Nova Law Review

Volume 20, *Issue* 2 1996 *Article* 8

Babbit v. Sweet Home Chapter of Communities for a Great Oregon: Preserving the "Critical Link" Between Habitat Modification and the "Taking" of an Endangered Species

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The authors would like to thank M.B. Adelson IV, Assistant General Counsel, Florida Department of Environmental Protection, for his substantial contribution to the analysis and drafting of this article.

I. INTRODUCTION

Section 9(a)(1) of the Endangered Species Act of 1973[1] makes it unlawful for any person to "take" an endangered or threatened species of wildlife.[2] Since its adoption, the Endangered Species Act ("ESA") has embroiled judges, environmentalists, and the development community in bitter controversy. Industry and development interests have continually attacked the ESA, charging that it favors plants and animals over jobs and people. Environmentalists and conservationists embrace the Act as the last

1. Pub. L. No. 93-205, 87 Stat. 884 (1973) (codified as amended in scattered sections of 16 U.S.C.).

2. *Id.* § 9(a)(1), 87 Stat. at 893 (current version at 16 U.S.C. § 1538(a)(1)(B) (1994)).

hope for a significant number of species pushed to the brink of extinction by the adverse activities of mankind.[3]

Nowhere in the ESA has the legal battle been more critically focused than in section 9 and what it means to "take" an endangered species. As analytically discussed in this article, the term "take" clearly encompasses the actual killing, injury, collection, or capture of an individual member of a protected species through the direct application of physical force.[4] These, however, are the limits that the development and land use community has been willing to concede are section 9's prohibitions. Conservationists and others opposed to some particular human impacts, on the other hand, have sought to extend section 9's protections to encompass activities that, while not resulting in the direct or immediate application of physical force to the animal, nevertheless results in harm, injury, or death through the adverse modification, degradation or destruction of habitat. This is where the agreement that has existed dissolves and where the hard-fought battle has been waged in earnest. In the summer of 1995, a case dispositive of the definition of "harm" as used in section 9's prohibition against "taking" an endangered species was decided.

On June 29, 1995, the United States Supreme Court handed down its long awaited decision in *Babbit v. Sweet Home Chapter of Communities For A Great Oregon* (*Sweet Home V*).[5] The decision is significant in several contemporary respects. First, in *Sweet Home V*, the Court has apparently concluded, by a 6-3 majority, a colloquial dispute that has persisted for over two decades regarding the proper scope of section 9's protections. Second, the decision was rendered at a time when the ESA was under increasingly vigorous attack from political, legislative, and popular interests; at a time

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3. In promulgating the ESA, Congress recognized the serious nature of the rising number of plant and animal extinctions worldwide:

> It has become increasingly apparent that some sort of protective measures must be taken to prevent the further extinction of many of the world's animal species. The number of animals on the Secretary of Interior's list of domestic species that are currently threatened with extinction is now 109. On the foreign list there are over 300 species. Further, the rate of extinction has increased to where on the average, one species disappears per year.

S. REP. NO. 307, 93d Cong., 1st Sess. 1 (1973), *reprinted in* 1973 U.S.C.C.A.N. 2989, 2990. This so-called "Extinction Crises" is more fully discussed in DANIEL J. ROHLF, THE ENDANGERED SPECIES ACT, A GUIDE TO ITS PROTECTIONS AND IMPLEMENTATION 7-17 (1989).

4. Pub. L. No. 93-205, § 3(14), 87 Stat. at 885 (1978) (redesignated as § 3(19) by Pub. L. No. 95-632, § 2, 92 Stat. 3751, 3752 (1978); current version at 16 U.S.C. § 1532(19) (1994)).

5. 115 S. Ct. 2407 (1995).

when the ESA's future was, and indeed remains, uncertain. Thus, *Sweet Home V* arguably signals an emerging view in the federal courts calling for a logical, common sense construction of our nation's environmental laws.

This article examines the existing regulatory scheme associated with section 9 of the ESA as it developed and exists before and after *Sweet Home V*. The dispute over the incorporation of significant habitat protection under this section is summarized, and this article culminates with a detailed analysis of the *Sweet Home V* opinion itself. The effects of the *Sweet Home V* opinion upon section 9, as well as other provisions of the ESA, are examined, and conclusions are drawn regarding the long-term impact of this case.

II. PROHIBITING THE "TAKE" OF AN ENDANGERED SPECIES UNDER SECTION 9 OF THE ACT

Section 9(a)(1)(B) of the ESA forbids conduct by any person that will "take" a species protected under the Act:

> (1) Except as provided in sections 6(g)(2) and 10 of this title, with respect to any endangered species of fish or wildlife listed pursuant to section 4 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 . . . .[6]

This prohibition differs from other major provisions of the ESA in several particular respects. Initially, section 9 distinguishes between those species which are endangered[7] and those which are threatened.[8] By its

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6. Pub L. No. 93-205, § 9(a)(1)(B), 87 Stat. at 893 (current version at 16 U.S.C. § 1538(a)(1)(B).

7. The term "endangered species" is defined by the Act to mean:

> any species which is in danger of extinction throughout all or a significant portion of its range other than a species of the Class Insecta determined by the Secretary to constitute a pest whose protection under the provisions of this chapter would present an overwhelming and overriding risk to man.

Id. § 3(4), 87 Stat. at 885 (redesignated as § 3(6) by Pub. L. No. 95-632, § 2, 92 Stat. at 3751; current version at 16 U.S.C. § 1532(6)).

8. The Act also defines "threatened species" as "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." *Id.* § 3(15), 87 Stat. at 835 (redesignated as § 3(20) by Pub. L. No. 95-632, § 2, 92 Stat. at 3752; current version at 16 U.S.C. § 1532(20)).

very terms, the statute applies "with respect to any *endangered* species of fish or wildlife . . ."[9] "throughout all or a significant portion of its range."[10] Thus, only those species qualifying for endangered status are expressly included under section 9. By contrast, those species listed as threatened enjoy section 9 protection only by virtue of regulations promulgated by the Secretary of the Interior ("Secretary").[11] Even then, extension of section 9 protection to threatened species does not appear to be a mandatory obligation imposed upon the Secretary.[12] Instead, section 9(a)(1) protection is provided at the discretion of the Secretary who must deem such action to be "necessary and advisable."[13]

Unlike other provisions of the ESA which apply to federal agencies, section 9 prohibits acts by "any person." Section 3, in turn, defines "person" very broadly, including individuals, business entities, and all levels

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9. *Id.* § 9, 87 Stat. at 893 (current version at 16 U.S.C. § 1538(a)(1)) (emphasis added); *see also* ROHLF, *supra* note 3, at 59, 73. This language also excludes plants from § 9 protection. Pub. L. No. 93-205, § 9, 87 Stat. at 893 (current version at 16 U.S.C. § 1538(a)(1)).

10. *Id.* § 3(4), (15), 87 Stat. at 885.

11. 50 C.F.R. §§ 17.31-.48 (1994). In this regulation, the Secretary, with a few noted exceptions, declares that the provisions and protections (including the prohibition against "taking" under § 9) found in § 17.21 for endangered species, shall now be applicable for species listed as threatened under the Act. These regulations are issued pursuant to regulatory power identified under § 4(d) of the ESA:

> Whenever any species is listed as a threatened species pursuant to subsection (c) of this section, the Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation of such species. The Secretary *may* by regulation prohibit with respect to any threatened species any act prohibited under section 9(a)(1) of this title . . . .

Pub. L. No. 93-205, § 4, 87 Stat. at 888 (current version at 16 U.S.C. § 1533(d) (1994)) (emphasis added).

12. ROHLF, *supra* note 3, at 74-75. The issue of whether the Secretary *must* prevent the taking of a threatened species has not been directly litigated. *Id.*

13. For a more thorough discussion of this issue see ROHLF, *supra* note 3, at 73-75. It should be noted that § 4(d) of the ESA which grants the Secretary this regulatory power does seem to provide a significant degree of discretion. Pub. L. No. 93-205, § 4, 87 Stat. at 886 (current version at 16 U.S.C. § 1533(d)). Note that the Secretary must issue regulations for threatened species only upon deeming such action to be "necessary and advisable to provide for the conservation of such species." *Id.* Therefore, the Secretary must make some kind of finding as to the necessity of such regulations for that species' conservation. Additionally, § 4(d) provides that "[t]he Secretary *may* by regulation" prohibit a taking under § 9(a)(1). *Id.* (emphasis added). This is a significant departure from the use of "shall" only one sentence earlier.

of government within the reach of section 9.[14] The scope of this regulation is far more extensive and encompasses every conceivable actor down to the individual.[15]

Section 9 of the ESA defines the term "take" as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."[16] This definition clearly contemplates the more traditionally understood activities that "take" wildlife by hunting, killing, and collecting of individual animals. But in defining the ESA's true intent and scope around the "take" concept (within the purposes of the ESA) the focus has been on the terms "harm" and "harass." The term "harm" has been defined in regulations promulgated by the Department: "*Harm* in the definition of take in the Act means an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering."[17]

Similarly, the Department has defined "harass" as used in section 9:

> Harass in the definition of "take" in the Act means an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding and sheltering.[18]

Substantial controversy has been fomented over the use of these two terms by the Department of Interior as well as by the courts.[19] The salient issue

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14. Section 3(13) of the ESA defines "person" to include:
> [A]n 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.

Pub. L. No. 100-478, § 1001(a)(13), 102 Stat. 2306 (1988) (original version at Pub. L. No. 95-205, § 3(8), 87 Stat. at 885; current version at 16 U.S.C. § 1532(13)).

15. *See* ROHLF, *supra* note 3, at 73-75.

16. Pub. L. No. 93-205, § 3, 87 Stat. at 885 (redesignated as § 3(19) by Pub. L. No. 95-632, § 2(7), 92 Stat. at 3751; current version at 16 U.S.C. § 1532(19)).

17. 50 C.F.R. § 17.3 (1994) (emphasis added).

18. *Id.*

19. *See generally* Federico Cheever, *An Introduction to the Prohibition Against Takings in Section 9 of the Endangered Species Act of 1973: Learning to Live with a Powerful Species Preservation Law*, 62 U. COLO. L. REV. 109 (1991).

was always: can a person "take" an endangered species by altering or destroying its habitat?

III. FROM *PALILA* TO *SWEET HOME*—RECOGNIZING THE CRITICAL LINK BETWEEN HABITAT DESTRUCTION AND "HARM"

From its origin, the ESA was intently focused on habitat preservation.[20] Congress identified the two most significant causes of species extinction as habitat loss and hunting.[21] Given the ESA's clear focus on habitat, it seemed logical, and Congress understood, that a species could be "taken" through the destruction of its habitat. Yet this link between habitat loss and the "taking" of an endangered species was frequently litigated and initially eluded the courts.

A. *The Early Cases*—Froehlke, Coleman, *and* Hill

In *Sierra Club v. Froehlke*, the Sierra Club initiated a lawsuit to halt the construction of Missouri's Meramec Park Dam and Reservoir.[22] Brought under the National Environmental Policy Act ("NEPA"),[23] Sierra

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20. The legislative history underlying the ESA acknowledged habitat loss as "the major cause for the extinction of species worldwide." H.R. REP. NO. 1625, 95th Cong., 2d Sess. 5 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9453, 9455. During the floor debates on the 1973 House draft of the ESA, Representative Sullivan proclaimed that:

> For the most part, the principal threat to animals stems from the destruction of their habitat. The destruction may be intentional, as would be the case in clearing of fields and forests for development or resource extraction, or it may be unintentional, as in the case of the spread of pesticides beyond their target area. Whether it is intentional or not, however, the result is unfortunate for the species of animals that depend on that habitat, most of whom are already living on the edge of survival.

119 CONG. REC. H30,162 (1973). This overriding concern for habitat is reflected in Congress' declaration of purpose found in § 2 of the ESA:

> The purposes of this Act are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in subsection (a) of this section.

Pub. L. No. 93-205, § 2(b), 87 Stat. at 885 (current version at 16 U.S.C. § 1531(b) (1994)). The primacy of habitat protection in the scheme of the ESA is more fully discussed in Katherine S. Yagerman, *Protecting Critical Habitat Under the Federal Endangered Species Act*, 20 ENVT. L. 811, 827-47 (1990).

21. S. REP. NO. 307, *supra* note 3, at 1, *reprinted in* 1973 U.S.C.C.A.N. at 2990.

22. 392 F. Supp. 130 (E.D. Mo. 1975), *aff'd*, 534 F.2d 1289 (8th Cir. 1976).

23. 42 U.S.C. § 4321 (1988 & Supp. V 1993).

Club's complaint was amended, adding a claim under section 7(a)(2) of the then newly-enacted ESA.[24] The Sierra Club asserted that completion of the reservoir would flood a series of subterranean caverns which were home to the endangered Indiana bat, thereby violating the ESA because this flooding would jeopardize the continued existence of this listed species.[25]

The district court was not persuaded by the Sierra Club's arguments. Pointing to a dearth of knowledge concerning the bat, the court concluded that the project did not violate section 7 of the Act.[26] Section 9 was not even addressed in the district court ruling which allowed the development to proceed.[27]

On appeal, the Eight Circuit Court of Appeals examined Sierra Club's ESA claims under both section 7 and section 9 of the ESA,[28] upholding the lower court's dismissal of the section 7 claim.[29] The court also rejected Sierra Club's section 9 claim noting that the section 9 claim rested upon Sierra Club's assertion that the dam's construction was an attempt to harm the bat.[30] The *Froehlke* opinion tied section 9 claims to a scienter

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24. *Sierra Club*, 392 F. Supp. at 143.

25. *See id.*

26. *Id.* at 144. While not the focus of this article, § 7(a)(2) remains the centerpiece of endangered species preservation efforts. Section 7(a)(2) of the ESA provides in relevant part:

> Each federal agency shall, in consultation with and with the assistance of the Secretary [of the Interior], 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, after consultation as appropriate with affected States, to be critical . . . .

Pub. L. No. 96-159, § 4, 93 Stat. 1225, 1226 (1979) (current version at 16 U.S.C. § 1536(a)(2) (1994)). For a thorough analysis of § 7(a)(2) and the issues surrounding its implementation, see Oliver A. Houck, *The Endangered Species Act and its Implementation by the U.S. Departments of Interior and Commerce*, 64 U. COLO. L. REV. 277 (1993). For a more focused discussion of the "critical habitat" provision of § 7, see Yagerman, *supra* note 20; *see also* James Salzman, *Evolution and Application of Critical Habitat Under the Endangered Species Act*, 14 HARV. ENVTL. L. REV. 311 (1990).

27. *See* Cheever, *supra* note 19, at 130 n.132 (pointing out that at the conclusion of the district court stage of the *Froehlke* litigation, the Service had not yet adopted a regulation defining "harass" as used defining a "taking").

28. Sierra Club v. Froehlke, 534 F.2d 1289, 1301-02 (8th Cir. 1976) (noting claims under both § 7 and § 9 of the ESA).

29. *Id.* at 1303-04.

30. *Id.* at 1304. In rejecting Sierra Club's § 9 claim, the Eighth Circuit found that:

> The allegation as to violation of Section 9, as we have noted, rests upon the asserted ground that the erection of the dam is a "clear attempt to harass or harm" the Indiana bat. We are cited to no portion of the record so stating nor

requirement somewhat akin to specific intent.[31] Under *Froehlke*, a violation of section 9 would be predicated by a specific intent to "harass" or "harm" through the proposed activity. While this mental requirement is easily established in the traditional context of a "taking" by hunting, trapping, or collecting, this requirement would be insurmountable in cases where the "taking" indirectly or allegedly resulted only from habitat degradation. Development is rarely conducted with the specific goal of harming a listed species. The *Froehlke* opinion illustrates an initial reluctance by the federal courts to recognize incidental habitat protection as being included within the concept of "taking" wildlife under section 9.

The continued vitality of this portion of the *Froehlke* opinion is in doubt. Such a stringent intent requirement is inconsistent with the plain meaning of the Act.[32] A violation of section 9 requires only a showing of general intent.[33] A successful section 9(a)(1) cause of action need only show that: 1) the defendant knowingly took an animal within the United States; 2) the animal taken was actually an endangered or threatened species protected under section 9(a)(1) of the ESA; and 3) that the defendant did not have a permit from the Department of the Interior to "take" the animal.[34]

> do we believe that from a fair reading thereof any such attempt may be found. The purposes of the dam's construction have heretofore been discussed in some detail and need not be elaborated upon at this point. An attempt to harass may not reasonably be found therein. This Act, as any other, must have reasonable construction.

Id.

31. Indeed, the *Froehlke* court required that the drowning of Indiana bats be a specific goal of the project before it would find a "taking" under § 9. The court may have assumed that the bats could simply relocate to avoid the rising water. Sierra Club v. Froehlke, 392 F. Supp. 130 (E.D. Mo. 1975), *aff'd*, 534 F.2d 1289 (8th Cir. 1976). Sierra Club apparently offered no discussion or evidence of the availability or scarcity of other suitable caves. *See id.*

32. The legislative history of the ESA contains plain congressional intent. Congress expressed its desire that criminal violations of the ESA be general rather than specific intent crimes. H.R. REP. NO. 1625, *supra* note 20, at 5, *reprinted in* 1978 U.S.C.C.A.N. at 9476.

33. United States v. St. Onge, 676 F. Supp. 1044, 1045 (D. Mont. 1988); United States v. Billie, 667 F. Supp. 1485, 1493 (S.D. Fla. 1987). In *United States v. St. Onge*, the defendant, a hunter, mistook a protected grizzly bear for an elk. That he neither knew he was shooting at a grizzly bear, nor intended any harm to the species, was no defense to a prosecution for violating § 9. 676 F. Supp. at 1045. Similarly, in *United States v. Billie*, the defendant was unsuccessful in his claim that the Government was required to prove that he knew that the animal he was shooting at was an endangered Florida panther. 667 F. Supp. at 1493.

34. *St. Onge*, 676 F. Supp. at 1045.

Harm to the species need not be a specific goal of the violator, only the factual result of his activity.

National Wildlife Federation v. Coleman[35] also dealt with the ESA shortly after its adoption. *Coleman* focused exclusively on section 7. Section 9 was not addressed in its holding.[36] At issue was the proposed extension of Interstate 10 through portions of Mississippi that would disturb and destroy habitat vital to the Mississippi sandhill crane.[37] The district court concluded that the proposed Interstate 10 extension would not violate ESA section 7(a)(2).[38] The National Wildlife Federation appealed to the Fifth Circuit Court of Appeals and, in the interim, the Department of the Interior designated the subject area as "critical habitat" of the sandhill crane.[39] The Fifth Circuit Court of Appeals found this designation compelling. The appellate court reversed the lower court, concluding that the project violated section 7 and threatened the crane with extinction because critical habitat would be lost, actually resulting in ultimate impacts prohibited under the ESA.[40]

In 1979, the Supreme Court of the United States decided *Tennessee Valley Authority v. Hill*,[41] its first case directly involved with interpreting the ESA. Faced with a multi-million dollar dam and reservoir project which, upon completion, promised to eradicate the tiny snail darter, a species of endangered fish,[42] the Court concluded that it "would be hard pressed to find a statutory provision whose terms were any plainer" than those found in the ESA.[43] Section 7(a)(2) of the ESA commanded federal agencies to "insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence" of an endangered species.[44]

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35. 400 F. Supp. 705 (S.D. Miss. 1975), *rev'd*, 529 F.2d 359 (5th Cir. 1976), *cert. denied sub nom.* Boteler v. National Wildlife Fed'n, 429 U.S. 979 (1976).

36. *Id.* at 711-12. The true significance of *Coleman* lies in the fact that § 7(a)(2) was selected and used in the National Wildlife Federation's efforts to preserve sandhill crane habitat, while § 9 was not. *See* Cheever, *supra* note 19, at 133-34.

37. *Coleman*, 407 F. Supp. at 707.

38. *Id.*

39. National Wildlife Fed'n v. Coleman, 529 F.2d 359, 367 (5th Cir.), *cert. denied sub nom.* Boteler v. National Wildlife Fed'n, 429 U.S. 979 (1976).

40. *Id.* at 374-75.

41. 437 U.S. 153 (1978).

42. The Tennessee Valley Authority constructed the Tellico dam and reservoir on the Little Tennessee River for the express purpose of generating electricity, providing recreation, and encouraging shoreline development. The dam, once completed, would impound 16,500 acres of land, including the habitat of the tiny endangered snail darter fish. *See id.* at 156-58.

43. *Id.* at 173.

44. Pub. L. No. 93-205, § 7, 87 Stat. at 892 (codified at 16 U.S.C. § 1536(a)(2) (1978)).

Dam or no dam, the *Hill* Court concluded that ESA section 7 demanded halting the project's completion to preserve the snail darter.[45] Throughout the *Hill* opinion, the Court noted the comprehensive nature of the protections created for listed species under the Act, measuring the ESA's protective mechanisms against the backdrop of strong congressional intent directed at preserving the habitat of such species.[46] While not directly concerning section 9, the "take" provision did receive some attention by the *Hill* court:

> We do not understand how TVA intends to operate Tellico Dam without "harming" the snail darter. The Secretary of the Interior has defined the term "harm" to mean "an act or omission which actually injures or kills wildlife, including acts which annoy it to such an extent as to significantly disrupt essential behavior patterns, which include, but are not limited to, breeding, feeding or sheltering; *significant environmental modification or degradation which has such effects is included within the meaning of 'harm.'*"[47]

These early cases illustrate the use of sections 9 and 7 to protect the habitat of endangered species. Under *Froehlke* and *Coleman*, habitat protection had arguably been assigned to section 7(a)(2), while section 9 was interpreted according to the more traditional notions of "taking" by hunting, trapping, and collecting. Even *Hill*, while recognizing section 9's habitat protection functions, nevertheless focused most of its analysis on section 7. However, a small bird in Hawaii would advance what a rare fish in Tennessee had started.

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45. *Hill*, 437 U.S. at 194. On the nature of Congress' stated intent, the *Hill* Court observed that "Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities, thereby adopting a policy which it described as 'institutionalized caution.'" *Id.*

46. In reviewing the ESA, the court acknowledged the Act's strong emphasis on habitat:

> The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost. This is reflected not only in the stated policies of the Act, but in literally every section of the statute. All persons, including federal agencies, are specifically instructed not to "take" endangered species, meaning that no one is "to harass, harm, pursue, hunt, shoot, wound, kill, capture, or collect" such life forms. Agencies in particular are [to] . . . "use . . . *all methods* and procedures which are necessary" to preserve endangered species . . . . The pointed omission of the type of qualifying language previously included in endangered species legislation reveals a conscious decision by Congress to give endangered species priority over the "primary missions" of federal agencies.

Id. at 184-85 (citation and footnote omitted).

47. *Id.* at 184-85 n.30 (citing 50 C.F.R. § 17.3 (1976)).

B. *Section 9 is Linked to Habitat Destruction*—Palila

The rigid bifurcation of protection for the animal and protection for the animal's habitat under ESA analysis came to an abrupt end in 1978 when the District Court of Hawaii handed down its decision in *Palila v. Hawaii Department of Land & Natural Resources* (*Palila I*).[48] The decision, in addition to saving a tiny endangered bird, polarized and sparked a controversy ultimately resolved by the Supreme Court of the United States in its *Sweet Home V* decision. An analysis of the *Palila* cases is necessary to fully comprehend this landmark *Sweet Home V* decision.

The palila (*Loxiodes bailleui*) is a six-inch long, finch-billed bird in the Hawaiian honycreeper family, a group originally consisting of twenty-three species and subspecies indigenous only to Hawaii.[49] Once common in the higher altitudes along the slopes of Mauna Kea,[50] the palila's range has been drastically reduced to a narrow fringe of tropical mamane forest habitat encircling the mountain.[51] The scientific community attributed the palila's precipitous decline[52] to the deforestation of the island's groves of mamane (*Sophora chysophylla*) and naio (*Myoporum sandwicense*) trees upon which the bird relies for its food and nesting sites.[53] The destruction of the mamane forests, in turn, was blamed on feral sheep grazing on the

48. 471 F. Supp. 985 (D. Haw. 1979), *aff'd*, 639 F.2d 495 (9th Cir. 1981).

49. *Id.* at 988; Jonathan Durrett & Christopher Yuen, Palila v. Department of Land and Natural Resources*: "Taking" Under Section Nine of the Endangered Species Act of 1973*, 4 U. HAW. L. REV. 181, 183-84 (1982) (citing SHERWIN CARLQUIST, ISLAND BIOLOGY 158 (1974)).

50. Mauna Kea is a dormant volcano located on the island of Hawaii. Durrett & Yuen, *supra* note 49, at 183 n.9.

51. *Palila I*, 471 F. Supp. at 988-89.

52. The palila was listed as an endangered species by the Secretary of the Interior in 1967. Burton E. Dezendorf, Jr., Palila v. Hawaii Department of Land and Natural Resources*: A New Interpretation of "Taking" Under the Endangered Species Act of 1973*, 19 IDAHO L. REV. 157, 158 (1983).

53. Durrett & Yuen, *supra* note 49, at 183-84. In 1977, the U.S. Fish and Wildlife Service, upon recommendation by the Palila Recovery Team, designated the remaining mamane-naio forest as the "critical habitat" of the palila. 50 C.F.R. § 17.95 (1977); 42 Fed. Reg. 40,687 (1977); *see generally* Dezendorf, *supra* note 52. Indeed, the scientific evidence leads to the conclusion that the palila's survival is inseparably linked to the preservation of the mamane-naio ecosystem in which it has evolved and adapted to survive. *Palila I*, 471 F. Supp. at 989 (citing PALILA RECOVERY TEAM, PALILA RECOVERY PLAN 1 (1977)).

mamane.[54] When the suit was originally filed, the palila, mamane, and sheep all resided almost exclusively on state-owned land.[55]

In efforts to preserve the mamane ecosystem and the palila, the Hawaiian government embarked on a campaign to eradicate the human-introduced herds of feral sheep and goats, only to be halted by recreational hunting interests.[56] When this conservation effort was stalled by sports hunters targeting the sheep for recreational hunting purposes, the Audobon Society, the Sierra Club, and one individual brought suit on the palila's behalf because the bird itself cannot sue.[57] The court held that the Hawaiian Department of Land and Natural Resources ("Hawaiian DLNR") was compelled to remove these herds of sheep from the palila's critical habitat, agreeing with the position taken by the plaintiffs on behalf of the endangered bird.[58]

The plaintiffs claimed that the Hawaiian DLNR's continued maintenance of population of feral sheep and goats, albeit a limited one, amounted to a "taking" of the palila through the pervasive and continuing degradation and destruction of its critical habitat. To this end, the plaintiffs sought the removal of the animals from state-owned palila habitat.[59] This removal would ameliorate the critical habitat degradation attributed to the sheep.

The district court in *Palila I* developed an extensive factual record and then made several important findings of fact. First, the court found that the survival of the palila depended upon the preservation of the mamane-naio ecosystem.[60] Second, the continued presence of feral sheep and goats in

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54. *Palila I*, 471 F. Supp. at 990. The mamane leaves, stems, seedlings, and sprouts served as an important source of food for the browsing sheep. By consuming the mamane leaves, stems, seedlings and sprouts, the sheep prevented the regeneration of the mamane forest and, therefore, contributed to its continued decline. *Id.*

55. Durrett & Yuen, *supra* note 49, at 184.

56. *Palila I*, 471 F. Supp. at 989 n.9. Recreational hunters pressured the Hawaiian DLNR to maintain some population of feral animals on Mauna Kea as game animals.

57. *Id.* at 987. *Palila I* began the modern trend in ESA litigation of naming the aggrieved species itself as a plaintiff.

58. *Id.* at 999.

59. *Id.* at 987.

60. *Id.* at 989 (finding that the mamane-naio forest is essential for the palila's survival); *see also* Dezendorf, *supra* note 52, at 159. The defendants took issue with this finding, pointing out that no one can state for certain whether this is true, since no attempts have been made to breed and keep palila in captivity or in an environment lacking mamane or naio trees. *Palila I*, 471 F. Supp. at 989 n.7. The district court summarily dismissed this contention finding that all available evidence pointed to the conclusion that the palila's survival is inseparably linked to the mamane-naio forest. *Id.* (citing 42 Fed. Reg. 40,687 (1977); PALILA RECOVERY TEAM, *supra* note 53, at 32).

the mamane-naio forest was found to be the primary cause of the destruction of the palila's critical habitat.[61] The court also found that DLNR's efforts to preserve the mamane-naio forest, the palila, and a limited stock of feral sheep through intensive management efforts was an ineffective solution to regeneration of the mamane-naio forest.[62] As long as the feral sheep and goats remained, so too would the pressure from hunting interests to increase that population.[63] Indeed, the court pointed to the destructive effect that even a small population of the animals may have on the ecosystem.[64] Finally, the district court found the complete removal of the feral sheep and goats from the palila's critical habitat to be feasible.[65] Sport hunters could hunt these animals elsewhere, and they could still hunt other species in the mamane-naio forest.[66] Moreover, the complete removal of these animals from the palila's critical habitat could be accomplished with relatively minor expense to the state.[67]

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61. *Palila I*, 471 F. Supp. at 991. The court engaged in an extensive inquiry into the effect that these feral sheep and goats have had on the ecosystem. *Id.* at 990. Relying on this data, the *Palila I* court concluded that:

> The Mauna Kea Plan [proposed by the Hawaii DLNR] also proposes that any game animals be eliminated only after further studies have been made; but no further studies need be done. Plaintiffs have shown (and defendants have produced no substantial evidence to the contrary) that the Palila requires all of its designated critical habitat in order to survive as a species and that the feral sheep and goats maintained by defendants are the major cause of that habitat's degradation.

Id. at 991. Indeed, the *Palila I* court, relying on a study conducted by a DLNR biologist, pointed to a direct correlation between the ability of the mamane to regenerate and the presence of browsing sheep and goats in the area under study. *Id.* at 990 n.11. The district court further observed that:

> There are doubtless other factors, such as disease, drought, insects, frost, or competition from exotic grasses and weeds, which prevent the regeneration of the mamane forest. Feral pigs and Mouflon sheep (a study on the latter by the State is due for completion in 1980) may also contribute to the forest's decline. However, the Palila Recovery Team is convinced that stopping destruction of the forest by feral sheep and goats would solve 90 percent of the problem.

Id. at 990 n.13.

62. *Palila I*, 471 F. Supp. at 990 n.13.
63. *Id.* at 990.
64. *Id.*
65. *Id.*
66. *Id.* at 990-91.
67. *Palila I*, 471 F. Supp. at 991.

In light of these facts, the district court in *Palila I* briefly considered the section 9 "taking" claim before concluding:

> "Take" is defined in the Act to include "harm" which in turn is defined in the regulations propounded by the Secretary of the Interior to include "significant environmental modification or degradation" which actually injures or kills wildlife. The undisputed facts bring the acts and omissions of the defendants clearly within these definitions. I conclude that there is an unlawful "taking" of the Palila.[68]

As a result, the plaintiff's motion for summary judgment and their request for declaratory and injunctive relief were granted.[69]

An appeal soon followed, and little more than a year later, *Palila I* was before the Ninth Circuit Court of Appeals (*Palila I Appeal*).[70] The sole issue on appeal was whether the term "harm" as used in defining "take" encompassed significant habitat modification.[71] The Ninth Circuit Court of Appeals affirmed summary judgment for the plaintiffs.[72] In upholding the district court's interpretation of the term "take" as it relates to habitat modification, the circuit court relied on the 1978 definitions of both "harm" and "harass" found in contemporary Department of the Interior regulations.[73]

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68. *Id.* at 995 (citations omitted).

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

70. *Id.*

71. The district court in *Palila I* actually resolved a number of legal disputes concerning the ESA. The district court held as a matter of law that jurisdiction and venue were proper under the ESA, and that the plaintiffs had standing to sue on this matter. *Palila I*, 471 F. Supp. at 991-92. The court also addressed the effect of the Tenth and Eleventh Amendments upon the enforcement of the ESA against the states. *Id.* at 992-99. The district court concluded, as a matter of law, that neither the Tenth nor the Eleventh Amendments bar the enforcement of the ESA against a state government violating the prohibitions of § 9(a)(1). *Id.* at 995, 999. For analysis of the Tenth and Eleventh Amendment issues addressed in the district court's *Palila* decision, see Jack R. Nelson, Palila v. Hawaii Department of Land and Natural Resources*: State Governments Fall Prey to the Endangered Species Act of 1973*, 10 ECOLOGY L.Q. 281 (1982).

72. *Palila I Appeal*, 639 F.2d at 496.

73. Following the first *Palila* litigation, the Department of Interior revised its definitions of "harm" and "harass" to accommodate the district court's decision. *See infra* Part III.C. However, in 1979, at the time of the first *Palila* litigation, "harm" was defined as:

> "Harm" in the definition of "take" in the Act means an act or omission which actually injures or kills wildlife, including acts which annoy it to such an extent as to significantly disrupt essential behavioral patterns, which include, but

The court observed that a successful *Palila I*-type section 9 claim necessitated demonstrating some prohibited impact on the species resulting from the alleged activity.[74] To this end, the Ninth Circuit concluded that:

> The defendant's action in maintaining feral sheep and goats in the critical habitat is a violation of the Act since it was shown that the Palila was endangered by the activity. Defendants have not shown us how the district court erred in determining that the acts and omissions of the state were prohibited by the Act. The district court's conclusion is consistent with the Act's legislative history showing that Congress was informed that the greatest threat to endangered species is the destruction of their natural habitat. It was supported by all of the expert opinions.[75]

The Ninth Circuit's decision in *Palila I Appeal* must be assessed with recognition of the extremely supportive fact-finding on the part of the district court for its conclusions. The court of appeals found a "taking" of the bird in a relatively conclusory manner, pointing to the district court's findings of fact and the failure of the State of Hawaii to show where the district court erred.[76]

This procedural affirmance may be attributed to the methodology used by the district court in deciding the case. The science-driven approach taken by Chief District Judge Samuel King in the *Palila I Appeal* decision provided the model for future habitat-based "taking" cases. Judge King's fact finding regarding the correlation between the effects of the browsing sheep and the palila's decline was extensive. With extensive fact finding, the attendant legal analysis was necessarily brief and conclusory.[77] The *Palila I*-type "taking" case became characterized by fact specific inquiry resulting in detailed fact finding at the district court level. Then, given the strong presumption of correctness accorded to the district court's findings of fact, review by the appellate court in *Palila I Appeal* was understandably and appropriately brief.

> are not limited to, breeding, feeding, or sheltering; significant environmental modification or degradation which has such effects is included within the meaning of "harm" . . . .

50 C.F.R. § 17.3 (1978) (amended by 46 Fed. Reg. 54,748 (1981)).

74. *Palila I Appeal*, 639 F.2d at 497 (citing Barcelo v. Brown, 478 F. Supp. 646 (D.P.R. 1979)).

75. *Id.* at 497-98 (citing Tennessee Valley Auth. v. Hill, 437 U.S. 153, 179 (1978)).

76. *Id.*

77. *See Palila I*, 471 F. Supp. at 995.

The findings by the district court make *Palila I Appeal* a thoroughly grounded case. Empirical inquiry established that the species' decline was directly and almost exclusively linked to habitat degradation. Sometimes scientific evidence cannot be clearly marshaled.[78] The decisions in both the district and circuit courts in *Palila* were fueled by an exhaustive body of unrefuted scientific data.[79] The "critical link" between habitat degradation and injury to the species is not always a clear one. Cases involving a species that is subject to a variety of threats, or a species threatened by a number of different parties (as opposed to just one party in *Palila*) multiply the burden for plaintiffs who must assemble the necessary science to support judicial conclusions that a *Palila*-type "taking" has been presented.

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78. Morrill v. Lujan, 802 F. Supp. 424 (S.D. Ala. 1992), is illustrative of what can happen to a *Palila I*-type "taking" claim lacking the persuasive scientific data that fueled the supportive fact finding in the *Palila I* district court case. *Morrill* concerned the effects of development of private property on the northeastern end of Perdido Key upon the highly endangered Perdido Key beach mouse. *Id.* at 425. The land immediately to the south of the parcel in question was state owned land that had been federally designated critical habitat of the beach mouse. Evidence indicated that the beach mouse had expanded its range outside of its designated critical habitat and into the private, undeveloped land to the north. *Id.* Development of the defendant's land was alleged to constitute a taking of the endangered mouse. *Id.* at 426. However, the Southern District Court of Alabama disagreed, concluding that the plaintiffs had failed to establish the critical link between destruction of the habitat on defendant's property and injury to the beach mouse. *Id.* at 431. Specifically, the evidence could not conclusively prove that the endangered beach mice were present on the parcel in question:

> There must be some proof of "the critical link between habitat modification and injury to the species." Plaintiff's only proof as to the link between habitat modification and injury is dependent upon plaintiff's assertion that the beach mouse exists on DeWeese's property. For the reasons stated above, the Court finds that plaintiff's evidence is insufficient in this regard. Moreover, even if the beach mouse did exist on the relatively small area of suitable habitat found on DeWeese's property, there is no substantial evidence that the destruction of this habitat could threaten the species.

Morrill, 822 F. Supp. at 430 (citations omitted). The district court found plaintiff's scientific studies on the effects of the proposed development upon the beach mouse insufficient. *Morrill*, therefore, illustrates how a *Palila*-type claim can fail if the science is not present to drive supportive fact finding for concluding a "taking" under the Act. Conversely, Sierra Club v. Lyng, 694 F. Supp. 1260 (E.D. Tex. 1988), *aff'd in part and vacated in part on other grounds sub nom.* Sierra Club v. Yeutter, 926 F.2d 429 (5th Cir. 1991), provides an example of a district court confronted with a formidable body of scientific evidence leading to very favorable conclusions of law for those trying to protect the red-cockaded woodpecker.

79. *See Palila I*, 471 F. Supp. at 988-91.

C. *The Federal Government Reacts—The Attempted Dilution of* Palila *and the Redefinition of Harm*

Palila elevated the use of section 9 from a little-known provision in a poorly understood statute to a formidable cause of action for the protection of endangered species and their habitat.[80] The reaction to the *Palila I Appeal* decision was swift and dramatic. In 1981, the United States Solicitor's Office in the incoming Reagan Administration and the U.S. Fish and Wildlife Service (a division of the Department of Interior) sought to undo *Palila I Appeal*.[81] The Solicitor's Office read section 9 and the Secretary's regulatory definition of "harm" as a prohibition against habitat destruction only when such destruction could be shown to actually kill or injure wildlife.[82] Accordingly, the Fish and Wildlife Service ("Service"), in a controversial effort to nullify the impact of the *Palila I Appeal*, revamped its regulations defining "harm."[83] The new definitions were codified into regulation by the Secretary in 1981, to prohibit only significant habitat modifications that actually kill or injure wildlife.[84] "Harm" rising to the level of a "taking" could not be shown by habitat modification alone; for this, the Service asserted, was unsupported by the legislative history of the Act and violative of the ESA.[85]

The major impacts of this redefinition were twofold. The first major change came in the form of a newly-emphasized restriction on the *Palila I Appeal*, requiring a demonstration that a habitat modification leading to a section 9 "taking" must actually kill or injure members of a protected species.[86] A showing of habitat degradation alone will not amount to

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80. Cheever, *supra* note 19, at 146.

81. In fact, some critics who saw *Palila I* as being correctly decided, suggested that the Service, in an apparent attempt to reverse the case through regulation and avoid its results, was engaging in a constitutionally questionable course of conduct. 46 Fed. Reg. 54,749 (1981).

82. 46 Fed. Reg. 29,490-91 (1981). The Solicitor's Office, in the spirit of the times, attributed *Palila I* to a "fundamental confusion over the distinction between habitat modification and takings." *Id.* at 29,492.

83. 46 Fed. Reg. 54,748 (1981).

84. *Id.*

85. *Id.* While the legislative history behind § 9 indicates a congressional intent to read the term "take" broadly, the Service concluded that the history of § 9 did indeed support a broad reading of the term "take." However, the Service concluded that "take" cannot be read to prohibit habitat modification absent actual injury. *Id.*

86. *Id.* at 54,749. The Service points to the preamble of the original harm definition:

> "Harm" covers actions . . . which actually (as opposed to potentially) cause injury . . . . By moving the concept of environmental degradation to the

"harm," rising to the level of a "taking" under the *Palila I Appeal*, unless actual injury or death to the species is also proven.[87] Thus, "[i]n the opinion of the Service, the final redefinition sufficiently clarifies the restraints of section 9 so as to avoid injury to protected wildlife due to significant habitat modification, while at the same time precluding a taking where no actual injury is shown."[88] It is, therefore, significant to note that the Service's actions, while clearly limiting the impact of the *Palila I Appeal*, never actually questioned the underlying principle that a "taking" may result from significant habitat alteration.[89] What the Service sought to accomplish through this redefinition of "harm," was the addition of a formidable element of causation into the section 9 "taking" cause of action, along with the introduction of some notion that the actual modification of habitat must be more than de minimis. "To be subject to section 9, the modification or degradation must be significant, must significantly impair essential behavioral patterns, and must result in actual injury to a protected wildlife species."[90]

However, while limiting the impact of the *Palila I Appeal*, the new definition of "harm" simultaneously conceded the most significant aspect of the *Palila I Appeal* opinion—the notion that a species could indeed be "taken" through the alteration of its habitat. Recognition of this very basic premise was far from universal in 1981.[91] Rather, the Service remained

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> definition of "harm," potential restrictions on environmental modifications are expressly limited to those actions causing actual death or injury to a protected species of fish or wildlife. The actual consequence of such action upon a listed species is paramount.

46 Fed. Reg. 54,749 (1981) (citing 40 Fed. Reg. 44,412-13 (1975)). Thus, the requirement that habitat modification actually kill or injure in order to amount to a § 9 "taking" is nothing new. Rather, *Palila I Appeal* has apparently forced the Service to amend its regulations to better reflect this sentiment as intended in the original "harm" definition. *See id.*

87. *Id.*

88. *Id.*

89. *See id.*; *see also* Cheever, *supra* note 19, at 149.

90. 46 Fed. Reg. 54,749. The inclusion of "actually" (as in "actually kills or injures") was intended by the Service to "bulwark the need for proven injury to a species due to a party's actions." This injury could occur through the significant impairment of essential behavioral patterns such as breeding, feeding, and sheltering. *Id.*

91. *See, e.g.*, North Slope Borough v. Andrus, 486 F. Supp. 332 (D.D.C. 1978), *aff'd in part, rev'd in part*, 642 F.2d 589 (D.C. Cir. 1980). The district court in *North Slope Borough* only gave a cursory glance at the § 9 claim, concluding that the possibility of a future taking through modification of the Bowhead whale's habitat did not require the government to halt the oil exploration being challenged in that case. *Id.* at 362. Thus, *North Slope Borough* first raised the distinction between present harm and potential harm resolved

myopically confined to the narrow concern over the possibility of a flood of section 9 litigation claiming "takings" based solely on habitat modification, and without any showing of "actual" injury or "harm" to the species.[92]

Though arguably curtailing the overall effectiveness of the *Palila I Appeal* as a means of protecting the habitat of a protected species, the basic principle that a "taking" could result from habitat modification became more firmly established as a result of the Service's actions. In fact, throughout its response to public comments on the proposed redefinition, the Service repeatedly declined the invitation by many to limit harm to direct physical injury to an individual member of a species:

> Congress made its intent to protect species and their habitat very clear. It did not, however, express any intention to protect habitat under section 9 where there was no appurtenant showing of death or injury to a protected species. . . . Thus, to the extent that comments recommend further limitations, they misconstrued the intent of the rulemaking.[93]

The regulations, as amended in 1981, sought both the adoption and reversal of certain aspects of the *Palila I Appeal* decision.

D. *Congress Reacts—Genesis of the "Incidental Taking" Exception*

The *Palila I Appeal* also brought swift reaction from Congress. This reaction became manifest in the Endangered Species Act Amendments of 1982.[94] The most significant of these changes were the inclusion of so-called "incidental take" exceptions to the prohibitions of section 7 and section 9.[95]

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by the court in Palila (Loxiodes bailleui) v. Hawaii Dep't of Land and Natural Resources (*Palila II*), 649 F. Supp. 1070 (D. Haw. 1986), *aff'd*, 852 F.2d 1106 (9th Cir. 1988). On review in the District of Columbia Circuit Court, the court did not even address the § 9 claim.

92. 46 Fed. Reg. 54,749. Additionally, the Solicitor's Office pointed to its own concerns that perhaps the district court in *Palila I* had misconstrued the biological evidence presented and had instead substituted its own judgment in finding "harm" to the palila bird in that case. *Id.*

93. *Id.*

94. Pub. L. No. 97-304, 96 Stat. 1411 (1982).

95. *See id.* §§ 3, 6, 96 Stat. at 1416, 1422 (current version at 16 U.S.C. §§ 1536(b)(4), (o)(2), 1539(a) (1994)).

> (1) The Secretary may permit, under such terms and conditions as he shall prescribe—
>
> (A) any act otherwise prohibited by [section 9] of this title for scientific purposes or to enhance the propagation or survival of the affected species, including, but not limited to, acts necessary for the establishment and maintenance of experimental populations pursuant to subsection (j) of this section; or
>
> (B) any taking otherwise prohibited by [section 9(a)(1)(B)] of this title if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.[96]

Thus, newly-added section 10(a)(1) provides two means by which a person may avoid the consequences of section 9(a)(1). The first exception describes "takings" for "scientific purposes," and for the enhancement of the propagation or survival of the affected species.[97] This technically intentioned exception typically encompasses recovery activities such as tagging, captive breeding, and establishment of experimental populations aimed at reintroduction of a species into its formerly occupied range.[98] However, section 10(a)(1)(B) permits any taking otherwise prohibited by section

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96. *Id.* (current version at 16 U.S.C. §§ 1539(a)(1)(A), (B) (1994)).

97. *Id.* (current version at 16 U.S.C. § 1539(a)(1)(A)).

98. Department of Interior regulations detail the criteria considered in issuing or denying "scientific purpose" permits under § 10(a)(1)(A). *See* 50 C.F.R. § 17.22(a) (1994). In addition to general permit criteria found at 50 C.F.R. § 13.21(b) (1994), the Secretary, through the Director of the Fish and Wildlife Service, must also consider:

> (i) Whether the purpose for which the permit is required is adequate to justify removing from the wild or otherwise changing the status of the wildlife sought to be covered by the permit;
>
> (ii) The probable direct and indirect effect which issuing the permit would have on the wild populations of the wildlife sought to be covered by the permit;
>
> (iii) Whether the permit, if issued, would in any way, directly or indirectly, conflict with any known program intended to enhance the survival probabilities of the population from which the wildlife sought to be covered by the permit was or would be removed;
>
> (iv) Whether the purpose for which the permit is required would be likely to reduce the threat of extinction facing the species of wildlife sought to be covered by the permit;
>
> (v) The opinions or views of scientists or other persons or organizations having expertise concerning the wildlife or other matters germane to the application; and
>
> (vi) Whether the expertise, facilities, or other resources available to the applicant appear adequate to successfully accomplish the objectives stated in the application.

50 C.F.R. § 17.22(a)(2)(i)-(vi); *see generally* ROHLF, *supra* note 3, at 82-86.

9(a)(1), so long as the "taking" is incidental to an "otherwise lawful activity."[99] That is, the activity may accidentally effect a "taking" under section 9, but may be exempt from prosecution under section 10 depending upon case by case circumstances.[100] In any case, no "incidental take" permit will be issued by the Secretary to any person without the submission of a satisfactory conservation plan including adequate safeguards to reduce the impact of the "incidental take."[101]

The conservation plan required under section 10(a)(2)(A) must include and detail the anticipated impact of the activity on listed species in proximity of the proposed activity, the applicant's efforts to mitigate those impacts, any alternatives to a "taking" available to the applicant, and any other necessary and appropriate measures required by the plan.[102]

Based upon the described activities in the permit application, and the submitted conservation plan, the Secretary must then make the following determination before an "incidental take" will be permitted under section 10(a): 1) that any "taking" will in fact be incidental; 2) that the applicant will minimize and mitigate the impacts of the "taking" to the maximum extent practicable; 3) that the applicant will ensure that the conservation plan's implementation is adequately funded; 4) that "the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild"; 5) that any other necessary and appropriate measures required by the Secretary will also be met; and 6) that the Secretary is provided with other assurances that the plan will be implemented.[103] Congress' reaction to the *Palila I Appeal* decision was observably more tempered than that of the Service. While section 10(a) provides an exception to the otherwise absolute and categorical ban in section 9, the standards for that exception are quite rigorous and protective of the species being impacted.[104]

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99. Pub. L. No. 97-304, § 6, 96 Stat. at 1422 (current version at 16 U.S.C. § 1539(a)(1)(B)).

100. *Id.*

101. *Id.* (current version at 16 U.S.C. § 1539(a)(2)(A)).

102. *Id.*

103. 50 C.F.R. § 17.22(b)(2). Department of Interior regulations also require the Secretary, through the Director of the Fish and Wildlife Service, to "consider the anticipated duration and geographic scope of the applicant's planned activities, including the amount of listed species habitat that is involved and the degree to which listed species and their habitats are affected." *Id.*

104. Pub. L. No. 97-304, § 6, 96 Stat. at 1422 (current version at 16 U.S.C. § 1539(a)(2)(B)).

E. Palila II—*Identifying the "Critical Link Between Habitat Modification and Injury to the Species"*

The mamane and naio forests of Hawaii's Mauna Kea and the tiny palila they harbored were again destined to rise to the forefront of the persistent controversy over the scope of section 9. *Palila v. Hawaii Department of Land and Natural Resources (Palila II)*[105] virtually duplicated the facts and issues litigated only five years earlier.[106] The palila's critical habitat was still being grazed by non-indigenous animals, only this time the adverse impacts were caused by exotic mouflon sheep rather than the feral animals removed following *Palila I*.[107]

The district court in *Palila II* was presented with the Secretary's revamped "harm" regulation. *Palila II*, reduced to its essence, examined whether the Service's redefinition of "harm," in the Secretary's amended regulatory definition, embodied a substantial change from the previous definition.[108] The district court, in a cogent legal analysis, answered that question resoundingly in the negative.[109]

Throughout the trial, the Hawaiian DLNR emphasized the difference between "potential" harm and "actual" harm.[110] They argued that the plaintiffs could show no present pattern of decline in the palila's numbers; thus, the Hawaiian DLNR insisted that any harm done to the palila due to

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

106. *See* Cheever, *supra* note 19, at 152-53.

107. The distinction between the two was described by the district court. "Feral" refers to animals that, while once domesticated, now roam wild. On the contrary, mouflon sheep are wild game animals that were taken from the wilds of Corsica and Sardinia and introduced onto slopes of Mauna Kea between 1962 and 1966. Like the feral sheep and goats, the mouflon were maintained in the palila's habitat for sport hunting purposes. *Palila II*, 649 F. Supp. at 1074. During the initial *Palila I* litigation, a mouflon sheep study was still underway to determine the extent of the mouflon's destructive effects upon the mamane. *See Palila I*, 471 F. Supp. at 990 n.13.

108. *See* ROHLF, *supra* note 3, at 63-64.

109. *Palila II*, 649 F. Supp. at 1075. The court in *Palila II* had already stated its position on this issue at the summary judgment stage of the proceeding. Palila v. Hawaiian Dep't of Land and Natural Resources, 631 F. Supp. 787 (D. Haw. 1985). At that time, the defendants continuously argued that the amendments to the regulation had worked substantial changes upon the meaning of the term "harm," but the court refused to adopt their interpretation. *Palila II*, 649 F. Supp. at 1075 n.18. Since the government had apparently failed to recognize the court's position at this earlier proceeding, the district court in *Palila II* saw the need to elaborate on its conclusion that the amendments still prohibited destruction of habitat. *Id.*

110. *Id.* at 1075.

the mouflon sheep's destructive browsing habits was, at best, a potential one.[111] The DLNR also observed that the palila, whose population numbers remained constant throughout the controversy, had not been actually harmed as required under the Secretary's revised "harm" regulation.[112] Mere adverse impact to the habitat, they contended, did not amount to "harm" under the Act and the regulation.[113]

The district court emphatically rejected this "shortsighted and limited interpretation of 'harm'" concluding that:

> A finding of "harm" does not require death to individual members of the species; nor does it require a finding that habitat degradation is presently driving the species further toward extinction. Habitat destruction that prevents the recovery of the species by affecting essential behavioral patterns causes actual injury to the species and effects a taking under section 9 of the Act.[114]

Palila II clearly and deliberately expanded the scope of section 9 beyond the bounds set only a few years earlier in *Palila I*. In evaluating the significance of the Service's redefinition of "harm," the district court held that the Service explicitly declined to limit "harm" to "direct physical injury to an individual member of a wildlife species."[115] In fact, the Service attributed the regulation's revision to the following purpose:

> The purpose of the redefinition was to preclude claims of a Section 9 taking for habitat modification alone without any attendant death or

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111. *Id.* Specifically, the Hawaiian Government argued that the mouflon sheep do not presently harm the palila because the sheep feed primarily on the shoots and sprouts of the mamane trees. The palila derives its sustenance from the seeds and seed pods of the mature trees. Therefore, the government argued that the browsing activities did not presently deny the palila of its food source. The government contended that any harm to the palila could only be indirect and in the future, as the browsing mouflon, at most, merely prevented regeneration of the mamane trees over the coming years. *Id.*

112. *Palila II*, 649 F. Supp. at 1075. This apparently was a distinct argument against the existence of any "actual injury." Since, as the Hawaiian DLNR reasoned, "harm" required actual death or injury, this showing would be substantially undermined by the fact that the palila population had remained static and may have even increased in spite of the continued grazing activity of the mouflon sheep.

113. The Hawaiian DLNR's argument was a linear one. Harm to the mamane and naio forest did not, in and of itself, equal "actual harm" to the palila. The population of the palila had not declined since *Palila I* and had even slightly increased. Preventing "harm" to the trees was beyond the protection intended under the ESA. *Id.*

114. *Id.*

115. *Id.* at 1077 (quoting 46 Fed. Reg. 54,748 (1981)).

> injury of the protected wildlife. Death or injury, however, may be caused by impairment of essential behavioral patterns which can have significant and permanent effects on a listed species.[116]

Clearly, the Service declined to limit "harm" to direct applications of physical force or violence aimed at an individual animal.[117] Yet, the Hawaiian DLNR asserted that habitat modification prohibited under section 9 must be limited to occasions where direct physical injury or killing of individual palila birds was the direct and intended consequence of the modification—precisely what the Service declined to do in amending the regulation.

The district court's focus on injury to the species as a whole is consistent with the revised "harm" regulation after *Palila II*.[118] What the Service accomplished through its redefined term is that "harm" via habitat modification requires two elements: significant habitat modification and

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116. *Id.*

117. At this point in the district court's decision, Judge King took an opportunity to answer criticisms of his *Palila I* opinion raised during the 1981 amendments to the "harm" regulation. Judge King concluded that the Service had misconstrued his earlier ruling in *Palila I*. *Palila II*, 649 F. Supp. at 1076 n.21.

> Contrary to the assertions [of the DLNR, the court] did not find that habitat modification alone caused harm to the Palila. On the contrary, the evidence considered at the summary judgment hearing overwhelmingly showed that the feral animals had a drastic negative impact on the mamane forest, which in turn injured the Palila by significantly disrupting its essential behavioral habits.

Id. (citations omitted).

118. *See id.* at 1077. Judge King's response to criticisms leveled at his *Palila I* decision by the Service suggests that, from the outset, his focus remained on the injury to the species as a whole and the purpose of the ESA—recovery of listed species:

> By consuming the shoots and seedlings, the [feral sheep] prevented the regeneration of the forest and thus brought about the "relentless decline of the Palila's habitat."
>
> . . . .
>
> The record was similarly clear that this loss of habitat was the single most important factor limiting the Palila population. Continued destruction of the forest would have driven the bird into extinction. As it was, the bird was, and still is, at the critical population level, that is, perched on the verge of extinction. The bird is thus highly susceptible to harm from other environmental factors, such as fire or drought. At the time then, the continued presence of feral sheep had a severe negative impact on the Palila by indirectly suppressing the population figures to a level which threatened extinction and by preventing the expansion or recovery of the population. These factors supported my decision to order removal of the feral sheep and goats in *Palila I*.

Id. at 1078 (citation omitted).

actual injury. If a "critical link between habitat modification and actual injury to the species" can be shown, the section 9 claim will succeed.[119] This "critical link" draws habitat modification into the folds of the "take" concept found in section 9. The presence of an actual injury or instances of habitat destruction likely to significantly and adversely affect a listed species now can amount to a prohibited "taking."[120]

After *Palila II*, the "critical link between habitat modification and injury to the species" could be established in one of two ways: 1) by showing that the activity has an adverse impact on the species or 2) by showing that the activity prevents the recovery of a species.[121] The district court rejected the contention that the establishment of this "critical link" required either the proven death or injury of individual members of the species, or some demonstrated decline in population numbers.[122]

The Ninth Circuit Court of Appeals affirmed the district court's ruling that the palila had indeed been "taken" within the meaning of the amendments to the Department of Interior's regulation defining "harm."[123] Significantly, the court of appeals limited its review to the district court's focus on the harm to the species as a whole and the question of whether the district court erred in finding that "harm" included habitat modification that could drive the palila to extinction.[124] The court acknowledged the

119. *Id.* As the district court opined, "[t]he redefinition stresses the critical link between habitat modification and injury to the species. Obviously since the purpose of the Endangered Species Act is to protect endangered wildlife, there can be no finding of a taking unless habitat modification or degradation has an adverse impact on the protected species." *Palila II*, 649 F. Supp. at 1077.

120. *Palila II* reduced the inquiry to a two-part analysis centered on the element of causation. A significant habitat modification must first be established. Then, this modification must be linked to the actual death or injury of wildlife. This element of connectedness distinguishes prohibited "takings" from other incidental activities affecting habitat without adversely affecting the species.

121. *Palila II*, 649 F. Supp. at 1077.

122. *Id.*

123. Palila (Loxiodes bailleui) v. Hawaii Dep't of Land and Natural Resources (*Palila II Appeal*), 852 F.2d 1106 (9th Cir. 1988).

124. *Id.* at 1108. The circuit court concluded that the district court's inclusion within the definition of "harm" of habitat destruction that could drive the species to extinction fell within the Secretary of Interior's construction of the term. However, the Ninth Circuit Court of Appeals declined to decide whether habitat modification not threatening the palila with extinction, but hindering recovery of the species, was also properly included within the Secretary's definition. *Id.* at 1110-11.

deference given to the Secretary's interpretation of "harm," citing this standard of review as a principal reason for its holding.[125]

The Ninth Circuit Court of Appeals concurred with the district court's assessment that the inclusion of habitat destruction contributing to extinction was consistent with the Secretary's "harm" regulation.[126] Interpreting "harm" in this manner advanced the overall objectives of the ESA by "'[providing] a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved . . . .'"[127] This interpretation, the court reasoned, also was entirely consistent with Congress' desire to provide an expansive reading of the term "take," as evidenced by the legislative history of the Act.[128] The *Palila II Appeal* both affirmed the district court's construction of "harm" to include habitat modification that threatens a species with extinction and upheld the Secretary of Interior's definition of "harm" as consistent with the ESA. But this ruling fell short of a complete answer to the controversy.

The Ninth Circuit Court of Appeals declined to reach the question of whether the regulation's "actual death or injury" requirement could be satisfied by a habitat modification that hampered a species' recovery as opposed to precipitating its extinction.[129] The precise scope of the issue left unaddressed by the court's declination remains unclear.[130] In the first instance, the opinion passed on the question of whether "harm" included "habitat degradation that *merely retards* recovery."[131] Yet, only a few sentences later, the court pronounced its decision to pass on the issue of

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125. *Id.* at 1108 (citing United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 131 (1985) (upholding the Secretary of the Army's regulations including hydrologically connected wetlands within the jurisdictional term "navigable waters," the dredging and filling of which requires a permit under § 404 of the Federal Water Pollution Control Act)).

126. *Id.*

127. *Palila II Appeal*, 852 F.2d at 1108 (citing 16 U.S.C. § 1531(b) (1988)).

128. *Id.* (relying on S. REP. NO. 307, *supra* note 3, *reprinted in* 1973 U.S.C.C.A.N. at 2989, 2995). In defining "take" in § 3(12) of the ESA, Congress has arguably made its intentions clear: "'[t]ake' is defined in section 3(12) in the broadest possible manner to include every conceivable way in which a person can 'take' or attempt to 'take' any fish or wildlife." S. REP. NO. 307, *supra* note 3, *reprinted in* 1973 U.S.C.C.A.N. at 2995.

129. *Palila II Appeal*, 852 F.2d at 1110.

130. *See id.* From the court's statements it is possible to draw two different conclusions. The circuit court may have only declined to address temporary setbacks to a species' recovery, while otherwise including habitat modifications presenting a permanent and total impediment to recovery efforts in its principal holding. Conversely, the court may have refused to reach the more general issue of whether hindrance to a species recovery can legally amount to "actual injury" to a species.

131. *Id.* at 1110 (emphasis added).

whether "harm" includes those activities that *prevent* recovery.[132] The first passage indicates the court's inclusion within "harm" of those activities that prevent recovery, suggesting that the court hesitated to extend "harm" to activities that "merely" present a temporary or short term impairment to the species' recovery. In light of this statement, the second pronouncement is enigmatic. It purports to cover "habitat degradation that *prevents* recovery."[133] It is, therefore, unclear whether the variance between these two declarations is purposeful.

In reality, the distinction between threats to survival and the impairment of recovery is a significant one. The goal of the ESA is to "recover" endangered and threatened species, not merely to maintain these species in a continuing state of endangerment.[134] A large category of activities may hamper the achievement of this goal while still falling short of precipitating a species' extinction. If such a distinction were acknowledged, a number of activities could be permitted that, while not threatening a species with extinction, will nevertheless ensure perpetual enrollment on the growing roster of endangered and threatened fauna.

F. *Post* Palila II—*Meeting the "Critical Link" Requirement*

Palila II, in practice, reduced the "taking" inquiry to a question of causation and what level of connectedness must be demonstrated by a preponderance of evidence to prove a violation of section 9. *American Bald Eagle v. Bhatti*[135] is illustrative on this point. *Bhatti* began as a suit to bar deer hunting on a state reservation to avoid alleged risks to bald eagles

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132. *Id.* at 1111 (emphasis added).

133. *Id.* (emphasis added).

134. The stated purpose of the ESA is "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved" and "to provide a program for the conservation of such endangered and threatened species." Pub. L. No. 93-205, § 2, 87 Stat. at 884 (current version at 16 U.S.C. § 1531(b)). Conservation of endangered and threatened species is defined in the ESA as "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 Act are no longer necessary." *Id.* § 3, 87 Stat. at 885 (current version at 16 U.S.C. § 1532(3)).

Upon listing a species as endangered or threatened under the provisions of ESA § 4, the Secretary is directed to develop and implement "recovery plans" for the conservation and survival of the listed species unless he finds that the development of a recovery plan will not promote the species' conservation. Pub. L. No. 95-632, § 11, 92 Stat. at 3766 (redesignated as § 4(f) by Pub. L. No. 97-304, § 2(a), 96 Stat. at 1411; current version at 16 U.S.C. § 1533(f)).

135. 9 F.3d 163 (1st Cir. 1993).

present on the site.[136] The alleged risk to the eagle came in the form of the ingestion of lead shot from the carrion of deer that have been shot, but not recovered by the hunter.[137] Analogizing to other environmental regulations, the plaintiffs asked the court to impose a human health-based numerical standard of "one in a million risk of harm" for determining when a "taking" has occurred.[138] The First Circuit Court of Appeals declined to do so, concluding that while such numeric standards are appropriate for EPA pollution control regulations, they were not proper for determining "harm" under the Secretary's regulation.[139] Rather, the proper standard for determining a "taking" under the regulation is the presence of "actual harm," which requires a greater degree of connectedness than a calculated possibility of harm under a numeric standard.[140] While bald eagles can be harmed by ingesting lead, the plaintiffs were unable to introduce evidence demonstrating that they had actually consumed harmful levels of lead.[141] Thus, the court acknowledged that the regulation requires a qualitative, rather than a bare quantitative standard for making decisions under the ESA.

G. Sweet Home Chapter of Communities for a Great Oregon v. Lujan—*Raising a Direct Challenge to* Palila *in the District Court*

In 1992, *Sweet Home Chapter of Communities for a Great Oregon v. Lujan* (*Sweet Home I*)[142] raised the controversy surrounding section 9 to the next level of analysis. While previous courts limited their consideration to the question of whether a particular habitat modification amounted to "harm" resulting in a "taking" under section 9, the United States District

136. *Id.* at 164.

137. *Id.* The core of the plaintiffs' case was that some of the deer shot at the reservation would not be recovered and would subsequently die of their wounds. These "cripple loss deer" would still carry the lead shot from the hunter's gun and the bald eagles, among other animals, would ingest this lead while feeding on the carcasses. *Id.*

138. *Id.* at 165. Similar health-based standards are set by the Environmental Protection Agency in regulating discharges under the Clean Air Act and the Clean Water Act. These numeric standards set the amount of a pollutant to be tolerated based on the level of risk that the tolerated concentrations will pose to human health. *See, e.g.*, National Emission Standards for Hazardous Air Pollutants, 49 Fed. Reg. 23,521-27 (1984).

139. American Bald Eagle v. Bhatti, 9 F.3d 163, 165 (1st Cir. 1993).

140. *Id.* at 165-66.

141. *Id.* at 166. This case, like *Morrill v. Lujan*, presents a case where the plaintiffs were unable to establish sufficient scientific proof of "actual injury" resulting from the alleged habitat modification. *See* Morrill v. Lujan, 802 F. Supp. 424 (S.D. Ala. 1992).

142. 806 F. Supp. 279 (D.D.C. 1992).

Court for the District of Columbia was asked to consider whether habitat modification or degradation could be a taking at all. The suit was a direct attack on the very basis of the *Palila* line of cases and a direct challenge to the regulatory structure of section 9 as it had stood for more than a decade.

The case was brought by a number of small land owners, logging and timber companies, and individuals dependent in varying degrees upon the logging industry in the Pacific Northwest and in the southeastern United States.[143] The plaintiffs (the "Chapter") challenged restrictions placed upon logging activities on private property by the United States Fish and Wildlife Service in its efforts to avoid *Palila*-type "takings" of the endangered red-cockaded woodpecker[144] and the threatened northern spotted owl[145] in violation of section 9.[146] The restrictions allegedly resulted in a host of economic injuries to the plaintiffs and reached impermissibly beyond the scope of section 9 protections.[147]

The Chapter attacked two specific regulations promulgated by the Secretary of the Interior for the enforcement of section 9.[148] The primary focus remained on the Secretary's regulation defining "harm" under the Act. The Chapter insisted that this regulation was, on its face, both contrary to the ESA and fatally vague under the Fifth Amendment's guarantee of due process of law.[149] The Chapter also attacked the regulation extending section 9's protections to threatened species of wildlife.[150]

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143. *Id.* at 282. The plaintiffs consisted of Sweet Home Chapter of Communities for a Great Oregon, Betty F. Orem, Erickson Busheling, Inc., Southeastern Lumber Manufacturers Association, Inc., Southern Timber Purchasers Council, Ridgetree Logging Company, Shotpouch Logging Company, Jean Reynolds, Emmy G. Birkenfield, and Pat McCollum. *See* Brief for Petitioners at ii, Babbit v. Sweet Home Chapter of Communities for a Great Or., 115 S. Ct. 2407 (1995) (No. 94-859).

144. 50 C.F.R. § 17.11(h) (1994). The red-cockaded woodpecker was listed under the Endangered Species Conservation Act of 1969, the predecessor to the modern ESA. Pub. L. No. 91-135, §§ 1-12, 83 Stat. 275 (1969) (repealed by Pub. L. No. 93-205, § 14, 87 Stat. 903).

145. 50 C.F.R. § 17.11(h). "Taking" a threatened northern spotted owl is prohibited pursuant to Department of Interior regulations promulgated under § 4(d) of the ESA. 50 C.F.R. § 17.31(a).

146. *Sweet Home I*, 806 F. Supp. at 282.

147. *Id.* Specifically, the plaintiffs alleged that the restrictions forced them to lay off employees and down-size their operations. Moreover, the restrictions were purported to have limited their incomes, reduced the supply of timber and to have imposed substantial economic hardships upon a number of individuals and families. *Id.*

148. *Id.*

149. *Id.*

150. *Sweet Home I*, 806 F. Supp. at 282.

After agreeing on the absence of any genuine disputes of material fact, both parties moved for summary judgment on the legal issues presented.[151] Because the areas owned by, or of interest to, the plaintiffs contained habitat and/or populations of the listed wildlife, the plaintiffs were uncertain about disturbance or harvest in these areas for fear that a section 9 violation would be charged against them.[152] The suit was filed to avoid an enforcement action. In a carefully formulated response, the district court denied the plaintiffs' motion and granted summary judgment in favor of the defendant, the Department of Interior.[153] Regarding section 9 of the ESA, the court found Congress' intentions clear and unequivocal; the term "take" was to be read "'in the broadest possible manner to include every conceivable way in which a person can 'take' or attempt to 'take' any fish or wildlife.'"[154] The ESA and its legislative history supported this conclusion.[155]

First and foremost, the Chapter argued that by including habitat modification and degradation as a form of "harm," the regulatory definition promulgated by the Secretary in the Code of Federal Regulations[156] exceeded the intentions of Congress.[157] This argument was soundly rejected by the district court through application of the principles espoused in *Chevron, U.S.A., Inc. v. Natural Resource Defense Council.*[158] Under

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151. *Id.* at 281.

152. The plaintiffs generally alleged that the Service has placed restrictions on timber harvesting in the Pacific Northwest and in the Southeast in order to avoid a *Palila*-type "taking" of the owl and other endangered wildlife. *Id.* at 282. However, the plaintiffs made no claims or allegations of actual or threatened criminal enforcement of the regulation against them. *Id.* at 285. Instead, the Chapter asserted that "[t]he [Service] relies on the regulation to warn landowners that it considers certain land uses harmful to certain listed species (as by interfering with breeding or foraging patterns), and that engaging in such activities will subject the actor to agency enforcement." Brief for Respondents at 4, *Babbit* (No. 94-859) (citations omitted). "These warnings put landowners on "notice," of course, and thus facilitate criminal enforcement for a "knowing" violation of the Act." *Id.* at 4 n.5. "As a practical matter, 'persons whose extended conduct might be found a 'take,' and who thus are exposed to criminal penalties . . . are under commanding pressure to comply' with the [Service's] view of 'harm,' either by foregoing such conduct or by applying for an incidental take permit." *Id.*

153. *Sweet Home I*, 806 F. Supp. at 281.

154. *Id.* at 283 (citing S. REP. NO. 307, *supra* note 3, *reprinted in* 1973 U.S.C.C.A.N. at 2995); *see also* H.R. REP. NO. 412, 93d Cong., 1st Sess. 11, 15 (1973), *microformed on* CIS 73-H563-9 (Congressional Info. Serv.).

155. *Sweet Home I*, 806 F. Supp. at 283.

156. 50 C.F.R. § 17.3.

157. *Sweet Home I*, 806 F. Supp. at 283.

158. *Id.* at 285 (citing Chevron, U.S.A., Inc. v. Natural Resource Defense Council, 467 U.S. 837, 842-43 (1984)).

the well-known *Chevron* two-step analysis, the clear intent of Congress must prevail.[159] In the absence of such clear intent, any permissible interpretation of a federal statute made by the agency charged with its administration will be upheld.[160]

The court rejected the Chapter's position based on the second prong of the *Chevron* test and supported the Secretary's interpretation.[161] The Chapter unsuccessfully raised a triumvirate of arguments for their position that Congress did not intend the term "take" to reach habitat modification and that the Secretary's interpretation was impermissible.[162] They argued that the origin of the definition counseled against this construction, that another section of the ESA provided a remedy if necessary, and that the Secretary's definition was impermissibly broad. In rejecting the Chapter's claims, the court explained why each of these arguments failed.

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159. *Chevron*, 467 U.S. at 842-43.

160. *Id.* at 843. In *Chevron*, the United States Supreme Court reviewed challenges to Environmental Protection Agency regulations permitting states "to treat all pollution-emitting devices within the same industrial grouping as through they were encased within a single 'bubble'." *Id.* at 840. In the course of that review, the court pronounced the following two-step analysis guiding the judicial review of agency interpretations of federal statutes:

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

Id. at 842-43. The *Chevron* analysis is premised upon the long-recognized view that considerable weight and deference must be paid to the executive department's interpretations of a statutory scheme it is entrusted to administer. *Id.* at 844.

161. *Sweet Home I*, 806 F. Supp. at 284. The district court initially examined the legislative history supporting the ESA, concluding that the Congress' intentions as stated in the Act and its history clearly support interpreting "take" in the broadest possible manner. *Id.* (construing S. REP. NO. 307, *supra* note 3, *reprinted in* 1973 U.S.C.C.A.N. at 2995). Thus armed, the district court was in a position to discard the plaintiffs' claim under the first step in the *Chevron* analysis. Having found a "clear congressional intent" the inquiry into the Secretary's interpretation should end at that point. However, the district court chose to bolster its opinion by demonstrating that the plaintiffs' claims fell equally short of the mark on the second prong of the *Chevron* test. *See id.* at 285.

162. *Id.* at 283-85.

First, the Chapter questioned the permissibility of the Secretary's interpretation of "harm" by pointing to the origins of the "take" definition.[163] The original ESA bill, Senate Bill 1983, broadly defined "take" to include "'destruction, modification, or curtailment of its habitat or range.'"[164] However, when Senate Bill 1983 was reported out of the Senate Committee on Commerce, this provision was deleted.[165] The Chapter pointed to this omission as compelling evidence that Congress did not intend "take" to encompass habitat destruction.[166] The court disagreed.[167]

The district court noted that Senate Bill 1983 was one of two ESA bills considered by the Senate Committee on Commerce.[168] The other, Senate Bill 1592, defined "take" in its adopted form.[169] The court reasoned that this legislative history could stand for no more than the proposition that the Senate chose one definition over another.[170] As for any conscious decision to remove explicit references to habitat destruction from the "take" provision, the court found this characterization of the legislative history far too speculative.[171] The historical evidence supporting the Chapter's position was insufficient to overcome the traditional deference accorded the Secretary's interpretation under *Chevron.*

The Chapter also argued that the Secretary's interpretation of "harm" was impermissible in light of Congress' alleged desire to address habitat concerns exclusively through the federal land acquisition provisions found in section 4 of the ESA.[172] Pursuant to section 4, the Secretary is given the authority to utilize land acquisition and other measures to implement recovery programs for endangered and threatened species.[173] By including

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163. *Id.* at 283.

164. *Sweet Home I*, 806 F. Supp. at 283.

165. *Id.*

166. *Id.* The premise underlying the plaintiffs' contention was that the reference was purposefully deleted by the Senate Committee expressing a desire to curtail the definition of "take" and exclude habitat modification as a course of conduct that may result in a "taking." *Id.*

167. *Id.*

168. *Sweet Home I*, 806 F. Supp. at 283.

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. Pub. L. No. 93-205, § 5, 87 Stat. at 889 (current version at 16 U.S.C. § 1534(a)(1) (1994)). Section 5 provides, in relevant, part that to carry out a program to conserve endangered or threatened species, the appropriate Secretary:

this provision, the Chapter suggested that Congress had provided the Secretary with the means to protect habitat through public purchase of private property.[174] This protective measure, the Chapter reasoned, was intended to be the sole and exclusive means by which the problem of habitat destruction was to be addressed.[175] Any further protection under section 9 would, therefore, render section 5 a nullity.[176] This argument also was rejected by the district court.[177] While the ESA's legislative history revealed an intent that federal land acquisition play an important role in habitat preservation, the court was unable to find any indication that land acquisition was to be the "*exclusive* protective mechanism for listed species' habitat."[178]

The Act and its underlying legislative history instead lent credence to the notion that land acquisition was intended to be just one of several protective mechanisms at the Secretary's disposal.[179] The Act itself empowers the Secretary to "utilize the land acquisition *and other authority*" provided under a number of federal acts to carry out conservation programs.[180] Specific statements in the legislative history also countered the Chapter's position.[181]

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(1) shall utilize the land acquisition and other authority under the Fish and Wildlife Act of 1956, . . . the Fish and Wildlife Coordination Act, . . . and the Migratory Bird Conservation Act, as appropriate; and

(2) is authorized to acquire by purchase, donation, or otherwise, lands, waters, or interests therein, and such authority shall be in addition to any other land acquisition authority vested in him.

Id. (citations omitted).

174. *Sweet Home I*, 806 F. Supp. at 283.

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. *Sweet Home I*, 806 F. Supp. at 283.

180. *Id.* (citing 16 U.S.C. § 1534(a)(1)) (emphasis added).

181. The district court points to two specific statements found in the legislative history leading to the passage of § 4 of the Act. In considering § 4, a House Conference Report provided, *inter alia*, that "[a]ny effective program for the conservation of endangered species demands that there be adequate authority vested in the program managers to acquire habitat which is critical to the survival of the species." *Id.* at 283 (quoting H.R. CONF. REP. NO. 740, 93d Cong., 1st Sess. 25 (1973), *reprinted in* 1973 U.S.C.C.A.N. 3001, 3004). The second statement relied upon by the district court is found in the Senate Committee on Commerce's Report on Senate Bill 1983, which recognized that protection of habitat was often the only means of protecting endangered animals occurring on private lands. *Id.* (construing S. REP. NO. 307, *supra* note 3, *reprinted in* 1973 U.S.C.C.A.N. at 2995). Clearly, these schemes are intended to be mutually supporting (not mutually exclusive) means

Finally, the Chapter questioned the permissibility of the Secretary's interpretation on the ground that "harm" was added to the definition of "take" via a technical amendment which was never debated by Congress. In light of this, the Chapter reasoned that the expansive interpretation ascribed to the term "harm" by the Secretary was inappropriate.[182]

In rejecting this claim, the district court's reasoning was two-fold. First, the court reiterated its conclusion that the Secretary's definition of the term "harm" was entirely compatible with Congress' definition of "take."[183] Although the Chapter suggested that the Secretary's regulation encompassing land use and habitat destruction stood at variance with every other component of the "take" definition, the court found the plaintiff's own argument flawed since it also relied on an overly-broad interpretation of the Secretary's regulation.[184] The district court found the term "harm" sufficiently similar to the terms hunt, harass, and pursue, since the interpretation of the term "harm" limited its application only to those habitat modifications that actually kill or injure wildlife.[185]

> The Secretary correctly points out, however, that not all habitat modification actions constitute "harm" under the § 17.3 definition; rather, only an action which "actually kills or injures wildlife" falls into the category of "harm." The Secretary's definition thus requires proof of actual killing or injury to wildlife, consistent with the ESA's definition of "take."[186]

This statement is somewhat disingenuous in light of *Palila II* which held the "actual death or injury" requirement satisfied by injury to the species as a whole and not just injury to individual animals was required to show a

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to accomplish the species recovery purposes of the Act. *Id.* at 284.

182. *Sweet Home I*, 806 F. Supp. at 284.

183. *Id.*

184. *Id.* The Chapter argued that "harm," unlike every other component of the "take" definition, was expanded to include habitat destruction and land use, while the other terms such as "hunt," "pursue," and "shoot" are not provided with such an expansive definition. *See id.* (citing Plaintiffs' Mem. for Summary Judgment at 21, *Babbit* (No. 94-859)). This argument, relying on the *nocitur a sociis* principle of statutory construction, played a much more prominent role in the several appellate opinions that followed. *See generally*, Sweet Home Chapter of Communities for a Great Or. v. Babbit (*Sweet Home II*), 1 F.3d 1 (D.C. Cir. 1993).

185. *Sweet Home I*, 806 F. Supp. at 284.

186. *Id.*

"taking."[187] In a relatively conclusory manner, the District of Columbia district court avoided much of the holding of the Hawaiian district court in *Palila II*.[188]

The district court ultimately resolved this argument on the grounds that Congress, when reauthorizing the ESA in 1982, was aware of the *Palila* decisions and, nevertheless, declined the opportunity to reverse these decisions through legislation.[189] The court observed that Congress' reaction to *Palila II* was instead found in the amendments to section 10(a),[190] evidencing a congressional desire to accommodate the Secretary's definition of "harm" and ratify the interpretation found in *Palila II*. The court concluded that the Chapter failed to meet its burden under the *Chevron* analysis.[191] In accordance with the Supreme Court's *Chevron* analysis, the district court deferred to the discretion of the Secretary and upheld the regulation.[192]

The Chapter also advanced the theory that the "harm" definition was fatally vague and, therefore, in contravention of the Fifth Amendment's Due Process Clause.[193] Under the "void for vagueness" doctrine, the Due Process Clause demands that criminal statutes define criminal offenses with a sufficient degree of definiteness so as to adequately inform ordinary people of the type of conduct being prohibited and to discourage the arbitrary and discriminatory enforcement of the statute.[194] In essence, a

187. Palila (Loxiodes bailleui) v. Hawaii Dep't of Land and Natural Resources (*Palila II*), 649 F. Supp. 1070, 1075 (D. Haw. 1986), *aff'd*, 852 F.2d 1106 (9th Cir. 1988).

188. The D.C. district court points out that the Secretary's regulatory definition has been consistently upheld by the courts. *Sweet Home I*, 806 F. Supp. at 284. However, in supporting this statement, the D.C. district court cites both the district and circuit court opinions of *Palila I* and *Palila I Appeal*, while only citing the circuit court opinion of *Palila II*. *Id.* This would suggest that, when confronted with the Chapter's *nocitur a sociis* argument, *infra* notes 258-61, this court was troubled by the dicta in the *Palila II* district court decision.

189. *Sweet Home I*, 806 F. Supp. at 284.

190. *Id.*

191. *Id.* at 285.

192. *Id.*

193. *Id.*

194. *Sweet Home I*, 806 F. Supp. at 285 (citing Kolender v. Lawson, 461 U.S. 352, 357 (1983)). In *Kolender*, the United States Supreme Court described the so-called "void for vagueness" doctrine as requiring "that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender*, 461 U.S. at 357.

criminal statute must provide citizens with actual notice of prohibited conduct.[195] This claim by the Chapter was also unsuccessful.[196]

Understandably, the Chapter made no allegations that they were actually threatened with any criminal enforcement or prosecution pursuant to this regulation, instead raising a purely facial constitutional challenge to this regulation.[197] The Secretary successfully argued that the plaintiffs' facial challenge must fail because the regulation implicated no constitutionally protected conduct unless the Chapter could demonstrate that the regulatory definition was impermissibly vague in all of its applications.[198] The Chapter could prove neither, despite shopworn claims that their Fifth Amendment property rights amounted to such constitutionally protected conduct.[199]

Applying the regulation to the facts, the district court in *Sweet Home I* found the criminal conduct was defined with adequate certainty to pass constitutional muster.[200] The court observed that the definition of "harm" was limited to habitat degradation that "actually kills or injures wildlife."[201] Moreover, habitat modifications could only result in a chargeable "taking" if they were shown to be "significant."[202] "Significant habitat modification or degradation" was, in turn, defined as modifications that "'actually kill or injure wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.'"[203] A determination of whether or not this regulation was violated necessitated an evaluation of three factors: the species involved, the nature and degree of the habitat degradation, and the needs of that particular species.[204] The court considered that these factors were readily ascertainable in determining

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195. *Sweet Home I*, 806 F. Supp. at 285 (citing *Kolender*, 461 U.S. at 358).

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.* (citing Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494 (1982)). The Chapter insisted that the Secretary's regulatory definition of "harm" implicated their private property rights under the Fifth Amendment, and, therefore, they need not prove the regulation impermissibly vague in all its applications under *Flipside*. However, the district court in *Sweet Home I* agreed with the defendants' argument that "constitutionally protected conduct" as used in *Flipside* denoted First Amendment rights—not Fifth Amendment property rights. *Sweet Home I*, 806 F. Supp. at 285. Accordingly, the plaintiffs' attempts to avoid the *Flipside* standard for facial challenges was rejected by the court. *Id.*

200. *Id.* at 286.

201. *Id.* (citing 50 C.F.R. § 17.3 (1992)).

202. *Id.*

203. *Sweet Home I*, 806 F. Supp. at 286 (citing 50 C.F.R. § 17.3 (1992)).

204. *Id.*

whether section 9 has been violated.[205] The court was convinced that the regulatory definition provided more than minimal guidelines and was adequate notice of unlawful conduct.[206]

Finally, the district court placed considerable reliance on the fact that section 9 violations must be knowingly committed.[207] The court opined that the government would be required to demonstrate the requisite mental state necessary before obtaining a conviction under this provision.[208] In this manner, the district court concluded that the Secretary's regulatory definition was not fatally vague.[209]

The Chapter also attacked the Secretary's blanket regulation which extended the "taking" prohibition to those species listed as "threatened" under the Act. As previously discussed, section 9 differentiates between threatened species and endangered species, explicitly affording protection only to the endangered species.[210] The extension of section 9 protection to threatened species is accomplished via regulations promulgated by the Secretary pursuant to authority granted under section 4(d) of the ESA:

> Whenever any species is listed as a threatened species pursuant to subsection (c) of this section, the Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation of such species. The Secretary may, by regulation prohibit with respect to any threatened species any act prohibited under [section 9(a)] . . . .[211]

Pursuant to this authority, the Secretary extended section 9(a)(1) protection to threatened species of wildlife by means of a single, blanket regulation.[212]

The Chapter opposed this blanket regulation, contending that section 4(d) mandated the adoption of regulations on a species-by-species basis.[213] Moreover, the Chapter insisted that rulemaking under this provision could

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205. *Id.*

206. *Id.* The Chapter also acknowledged the Service's common practice of informing landowners that their proposed activity would lead to a "taking," thus putting the individual on notice for the purposes of "knowing" violations of § 9. Brief for Respondents at 4 n.5, *Babbit* (No. 94-859).

207. *Sweet Home I*, 806 F. Supp. at 286.

208. *Id.*; *see* United States v. St. Onge, 676 F. Supp. 1044, 1045 (D. Mont. 1988).

209. *Sweet Home I*, 806 F. Supp. at 286.

210. *See supra* note 11 and accompanying text.

211. 16 U.S.C. § 1538 (1994).

212. *See supra* notes 7-8 and accompanying text.

213. *Sweet Home I*, 806 F. Supp. at 286.

only proceed upon specific determinations by the Secretary that such regulations are "necessary and advisable."[214] Since no such finding was evident, the Chapter argued that the Secretary's regulation contravened section 4(d) of the ESA.[215]

The court rejected this interpretation as entirely inconsistent with the "clear and unequivocal" language of the statute.[216] Section 4(d) authorizes the Secretary to prohibit by regulation "with respect to any threatened species any act prohibited under [section 9(a)(1)]."[217] Congress' use of the word "any" throughout section 4(d) provided this clear intent: "The word "any" encompasses the entire range of threatened species and prohibited acts which the Secretary might consider. It allows the Secretary to prohibit one act with respect to one threatened species or as many as *all* acts with respect to *all* threatened species."[218] Nothing in the language or the legislative history of the ESA required the Secretary to promulgate these regulations on a species-by-species basis.[219] Section 4(d) admits of broad discretion permitting the Secretary to issue regulations whenever he deems it "necessary and advisable" to do so.[220]

The district court dismissed the Chapter's theory that section 4(d) requires the Secretary to make findings that a particular regulation is "necessary and advisable."[221] Section 4(d) of the Act, the court declared, requires the Secretary to issue regulations, not findings.[222] Thus, all three counts of the Chapter's complaint were rejected by the district court in *Sweet Home I*, and summary judgment was issued in favor of the Secretary.[223]

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214. *Id.*

215. *Id.*

216. *Id.* The *Sweet Home I* court relies on Gatewood v. Washington Healthcare Corp., 933 F.2d 1037, 1040 (D.C. Cir. 1976), for the proposition that a court's decision may rest solely on the words of a statute where the statute is clear and unequivocal on its face. *Sweet Home I*, 806 F. Supp. at 286.

217. *Sweet Home I*, 806 F. Supp. at 286 (quoting Pub. L. No. 93-205, § 16, 87 Stat. at 903 (current version at 16 U.S.C. § 1533(d) (1994)) (emphasis added).

218. *Id.*

219. *Id.* at 286-87. As the court notes, the legislative intent, as evidenced by the Senate report, was for a more sweeping use of the Secretary's regulatory power under § 4(d). *See id.* at 287 (construing S. REP. NO. 307, *supra* note 3, at 8, *reprinted in* 1973 U.S.C.C.A.N. at 2996).

220. *Id.* at 287.

221. *Sweet Home I*, 806 F. Supp. at 287.

222. *Id.*

223. *Id.*

H. Sweet Home Chapter of Communities for a Great Oregon v. Babbit—*The Tortuous Journey Through the Circuit Court*

An appeal was immediately taken by the Chapter, initiating the first of three appellate decisions issued in the *Sweet Home* litigation.[224] Since the issues appealed were allegations of legal error, the district court's judgment was scrutinized de novo.[225] In an opinion by Chief Circuit Judge Mikva, the District of Columbia Circuit Court of Appeals unanimously affirmed the district court's decisions regarding the constitutional "void for vagueness" challenge to the "harm" regulation and the statutory challenge to the Secretary's blanket regulation extending section 9 protection to threatened species.[226] As for the statutory attack on the "harm" regulation, the appellate court upheld the definition per curiam.[227]

First, the panel affirmed the district court's disposition of the "void for vagueness" attack on the "harm" regulation.[228] The Chapter urged the court to resolve the alleged vagueness problem in one of two ways: 1) by interpreting "harm" in a much more limiting manner, finding harm only upon proof of an intentionally inflicted physical injury to an individual member of a listed species of wildlife, or 2) by striking down the "harm" regulation in its entirety, should the limiting construction not be possible.[229]

The circuit court declined to grant either of the Chapter's requests on this matter.[230] Like the district court before it, the circuit court was unable to find the regulation impermissibly vague in all of its applications, as required by the United States Supreme Court's opinion in *Village of Hoffman Estates v. Flipside*.[231] This finding was necessary since the Chapter was asserting a facial "void for vagueness" challenge to the regulation.[232]

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224. Sweet Home Chapter of Communities for a Great Or. v. Babbit (*Sweet Home II*), 1 F.3d 1 (D.C. Cir. 1993). This is the first of no less than three opinions issued by the circuit court of appeals on the *Sweet Home* decision. *See also* Sweet Home Chapter of Communities for a Great Or. v. Babbit (*Sweet Home IV*), 30 F.3d 190 (D.C. Cir. 1994) (providing history of this litigation in circuit court).

225. *Sweet Home II*, 1 F.3d at 3.

226. *Id.* at 2.

227. *Id.* at 3.

228. *Id.*

229. *See id.* at 4.

230. *Sweet Home II*, 1 F.3d at 5.

231. *See* 455 U.S. 489, 497.

232. *Sweet Home II*, 1 F.3d at 4.

Arguing against the circuit court's application of the *Flipside* standard, the Chapter insisted that this regulation impinged upon "constitutionally protected conduct," again trying to assert their Fifth Amendment property rights.[233] The Chapter claimed that this "constitutionally protected conduct" fell under an exception to the *Flipside* rule and, consequently, they were not required to establish that the regulation was impermissibly vague in all of its applications.[234] The circuit court was unimpressed. While not stating precisely of what "constitutionally protected conduct" consisted, the panel was confident that the Supreme Court was referring to First Amendment freedoms, which have long received special protection under the "void for vagueness" doctrine.[235] Economic activity, such as that raised by the Chapter, has traditionally been given less protection under the vagueness doctrine.[236] The court dismissed the "void for vagueness" claim, holding the Chapter's showing that the regulation would be impermissibly vague in some hypothetical application was insufficient to meet the standard for pre-enforcement facial attacks under *Flipside*.[237]

Having disposed of the constitutional claim, the appellate court focused on the statutory challenge to the Secretary's rulemaking power under section 4(d).[238] Insisting that the Secretary interpreted this provision in reverse, the Chapter argued that in enacting section 4(d), Congress intended these protections to extend to threatened species only on a species-by-species basis and only upon an explicit finding that such rulemaking was "necessary and advisable."[239]

Consistent with the district court, the District of Columbia Circuit Court of Appeal applied the *Chevron* doctrine in reviewing the Secretary's interpretation of section 4(d).[240] Contrary to the district court, however, the appellate court found no "clear and unequivocal" intent in section 4(d); instead, it found great difficulty divining Congress' true intent from either

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233. *Id.*

234. *Id.*

235. *Id.* (citing Smith v. Goguen, 415 U.S. 566, 573 (1974)).

236. *Id.* (citing *Flipside*, 455 U.S. at 497).

237. *Sweet Home II*, 1 F.3d at 4.

238. Pursuant to authority vested by Pub. L. No. 93-205, § 16, 87 Stat. at 903 (current version at 16 U.S.C. § 1533(d)), the Department of Interior and the Fish and Wildlife Service have erected a regulatory framework by which protections normally reserved for endangered species have been extended to include threatened species by a blanket rule. These protections, in turn, may only be withdrawn by special rule, and even then, only for particular species. *See* 50 C.F.R. § 17.31(c).

239. *Sweet Home II*, 1 F.3d at 5-6.

240. *Id.* at 6.

the statute or its legislative history.[241] The Chapter referred the court to specific language in the statute and its legislative history supporting its position.[242] However, the court found these passages in the legislative history conflicting, inconsistent, and generally unclear.[243]

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241. *Id.* In applying *Chevron* to the Secretary's regulations in § 17.31(a), the District of Columbia Circuit reasoned:

> As was the case with the "harm" regulation, there is no clear indication that § 17.31(a) violates the intent of the ESA. The statute does not unambiguously compel the agency to expand regulatory protection for threatened species only by promulgating regulations that are specific to individual species. In light of the substantial deference we thus owe the agency under the principles of *Chevron, USA, Inc. v. Natural Resource Defense Council, Inc.*, . . . we uphold the challenged regulation as a reasonable interpretation of the statute.

Id. (citation omitted).

242. *Id.* Both the Chapter and the Secretary directed the appellate court to specific passages found in the ESA's legislative history. The crux of the debate centered around the use of singular or plural language in referring to threatened wildlife within the context of the Secretary's regulatory power under § 4(e). First, the Chapter pointed to the Senate Report on the Act and its § 4(e) delegation of authority to the Secretary:

> [The section] requires the Secretary, once he has listed *a species* of fish or wildlife as *a threatened species*, to issue regulations to protect *that species*. Among other protective measures available, he may make any or all of the acts and conduct defined as "prohibited acts" . . . as to "endangered species" also prohibited acts as to *the particular threatened species*.

Sweet Home II, 1 F.3d at 6 (citing S. REP. NO. 307, *supra* note 3, *reprinted in* 1973 U.S.C.C.A.N. at 2996). However, the government countered with legislative history of its own:

> The Secretary is authorized to issue appropriate regulations to protect endangered or threatened species; he may also make specifically applicable any of the prohibitions with regard to *threatened species* that have been listed in section 9(a) as are prohibited with regard to endangered species. Once an animal is on the threatened list, the Secretary has almost an infinite number of options available to him with regard to the permitted activities for *those species*. He may, for example, permit taking, but not importation of *such species*, or he may choose to forbid both taking and importation by not allowing the transportation of *such species*.

Id. (quoting H.R. REP. NO. 412, *supra* note 154, at 12) (alteration in original).

243. *Id.* The District of Columbia Circuit Court of Appeals rejected the Chapter's argument, pointing out that the legislative history is simply too ambiguous to support its conclusions. Where the passage from the Senate report does indeed refer to the threatened species in the singular, the House of Representatives report offered by the Government uses plural language. Accordingly, the district court concluded that: "The possible conflict between the two reports, as well as the apparent inconsistency with the above-quoted paragraph itself as to singular and plural, shows the perils of attempting to use ambiguous legislative history to clarify ambiguous words within statutes." *Id.*

The inescapable fact recognized by the panel was that Congress, in drafting section 4(d), simply did not speak directly on this issue.[244] In the face of this ambiguity, the administrative agency tasked with implementing this provision is authorized to fill in the legislative scheme, formulating its own procedural strategy in lieu of clear legislative directives.[245] Since the Secretary's interpretation, extending section 9 to cover threatened species via a blanket rule, did not clearly contravene section 4(d), the deference afforded to the agency's interpretation under *Chevron* counseled upholding the regulation.[246]

The Chapter's claim that an explicit finding of "necessary and appropriate" was required prior to section 4(d) rulemaking was also rejected.[247] In opposition to this claim an alternate interpretation of section 4(d) was offered. Section 4(d), as construed by the Secretary, consists of two distinct grants of power.[248] The first authorizes the Secretary to issue regulations for the conservation of threatened species as she deems it "necessary and advisable" to do so.[249] The second grant of authority permits her to prohibit via regulation, with respect to any threatened species, any act prohibited under section 9(a)(1).[250] Under this construction, only the former grant of authority is conditioned upon any explicit "necessary and appropriate" finding by the Secretary. Recognizing the relative ambiguity of Congress' intent in section 4(d), the panel deferred to the Secretary's interpretation since it was not clearly in violation of this ambiguous provision.[251]

In any event, the court concluded that the Chapter has imparted an inappropriate amount of significance to the use of the single as opposed to the plural. Even assuming the Chapter is correct, and the term "species" as found in § 4(d) is singular, the court reasoned that this still would not clearly forbid what the Secretary had done. Since *Chevron* calls for deference in such a circumstance, the Chapter's arguments fall short of the mark. *Sweet Home II*, 1 F.3d at 6.

244. *Id.* at 7. The court notes that "regardless of the use of the singular and plural terms in the statute, § 1533(d) simply does not speak directly to the question of whether the [Fish and Wildlife Service] must promulgate protections species-by-species or may extend such protection in a single rulemaking." *Id.*

245. *Id.*

246. *Id.* (citing INS v. Cardoza-Fonseca, 480 U.S. 421, 448 (1987)).

247. *Sweet Home II*, 1 F.3d at 7.

248. *Id.* at 7-8; *see supra* note 11 and accompanying text.

249. *Sweet Home II*, 1 F.3d at 8 (citing Pub. L. No. 93-205, § 16, 87 Stat. at 903 (current version at 16 U.S.C. § 1533(d) (1994)).

250. *Id.*

251. *Id.*

It was, however, the statutory challenge to the regulatory definition of "harm" that received the most attention by the court. As stated above, the district court's findings on the propriety of this regulation were affirmed per curiam, and without comment on the matter.[252] Two separate concurrences and a single dissenting opinion were also filed, each examining the regulation in detail.[253]

Most significantly, the Chapter again deemed the expansive definition of "harm" improperly broad in light of the more narrow terms that accompany "harm" in the "take" definition.[254] None of the other terms found in the "take" definition extended to land use activities indirectly injuring wildlife. Rather, the other "take" terms like "harass," "hunt," "trap," "kill," or "pursue" all involved the direct application of physical force to the animal.[255] This principle of statutory construction, known as *nocitur a sociis*, demands that a general term appearing in a list not be given an overly expansive interpretation in light of the other terms that accompany it.[256] Thus, a term is properly defined by "the company it keeps."[257]

In a separate concurring opinion, Chief Circuit Judge Mikva rejected the Chapter's *nocitur a sociis* argument. The Chief Judge observed that other terms in the "take" definition, namely "harass," may be expanded in a manner limiting the use of private property.[258] Judge Mikva also found

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252. *See id.*

253. On the question of the Chapter's statutory challenge to the regulatory definition of "harm," the District of Columbia Circuit Court upheld the regulation per curiam with two concurrences by Chief Circuit Judge Mikva and Judge Williams, while Judge Sentelle dissented as to this portion of the opinion. *Id.* at 8-13.

254. *See Sweet Home II*, 1 F.3d at 10-11 (Mikva, C.J. and Williams, J., concurring separately).

255. *See id.* at 10.

256. *Id.* (citing Jarecki v. G.D. Searle & Co., 367 U.S. 303, 307 (1961)).

257. *Id.*

258. *Id.* In dismissing this argument, the Chief Judge reasoned that: "Despite appellants' suggestions, however, the other prohibitions can limit a private landowner's use of land in a rather broad manner. In particular, the prohibition against "harassment" can be used to suppress activities that are in no way intended to injure an endangered species." *Sweet Home II*, 1 F.3d at 10.

Chief Judge Mikva bolstered his position by pointing to a House of Representatives Report considering the "take" definition which "includes harassment, whether intentional or not. This would allow, for example, the Secretary to regulate or prohibit the activities of birdwatchers where the effect of those activities might disturb the birds and make it difficult for them to hatch or raise their young." *Id.* (quoting H.R. REP. NO. 412, *supra* note 154, at 11).

Indeed, Judge Mikva, in supporting his contention, points out that the definition of "harass" is nearly as broad as the definition of "harm," and yet, this definition has not been

strong support for his position from Congress' inclusion of "incidental take" exceptions in the 1982 amendments.[259]

In a separate concurrence, Judge Williams focused exclusively on the *nocitur a sociis* doctrine, finding the Chapter's claim much more persuasive than did Judge Mikva.[260] Judge Williams, while nearly willing to concede to this argument, nevertheless upheld the regulation as valid solely on the basis of the 1982 amendments to the ESA.[261] By allowing permits for the "incidental taking" of endangered species, Congress was implicitly admitting that such indirect takings were otherwise prohibited under section 9. But for this amendment, Judge Williams was fully prepared to join in Judge Sentelle's dissenting opinion, accepting the Chapter's *nocitur a sociis* analysis.

In his dissent, Judge Sentelle did accept this theory and called for the invalidation of the "harm" regulation.[262] Judge Sentelle likened the Secretary's reading of "harm" to an overzealous enforcement of a "No Smoking" ordinance:

> In my view, the fact that the farmer may be indirectly harming wildlife, and that the statutory definition includes "harm" helps the agency's cause but little. To analogize again to the smoking proposition, if Congress authorized the erection of "No Smoking" signs in public buildings and thereafter defined smoking to "include lighting, burning, puffing, inhaling, and otherwise harmfully employing the noxious nicotine-bearing tobacco products," some zealous bureau might well attempt to define smoking to include chewing and spitting under the rubric of "harmful use" in Congress' definition of smoking. . . . I do not think those creative regulators would be thinking reasonably if they should do so, nor do I think the regulators act reasonably in the present case.[263]

Judge Sentelle further based his decision on the notion that "harm" as defined violated the canon of statutory construction that directs a court to

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challenged. *Id.*

259. *Id.*

260. *Id.* at 11 (Williams, J., concurring).

261. *Sweet Home II*, 1 F.3d at 11. Judge Williams began his concurrence by stating: "I agree that the 'harm' regulation, 50 C.F.R. § 17.3, complies with the Endangered Species Act—but *only* because of the 1982 amendments to the ESA." *Id.*

262. *Id.* at 12 (Sentelle, J., dissenting).

263. *Id.*

presume the statute to read in a manner that avoids "surplusage."[264] While "harm" may be defined to include any "act which actually kills wildlife," including habitat modification, this definition, in Judge Sentelle's opinion, renders the other terms found in the "take" definition mere surplusage, since they all cover acts which actually kill wildlife.[265]

In *Sweet Home Chapter of Communities for a Great Oregon v. Babbit* (*Sweet Home III*), the Chapter petitioned the District of Columbia Circuit Court of Appeal for rehearing on the validity of the regulatory "harm" definition.[266] Without the benefit of further oral argument or additional briefs, the circuit court per Judge Williams granted the Chapter's petition for rehearing solely on the statutory challenge to the "harm" regulation.[267] Judge Sentelle's opinion prevailed on rehearing, and the decision was partially modified, holding the regulation invalid.[268]

The Secretary repeatedly argued that the Act, as originally adopted, supported this expansive reading of "harm" within the context of the "take" definition. In the alternative, the government pointed to the 1982 Amendments to the ESA and the inclusion of "incidental take" permits as evidence of Congress' implicit ratification of this definition. Neither contention was successful.[269]

Writing for the panel, Judge Williams immediately recognized as indisputable the inherent breadth of the term "harm."[270] The United States Supreme Court's opinion in *Lucas v. South Carolina Coastal Council* was cited as an illustration of the potential for an overly-broad reading of the term.[271] In *Lucas*, the Court, per Justice Scalia, engaged in a mental exercise attempting to discern the line between those regulations that actually prevent harm as opposed to merely conferring a benefit.[272] As a

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264. *Id.* at 13.

265. *Sweet Home II*, 1 F.3d at 13.

266. 17 F.3d 1463-64 (D.C. Cir. 1994).

267. *Id.*

268. *Id.* However, Chief Judge Mikva criticized the majority for granting this rehearing and for its reversal without the benefit of additional briefs or oral argument tailored to this single issue. *Id.* at 1473.

269. *Id.* at 1464.

270. *Sweet Home III*, 17 F.3d at 1464.

271. *Id.* (citing Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992)).

272. Too often, this "harm prevention" rationale is used to confer benefits upon the public at large in the guise of preventing use of private property that is noxious to adjacent property owners. Any given restraint may well be seen by some as mitigating a "harm" to the adjacent parcels or securing a benefit for them, depending on how the restraint is perceived and the importance of the use evaluated. *Lucas*, 505 U.S. at 1026-27 (citing

matter of pure linguistic possibility, Judge Williams pointed to *Lucas* for the proposition that the withholding of a benefit may easily be recast into the infliction of a harm:

> In one sense of the word, we "harm" the people of Somalia to the extent that we refrain from providing humanitarian aid, and we harm the people of Bosnia to the extent that we fail to stop "ethnic cleansing." By the same token, it is linguistically possible to read "harm" as referring to a landowner's withholding of the benefits of a habitat that is beneficial to a species. A farmer who harvests crops or trees on which a species may depend harms it in the sense of withdrawing a benefit; if the benefit withdrawn be important, then the Service's regulation sweeps up the farmer's decision.[273]

The panel's use of dicta extracted from Justice Scalia's *Lucas* opinion to fashion an interpretation of "harm" under the ESA suffers from changing context. The distinction between "benefit conferring" and "harm preventing" is a reference to the proper scope of the state's exercise of its inherent authority under the police power.[274] However, the case at bar involved the interpretation of a federal statute by an administrative agency. No police power concerns of the type dealt with in *Lucas* were implicated.

Notwithstanding the foregoing, Judge Williams perceived a need to limit the interpretation of "harm" and guard against its apparent propensity

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Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 49 (1964)).

273. *Sweet Home III*, 17 F.3d at 1464-65.

274. *Lucas*, 505 U.S. at 1024. The "prevention of harmful use" was merely an earlier statement of the police power justification necessary to sustain the regulation of the use of property in order to prevent the noxious use of private property: "One could say that imposing a servitude on Lucas' land is necessary in order to prevent his use of it from 'harming' South Carolina's ecological resources; or instead, in order to achieve the benefits of an ecological preserve." *Id.* Judge Williams, in his analysis, has very likely seized upon language found in footnote 11 of the *Lucas* opinion:

> In the present case, in fact, some of the "[South Carolina] legislature's 'findings'" to which the South Carolina Supreme Court purported to defer in characterizing the purpose of the Act as "harm preventing," seem to us phrased in "benefit conferring" language instead. For example, they describe the importance of a construction ban in enhancing "South Carolina's annual tourism industry revenue," *in "providing habitat for numerous species of plants and animals, several of which are threatened or endangered,"* and in "providing a natural healthy environment for the citizens of South Carolina to spend leisure time which serves their physical and mental well being . . . ."

Id. at 1024 n.11 (citations omitted) (alteration in original).

for misuse. This was accomplished by reading "harm" in light of the other terms that accompany it in the definition of "take" under section 9:

> The immediate context of the word ["harm"], however, argues strongly against any such broad reading. With the single exception of the word "harm," the words of the definition contemplate the perpetrator's direct application of force against the animal taken: "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect." The forbidden acts fit, in ordinary language, the basic model "A hit B."[275]

Any term that extends "take" beyond the direct application of physical force to the animal taken, in the panel's view, exceeds Congress' intentions. This includes the words "harm" and "harass."[276]

Judge Williams reasoned that all of the terms found in the "take" definition contemplate the direct application of physical force, though this force need not be exerted by a bullet or a blade.[277] Some of the terms like "pursue" do not actually result in injury, capture, or death, but are nevertheless included by reason of the definition's reference to "attempted takings."[278] Others, like "trap," may occur through the planned release of physical force upon the animal at a future time, even in the absence of the perpetrator.[279] Still, all instances of "taking" a species involve the application of physical force under the panel's view.

In the prior appellate decision, Judge Mikva had dismissed this argument relying on the term "harass."[280] Since another term in the "take" definition could encompass activities lacking any direct application of physical force, Judge Mikva determined that "harm" was not drawn in

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275. *Sweet Home III*, 17 F.3d at 1465.

276. *Id.*

277. *Id.*

278. *Id.* Recall that the definition of "take" includes "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, *or to attempt to engage in any such conduct.*" Pub. L. No. 93-205, § 16, 87 Stat. at 903 (current version at 16 U.S.C. § 1532(19)) (emphasis added).

279. *Sweet Home III*, 17 F.3d at 1465.

280. *Sweet Home II*, 1 F.3d at 10. In his concurring opinion, Chief Judge Mikva dismissed the Chapter's *nocitur a sociis* claim noting that "[d]espite appellants' suggestions, however, the other prohibitions can limit a private landowner's use of his land in a rather broad manner. In particular, the prohibition against "harassment" can be used to suppress activities that are in no way intended to injure an endangered species." *Id.* Judge Mikva went on to quote the Secretary's definition of harass, illustrating the similarities between the definition of "harass" and that of "harm." *Id.*

impermissibly broad terms.[281] This earlier statement was contradicted by Judge Williams who concluded that "harass" also involved physical force directed at the individual animal.[282] For example, aiming light or sound at an animal may constitute "harassment." This, too, is a physical force under the panel's analysis, as the particles and waves that comprise the light and sound constitute physical forces being propelled at the animal by the perpetrator.[283]

Judge Williams, in supporting his narrow construction of "harass," also referred to the restrictive meaning of the term as used in the Marine Mammal Protection Act ("MMPA").[284] In *United States v. Hayashi*,[285] the perpetrator was prosecuted and convicted for "taking" a marine mammal in violation of the MMPA.[286] Hayashi allegedly "harassed" a pod of porpoises by firing a rifle twice into the water behind the animals.[287] The Ninth Circuit Court of Appeals, using a *nocitur a sociis* argument, ascribed a much more restrictive meaning to "harass" under the MMPA's prohibition against "takings":

> The statute groups "harass" with "hunt," "capture," and "kill" as forms of prohibited "taking[s]." The latter three each involve direct, sustained, and significant intrusions upon the normal, life-sustaining activities of a marine mammal; killing is a direct and permanent intrusion, while hunting and capturing cause significant disruptions of a marine

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281. *Id.*

282. *Sweet Home III*, 17 F.3d at 1465.

283. *Id.*

284. *Id.* The MMPA includes an "anti-take" provision:

> There shall be a moratorium on the taking and importation of marine mammals and marine mammal products, commencing on the effective date of this chapter, during which time no permit may be issued for the taking of any marine mammal and no marine mammal or marine mammal product may be imported into the United States . . . .

16 U.S.C. § 1371(a) (1994). The MMPA in turn states that "[t]he term 'take' means to harass, hunt, capture, or kill, or attempt to harass, hunt, capture or kill any marine mammal." *Id.* § 1362(13) (1994).

285. 5 F.3d 1278 (9th Cir. 1993).

286. *Id.* at 1279. An April 22, 1991 information charged Hayashi with knowingly taking a marine mammal in violation of the MMPA, and Hayashi was subsequently convicted by a district court judge in July of that same year. *See id.* (providing a recount of the proceedings below).

287. Hayashi and his son, commercial tuna fishermen in Hawaii, were retrieving their catch when a pod of porpoises began to eat the captured tuna before they could be landed. Hoping to frighten the porpoises away from their catch, Hayashi fired two rifle shots into the water behind the animals. The shots did not hit the porpoises. *Id.*

> mammal's natural state. Consistent with these other terms, "harassment" to constitute a "taking" under the MMPA, must entail a similar level of direct and sustained intrusion.[288]

Like the term "harass" as used in the MMPA, the ESA's definition of "take" similarly aligns "harass" with other verbs lacking in the concept of habitat modification that all involve direct applications of force.[289]

The use of the MMPA in the panel's decision is problematic for two reasons. First, *Hayashi* was decided by the Ninth Circuit Court of Appeals—the very same court that decided the *Palila* cases. It would be logical to conclude that the appellate court saw something in the ESA that was not present in the MMPA. Nowhere in *Hayashi* was *Palila* ever questioned or reversed, *Hayashi* certainly cannot stand for that proposition.[290] Nevertheless, *Hayashi* has been used in precisely this manner by directly questioning the interpretation of the ESA in *Palila*.

More significantly, there is a substantial difference between the MMPA and the ESA. The MMPA is almost devoid of the congressional concerns for habitat loss that predominates the ESA.[291] The exigencies leading to the adoption of the two statutes are highly dissimilar. Congress, in enacting the ESA, ranked habitat loss or degradation as the primary cause of the extinction crisis.[292] Yet, the predominant threat to marine mammals

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288. *Id.* at 1282 (relying on Third Nat'l Bank in Nashville v. Impac Ltd., 432 U.S. 312, 322 (1977)). The Ninth Circuit Court of Appeals applies the "familiar principle" that words grouped together in a list should be given related meaning. *Hayashi*, 5 F.3d at 1282.

289. *See Sweet Home III*, 17 F.3d at 1465.

290. Nowhere in either the majority opinion or the dissent in *Hayashi* does the *Palila* line of cases even earn mention. However, many of the same arguments found in *Sweet Home V* are presented in the *Hayashi* opinion. *See generally* Babbit v. Sweet Home Chapter of Communities for a Great Or. (*Sweet Home V*), 115 S. Ct. 2407 (1995).

291. In contrast to the prominent position occupied by habitat in Congress' findings in the ESA, 16 U.S.C. § 1531(b), the MMPA contains only the following broad congressional finding:

> (2) such species and population stocks should not be permitted to diminish beyond the point at which they cease to be a significant functioning element in the ecosystem of which they are a part, and, consistent with this major objective, they should not be permitted to diminish below their optimum sustainable population. Further measures should be immediately taken to replenish any species or population stock which has already diminished below that population. In particular, efforts should be made to protect essential habitats including the rookeries, mating grounds, and areas of similar significance for each species of marine mammal from the adverse effect of man's actions. . . .

16 U.S.C. § 1361(2) (1994).

292. *See supra* note 20.

addressed by the MMPA was the hunting, capture, and commerce in those species.[293] Indeed, Congress, in enacting the MMPA, has arguably left habitat protection concerns to the states.[294]

In spite of these issues, Judge Williams was able to circumvent Judge Mikva's previous opinion, isolating "harm" from the rest of the terms defining "take."[295] Judge Williams concluded that the word is indeed drawn in impermissibly broad terms, deeming the application of *nocitur a sociis* necessary to avoid giving the term "harm" a breadth unintended by Congress.[296] Judge Williams, in turn, denounced the Secretary's construction of the "take" definition and its inclusion of habitat modification as a form of harm.[297] He also adopted the Chapter's previously rejected claim that Congress intended to address the habitat problem on private property through habitat acquisition and not through the prohibitions of section 9.[298] This construction of the Act, in his view, reflected Congress' desire to place the primary duty of conserving habitat with the federal government.[299] Thus, the Secretary's reading contravened this objective by assigning the duty to preserve habitat to private landowners.[300]

Regarding the effect of the 1982 Amendments to the ESA, Judge Williams repudiated his former concurring opinion, holding that the

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293. The MMPA is replete with provisions regarding the harvest and commerce of marine mammals and marine mammal products, while otherwise remaining silent on habitat concerns. *See generally* 16 U.S.C. §§ 1361-1406 (1994).

294. In discussing the scope of the MMPA's federal preemption of state law, the House issued the following explanation:

> [Subsection (b)] authorizes the Secretary [of Commerce] to develop effective working cooperative arrangements with state agencies and officials in order to carry out the purposes of this Act. *It is not the intention of this Committee to foreclose effective state programs and protective measures such as sanctuaries*; it is rather our intention to allow development of a unified integrated system of management for the benefit of these animals and *to encourage the states to take all actions which are consistent with this objective.*

H.R. REP. NO. 707, 92d Cong., 1st Sess. 28 (1971), *microformed on* CIS No. 71-H563-25 (Congressional Info. Serv.) (emphasis added).

295. Judge Mikva's disagreement with the Chapter's *nocitur a sociis* argument relies heavily on his conclusion that "harm" is not the only term in the "take" definition applying § 9 to habitat modification and other indirect impacts. *Sweet Home II*, 1 F.3d at 10.

296. *Sweet Home III*, 17 F.3d at 1465-66.

297. *Id.* at 1466.

298. *Id.* Judge Williams recognizes that the ESA addresses habitat preservation in two ways—through the federal land acquisition program of § 5 and through the § 7(a)(2) directive to federal agencies to avoid adverse impacts. *Id.*

299. *Id.* at 1466.

300. *Sweet Home III*, 17 F.3d at 1466.

inclusion of so-called "incidental take" permits, in amending section 10(a), could not stand for the proposition that Congress had ratified the broad reading of section 9, as advocated by *Palila* and by the Secretary's regulation.[301] Newly added section 10(a)(1)(B) of the ESA authorized the FWS to issue permits for "any taking otherwise prohibited" by section 9, if such taking is incidental to an otherwise lawful purpose.[302] It did not follow, Judge Williams reasoned, that such incidental takings included habitat modifications.[303]

An incensed Chief Circuit Judge Mikva denounced the panel's opinion, reasoning, and effect:

> The majority decision in this case is unfortunate. It scuttles a carefully conceived Fish and Wildlife Service ("FWS") regulation and creates a split in the circuits on an important statutory question. . . . What was

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301. *Id.* at 1467. Judge Williams recognizes two possible implications resulting from the 1982 amendments and ultimately rejects both:

> First, one might argue that one of the amendments so altered the context of the definition of "take" so as to render the Service's interpretation reasonable, or even, conceivable, to reflect express congressional adoption of that view. Second, one might argue that the process of amendment, which brought the Service's regulation and a judicial endorsement to the attention of a congressional subcommittee, constituted a ratification of the regulation. We reject both theories.

Id.

302. *Id.* (citing Pub. L. No. 93-205, § 16, 87 Stat. at 903 (current version at 16 U.S.C. § 1539(a)(1)(B)).

303. *Id.* Judge Williams rebuts previous claims that the 1982 amendments served as a ratification of *Palila* and the Secretary's regulation by focusing on the House Conference Reports relied upon by the Government in the principle case, and by the district court below:

> This provision is modeled after a *habitat conservation plan* that has been developed by three Northern California cities, the County of San Mateo, and private landowners and developers to provide for the conservation of the habitat of three endangered species and other unlisted species of concern within the San Bruno Mountain area of San Mateo County.
>
> This provision will measurably reduce conflicts under the Act and will provide the institutional framework to permit cooperation between the public and private sectors in the interest of endangered species and *habitat conservation.*
>
> The terms of this provision require a unique partnership between the public and private sectors in the interest of species and *habitat conservation.* . . .

Sweet Home III, 17 F.3d at 1468 (quoting H.R. CONF. REP. NO. 835, 97th Cong., 2d Sess. 30-31 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2807, 2871-72). The focus in these reports, reasoned Judge Williams, is on the flexibility of the relief available under this new section. However, this alone, under his view, does not imply an assumption that "takings" under § 9 encompass habitat degradation. *Id.*

> rightly considered good law in the opinion in this case issued last year, . . . is now "altered" on the basis of a confusing and misguided legal analysis that creates a needless conflict among the circuits. I dissent.[304]

In his detailed dissent, the Chief Judge's most telling criticism of the majority opinion is what he deemed the majority's apparent decision to "jettison" the *Chevron* standard.[305] Specifically, he charged that the majority opinion invalidated the Fish and Wildlife Services' definition because it was neither "clearly authorized by Congress" nor a reasonable and permissible interpretation of the Act. By shifting to the agency the burden of defending the reasonableness of its interpretations, Judge Mikva insisted that the panel's decision conflicted with *Chevron,* which defers to agency interpretations, unless proven unreasonable or contrary to clearly stated congressional intent. Indeed, as the Chief Judge recognized, deference is the whole point of the *Chevron* standard.[306] This position would ultimately prevail among the Justices of the United States Supreme Court.

In *Sweet Home Chapter of Communities for a Great Oregon v. Babbit* (*Sweet Home IV*), the Government quickly petitioned the appellate court for a rehearing, suggesting a rehearing en banc.[307] This petition was denied on August 12, 1994.[308] Over a dissent by Chief Judge Mikva and three other circuit judges, Judge Williams, writing for the panel, denied the petition.[309] Judge Williams concluded that the Secretary's definition of "harm" created serious overlap problems between the various provisions of the statute.[310] Specifically, section 7's prohibition against the adverse modification of critical habitat would be entirely superseded by the Secretary's ability to bar habitat modification under section 9.[311] Judge

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304. *Id.* at 1473 (Mikva, C.J., dissenting) (citation omitted).

305. *Id.*

306. *Id.* at 1467.

307. 30 F.3d 190 (D.C. Cir. 1994).

308. *Id.* at 191.

309. Chief Judge Mikva was joined by Circuit Judges Wald, Silberman, and Rogers in dissenting from the majority's denial of the hearing en banc. *Id.* at 191. Silberman filed a separate dissenting opinion. *Id.* at 194 (Silberman, J. dissenting).

310. *Id.* at 192.

311. *Sweet Home IV*, 30 F.3d at 192 (citing MICHAEL J. BEAN, THE EVOLUTION OF NATIONAL WILDLIFE LAW 397 (1977)).

Williams also leveled criticism at the regulation's apparent inclusion of omissions that actually kill or injure wildlife.[312]

I. *The Circuits Split—Harsh Reactions to* Sweet Home *in the Ninth Circuit Court of Appeals*

Chief Circuit Judge Mikva's predictions proved correct.[313] *Sweet Home*, as decided on rehearing, created a sharp split in position between the District of Columbia Circuit and the Ninth Circuit Court of Appeals, with the latter remaining true to the *Palila* line of cases.

Less than a month after the final rehearing of *Sweet Home*, the Ninth Circuit Court of Appeals decided *National Wildlife Federation v. Burlington Northern Railroad*.[314] In that case, the Ninth Circuit restated its *Palila II* decision, citing to it for authority.[315] *Sweet Home* was not mentioned.

A few months later, still in the Ninth Circuit Court of Appeals, the District Court for the Western District of Washington was asked to follow *Sweet Home* in lieu of *Palila II*.[316] This request was emphatically denied:

> The argument that *Sweet Home* is now binding in the Ninth Circuit, however, is incorrect. Differences among the circuits are common, and the District of Columbia Circuit has no power to overrule another circuit's decision. . . .
>
> Here, a contrary conclusion has already been reached by the court of appeals whose rulings are binding on this court. The *Palila* case, upholding the FWS regulation, is the law of the Ninth Circuit until and unless changed by the Supreme Court or by the circuit itself.
>
> It follows that the Secretaries did not act arbitrarily, or contrary to law, in concluding that *Sweet Home* requires no change in the [Record of Decision adopting the Management Plan]. If *Palila* ceases to be the law of the circuit, either because of Supreme Court review of *Sweet*

312. *Id.* at 191.

313. In dissenting to Judge Williams' reversal of the district court on rehearing, Chief Judge Mikva warned that the decision would create an unnecessary split in the circuits. *See Sweet Home III*, 17 F.3d at 1473 (Mikva, C.J., dissenting).

314. 23 F.3d 1508 (9th Cir. 1994). *Burlington Northern* involved several collisions between threatened grizzly bears and freight trains operated by the defendants. A series of accidental corn spills from railroad cars in northwestern Montana had attracted the bears to the tracks where seven grizzly bears were ultimately struck and killed by trains. *Id.* at 1509.

315. *Id.* at 1512-13.

316. Seattle Audobon Soc'y v. Lyons, 871 F. Supp. 1291, 1312 (W.D. Wash. 1994).

> *Home* or otherwise, the administrative decision under review will have to be reconsidered.[317]

This reaction was echoed a few months later in the Northern District of California in *Marbled Murrelet (Brachyramphus marmoratus) v. Pacific Lumber Co.*[318] The division among the federal circuits would only deepen.

IV. THE SUPREME COURT STEPS IN—*BABBIT V. SWEET HOME CHAPTER OF COMMUNITIES FOR A GREAT OREGON*

The United States Supreme Court, recognizing a growing split between the federal circuits, granted the Secretary's petition for a writ of certiorari and agreed to hear *Babbit v. Sweet Home Chapter of Communities for a Great Oregon* (*Sweet Home V*)[319] on January 6, 1995.[320] The Supreme Court reversed the District of Columbia Circuit Court in a six-to-three vote.[321] Justice Stevens, joined by Justices Kennedy, Souter, O'Connor, Ginsberg, and Breyer, upheld the Secretary's regulatory definition of "harm."[322] Justice O'Connor filed a separate concurring opinion, and Justice Scalia, joined by Justice Thomas, and Chief Justice Rehnquist dissented.[323]

Writing for the majority, Justice Stevens deemed certain initial assumptions to be appropriate in sufficiently framing the legal issue for the Court.[324] First, he assumed that the members of the Chapter had no wish to harm either the red-cockaded woodpecker or the Northern spotted owl.[325] The various economic interests challenging this regulation only desired a continuation of their logging activities.[326] Justice Stevens similarly assumed arguendo that these logging activities would nevertheless have the unintended effect of injuring or killing some members of these

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317. *Id.* at 1313.
318. 880 F. Supp. 1343, 1345 n.2 (N.D. Cal. 1995).
319. 115 S. Ct. 2407 (1995).
320. *Id.* at 2409.
321. *Id.*
322. *Id.*
323. *Id.* at 2418, 2421.
324. *Sweet Home V*, 115 S. Ct. at 2412. Justice Stevens attributed the propriety of these assumptions to the fact that this case was originally decided on cross motions for summary judgment. *Id.*
325. *Id.*
326. *Id.*

listed species through the degradation of their habitat.[327] He then reduced the controversy to its essence:

> Under [the Chapter's] view of the law, the Secretary's only means of forestalling that grave result [as described above]—even when the actor knows it is certain to occur—is to use his [section] 5 authority to purchase the lands on which the survival of the species depends. The Secretary, on the other hand, submits that the [section] 9 prohibition on takings, which Congress defined to include "harm," places on respondents a duty to avoid harm that habitat alteration will cause the birds unless respondents first obtain a permit pursuant to [section] 10.[328]

In selecting the latter view and holding the Secretary's interpretation of the ESA to be a reasonable one, Justice Stevens offered three principal justifications: the ordinary understanding of the terms used in defining "take," the ESA's broad objectives and purposes, and the 1982 Amendments all supported the Secretary's interpretation.[329]

A. *The Secretary's Interpretation is Supported by the Ordinary Usage of the Word "Harm"*

The *Sweet Home V* majority's first justification for upholding the Secretary's "harm" regulation was based on the "ordinary understanding" of the term. Both sides briefed the Court at length on the true meaning of "harm" as it appears in the ESA; the majority selected the interpretation that comported with the overall intent of the Act's purposes. The Chapter contended that the improper breadth of the Secretary's definition was owed in part to an abstract consideration of the term taken entirely out of context:

> When read in its statutory context, "take" necessarily involves action directed at wildlife. It thus cannot be stretched to cover the types of ordinary land use activities of concern to Respondents, such as cutting trees, clearing brush, or constructing or maintaining roads. . . .
>
> In so concluding, the court below recognized, and we concede, that the word "harm," wrenched from its context and considered abstractly, is a word of extraordinary elasticity, arguably capable of the meaning FWS attributes to it.[330]

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327. *Id.*
328. *Sweet Home V*, 115 S. Ct. at 2412.
329. *Id.* at 2412-23.
330. Brief for Respondents at 9, *Babbit* (No. 94-859).

The Chapter reasoned that, when read out of context from the rest of the ESA "take" definition, "harm" could and was being used to prohibit any action that might produce any type of negative impact on a listed animal.[331] This, the Chapter argued, permitted the Secretary to refer to acts or omissions that deprived wildlife of some environmental benefit, such as a suitable habitat, as "harm" to the species.[332] Moreover, the Secretary's interpretation was not limited to activity or conduct purposefully directed at injuring in a manner to which the term "harm" normally implies.[333] Thus, by focusing exclusively on the ultimate effect on the animal, while simultaneously disregarding the character of the conduct prohibited under section 9, the Chapter concluded that the regulation easily encompassed many normal activities that are neither directed at wildlife nor cause any concrete injury to that wildlife.[334] This, the Chapter insisted, countermanded section 9 as written.[335]

Conversely, the Government argued that the Secretary's interpretation did comport with "ordinary usage":

> In ordinary usage, the word "harm" in its verb form, means "to cause hurt or damage to: INJURE," or "to do or cause harm to: injure; damage; hurt[.]" This common understanding of the word unquestionably encompasses an act that actually "kills or injures wildlife"—the

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331. In particular, the Chapter took issue with the fact that the regulation does not demand "actual physical injury" to an identifiable animal. *Id.* at 8. Rather, "harm" may consist of the impairment of essential behavioral patterns resulting from significant habitat modification. *See* 50 C.F.R. § 17.3. Given the uncertainty in evaluating whether a particular habitat modification will significantly impair essential behavioral patterns, the Chapter contended that the "harm" regulation as written and as enforced by the Secretary has resulted in an improperly pervasive land use control. *See* Brief for Respondents at 8 n.9, *Babbit* (No. 94-859).

332. Brief for Respondents at 9, *Babbit* (No. 94-859). This argument is, of course, the analysis used by Judge Williams in the court below. *See Sweet Home III*, 17 F.3d at 1464; *see also* text accompanying notes 253-57.

333. Brief for Respondents at 9, *Babbit* (No. 94-859). The Chapter insisted that the term "harm" generally connotes a purposeful effort to injure:

> The command, "Don't harm that child!", for example, would not naturally be thought of as a directive to restrict the child's television-watching or candy intake, even though either in excess would cause the child "harm." In active voice, or in a prohibitory sense—as in ESA [§§] 3(19) and 9(a)(1)—"harm" is commonly understood to convey a sense of purposeful effort and direct, concrete injury.

Id.

334. *Id.* at 7.

335. *Id.*

> basic definition of "harm" in the first sentence of 50 C.F.R. [section] 17.3.[336]

Thus, the Government asserted that the basic definition of "harm," that is, conduct that "actually kills or injures wildlife," is a sound one supported by the word's ordinary usage.[337] This basic definition, the Government noted, was not what was attacked in the lower courts. Rather, the Chapter has challenged the validity of the second sentence of the regulation, which specifies that "harm" may include those activities that, while satisfying the original definition by actually killing or injuring wildlife, nevertheless occur through significant habitat modifications that impair essential behavioral patterns such as breeding, feeding, and sheltering.[338] This second sentence, in the Secretary's view "merely elaborates on the basic definition in the first sentence by explaining its application in one particular context."[339]

The Secretary's view ultimately prevailed on Justice Stevens and the majority in *Sweet Home V*. First, the majority adopted the Secretary's "ordinary usage" analysis in rejecting the Chapter's assertions that "harm" must be limited to "purposeful, direct" injury.[340] Justice Stevens could find no reference in the common definition of the word "harm" suggesting in any way that only direct and willful action leading to injury may constitute "harm."[341] Additionally, the holding pointed to the structure of the ESA's "take" definition in an apparent response to the Chapter's charge that the term's elastic definition is owed to the Secretary's attempt to read

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336. Brief for Petitioners at 20-21, *Babbit* (No. 94-859) (citations omitted) (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1034 (1986); RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 873 (2d ed. 1987)).

337. *Id.* at 21.

338. *Id.* (citing 50 C.F.R. § 17.3). The Government subdivided the "harm" regulation into two distinct components. The first component is the basic definition of "harm" as expressed in the initial sentence of the regulation: "Harm in the definition of 'take' in the Act means an act which actually kills or injures wildlife." 50 C.F.R. § 17.3 (1994). The second component of the regulation is the explanatory sentence which comprises the remainder of the Secretary's definition: "Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." *Id.* The Secretary contended that, given the soundness of the basic definition, this second sentence is also valid, since it includes only those significant habitat modifications that meet the basic definition—those that actually kill or injure wildlife. Brief for Petitioner at 21, *Babbit* (No. 94-859).

339. Brief for Respondents at 21, *Babbit* (No. 94-859).

340. *Sweet Home V*, 115 S. Ct. at 2413.

341. *Id.*

the term out of its context in the Act. To admit the Chapter's contentions and limit "harm" to direct injuries only would, in the majority's opinion, deprive the term of any independent meaning and reduce "harm" to little more than statutory surplusage.[342] The opinion concluded that a reluctance to reach such a result supported the reasonableness of the Secretary's interpretation.[343]

B. *The Broad Purpose of the ESA Supports the Reasonableness of the Secretary's Interpretation of "Harm"*

The second justification offered by the majority in upholding the Secretary's interpretation as reasonable was the broad objectives Congress apparently sought to realize through the ESA:

> Second, the broad purpose of the ESA supports the Secretary's decision to extend protection against activities that cause the precise harms Congress enacted the statute to avoid. In *TVA v. Hill*, we described the Act as "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation."[344]

Thus, the Act and its legislative history are replete with references to habitat protection and the role played by the threat of habitat loss in the ongoing extinction crisis.[345]

These sentiments echoed the Secretary's position that a contrary interpretation of "harm," limiting the term to "physical blows to the body of individual animals," would defeat Congress' wishes.[346] Pointing to an oft-quoted passage from the legislative history of the Act, the Secretary pointed out that it was Congress' intent that "take" be "defined . . . in the broadest possible manner to include every conceivable way in which a person could 'take' or attempt to 'take' any fish or wildlife."[347]

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342. *Id.* Unless "harm" is read to encompass indirect as well as direct injury, Justice Stevens concluded that the word would have no meaning that is not mere duplication of the other terms used to define "take" in § 3(19). *Id.*

343. *Id.* (citing Mackey v. Lanier Collection Agency & Serv., Inc., 486 U.S. 825, 837 n.11 (1988)).

344. *Sweet Home V*, 115 S. Ct. at 2413 (citation omitted).

345. *See id.*

346. Brief for Petitioners at 27, *Babbit* (No. 94-859).

347. *Id.* (citing S. REP. NO. 307, *supra* note 3, at 7, *reprinted in* 1973 U.S.C.C.A.N. at 2995).

By contrast, the Chapter insisted that the Secretary's reading of "harm" countermanded the plain intent of Congress:

> If Congress had meant "harm" to have such significance, it would have made the operative term in the statute "harm" instead of "take"—or found some other way to highlight ESA [section] 9's intended breadth. Instead, Congress cast the section more narrowly, as a prohibition on "take," and quietly placed the word "harm" in a list alongside nine other terms in the definitional section.[348]

If Congress had wished to reach the use of private property through section 9's "take" provision, the Chapter vigorously asserted that "it would have addressed the matter forthrightly."[349] Given Congress' keen awareness of the threat of habitat loss, the absence of any explicit reference to habitat in section 9 was a significant fact for the Chapter, for it served only to emphasize Congress' conscious decision to address habitat loss elsewhere in the Act.[350]

The Secretary's view ultimately prevailed upon the majority in *Sweet Home V*.[351] Harkening back to the Court's 1978 opinion in *TVA v. Hill*, the majority underscored the comprehensive nature of the Act's protective goals:

> Both our holding and the language in our opinion [in *TVA v. Hill*] stressed the importance of the statutory policy. "The plain intent of Congress in enacting this statute," we recognized, "was to halt and reverse the trend toward species extinction, whatever the cost. This is reflected not only in the stated policies of the Act, but in literally every section of the statute."[352]

Section 9 was no different. Although the Court in *TVA v. Hill* dealt primarily with the prohibitions of section 7, *Hill* took particular note of the Secretary's inclusion of habitat degradation in its definition of "harm" under section 9.[353]

The Chapter's arguments for the impermissibility of the Secretary's definition failed to persuade the Court. The majority was instead swayed

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348. Brief for Respondents at 22, *Babbit* (No. 94-859) (citation omitted).
349. *Id.*
350. *Id.* at 22-23.
351. *Sweet Home V*, 115 S. Ct. at 2407.
352. *Id.* at 2413 (citing Tennessee Valley Auth. v. Hill, 437 U.S. 153, 184 (1978)).
353. *Hill*, 437 U.S. at 184-85; *see also supra* text accompanying notes 41-47.

by the comprehensive protection provided under the ESA, finding the Secretary's interpretation permissible in light of this protection.

C. *The 1982 Amendments to the ESA Support the Reasonableness of the Secretary's Interpretation*

Finally, the Court examined the 1982 amendments to the ESA to bolster its reading of the Act.[354] Added to the ESA in 1982, section 10(a)(1)(B) authorized the Secretary to issue permits allowing "takings" otherwise prohibited under section 9 so long as "such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity."[355] The majority stated that this additional exemption to section 9's prohibitions, "strongly suggests that Congress understood [section] 9(a)(1)(B) to prohibit indirect as well as deliberate takings."[356]

The Chapter contended that "incidental" take permits were designed with inadvertent or accidental takings in mind.[357] Absent such a provision, a trapper who intends to capture an unlisted species, but inadvertently traps and injures a listed one, would be guilty of violating section 9.[358] A commercial fishermen whose otherwise lawful trawl nets intended for shrimp inadvertently ensnares an endangered sea turtle would similarly violate section 9 without this provision.[359] "Incidental" takings, as understood by the Chapter, must only be those actions directed at unprotected wildlife, which accidentally "take" a listed species.[360]

The Secretary's view on the true effect of the "incidental" take permit stood at variance with the Chapter's position. As the House Merchant Marine and Fisheries Committee Report accompanying the amendments revealed:

> [Section 10(a)] addresses the concerns of private landowners who are faced with having otherwise lawful actions not requiring federal permits prevented by the Section 9 prohibitions against taking.
>
> Section 10(a), as amended, would allow the Secretary to permit any taking otherwise prohibited by Section 9(a)(1)(B) if the taking is

354. *Sweet Home V*, 115 S. Ct. at 2414.

355. Pub. L. No. 97-304, § 2, 96 Stat. at 1411 (current version at 16 U.S.C. § 1539(a)(1)(B)). For a discussion in greater detail, see *supra* text accompanying notes 80-89.

356. *Sweet Home V*, 115 S. Ct. at 2414.

357. Brief for Respondents at 41-42, *Babbit* (No. 94-859)

358. *Id.*

359. *Id.*

360. *Id.*

> incidental to, and not the purpose of, an otherwise lawful activity. By use of the word "incidental" the Committee intends to cover situations in which it is known that a taking will occur if the other activity is engaged in but such a taking is incidental to, and not the purpose of, the activity.[361]

Thus, Congress' intentions, as construed by the Secretary, were to encompass more than simply accidental or inadvertent violations of section 9. Instead, the Secretary was authorized to exempt certain lawful activities from section 9 in instances where an unlawful taking was expected ahead of time, and where such an effect could only be minimized rather than avoided.[362] Implicit in this scheme, however, is the notion that an incidental take, to every extent practical, will be minimized and remedied immediately.[363]

This position was echoed by the *Sweet Home V* majority. By requiring the applicant to prepare a "conservation plan" identifying how he plans to carry forward with his proposed activity while minimizing the impact on the affected species, Justice Stevens concluded that Congress had foreseeable and anticipated impacts in mind when passing this provision.[364]

The Chapter's construction of section 10(a)(1)(B)'s "incidental" take permit is "logically" consistent with their highly limited reading of "harm" under section 9.[365] Yet, reading both constructions together, the Chapter's position is seen as nothing more than a rationalization resting on a creative assumption. Once permits are obtained to alter a natural area, the Chapter insisted that no "taking" could occur so long as the activity permitted is in compliance with the permit. Their argument assumes that any particular pine tree in which a red-cockaded woodpecker is seen nesting, resting, feeding, or breeding, or any other of a host of biological gerunds, will be left undisturbed. The key point advanced was that the woodpecker was not the target of the logging activity, and no individual woodpecker nest or

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361. H.R. REP. NO. 567, 97th Cong., 2d Sess. 31 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2807, 2831.

362. Brief for Petitioners at 34, *Babbit* (No. 94-859) (quoting H.R. REP. NO. 567, *supra* note 361, at 31, *reprinted in* 1982 U.S.C.C.A.N. at 2831).

363. *See, e.g.*, 50 C.F.R. § 17.32(b).

364. *Sweet Home V*, 115 S. Ct. at 2414.

365. Succinctly put, the Chapter reads "harm" as limited to purposeful and deliberate actions directing physical force against a listed species. *See* Brief for Respondents at 9, *Babbit* (No. 94-859). The Chapter's reading of "harm" is reminiscent of the intent requirement imposed on § 9 by the *Froehlke* decision issued by the Eighth Circuit Court of Appeals in 1976. *Id.* at 18 n.21.

respite was deliberately targeted. Therefore, no individual birds were deliberately killed. This ignores reality. The incidental take permit, according to the Chapter's argument, is needed only in the event that an "accident" occurs—that a good faith observation failed to reveal a woodpecker which, consequently, was destroyed.

The majority, according to Justice Stevens, rejected this argument as "absurd."[366] The argument is nothing more than a rationalism based on a false premise. What the Chapter virtually willfully ignored is the known biology of the impacted species; the animal does not live out its life statically, sitting on just one limb, feeding in just one tree, or sheltering in a single roost, while its habitat is destroyed.[367] Populations are dynamic. The animal has been directly "harmed," in that when the logging activities have ended for the day, its ability to live has been directly hampered through the impairment of essential behavior.[368] The static argument fails in the dynamic reality of the system being impacted by the otherwise "permitted" or "lawful" activity.

Accordingly, the Chapter's insistence on narrowing section 9 to direct and purposeful actions taken against a member of a listed species was, in the Court's view, reduced to an "absurdity" by the inclusion of Section 10(a)(1)(B).[369] Under the Chapter's interpretation, an applicant could request an "incidental" take permit to skirt liability under section 9 for direct and deliberate action taken against a listed species. Yet, no one could seriously request a permit for this bizarre purpose.[370] Consequentially, the majority perceived the need to give "real and substantial effect" to Congress' amendments. The Chapter's reading of the 1982 amendments was, therefore, completely rejected.

D. *Flaws in the Appellate Court's Opinion*

Having found the Secretary's regulation consistent with the ESA, the Court identified three principal errors in the circuit court's opinion.[371]

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366. *Sweet Home V*, 115 S. Ct. at 2414.

367. This criticism was more clearly expressed by Justice O'Connor in her separate concurrence with the majority's decision. *Id.* at 2419 (O'Connor, J. concurring).

368. *Id.*

369. *Id.*

370. *Id.*

371. *Sweet Home V*, 115 S. Ct. at 2414-15. It should remain clear that the opinion to which the majority now refers is that issued by the District of Columbia Circuit Court of Appeals by Judge Williams upon rehearing. *See Sweet Home III*, 17 F.3d at 1463.

First, the holding rejects the circuit court's initial premise which construed the Secretary's definition of "harm" as exceeding the scope of every other term found in the "take" definition.[372] The majority concluded that "harass," "pursue," "wound," and "kill" all encompass conduct and impacts that do not necessitate the direct application of physical force to the animal.[373]

Elsewhere in the majority opinion, Stevens relied on the Act's legislative history in determining the intended breadth of the definition of "harass" was fairly expansive.[374] Accordingly, the circuit court's use of *United States v. Hayashi* was considered improper.[375]

The second error committed by the appellate court was the majority's effort to incorporate an intent requirement directly into the terms defining "take."[376] Indeed, the circuit court's interpretation of the "take" prohibition was somewhat reminiscent of the stringent intent requirement placed on section 9 in *Sierra Club v. Froehlke*.[377] Such a construction would stand in variance with ESA section 11, under which an act which is merely "knowing" will be enough to prove a violation.[378] Congress added

372. *Sweet Home V*, 115 S. Ct. at 2415.

373. *Id.*

374. *Id.* at 2416.

375. *Id.* at 2415 n.16. Justice Stevens finds the appellate court's reliance on *Hayashi* misplaced. First, *Hayashi* dealt with a single application of the MMPA's "take" prohibition, whereas the present litigation had been presented as a facial challenge to the Secretary's regulation. Moreover, *Hayashi* construed the term "harass" under the MMPA's "take" definition, while *Sweet Home* dealt with "harm," a term that does not even appear in the MMPA's "take" provision. Finally, *Hayashi* was decided by the same court that decided the *Palila* line of cases. Yet, "neither the *Hayashi* majority nor the dissent saw any need to distinguish or even to cite Palila II." *Id.*

376. *Sweet Home V*, 115 S. Ct. at 2415.

377. *See supra* note 27. As discussed above, this specific intent requirement countermands the clear meaning of the Act. United States v. St. Onge, 676 F. Supp. 1044 (D. Mont. 1988). This is strikingly similar to the circuit court's conclusions in *Sweet Home.* Only deliberate activities directed at the animal will suffice under this reading. *See generally Sweet Home III*, 17 F.3d at 1463.

378. *Sweet Home V*, 115 S. Ct. at 2415 (relying on Pub. L. No. 93-205, § 11, 87 Stat. at 897-98 (current version at 16 U.S.C. § 1540(a), (b) (1994)). Section 11(a), regarding civil penalties, encompasses "[a]ny person who knowingly violates . . . any provision of this Act . . . ." Pub. L. No. 93-205, § 11(a), 87 Stat. at 897 (current version at 16 U.S.C. § 1540(a) (1994)). Similarly, with reference to criminal penalties, § 11(b) also applies to anyone who "knowingly" violates the Act. *Id.* § 11(b), 87 Stat. at 898 (current version at 16 U.S.C. § 1540(b)).

"knowingly" in place of "willfully" to make criminal violations of the Act general rather than specific intent crimes.[379]

Finally, the Court concluded that the circuit court erred in applying the *nocitur a sociis* doctrine in such a manner as to reduce "harm" to mere surplusage, denying the term any independent meaning.[380]

> The statutory context of "harm" suggests that Congress meant that term to serve a particular function in the ESA, consistent with but distinct from the functions of the other verbs used to define "take." The Secretary's interpretation of "harm" to include indirectly injuring endangered animals through habitat modifications permissibly interprets "harm" to have a "character of its own not to be submerged by its association."[381]

This is a vindication of the views of Chief Circuit Judge Mikva who, on rehearing, found himself in the minority on this issue.

E. *Addressing the Chapter's Other Arguments*

The remainder of the majority's opinion was devoted to refuting other arguments used by the Chapter and adopted by the District of Columbia Circuit. First, the Chapter asserted that such a broad reading of "take" created more than minor overlaps in the statute, as the Secretary claimed, and in fact threatened to subsume habitat protection measures found in section 7 and section 5 if given such an expansive reading.[382] The Government, now able to limit the use of private land under the auspices of section 9, would supposedly lack any incentive to purchase land under section 5.[383] Similarly, section 7, directing federal agencies to avoid "jeopardizing" the continued existence of a listed species, or adversely modifying its critical habitat would, in the Chapter's view, be swallowed up by the prohibition against "takings" which applies to "any person," including the federal government.[384] The Court found neither claim persuasive:

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379. *Sweet Home V*, 115 S. Ct. at 2412 n.9 (citing H.R. CONF. REP. NO. 1804, 95th Cong., 2d Sess. 5 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9484, 9493).

380. *Id.* at 2415.

381. *Id.* (citing Russell Motor Car Co. v. United States, 261 U.S. 514, 519 (1923)).

382. Brief for Respondents at 23-25, *Babbit* (No. 94-859).

383. *Id.* at 24. Given the expansive application of § 9, the Chapter concluded that there would be no incentive for the Service to purchase valuable habitat on private land (or conservation easements), since the same goals could be more cheaply accomplished simply by limiting the activities conducted on that land. *Id.*

384. *Id.* at 25.

> Purchasing habitat lands may well cost the Government less in many circumstances than pursuing civil or criminal penalties. In addition, the [section] 5 procedure allows 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. The Secretary may also find the [section] 5 authority useful for preventing modification of land that is not yet but may in the future become habitat for an endangered or threatened species . . . . 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."[385]

Thus, any overlap between sections 5 and 7, and section 9 was deemed "unexceptional," and merely a reflection of the broad purposes of the Act as acknowledged in the *Hill* case.[386]

The Chapter's analysis of the Act's legislative history was refuted by the *Sweet Home* Court. The majority pointed to this history, including the 1982 amendments, as "further support" of the Secretary's permissible interpretation of the statute.[387] Congress intended "take" to be defined as broadly as possible, and this was soundly reflected in the ESA's legislative history. Adding the obviously broad term "harm" was a conscious decision by Congress to "help to achieve the purposes of the bill."[388] The 1982 amendments only bolstered this reading of the Act.[389]

Thus, the ESA delegated broad administrative authority to the Secretary to interpret and enforce the provisions of the Act, which received a significant amount of deference by the Court.[390] Accordingly, the regulation was upheld and the district court's decision reinstated.

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385. *Sweet Home V*, 115 S. Ct. at 2415.

386. *Id.* at 2415-16.

387. *Id.* at 2416.

388. *Id.* at 2416-17. In examining the legislative history of the Act, Justice Stevens noted that a floor amendment in the Senate introducing "harm" to the bill was seen as a step to "help to achieve the purposes of the bill." *Id.* at 2417 (quoting 119 CONG. REC. 25,683 (1973)).

389. *Sweet Home V*, 115 S. Ct. at 2417. The Court pointed to statements by Congress indicating that § 10 was aimed toward the limited permitting of anticipated and foreseeable "takes" that could not be avoided even after implementation of a habitat conservation plan. *Id.*

390. *Id.* at 2418.

F. *Justice O'Connor's Concurrence*

Justice O'Connor joined the *Sweet Home V* majority in holding the Secretary's "harm" regulation valid.[391] However, while concurring with the majority's basic decision, Justice O'Connor's agreement was qualified in two important respects. First, the regulation defining "harm" must be applied only to significant habitat modifications resulting in actual, rather than speculative or hypothetical, death or injury to identifiable endangered or threatened animals.[392] Second, the regulation must be applied in light of ordinary notions of proximate cause and foreseeability.[393] These two limitations were, in her view, clear on the face of the "harm" regulation, and contrary to the views of the dissent, she found the regulation inherently sound.[394] Both Justice O'Connor and the dissenters appeared to agree that the "harm" regulation has been improperly applied in the past.[395] The essential difference between the two is in the placement of the blame for these improper applications of section 9. The dissent, through Justice Scalia, ascribed these instances of section 9's improper use to flaws inherent in the Secretary's regulation itself. Justice O'Connor by contrast blamed a wrongly decided *Palila II* decision for those erroneous applications of section 9 ridiculed by the dissent.[396] Indeed, she acknowledged that many

391. *Id.* (O'Connor, J., concurring).

392. *Id.*

393. *Sweet Home V*, 115 S. Ct. at 2418.

394. *Id.* Justice O'Connor, unlike the dissenters, saw "no need to strike a regulation on a facial challenge out of concern that it is susceptible of erroneous application, however, and because there are many habitat-related circumstances in which the regulation might validly apply . . . ." The essential difference between the concurrence and the dissent is that the dissent found the regulation fatally flawed, while Justice O'Connor found it poorly interpreted by the courts. *Id.*

395. *Id.*

396. *Id.* Justice O'Connor concluded that *Palila II* was wrongly decided because, in her opinion, the case failed to present any proximate cause between the grazing activities of the sheep and actual harm to the palila. *Sweet Home V*, 115 S. Ct. at 2420. However, as she noted:

> This case, of course, [comes before the Court] as a facial challenge. [The Court is] charged with deciding whether the regulation on its face exceeds the agency's statutory mandate. I have identified at least one application of the regulation (*Palila II*) that is, in my view, inconsistent with the regulation's *own* limitations. That misapplication does not, however, call into question the validity of the regulation itself.

Id. at 2421.

circumstances of habitat degradation exist where the regulation may validly apply.[397]

Justice O'Connor's initial criticism rests on the *Palila II* decision's extension of the "harm" definition, which interpreted the actual death or injury requirement to encompass not just individual animals, but injury to the species as a whole.[398] On this point, she and the dissenters are in agreement. Admittedly, the death of an individual animal always "injures" a population to the extent that it has been reduced in size or numbers. Justice O'Connor opines that such an extension, as accomplished by *Palila II*, is inconsistent with the regulation's actual injury or death requirement.[399] The *Sweet Home V* dissent, on the other hand, attributed this extension to a defect inherent in the regulation itself. Seizing on the regulation's use of the word "breeding," Justice Scalia concluded that the regulation facially prohibits significant habitat modifications that actually kill or injure potential or hypothetical animals. He argues that impairment of breeding activity fails to injure any living animal; therefore, the regulation has been improperly written if the prevention of injuries to living populations was the Service's goal.[400]

However, Justice O'Connor was apparently unable to accept Justice Scalia's reasoning that an impairment of breeding activities harms no living animals. In her view, impairment is injury; impairment of essential physical functions such as breeding which renders the animal biologically obsolete amounts to actual injury under the regulation.[401] She concluded that

397. *Id.* at 2418.

398. *Id.*

399. Justice O'Connor observes that "the regulation is limited by its terms to actions that actually kill or injure individual animals." *Id.* This is in clear variance with the *Palila II* opinion which held that the regulation was properly interpreted to include habitat modification that could drive the palila into extinction. Palila (Loxiodes bailleui) v. Hawaii Dep't of Land & Natural Resources (*Palila II Appeal*), 852 F.2d 1106, 1108 (9th Cir. 1988). This reading of the Act was deemed consistent with the overall purposes of the ESA "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved . . . ." *Id.* (quoting Pub. L. No. 93-205, § 2(5)(b), 87 Stat. at 884 (current version at 16 U.S.C. § 1531(b)). The overall purposes of the Act were served, held the court, because the palila's threatened ecosystem was conserved. *Id.* No evidence of death to individual palila birds was produced. Moreover, the district court explicitly held that no such proof was required to satisfy the regulation. Palila (Loxiodes bailleui) v. Hawaii Dep't of Land & Natural Resources (*Palila II*), 649 F. Supp. 1070, 1077 (D. Haw. 1986).

400. *See Sweet Home V*, 115 S. Ct. at 2422 (Scalia, J., dissenting).

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

interference with breeding and other essential behavioral patterns could result in a host of actual injuries:

> 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 behaviors, actually kills or injures an animal protected by the Act, it causes "harm" within the meaning of the regulation.[402]

Justice O'Connor would require that a demonstrable injury to identifiable animals be shown, and this actual injury must be distinguished from the potential, the speculative and the hypothetical.[403] Activities degrading an endangered species' potential habitat would be insufficient.[404] Similarly, the inability to produce evidence of dead or injured animals would seem to fall short under this reading of the Secretary's regulation.[405] Yet, both circumstances satisfied the regulation under *Palila II*.

Justice O'Connor directly questioned the correctness of *Palila II* on this point. Injury to the species as a whole, as opposed to an individual member, and injury to the species' recovery, have both been called into doubt by her position on the regulation's actual death or injury requirement. Her strict reading of the actual death or injury requirement overlooks the plain goals of the ESA to conserve species and their ecosystems.[406] The *Palila II* court's focus on injuries to the collective species links section 9

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402. *Id.*

403. *Id.* at 2418. Justice O'Connor's first qualification to the regulation was a showing of actual death to identifiable protected animals. *Id.*

404. On this point, Justice O'Connor observed:

> That a protected animal could have eaten the leaves of a fallen tree, or could, perhaps, have fruitfully multiplied in its branches is not sufficient under the regulation. Instead, as the commentary [on revising the "harm" definition] reflects, the regulation requires demonstrable effect (*i.e.*, actual injury or death) on actual, individual members of the protected species.

Sweet Home V, 115 S. Ct. at 2419.

405. *Id.*

406. The ESA's stated purpose is "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered *species* and threatened species . . . ." Pub. L. No. 93-205, § 2(5)(b), 87 Stat. at 884 (current version at 16 U.S.C. § 1531(b)).

with the stated overall purpose of the ESA.[407] A contrary interpretation would permit activities that frustrate this overall purpose.[408] The court in *Palila II* recognized this and properly placed the burden of demonstrating actual death or injury on the plaintiffs.[409] An extensive body of scientific data pointed to one, and only one cause for this—the browsing activities of the offending sheep. For the *Palila II* court, this well-founded body of unrefuted data obviated any need to produce actual dead or starving palila birds, but that is not to say that proof of dead animals will not suffice. The burden of demonstrating actual death or injury may be satisfied in any number of ways, and if empirical data is presented establishing an adverse impact to the species, the regulation's actual death or injury requirement is satisfied.[410] Actual injury to the palila as a species was the ultimate result

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407. "The plain intent of Congress in enacting [the ESA] was to halt and reverse the trend toward species extinction, whatever the cost. This is reflected not only in the stated policies of the Act, but in literally every section of the statute." Tennessee Valley Auth. v. Hill, 437 U.S. 153, 184 (1978). *See* ROHLF, *supra* note 3, at 65 (observing that *Palila II* links § 9 with the ESA's overall purpose).

408. *See* Palila (Loxiodes bailleui) v. Hawaii Dep't of Land & Natural Resources (*Palila II*), 649 F. Supp. 1070, 1078 (D. Haw. 1986) (observing that continued destruction of the forest would have driven the bird into extinction).

409. *Id.* at 1075, 1077.

410. The Service's comments on the 1981 amendment to the "harm" regulation support this interpretation. Nowhere in the comments did the Service suggest that "actual death or injury" required proof of death or injury to individual animals. The Service contended that "[t]he final definition adds the word "actually" before the words "kills or injures" in response to comments requesting this addition to clarify that a standard of *actual, adverse effects* applies to section 9 takings." 45 Fed. Reg. 54,750 (1981) (emphasis added). Moreover, the Service responded to one comment arguing that habitat modification alone amounted to a "taking" by noting that the commenter's objection was unclear because the examples and discussion in the comment repeatedly referred to "*injury and harmful effects on the species* which can be caused by habitat modification." *Id.* (emphasis added). Justice O'Connor now asserts that the inclusion of "actually" has imposed a more stringent evidentiary requirement. On that point she is correct. However, the opinion places more emphasis on the word "actually" than the Service has intended. As the Service has noted:

> The purpose of redefinition was to preclude claims of a Section 9 taking for habitat modification alone without any attendant death or injury to the protected wildlife. Death or injury, however, may be caused by impairment of essential behavioral patterns which can have significant and permanent effects on a listed species. *Many commenters suggested that the word "actually" be reinserted in the definition to bulwark the need for proven injury to a species due to a party's actions. This has been done.*

Id. at 54,748-49 (emphasis added). "Actually" was inserted to preserve a distinction between habitat modification alone (which is not a "taking") and habitat modification that has a real impact on the species. As *Palila II* observes, proven injury to identifiable animals is one of

of numerous impairments of essential behavioral characteristics of its constituent members. Similarly, that the palila were unable to increase their numbers was a direct result of increased casualties of individual birds. This fact frustrated the achievement of the stated goal of conserving and recovering the palila.[411]

Justice O'Connor also determined that liability under the "harm" regulation must be conditioned on a showing of proximate cause and notions of ordinary foreseeability.[412] The decision on whether sections 11 and 9 erect a strict liability regime, as the dissent argued, could wait for another time.[413] Liability, strict or not, does not dispense with ordinary principles of causation.[414] Justice O'Connor could not discern any intent by Congress, in describing the ESA's penalties in section 11, to do away with traditional principles of proximate causation.[415] In the absence of such an abrogation by Congress, she asserts that section 9 violations must be established using principles of proximate causation borrowed from common law tort.[416]

Imposition of proximate cause principles arguably does no violence to the "harm" regulation and, as Justice O'Connor claims, is required. Again, pointing to the Service's inclusion of "actually," she observes that specula-

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several ways in which this evidentiary burden may be accomplished. *Palila II*, 649 F. Supp. at 1075.

411. *Palila II*, 649 F. Supp. at 1077.

412. *Sweet Home V*, 115 S. Ct. at 2419-20.

413. *Id.* at 2420.

414. *Id.* Justice O'Connor observed that "[s]trict liability means liability without regard to fault; it does not normally mean liability for every consequence, however remote, of one's conduct." *Id.* (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 79, at 559-60 (5th ed. 1984) (noting the "practical necessity for the restriction of liability within some reasonable bounds" in the strict liability context)).

415. *Id.* at 2420. The penalties found in § 11(1) punish knowing violations of § 9. Pub. L. No. 93-205, § 11(a), 87 Stat. at 897 (current version at 16 U.S.C. § 1540(1)).

416. Justice O'Connor pointed to Congress' silence on this issue, noting that she "would not lightly assume that Congress, in enacting a strict liability statute that is silent on the causation question, has dispensed with this well-entrenched principle." *Sweet Home V*, 115 S. Ct. at 2420 (relying on Benifiel v. Exxon Corp., 959 F.2d 805, 807-08 (9th Cir. 1992) (holding that Congress did not intend to abrogate common law principles of proximate cause to reach "remote and derivative" consequences under Trans-Alaska Pipeline Authorization Act)). Justice O'Connor also pointed to the Comprehensive Environmental Response Compensation & Liability Act ("CERCLA") as an example of a statute where Congress specifically abrogated a causation requirement. *Id.* (citing New York v. Shore Realty Corp., 759 F.2d 1032, 1044 (2d Cir. 1985)).

tive or conjectural effects on listed species were explicitly excluded under the regulation.[417]

Though proximate cause is not susceptible to a precise definition, O'Connor concludes that, at the very least, proximate cause "injects a foreseeability element into the statute."[418] In this manner, many of the erroneous applications of section 9 probed by the dissent could be avoided.[419] Moreover, Justice O'Connor asserts that this element was ignored by the Ninth Circuit Court of Appeals in *Palila II*, concluding that the case was wrongly decided on these grounds:

> Pursuant to my interpretation, *Palila II*—under which the Court of Appeals held that a state agency committed a "taking" by permitting feral sheep to eat mamane-naio seedlings that, when full-grown, might have fed and sheltered endangered palila—was wrongly decided according to the regulation's own terms. Destruction of the seedlings did not proximately cause actual death or injury to identifiable birds; it merely prevented the regeneration of the forest land not currently inhabited by actual birds.[420]

However, section 9 does not deal with torts against the protected animal. Section 9 directs the Secretary to restrict certain uses of private or public property having an ascertainable impact on the listed species. To this end, "actually" clearly injects an element of causation into the "harm" regulation by stressing the critical link between habitat modification and injury to the species.[421] Nowhere has the Act suggested the use of

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417. *Id.* Justice O'Connor concludes 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." *Id.*

418. *Id.*

419. *See Sweet Home V*, 115 S. Ct. at 2418.

420. *Id.* at 2420-21.

421. Palila (Loxiodes bailleui) v. Hawaii Dep't of Land & Natural Resources (*Palila II*), 649 F. Supp. 1070, 1077 (D. Haw. 1986) (holding that the redefinition "stresses the critical link between habitat modification and injury to the species"). The causation element is found in the plaintiff's burden to establish this link between the habitat modification and the requisite injury to the species. The plaintiff must be able to prove the significant habitat modification leads to the prohibited result. *See, e.g.*, American Bald Eagle v. Bhatti, 9 F.3d 163, 166 (1st Cir. 1993) (holding that no "taking" existed where the appellants "have not shown that the hunt *caused* actual harm") (emphasis added).

Morrill v. Lujan, 802 F. Supp. 424 (S.D. Ala. 1992), exemplifies this point. The district court found that no "taking" had occurred because the plaintiff could not meet its burden under the regulation and prove that the proposed development would lead to the

common law tort principles in establishing violations. Rather, the Secretary's regulation has imposed a cause-in-fact standard of causation which distinguishes between mere habitat modification and habitat modification resulting in a prohibited impact on the listed species.[422] This looser standard of causation again underscores the overall intent of Congress that the recovery of "endangered species be afforded the highest of priorities."[423]

G. *Justice Scalia's Dissent*

Justice Scalia, joined by Justice Thomas and Chief Justice Rehnquist, dissented.[424] Considering the Secretary's regulation an unfair conscription of private property for national zoological use, he concluded that the regulation contradicts the "unmistakably clear" intent of Congress.[425] The opinion grudgingly concedes to the application of the *Chevron* doctrine, nevertheless reasoning that no amount of deference to the Secretary can save the regulation.

From the outset, the dissent mischaracterized the nature of the restrictions imposed on private landowners by the application of section 9.[426] The opinion makes no consideration that restrictions under the ESA are ordinarily not permanent. Once a species has progressed toward recovery, land use restrictions can be re-evaluated according to the purpose of the Act.[427] Where circumstances dictate, these restrictions may be

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destruction of habitat which in turn could threaten the listed species. *Id.* at 432. The court concluded that "[i]t is this lack of a *causal link* between the [proposed] project and the potential harm projected by the plaintiff's expert that distinguishes this case from those cases cited by plaintiff." *Id.*

422. Steven G. Davison, *Alteration of Wildlife Habitat as a Prohibited Taking Under the Endangered Species Act*, 10 J. LAND USE & ENVTL. L. 155, 190 (1995).

423. Tennessee Valley Auth. v. Hill, 437 U.S. 153, 174 (1978).

424. *Sweet Home V*, 115 S. Ct. at 2421 (Scalia J., dissenting).

425. *Id.*

426. From the opening passage of the opinion, the dissent's tone echoed in inverse condemnation. "The Court's holding that the hunting and killing prohibition [of § 9] incidentally preserves habitat on private lands imposes unfairness to the point of financial ruin—not just upon the rich, but upon the simplest farmer who finds his land conscripted to national zoological use." *Id.*

427. The nature of § 9's restrictions on land use was recognized by the district court opinion in *Palila II*:

> The mamane forest can be expected to recover slowly when released from the current browsing pressures. At some point in the future, the mamane on Mauna Kea may have recovered sufficiently to support Palila beyond its current

relaxed, and section 9 protection may be withdrawn partially or altogether pursuant to the Secretary's rulemaking power under section 4(d).[428]

The dissent places the responsibility for solving this problem entirely on the shoulders of the Secretary rather than on those parties who caused the particular species to be listed. If landowners better recognized the need for instituting sustainable use practices and concepts of responsible stewardship on their own lands, and had relaxed economic and political pressures to intensely harvest resources on public lands, the critical habitat problem would have been significantly ameliorated. The combination of preserved public lands and responsibly managed private property would probably have been sufficient to substantially reduce the number of species listed by the Secretary or would have reduced the degree of protection necessary to avert the extinction of these animals. This point is avoided by the minority in *Sweet Home V*. It can be argued that the interests which played the most significant role in adversely affecting habitat and creating this problem are those same interests which are now being asked to alter their practices to allow species to recover.

Justice Scalia pointed to what he perceived to be three major failings of the regulation.[429] First, the regulation must fail in his view because of its inadequate causation requirement. Read this way, habitat modifications falling under this regulation, need only be the cause-in-fact of actual death

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> endangered population. Likewise, at some future date, the forest and the bird population may be sufficiently stable to allow the coexistence of some mouflon sheep with Palila. At present, however, the Endangered Species Act mandates the protection of the Palila to the extent possible, in the hope that this bird does not join the many other indigenous species that have disappeared from these islands.

Palila (Loxiodes bailleui) v. Hawaii Dep't of Land & Natural Resources (*Palila II*), 649 F. Supp. 1070, 1082 (D. Haw. 1986) (footnotes omitted).

428. For threatened wildlife, and for endangered wildlife downlisted to threatened status, § 9's "taking" prohibition is applied through a single blanket regulation. 50 C.F.R. § 17.31. This blanket regulation was upheld below. Sweet Home Chapter of Communities for a Great Or. v. Babbit (*Sweet Home II*), 1 F.3d 1, 5-8 (D.C. Cir. 1993). The Secretary can, when appropriate, withdraw part or all of these protections by special rule for particular species listed as threatened. *See* 50 C.F.R. §§ 17.40-.48 (Special Rules). Similarly, federally issued permits may be acquired allowing the limited take of endangered or threatened wildlife under appropriate circumstances. *See* Pub. L. No. 93-205, § 10, 87 Stat. at 896 (current version at 16 U.S.C. § 1539); 50 C.F.R. §§ 17.22-.23 (1994). The entire regulatory regime is designed to allow the Secretary to exercise common sense in tailoring restrictions so as to provide the best protection to the species in the least harsh manner, while always keeping in mind the goal of ultimately delisting the species through these decisions.

429. *Sweet Home V*, 115 S. Ct. at 2421 (Scalia, J., dissenting).

or injury to wildlife.[430] Any significant habitat modification producing this prohibited result by impairing essential behavioral patterns is unlawful, regardless of whether that result was foreseeable or intended, and regardless of how attenuated the causation between modification and injury may be.[431] On this point, Justice Scalia disapprovingly cited *Palila II* as an example of a "taking" claim resting on a highly attenuated chain of causation.[432]

Second, Justice Scalia objected to the fact that the regulation is satisfied by any act or omission resulting in actual death or injury.[433] This point

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430. *Id.* (citing Davison, *supra* note 422, at 190). The proper standard of causation under the regulation has been the source of some confusion. The Service has remained silent on the issue. The regulation's focus on the ultimate death or injury suggests a "but for" or "substantial factor" standard of causation borrowed from tort law:

> If a specific protected animal was found dead on land that was not part of modified or degraded wildlife habitat, there would be a finding that the modification of the wildlife habitat was a "taking" if the dead animal had used the altered or modified habitat prior to its death and if, using the "but for" or substantial factor test, the habitat modification was the cause in fact of the animal's death by forcing the animal to migrate to new habitat where it died or was killed.

Davison, *supra* note 423, at 191 (footnote omitted). A number of scenarios could fit this model. The unsuitability of the new habitat into which the relocated animal is forced to settle may precipitate its death or injury. Similarly, the introduction of foreign predators into the habitat (as was the case in the *Palila* cases) or the displacement of predators into new habitat bringing about conflict with the protected species, could also satisfy this standard. *See id.* at 191 n.182.

431. *Id.* The Chapter asserted that the regulation's exclusive focus on the ultimate effect (the injury) while disregarding the character of the conduct sought to be prohibited, substantially contributed to the improperly broad interpretation of harm. Brief for Respondents at 7, *Babbit* (No. 94-859). The narrow focus on the injury ignored the normal usage of the term which requires some form of purposeful effort to hurt or injure. *Sweet Home V*, 115 S. Ct. at 2421.

432. *Sweet Home V*, 115 S. Ct. at 2421. The dissenting opinion provides one other example of what it sees as the remote and tenuous chain of causation permitted under the regulation:

> To define "harm" as an act or omission that, however remotely, "actually kills or injures" a population of wildlife through habitat modification, is to choose a meaning that makes nonsense of the word that "harm" defines—requiring us to accept that a farmer who tills his field and causes erosion that makes silt run into a nearby river which depletes oxygen and thereby "impairs [the] breeding" of protected fish, has "taken" or "attempted to take" the fish. It should take the strongest evidence to make us believe that Congress has defined a term in a manner repugnant to its ordinary and traditional sense.

Id. at 2423.

433. *Id.* at 2422.

was clear on the face of the original "harm" regulation, which covered any "act or omission which actually kills wildlife . . . ."[434] However, the mention of omissions was deleted from the regulation in the course of the Service's 1981 redefinition of "harm."[435] Despite this deletion, the Service's comments indicate that "act" is inclusive of both affirmative action and omissions.[436] The dissent apparently disagrees with the propriety of including omissions under the regulation.[437]

Finally, the regulation's third inherent flaw under the dissent's analysis was its inclusion of injuries inflicted not just on individual animals, but on populations as well.[438] Habitat modifications resulting in "harm" through the impairment of breeding activity, he theorizes, fail to injure any living creature.[439] Only potential living animals may have been harmed by this conduct, and similarly, only the population at large has been injured since its future numbers may have been reduced.[440] The dissent, while properly understanding the regulation's scope applying to populations, misapprehends the meaning in application within the context of the Act. Justice Scalia's effort to limit section 9's application to individual animals runs counter to the language and purpose of the Act.[441]

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434. *Id.*

435. *Id.* at 2422 (relying on 46 Fed. Reg. § 54,750 (1981)).

436. *Sweet Home V*, 115 S. Ct. at 2422. On the deletion of "or omission" from the regulation in 1981, the Service attributed this change to their position that the term "act" is inclusive of either commissions or omissions which would be prohibited by § 9. *Id.*

437. The exact nature of Justice Scalia's objection to this is unclear on the face of the opinion. While attacking the regulation on its face, this particular objection appears to be directed toward a specific interpretation of the regulation rather than the regulation itself.

438. *Id.* at 2422. In Justice O'Connor's concurrence, she stated that the regulation, on its face, focused on individual animals, rather than on collective populations. *See supra* note 399. By contrast, Justice Scalia recognizes the appropriate scope of the regulation, but concludes that this focus on the species as a whole is impermissible under the Act. *Sweet Home V*, 115 S. Ct. at 2422.

439. Justice Scalia concludes that "[i]mpairment of breeding does not 'injure' living creatures; it prevents them from propagating, thus "injuring" a population of animals which would otherwise have maintained or increased its numbers." *Id.* The Secretary's official pronouncements in the Final Redefinition of "Harm" accompanying the amendment to the regulation confirm this reading for the dissent. *See* Brief for Respondents at 25, *Babbit* (No. 94-859).

440. *Sweet Home V*, 115 S. Ct. at 2422.

441. The stated purpose of the ESA is "to provide a means whereby the ecosystems upon which endangered *species* and threatened *species* depend may be conserved[, and] to provide a program for the conservation of such endangered *species* and threatened *species* . . . ." Pub. L. No. 93-205, § (2)(b), 87 Stat. at 884 (current version at 16 U.S.C. § 1531(b)) (emphasis added). Similarly, § 9(a)(1)(B) makes it unlawful for any person to "take any such

Unable to find any of these three criticized features of the "harm" regulation reflected in the language of the ESA, the dissent conducted a historical analysis of the term "take."[442] Justice Scalia observed that "harm" lacks legal significance independent from "take"—the only operative term in section 9.[443] When applied to animals, the dissent holds that "take" has long since been understood to mean *only* the reduction of a wild animal to human control via death or capture. This meaning of "take," the opinion noted, "is as old as the law itself."[444] This use of the term "take" was also consistent with the term's usage in other environmental statutes and treaties.[445] Justice Scalia considered his reading of "take" to be consistent with the structure of section 9, covering all aspects of commercial trafficking in endangered species and products made from such species; from the "taking" of such species to their sale, transport, and import or export.[446] Therefore, the dissent holds that the Secretary's definition of "harm," when read in conjunction with the term "take," must be confined within the long-understood meaning of "take":

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species within the United States . . . ." *Id.* § 9(a)(1)(b), 87 Stat. at 893 (current version at 16 U.S.C. § 1538(a)(1)(B)) (emphasis added). Nowhere in relevant part does the Act refer to the animal in any other sense than collectively.

442. *Sweet Home V*, 115 S. Ct. at 2422.

443. The dissent, rather than attempting to define harm as the Petitioners and Respondents have done, turns to the term "take," as the only word having legal significance. One cannot be criminally charged with "harming" a listed species—only of "taking" one. *Id.*

444. *Id.*

445. *See* Migratory Bird Treaty Act, Pub. L. No. 101-233, § 15, 103 Stat. 1977 (1989) (current version at 16 U.S.C. § 703 (1988 & Supp. V 1993)); *see also* Agreement on the Conservation of Polar Bears, Nov. 15, 1973, art. I, 27 U.S.T. 3918, 3921.

446. *Sweet Home V*, 115 S. Ct. at 2422. Justice Scalia considers "take" in view of the overall structure of § 9(a)(1):

> The taking prohibition, in other words, is only part of the regulatory plan of § 1538(a)(1), which covers all the stages of the process by which protected wildlife is reduced to man's dominion and made the object of profit. It is obvious that "take" in this sense—a term of art deeply embedded in the statutory and common law concerning wildlife—describes a class of acts (not omissions) done directly and intentionally (not indirectly and by accident) to particular animals (not populations of animals).

Id. at 2422 (citations omitted).

However, while the dissent's argument is logically consistent, this point still does not cure the basic flaw in its premise: the failure to recognize that the entire Act requires attention to populations as a whole. Section 9, as a whole, must be read in light of the statute in which it appears.

> The tempting fallacy—which the Court commits with abandon—is to assume that once defined, "take" loses any significance and it is only the definition that matters. The Court treats the statute as though Congress had directly enacted the [section] 1532(19) definition as a self-executing prohibition, and had not enacted [section] 1538(a)(1)(B) at all. But [section] 1538(a)(1)(B) is there, and if the terms contained in the definitional section are susceptible of two readings, one of which comports with the standard meaning of "take" as used in application to wildlife, and one of which does not, an agency regulation that adopts the latter reading is necessarily unreasonable, for it reads the defined term "take"—the only operative term—out of the statute altogether.[447]

Justice Scalia then turned his focus to "harm," read in light of the operative term "take." Following a list of dictionary definitions of "harm," he observed that the more common or preferred usage of the term incorporated some idea of direct and anticipated hurt or injury.[448] This, he concluded, was the common thread binding together all ten descriptors in the "take" definition found in the statute.[449] The application of force, as Circuit Judge Williams had concluded,[450] was not the point. Rather, in the view of the dissenters, it was this common sense of affirmative conduct intentionally directed against individual animals.[451]

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447. *Id.* at 2423.

448. *Id.*

449. *Id.*

450. Sweet Home Chapter of Communities for a Great Or. v. Babbit (*Sweet Home III*), 17 F.3d 1463, 1464-65 (D.C. Cir. 1994).

451. The majority points out this apparent abandonment of the circuit court's "direct application of force" argument. Recognizing the flaw in this interpretation, the dissent instead sought to impose a limitation on § 9 based on a requirement of "'affirmative conduct directed against a particular animal or animals.'" *Sweet Home V*, 115 S. Ct. at 2415 n.15. Under this reading of § 9, the majority observed that conduct clearly in violation of the Act would otherwise be permitted:

> Under the dissent's interpretation of the Act, a developer could drain a pond, knowing that the act would extinguish an endangered species of turtles, without even proposing a conservation plan or applying for a permit under § 9(a)(1)(B); unless the developer was motivated by a desire "to get at a turtle," no statutory taking could occur. Because such conduct would not constitute a taking at common law, the dissent would shield it from § 9 liability, even though the words "kill" and "harm" in the statutory definition could apply to such deliberate conduct. We cannot accept that limitation. In any event, our reasons for rejecting the Court of Appeals' interpretation apply as well to the dissent's novel construction.

Id.

The opinion logically errs by removing "take" from its modern context within the ESA and reading it in light of Nineteenth Century common law regulations on hunting. If traditional common law is the subject of the inquiry, "take" is properly limited in this respect. However, under modern law, the definition, like the subject matter defined, must remain dynamic, and be interpreted in the context of the statute in which it appears.

Instead, the dissent read "take" in an outdated manner typified by the sources relied on for its position. A 1949 dictionary and a series of hunting regulations and cases offer the only support cited for this position.[452] The Migratory Bird Treaty Act, the Agreement on the Conservation of Polar Bears, and even the Marine Mammal Protection Act, relied on by the circuit court—these are all programs geared specifically toward prohibiting the hunting of particular species. None of these provisions share the ESA's comprehensive focus toward wildlife and habitat protection, and none attest to the ESA's very clear goal of recovering extremely depleted populations of wildlife.[453] Consequently, the term "take" means something very different in the context of these statutes.[454]

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452. The dissent has drawn the term's definition from the English common law definition, and relies on some older sources. Geer v. Connecticut, 161 U.S. 519, 523 (1896) (observing that "all the animals which can be taken upon the earth, in the sea, or in the air, that is to say, wild animals, belong to those who take them"); 17 OXFORD ENGLISH DICTIONARY 537 (1989); WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 2331 (2d ed. 1949).

453. The species protected under the Act are signals of much greater ecological concern which foretell adverse impacts to human populations. On the need for the ESA legislation, the Report of the House Committee on Merchant Marine and Fishery observed:

> As we homogenize the habitats in which these plants and animals evolved, and as we increase the pressure for products that they are in a position to supply (usually unwillingly) we threaten their—and our own—genetic heritage.
>
> The value of this genetic heritage is, quite literally, incalculable. . . .
>
> . . . .
>
> From the most narrow possible point of view, it is in the best interest of mankind to minimize the losses of genetic variations. . . .
>
> . . . .
>
> Who knows, or who can say, what potential cure for cancer or other scourges, present or future, may lie locked up in the structures of plants which may yet be undiscovered, much less analyzed? . . . Sheer self-interest impels us to be cautious. . . . The institutionalization of that caution lies at the heart of [the ESA].

H.R. REP. NO. 412, *supra* note 154, at 4-5. The value to be realized through recovery of a signal species is value to the general community, not just for some ideal view of nature.

454. "Take" must be interpreted within the context of the ESA—a comprehensive body of legislation directed toward halting the growing trend toward extinction in a holistic

Obviously, the dissent concurred with the Chapter's use of the *nocitur a sociis* principle in reading "harm" linking it to the other nine descriptive terms in the statute.[455] He rejected the majority's conclusion that the circuit court erred in applying *nocitur a sociis* in a manner depriving "harm" of any independent meaning. Under this reasoning the dissent pointed to the terms "trap" and "capture" as two arguably superfluous terms.[456]

"Harm" would, therefore, still add something even under this narrow definition. Poisoning an animal, spraying it with chemicals, or destroying its habitat to get at it, while not necessarily wounding or killing, would nevertheless "harm" the animal in the narrow sense defined by the dissent.[457]

Justice Scalia also found this interpretation supported by the ESA's penalty provisions. Section 11 of the Act prohibits "knowingly" committed violations of section 9.[458] Yet, "harm" as defined by the Secretary would subject numerous routine private activities to strict liability when they

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manner. The problems to be corrected by the statutes cited by the dissent simply do not correlate with the findings of Congress in enacting the ESA:

> The Congress finds and declares that—
>
> (1) various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation;
>
> (2) other species of fish, wildlife, and plants have been so depleted in numbers that they are in danger of or threatened with extinction;
>
> (3) these species of fish, wildlife, and plants are of aesthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people;

Pub. L. No. 93-205, § 2(a)(1)-(3), 87 Stat. at 884 (current version at 16 U.S.C. § 1531(a)).

455. *Sweet Home V*, 115 S. Ct. at 2424.

456. *Id.* The majority's reasoning would require the redefinition of these terms to avoid the surplusage rule relied upon in upholding the "harm" regulation: "If it were true, we ought to give the word 'trap' in the definition its rare meaning of 'to clothe' (whence 'trappings')—since otherwise it adds nothing to the word 'capture.'" *Id.* However, this analogy is not entirely consistent with the dictionary definitions of these terms. Contrary to Justice Scalia's reading, "trap" *does* have a distinct meaning from capture. *Webster's* defines the verb "trap" as "to catch in or take in as if in a trap; to provide or set (a place) with traps." WEBSTER'S NEW COLLEGIATE DICTIONARY 1234 (1981). The word also is defined as a synonym for "snare, entrap, ensnare, bag, lure," and "decoy." THE MERRIAM-WEBSTER DICTIONARY 727 (1974); *see also* THE AMERICAN HERITAGE DICTIONARY 1293 (rev. ed. 1982) (defining "trepan," as "to trap; ensnare"). However, the verb "capture" is defined to encompass the seizure of something by force or trickery, to take captive. THE MERRIAM-WEBSTER DICTIONARY 116 (1974).

457. *Sweet Home V*, 115 S. Ct. at 2424.

458. *Id.*

"fortuitously" injure or kill protected wildlife, regardless of how remote the chain of causation.[459] This, Justice Scalia concludes, could not have been Congress' intent. A "knowing" violation requires that the defendant "know the facts that make the conduct illegal."[460] Under the Secretary's interpretation, a "taking" has occurred regardless of whether or not injury to the protected animal was foreseeable or anticipated. Under the Act, actual injury to the animal is the fact that makes the conduct illegal. The regulation, however, only requires that the conduct be the cause-in-fact of the injury or death.[461] No element of foreseeability has been explicitly required.[462] Therefore, the dissent, like Justice O'Connor, has attempted to inject some notion of tort law into the ESA, only to wonder aloud why the concept failed to fit comfortably in the legislative scheme.

Justice Scalia insisted that the Secretary's interpretation runs counter to the general structure of the ESA.[463] First, he pointed to the explicit reference to habitat modification in section 7(a)(2), which prohibits the adverse modification of critical habitat by federal agencies.[464] "Critical habitat" is defined in section 3.[465] In spite of the explicit prohibition of critical habitat modification in section 7, the dissent observed that Congress remained silent on the issue of habitat in section 9. Congress' decision to include habitat modification in one instance, while not mentioning it in another must, the dissent argues, be presumed intentional and purposeful.[466] Thus, Justice Scalia found it odd that Congress would carefully define "critical habitat" explicitly prohibiting its destruction or adverse modification in section 7, while leaving the Secretary free to evaluate adverse habitat modification under the guise of "harm" in section 9.[467] Justice Scalia questioned the majority's attempt to divide these provisions into two discrete regulatory realms based on section 7's limited applicability

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459. *Id.*

460. *Id.*

461. *See supra* note 416.

462. *Sweet Home V*, 115 S. Ct. at 2424.

463. *Id.* at 2425.

464. *Id.*

465. Pub. L. No. 95-632, § 2(2), (7), 92 Stat. at 3751 (current version at 16 U.S.C. § 1532(5)).

466. *Sweet Home V*, 115 S. Ct. at 2425 (citing Keene Corp. v. United States, 113 S. Ct. 2035 (1993) ("'Where Congress includes particular language in one section of a statute but omits it in another . . . , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'")).

467. *Id.*

to federal agencies.[468] Relying solely on the broad definition of "persons," to whom section 9 is directed, Justice Scalia concludes that section 7's prohibition against adverse modification of critical habitat has been rendered superfluous by the Secretary's interpretation of section 9.[469] This contention was rejected by the majority which held such overlap between sections 7 and 9 reflective of the comprehensive regulatory scheme erected under the ESA.[470]

The remainder of the dissent focused on each of the four bases supporting the majority's decision to uphold the regulation, attempting to reject each in turn.[471] The dissent points to previous holdings by this Court, in denouncing the "simplistic assumption that whatever furthers the statute's primary objective must be the law."[472] The ends reached by the Secretary's regulation could not, therefore, per se justify the means selected.[473] However, contrary to the dissent's suggestion, adherence to this rule cannot, by the same logic, counsel a reading that is counterproductive to the statute's overall purposes.[474]

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468. Justice Scalia concluded that "[i]n fact however, [§§ 7 and 9] do *not* operate in separate realms; federal agencies are subject to both, because 'person[s]' forbidden to take protected species under [§ 9] include agencies and departments of the Federal Government." *Id.* at 2426.

469. However, this sense of overlap among various provisions of the ESA offered no problem for the Court in Tennessee Valley Auth. v. Hill, 437 U.S. 153 (1978). The project was held to violate § 7's prohibitions. *Id.* at 185 n.30. The Court noted that the project would probably constitute a § 9 "taking" as well. *Id.*

470. *See supra* Part IV.E.

471. *Sweet Home V*, 115 S. Ct. at 2426.

472. On this point Justice Scalia declared, "I thought we had renounced the vice of 'simplistically . . . assum[ing] that whatever furthers the statute's primary objective must be the law.'" *Id.* (alteration in original) (quoting Rodriguez v. United States, 480 U.S. 522, 526 (1987)).

473. *Id.*

474. The dissent's means/ends analysis is weakened by consideration of the *Chevron* doctrine. The Secretary is given considerable discretion to construe and administer the ESA. *Chevron* dictates that this discretion be given great deference to by courts reviewing the Secretary's decisions. Chevron, U.S.A., Inc. v. Natural Resource Defense Council, Inc., 467 U.S. 837, 842-43 (1984). However, the Secretary's interpretation must advance the purposes of the Act, and no amount of deference accorded to the Secretary's reading will save an interpretation that is counterproductive to the goals and purposes of the statute interpreted. *Id.*

V. CONCLUSION

The immediate impact of the *Sweet Home V* decision was to restore the *Palila* cases and dissolve the split between the federal circuits. Since the case was a facial attack on the Secretary's "harm" regulation, the actual holding in *Sweet Home V* is not as significant as other aspects of the opinion. While the facial attack on this regulation was rejected, an amendment to the ESA deleting the term "harm" from the statutory definition of "take," or repeal of or significant amendment to the "harm" regulation it upholds, would nullify the decision.

Justice O'Connor's concurring opinion provides some insights as to where this area of the law may be headed. While upholding the regulation on its face, Justice O'Connor is one of at least four Supreme Court Justices who believe that *Palila* was wrongly decided. Her arguments regarding the regulation's causation requirement and its alleged focus on individual animals are best suited to legal challenges to specific applications of the regulation, and not facial attacks on the regulation itself. Indeed, she recognizes this point and cautions that such challenges must have well developed factual records to withstand scrutiny in accordance with the *Sweet Home V* decision.

The true impact of *Sweet Home V* lies as much in what was not settled by the court. The case demonstrates the soundness of the *Chevron* doctrine as a standard of review. The properly-exercised discretion of the Secretary ought to be upheld unless a clear incongruity with the Act can be distilled. In the instant case, the Secretary's decision reflected a proper understanding for the ESA and its comprehensive purposes. To conclude that a species cannot be "harmed" by destroying its habitat, leaving it inadequate shelter and food, defies common sense. Congress recognized this in enacting the ESA generally, and section 9 in particular. The Secretary recognized this too. Therefore, the *Chevron* doctrine emerges as an important mechanism for ensuring that our national environmental policy is administered in a rational manner and in the way expected by Congress. The remaining controversy over species recovery will diminish only when the raison d'etre of the ESA is fulfilled.