under the ESA occurs only if a person's affirmative act causes death

142. 115 S. Ct. at 2419-20 (O'Connor, J., concurring).

143. The FWS's commentary accompanying its 1981 amendments to its definition of harm makes a reference to "injury to a population," 46 Fed. Reg. at 54,749 (which the FWS stated involves a "question . . . of fact"), but the FWS did not state explicitly whether its definition of harm encompasses injury to a population and, if so, what types of effects would constitute injury to a population.

144. 46 Fed. Reg. 54,748 (1981).

145. Without supporting analysis, the Court of Appeals for the Ninth Circuit adopted this interpretation in *Rosboro Lumber Co.*, 50 F.3d at 788, stating that "[h]abitat modifications that significantly impair a protected species' essential behavioral patterns are explicitly proscribed by the Secretary's redefinition of 'harm.'" In a subsequent opinion, the Ninth Circuit held that "under *Sweet Home*, a habitat modification which significantly impairs the breeding and sheltering of a protected species amounts to 'harm' under that ESA . . . [and that] 'harm' under the ESA, therefore, includes that threat of future harm." *Murrelet v. Babbitt*, 1996 WL 227326, at *6-*7 (9th Cir. 1996).

or physical injury to a particular individual animal or animals.¹⁴⁶ Although he does not explicitly state that injure under the FWS's definition of harm should be limited to physical injury, he implies such a position. For example, in criticizing Justice O'Connor's interpretation of "harm" and "injure," he refers to her "imaginative construction" as achieving "the result of extending 'impairment of breeding' to individual animals, but only at the expense of also expanding 'injury' to include elements beyond *physical harm* to individual animals."¹⁴⁷ In addition, Justice Scalia referred to the "more common and preferred usage" of harm, defining it as "*to impair soundness of body, either animal or vegetable*" and "'to do . . . bodily harm."¹⁴⁸ Justice Scalia also argued that "[i]mpairment of breeding does not 'injure' living creatures,"¹⁴⁹ to show that the FWS's definition of harm violates the ESA by encompassing injury to populations of protected species as well as injury to individual animals.

However, Justice O'Connor notes that death of one animal reduces the population so that the death of one member of a wildlife population "in that sense, 'injures' that population."¹⁵⁰ Similarly, one could argue that injury of even one animal harms the population so that injury of one member of a wildlife population "injures" that population. Consequently, as suggested by Justice O'Connor, the focus on interpretation of "injures" in the FWS's definition of harm should be upon what types of adverse effects upon individual animals should be considered an injury and what types of evidence or facts should be considered sufficient to demonstrate injury to protected members of a species. In fact, as Justice O'Connor notes,¹⁵¹ the FWS's commentary accompanying its 1981 amendments to its definition of harm states that "section 9's threshold focuses on individual members of a protected species."¹⁵²

After Justice Scalia stated that the FWS's definition of harm violated the ESA because it encompasses injury to populations of species and that the "impairment of breeding does not 'injure' living creatures," he added that impairment of breeding "prevents them from propagating, thus 'injuring' a

146. 115 S. Ct. at 2430 (Scalia, J., dissenting).

147. 115 S. Ct. at 2430 n.5 (Scalia, J., dissenting)(emphasis added).

148. *Id.* at 2423 (emphasis added).

149. *Id.* at 2422.

150. *Id.* at 2418 (O'Connor, J., concurring).

151. 115 S. Ct. at 2419.

152. *Id.* (citing 46 Fed. Reg. at 54,749 (1981)).

population of animals which would otherwise have maintained or increased its numbers.”¹⁵³

Justice O’Connor disagreed with this approach, stating that the FWS’s definition of harm focuses on actual harm (not speculative or potential harm) to individual members of a protected species.¹⁵⁴ She concluded that both the FWS’s definition of harm, and the 1981 commentary accompanying the FWS’s promulgation of the amended definition, recognized harm as occurring to individual members of a protected species when their breeding is impaired.

As an initial matter, I do not find it as easy as Justice Scalia does to dismiss the notion that significant impairment of breeding injures living creatures. To raze the last remaining ground on which the piping plover currently breeds, thereby making it impossible for any piping plovers to reproduce, would obviously injure the population (causing the species’ extinction in a generation). But by completely preventing breeding, it would also injure the individual living bird, in the same way that sterilizing the creature injures the individual living bird. To “injure” is, among other things, “to impair” One need not subscribe to theories of “psychic harm” . . . to recognize that to make it impossible for an animal to reproduce is to impair its most essential physical functions and to render that animal, and its genetic material, biologically obsolete. This, in my view, is actual injury.

In any event, even if impairing an animal’s ability to breed were not, *in and of itself*, an injury to that animal, interference with

153. 115 S. Ct. at 2422 (Scalia, J., dissenting) (emphasis omitted). Near the end of his dissenting opinion, however, Justice Scalia stated:

As I understand the regulation that the Court has created and held consistent with the statute that it has also created, habitat modification can constitute a “taking”, but only if it results in the killing or harming of *individual animals*, and only if that consequence is the direct result of the modification. This means that the destruction of privately owned habitat that is essential, not for the feeding or nesting, but for the *breeding*, of butterflies, would not violate the Act, since it would not harm or kill any living butterfly. I, too, think it would not violate the Act—not for the utterly unsupported reason that habitat modifications fall outside the regulation if they happen not to kill or injure a living animal, but for the textual reason that only action directed at living animals constitutes a “take.”

Id. at 2431 (emphasis added).

154. *Id.* at 2419.

breeding can cause an animal to suffer other, perhaps more obvious, kinds of injury. The regulation has clear application, for example, to significant habitat modification that kills or physically injures animals which, because they are in a vulnerable breeding state, do not or cannot flee or defend themselves, or to environmental pollutants that cause an animal to suffer physical complications during gestation. Breeding, feeding, and sheltering are what animals do. If significant habitat modification, by interfering with these essential behaviours, actually kills or injures an animal protected by the Act, it causes “harm” within the meaning of the regulation. In contrast to Justice Scalia, I do not read the regulation’s “breeding” reference to vitiate or somehow to qualify the clear actual death or injury requirement, or to suggest that the regulation contemplates extension to nonexistent animals.¹⁵⁵

Justice Scalia responded to Justice O’Connor’s argument by referring to it as an “imaginative construction [that] does achieve the result of extending ‘impairment of breeding’ to individual animals.”¹⁵⁶ He argued, however, that her construction does so:

only at the expense of also expanding “injury” to include elements beyond *physical harm* to individual animals. For surely the only harm to the individual animal from impairment of that “essential function” is not the failure of issue (which harms only the issue), but the *psychic harm* of perceiving that it will leave this world with no issue (assuming, of course, that the animal in question, perhaps an endangered species of slug, is capable of such painful sentiments). If it includes *that* psychic harm, then why not the psychic harm of not being able to frolic about — so that the draining of a pond used for an endangered animal’s recreation, but in no way essential to its survival, would be prohibited by the Act? That the concurrence is driven to such a dubious redoubt is an argument for, not against, the proposition that “injury” in the regulation includes injury to populations of animals. Even more so with the concurrence’s alternative explanation: that “impairment of breeding” refers to nothing more than concrete injuries inflicted by the habitat modification on the ani-

155. *Id.*

156. 115 S. Ct. at 2430 n.5 (Scalia, J., dissenting).

mal who does the breeding, such as "physical complications [suffered] during gestation" Quite obviously, if "impairment of breeding" meant such physical harm to an individual animal, it would not have had to be mentioned.¹⁵⁷

Justice Scalia interprets the ESA's definition of harm as encompassing only death or physical injury to particular individual animals. Justice O'Connor, however, interprets the FWS's definition of harm as lawfully including impairment of breeding, feeding, or sheltering of members of a protected species which, she believes, can constitute injury to the individual member of that species as well as injury to the population in which the members reside.

Justice O'Connor stated that she would not find harm and a prohibited "take" simply because "a protected animal could have eaten the leaves of a fallen tree or could, perhaps, have fruitfully multiplied in its branches Instead, . . . the regulation requires demonstrable effect (*i.e.*, actual injury or death) on actual, individual members of the protected species."¹⁵⁸ She also asserted that under her interpretation, the court of appeals wrongly decided *Palila II*,¹⁵⁹ which she described as holding "that a state agency committed a 'taking' by permitting feral sheep to eat mamane-naio seedlings that, when fully grown, might have fed and sheltered endangered palila."¹⁶⁰ She argued that in *Palila II*, the "[d]estruction of the seedlings did not proximately cause actual death or injury to identifiable birds; it merely prevented the regeneration of forest land not currently inhabited by actual birds."¹⁶¹ However, the court of appeals actually affirmed the district court's decision¹⁶² that there was "harm" under the FWS's definition on the grounds that the habitat destruction being caused by the mouflon sheep "could result

157. *Id.* (emphasis added).

158. *Id.* at 2419 (O'Connor, J., concurring).

159. 852 F.2d 1106 (9th Cir. 1988).

160. 115 S. Ct. at 2420-21 (O'Connor, J., concurring). These facts to which she refers, however, appear to be the facts in *Palila v. Hawaii Department of Land and Natural Resources (Palila I)*, 471 F. Supp. 985 (D. Haw. 1979), *aff'd* 639 F.2d 495 (9th Cir. 1981). See Davison, *supra* note 5, at 181-83, 198-205. *Palila I* involved feral sheep, while *Palila II* involved mouflon sheep. *Palila I* interpreted the FWS's 1975 definition of harm, which was amended in 1981 by the FWS to its present form, to make clear that habitat modification must actually kill or injure protected wildlife in order to constitute "harm." See Davison, *supra* note 5, at 183-85.

161. 115 S. Ct. at 2421 (O'Connor, J., concurring).

162. 649 F. Supp. 1070 (D. Haw. 1986), *aff'd*, 852 F.2d 1106 (9th Cir. 1988).

in the extinction” of the palila species¹⁶³ and did “not reach the issue of whether the district court properly found that harm included habitat degradation that prevents recovery of an endangered species.”¹⁶⁴ The holding in *Palila II* and the alternative holding of the district court that the court of appeals did not reach might be characterized as finding harm under the FWS’s definition because of injury to a population of the palila species as opposed to injury to particular, individual palila birds.

While Justices O’Connor and Scalia in *Sweet Home Chapter* reject injury to a population as “harm” (when the injury to the population is not the collective injury to identifiable, individual protected animals), the majority did not explicitly address the issue of whether the FWS’s definition of harm encompasses injury to a population. The majority, however, stated that “[t]he dissent incorrectly asserts that the Secretary’s regulation . . . ‘fail[s] to require injury to particular animals.’”¹⁶⁵ Furthermore, the majority refers to harm occurring within the meaning of the FWS’s definition when there is actual killing or injury of members of an endangered or threatened species.¹⁶⁶ Justice Scalia asserts that this was a concession “that the statute require[d] injury to particular animals rather than merely to populations of animals.”¹⁶⁷

A strong case can be made that the majority in *Sweet Home Chapter* rejected the concept of “injury to population” as defined in *Palila II*,¹⁶⁸ although the issue of what constitutes “injury” is still subject to interpretation by the lower courts. The majority’s and concurrence’s references to the ordinary requirements of proximate causation and foreseeability and to harm occurring when there is actual killing or injury to members may lead to the conclusion that mere generalized claims of a population’s decline, without production of evidence of actual injury or death to identifiable animals, will not satisfy the harm requirement. Thus, it appears that the majority modifies *Sierra Club v. Lyng*,¹⁶⁹ by requiring a greater focus on foreseeable injury to individual animals as a condition for establishing injury to populations. *Lyng* held that harm to a protected species occurs under the FWS’s definition when

163. 852 F.2d at 1110.

164. *Id.* at 1110-11. See Davison, *supra* note 5, at 198-205.

165. 115 S. Ct. at 2414 n.13 (quoting Scalia, J., *Id.* at 2429).

166. 115 S. Ct. at 2412-13, 2414 n.13.

167. *Id.* at 2430 (Scalia, J., dissenting) (emphasis omitted).

168. However, in *Seattle Audubon Society v. Moseley*, 42 Env’t Rep. (BNA) 1568, 1570 (9th Cir. 1996), the court concluded that, in *Sweet Home Chapter*, five justices affirmed the *Palila II* decision “in all respects.”

169. 694 F. Supp. 1260 (E.D. Tex. 1988), *aff’d in part and vacated in part sub nom.* *Sierra Club v. Yeutter*, 926 F.2d 429 (5th Cir. 1991).

modification of the species' habitat causes the population of the species within that habitat to decline as a result of the members' death.¹⁷⁰ *Lyng's* focus upon the decline in the overall population of the species within the modified habitat might result in the court's holding being characterized as being based upon an injury to a population. However, the court's reference to the population decline being due to members of the species dying¹⁷¹ might result in *Lyng* being viewed as a decision defining "harm" on the basis of actual death or injury to individual members of the species.

Suffice it to say that after *Sweet Home Chapter*, lower courts will have to decide if the FWS's definition of harm encompasses an injury to a population, and, if so, what types of effects upon a population will be considered injury to that population.

V. INTERPRETATION OF STATE PROHIBITIONS AGAINST TAKING PROTECTED SPECIES

Section 6(f) of the ESA prohibits "any state law or regulation respecting the taking of an endangered or threatened species . . . [from being] less restrictive than the prohibitions" in any regulation which implements the ESA.¹⁷² Any less restrictive state taking law or regulation is therefore preempted by section 6(f).¹⁷³ However, section 6(f) does not require a state to adopt a statute or regulation that prohibits the taking of an endangered or threatened species; it only requires a state taking statute or regulation to be at least as restrictive as the FWS's definition of harm under section 9 of the ESA.¹⁷⁴ A state, however, only needs to follow the FWS's definition of harm and the Supreme Court's interpretation of this definition. A state would not be required to follow interpretations of the FWS's definition by federal courts of appeals, federal district courts, or courts of other states.¹⁷⁵ Furthermore, a state would not be required to follow the FWS's definition of "harm" or "harass," or section 9 of the ESA's definition of "take," when

170. See Davison, *supra* note 5, at 192-97.

171. 694 F. Supp. at 1271.

172. 16 U.S.C. § 1535(f) (1994).

173. See *United States v. Glenn-Colusa Irrigation Dist.*, 788 F. Supp. 1126, 1134 (E.D. Cal. 1992); *Swan View Coalition, Inc. v. Turner*, 824 F. Supp. 923, 938 (D. Mont. 1992).

174. *Swan View Coalition*, 824 F. Supp. at 938.

175. See *United States ex rel. Lawrence v. Woods*, 432 F.2d 1072, 1075 (7th Cir. 1970) ("because lower federal courts exercise no appellate jurisdiction over state tribunals, decisions of lower federal courts are not conclusive on state courts . . .").

applying a state takings statute or regulation to species that are protected under a state endangered species statute or regulation, but are not listed as an endangered or threatened species under the federal ESA.¹⁷⁶

The application of *Sweet Home Chapter* in Maryland may be particularly difficult because the State has not enacted any provision allowing for the incidental taking of threatened or endangered species. Thus, unlike section 10 of the federal ESA, which accommodates impacts on species' habitat under the incidental take criteria, the Maryland ESA has no mechanism for avoiding situations where a project may affect a particular listed species or its habitat. This problem came to the fore in the case of Indian Bridge Road in St. Mary's County, which could not be widened because the construction would affect the habitat of the eastern narrow mouth toad, a State listed endangered species.¹⁷⁷ Without an incidental take provision, Maryland law requires the State to deny any project that would result in the taking of even one member of the listed species.¹⁷⁸ After denial of the road-widening project, some people attributed a tragic accident that killed a young student to the inability of the State to widen the road because of the presence of the toad.¹⁷⁹ A State Task Force recently issued a report recommending that Maryland's law be amended to allow for incidental take authority to avoid such conflicts in the future.¹⁸⁰ Unfortunately, the Task Force members and the Maryland Department of Natural Resources could not reach agreement to allow the introduction of legislation during the 1995 session of the Maryland General Assembly to address this inadequacy. It remains to be seen whether this issue will be addressed in future sessions of the Maryland General Assembly. The *Sweet Home Chapter* decision could compound this

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176. Maryland has a state program for protecting endangered and threatened species of wildlife and plants. MD. CODE ANN., NAT. RES., §§ 10-2A-01 (1990 and Supp. 1995). Regulations under the Act generally prohibit the taking of any endangered or threatened wildlife species under the Act. COMAR 08.03.08.04, 08.03.08.07B(1). The regulations define "take" the same way that section 9 of the ESA defines "take," but do not define "harm" or "harass" for purposes of the prohibitions or takings. A number of the species protected under the Maryland statute and regulations are not protected under the federal ESA. COMAR 08.03.01B(12).
177. For a detailed discussion, see Jacquelyn V. Raley, Comment, *Narrow Mouth Toad v. Too Narrow Road: Maryland's First Attempt at Balancing the Protection of Endangered Species with the Protection of Public Safety*, 5 U. BALT. J. ENVTL. L. 193 (1995).
178. MD. CODE ANN., NAT. RES. § 10-2A-05(c)(2) (1990 and Supp. 1995).
179. Todd Shields, *Hopping Mad in St. Mary's County*, WASH. POST, Mar. 5, 1995, at B01.
180. Draft Statement of the Nongame and Endangered Species Conservation Act Review Task Force (Sept. 8, 1995).

dilemma. Should a state court broadly interpret it to apply to species protected under state law and to encompass habitat modification that may cause some foreseeable harm to a listed species, conflicts like those seen in the Indian Bridge Road case may be repeated.

VI. CONCLUSION

In upholding the FWS's definition of harm in *Sweet Home Chapter*, the Supreme Court viewed the case as a facial challenge to the FWS's harm regulations. The Court found that it could only rule in the timber industry's favor if it found that a "take" could never arise from habitat modification. However, Justice Stevens recognized that there are strong arguments that certain land use activities causing "minimal or unforeseeable harm" do not rise to the level of a statutory "take."¹⁸¹ The result is that the FWS's enforcement of harm must be scrutinized on a case-by-case basis. Therefore, in a specific factual situation, the effect of a builder's proposed land use on endangered or threatened species' habitat may be fully within the law and not trigger "take" liability unless the activity causes some unforeseeable and remote harm to an ESA listed species.

However, the FWS's definition of harm, as interpreted by the court, will have the effect of prohibiting modification of wildlife habitat on both private and public lands, when such modification actually and foreseeably causes death or injury to members of an endangered or threatened species protected under the ESA. The precise impact of the FWS's definition of harm upon the development of private land will depend upon how any mental state element is defined, upon whether omissions are encompassed within the definition, and how the term "injure" is defined under the definition. At present, the application of the definition to threats of future injury, to harm other than physical injuries, and to injuries to a population of a species, is unclear.

A landowner whose development of private land is sought to be prevented under the FWS's definition of harm may obtain relief by establishing: 1) that any injuries or harm to protected species as a result of habitat modification would be minor or insubstantial, or would be unforeseeable (not natural and probable) consequences of the land development activities; or 2) that the ESA's prohibition of their private land development is a taking of

181. 115 S. Ct. at 2414.

private property without just compensation in violation of the Fifth Amendment of the United States Constitution.

The battle over protection of the habitats of endangered and threatened species under the ESA has shifted to Congress. Congress is considering several bills that would narrow the FWS's definition of harm. Opponents of the ESA have proposed amendments to the Act that would overrule the Supreme Court's recent *Sweet Home Chapter* decision and make the ESA inapplicable to modifications of wildlife habitat on private lands. The majority and dissenting opinions will provide ammunition for each respective side in the ongoing debate over whether and to what degree private land development activities should be allowed to affect endangered and threatened species and their habitats.