

**ALTERATION OF WILDLIFE HABITAT AS A  
PROHIBITED TAKING UNDER THE ENDANGERED  
SPECIES ACT**

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## I. INTRODUCTION

The survival of individual wild animals, as well as species of wildlife, is dependent upon habitat, which provides wildlife with food, shelter, protection (from human and animal predators), breeding sites, and sites for rearing and nesting their young. In order for a particular area or ecosystem to provide a suitable habitat for a particular species of wildlife, the area may have to contain certain types of geological features (e.g., caves, mountains, etc.), particular types of waterbodies, particular types of trees or plants, or other species of wildlife.<sup>1</sup> The destruction or alteration of wildlife habitat may deprive members of that wildlife species of food, shelter, protection, reproduction sites, or nesting sites, and cause the death of individual wild animals and, eventually, the extinction of an entire species of wildlife.<sup>2</sup> Habitat modification of a wildlife species may result in the eventual extinction of the species when members of the species are unable to adapt to changes in their habitat because they have "become intimately tied" to the conditions of their existing habitat "through evolution."<sup>3</sup>

Representative Sullivan, the floor manager of the House version of the Endangered Species Act of 1973,<sup>4</sup> stated during a legislative process 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.<sup>5</sup>

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1. For example, some types of bird species may forage on insects, fruits, and seeds found only in particular types of trees in particular locations, see *Palila v. Hawaii Dep't of Land & Natural Resources*, 471 F. Supp. 985, 998-90 (D. Haw. 1979), *aff'd*, 639 F.2d 495 (9th Cir. 1981); *Sierra Club v. Lyng*, 694 F. Supp. 1260, 1265 (E.D. Tex. 1988), *aff'd in part and vacated in part sub. nom.* *Sierra Club v. Yeutter*, 926 F.2d 429 (5th Cir. 1991), and also may be dependent upon the same types of trees for shelter, "reproduction requirements," and nesting sites. See *Sierra Club v. Lyng*, 694 F. Supp. at 1265; *Palila v. Hawaii Dep't of Land & Natural Resources*, 471 F. Supp. at 989.

2. See *Palila v. Hawaii Dep't of Land & Natural Resources*, 649 F. Supp. 1070, 1075 (D. Haw. 1986), *aff'd*, 852 F.2d 1106 (9th Cir. 1988); *Sierra Club v. Lyng*, 694 F. Supp. at 1271-72.

3. *Palila*, 471 F. Supp. at 989 n.7. See *Sierra Club v. Lyng*, 694 F. Supp. at 1269 ("[T]he actions of man have taken an increasing toll on the survivability of various species, particularly those which, due to their particular habits and lifestyles, are unable to adapt to a changing environment.").

4. 16 U.S.C. §§ 1531-44 (1988).

5. 119 CONG. REC. H30,162 (daily ed. Sept. 18, 1973).

The United States Supreme Court has noted that "in shaping the [Endangered Species] Act, Congress started from the finding that '[t]he two major causes of extinction are hunting and destruction of natural habitat.' . . . Of these twin threats, Congress was informed that the greatest was destruction of natural habitat."<sup>6</sup> The drafters of the Endangered Species Act of 1973:

realized that the degradation of habitats posed one of the gravest threats to the continued existence of endangered and threatened species . . . . Indeed, the first stated purpose of the ESA is "to provide a means whereby the ecosystems upon which endangered and threatened species depend may be conserved . . . ." <sup>7</sup>

The Endangered Species Act of 1973 contains several provisions that seek to protect and preserve the habitat of endangered species and threatened species.<sup>9</sup> Section 510 of the Endangered Species Act grants the Secretaries of the Interior, Commerce and Agriculture authority to acquire land to preserve the habitat of protected species as part of conservation programs for endangered and threatened

6. *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 179 (1978) (citation omitted).

7. *Sweet Home Chapter v. Babbitt*, 1 F.3d 1, 8 (D.C. Cir. 1993) (Mikva, C. J., concurring) (quoting 16 U.S.C. § 1531(b) (1988)), *modified on other grounds*, 17 F.3d 1463 (D.C. Cir. 1994), *reh'g denied*, 30 F.3d 190 (D.C. Cir. 1994), *cert. granted*, 115 S. Ct. 714 (Jan. 6, 1995) (No. 94-859).

8. The Endangered Species Act of 1973 defines "endangered species" 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." 16 U.S.C. § 1532(6) (1988). The term "species" is defined by the Act to include "any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature." 16 U.S.C. § 1532(16) (1988). Particular species of wildlife are designated as an endangered species pursuant to the procedures of section 4 of the Act. 16 U.S.C. § 1533 (1988). Species of wildlife that have been listed as endangered are set forth at 50 C.F.R. § 17.11 (1993).

9. "Threatened species" is defined by the Endangered Species Act to mean "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." 16 U.S.C. § 1532(20) (1988). Particular species of wildlife are designated as threatened species pursuant to the procedures of section 4 of the Act. 16 U.S.C. § 1533 (1988). Species of wildlife that have been listed as threatened are set forth at 50 C.F.R. § 17.11 (1993).

Pursuant to 16 U.S.C. §§ 1532(15) & 1533(a)(2) (1988), the Fish and Wildlife Service (for the Secretary of the Interior) and the National Marine Fisheries Service (NMFS) (for the Secretary of Commerce) share responsibility for implementing and enforcing the provisions of the Endangered Species Act with respect to endangered and threatened species of fish and wildlife. See 50 C.F.R. §§ 17.2(b), 17.11 (1993). Endangered and threatened marine species under the jurisdiction of the NMFS are listed at 50 C.F.R. §§ 222.23(a), 227.4 (1993). NMFS regulations governing takings of protected terrestrial species under its jurisdiction are at 50 C.F.R. §§ 220.50-.53, 222.21-.28, and 227.11-.72 (1993). This article will analyze only Fish and Wildlife Service regulations governing the taking of terrestrial endangered and threatened species of fish and wildlife; NMFS regulations governing takings of endangered and threatened marine species will not be analyzed in this article.

10. 16 U.S.C. § 1534 (1988).

species of fish, wildlife and plants.<sup>11</sup> Section 712 of the Endangered Species Act protects endangered and threatened species habitat, by requiring each federal agency to "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 destruction or adverse modification of habitat of such species" which has been determined by the Secretary of the Interior or Commerce to be "critical."<sup>13</sup> Sections 9(a)(1)(B) and (C)<sup>14</sup> of the Endangered Species Act also make it illegal for any person to "take" any listed endangered species of fish or wildlife within the United States or the territorial sea of the United States or upon the high seas. This prohibition of takings of endangered species has been extended to threatened species of wildlife by Fish and Wildlife Service regulations.<sup>15</sup>

The Fish and Wildlife Service also adopted a regulation<sup>16</sup> specifying that modification or degradation of the habitat of a listed endangered or threatened species of wildlife constitutes, in certain circumstances, "harm" (and therefore a "take") in violation of the Endangered Species Act.<sup>17</sup> This regulation, however, leaves a number of questions unanswered regarding when habitat modification constitutes "harm" in violation of the Endangered Species Act.<sup>18</sup>

A disagreement has recently occurred between United States Courts of Appeals as to the validity of this Fish and Wildlife Service regulation providing that modification or destruction of wildlife habitat, in certain circumstances, can be a "harm" in violation of the Endangered Species Act. In 1988, the United States Court of Appeals for the Ninth Circuit held that this regulation "serves the overall purpose of the Act" and "is also consistent with the policy of Congress evidenced by the legislative history."<sup>19</sup> In 1994, however, a divided panel of the United States Court of Appeals for the District of Columbia invalidated the Fish and Wildlife Service regulation

11. See *Sweet Home Chapter v. Lujan*, 806 F. Supp. 279, 283-84 (D.D.C. 1992), *aff'd sub nom. Sweet Home Chapter v. Babbitt*, 1 F.3d 1 (D.C. Cir. 1993), *modified on other grounds*, 17 F.3d 1463 (D.C. Cir. 1994), *reh'g denied*, 30 F.3d 190 (D.C. Cir. 1994), *cert. granted*, 115 S. Ct. 714 (Jan. 6, 1995) (No. 94-859).

12. 16 U.S.C. § 1536 (1988).

13. *Id.* at § 1536(a)(2). See *Babbitt*, 17 F.3d at 1467. See also *infra* notes 114-27 and accompanying text.

14. 16 U.S.C. §§ 1538(a)(1)(B)-(C) (1988).

15. 50 C.F.R. § 17.31(a) (1993). See *infra* notes 37-45 and accompanying text.

16. 50 C.F.R. § 17.3 (1993).

17. See *infra* notes 149-62 and accompanying text.

18. See *infra* notes 162-229 and accompanying text.

19. *Palila v. Hawaii Dep't of Land & Natural Resources*, 852 F.2d 1106, 1108 (9th Cir. 1988). See *infra* notes 207-58 and accompanying text.

defining "harm" to include habitat modification.<sup>20</sup> On January 6, 1995, the United States Supreme Court granted the federal government's petition for certiorari in this case to address the validity on its face of the Fish and Wildlife Service's regulation that makes significant habitat modification a prohibited taking under the Endangered Species Act.<sup>21</sup>

The question of whether under the Endangered Species Act a prohibited "taking" of an endangered or threatened species of wildlife can include the modification or destruction of a protected species' habitat is significant because the Act's taking prohibition applies to any person,<sup>22</sup> including an individual, a corporation, and an officer, employee or agent of federal, state and local governments,<sup>23</sup> and is enforced through civil penalties,<sup>24</sup> criminal penalties,<sup>25</sup> and injunctive relief.<sup>26</sup> If the Act's prohibition on the "taking" of listed endangered and threatened species applies to habitat modification in certain circumstances, the Act's taking prohibition will in many cases prohibit development of private land that serves as habitat for an endangered or threatened species of wildlife, unless the person either qualifies for an exemption from the Act's taking prohibition,<sup>27</sup> or such prohibition constitutes a taking of private property without just compensation in violation of the Fifth Amendment of the United States Constitution.<sup>28</sup>

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20. Sweet Home Chapter v. Babbitt, 17 F.3d 1463 (D.C. Cir. 1994), *reh'g denied*, 30 F.3d 190 (D.C. Cir. 1994), *cert. granted*, 115 S. Ct. 714 (Jan. 6, 1995) (No. 94-859). See *infra* notes 322-461 and accompanying text. In 1993 this panel held, in a preenforcement challenge, that the Fish and Wildlife Service's regulation defining "harm" was not facially void for vagueness and was not invalid in violation of the Endangered Species Act. Sweet Home Chapter v. Babbitt, 1 F.3d 1 (D.C. Cir. 1993), *modified on other grounds*, 17 F.3d 1463 (D.C. Cir. 1994), *reh'g denied*, 30 F.3d 190 (D.C. Cir. 1994), *cert. granted*, 115 S. Ct. 714 (Jan. 6, 1995) (No. 94-859); see *infra* notes 261-320 and accompanying text. However, the panel granted a petition for rehearing and, based on Judge Stephen Williams changing his position, invalidated the Fish and Wildlife Service's definition of "harm" which included habitat modification. 17 F.3d at 1465, 1472.

Later in 1994, the divided panel, *per curiam*, denied the appellees' petition for rehearing, 30 F.3d 190 (D.C. Cir. 1994); the *en banc* United States Court of Appeals for the District of Columbia denied the appellees' suggestion for rehearing *en banc*. *Id.*

21. Babbitt v. Sweet Home Chapter, 115 S. Ct. 714 (Jan. 6, 1995) (No. 94-859). Oral arguments are expected to be scheduled for April 1995.

22. 16 U.S.C. § 1538(a)(1)(B)-(C) (1988).

23. The Endangered Species Act defines "person" to mean "an individual, corporation, partnership, trust, association, or any other private entity; or any officer, employee, agent, department, or instrumentality of the Federal Government, of any State, municipality, or political subdivision of a State; or any other entity subject to the jurisdiction of the United States." 16 U.S.C. § 1532(13) (1988).

24. *Id.* at § 1540(a). See *infra* notes 90-98 and accompanying text.

25. 16 U.S.C. § 1540(b) (1988). See *infra* notes 90-98 and accompanying text.

26. 16 U.S.C. §§ 1540(e)(6), (g) (1988). See *infra* notes 99-113 and accompanying text.

27. See *infra* notes 50-85 and accompanying text.

28. See Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992); Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987); Christy v. Hodel, 857 F.2d 1324, 1334-35 (9th Cir. 1988),

This article will first analyze provisions of the Endangered Species Act that make it illegal for any person to "take" any endangered species of fish or wildlife, and the Fish and Wildlife Service regulations that make it illegal for any person to "take" any threatened species of wildlife. The article then analyzes exemptions under the Act and the Fish and Wildlife Service regulations from the general prohibitions on taking any endangered or threatened species of wildlife. Also, this section discusses the Act's enforcement of the taking prohibitions through civil penalties, criminal penalties, and injunctive relief.

After comparing the protection of wildlife habitat provided by section 7 of the Endangered Species Act with habitat protection provided by the Act's taking prohibitions, this article analyzes the Fish and Wildlife Service regulations that define when a "take" occurs. This section of the article focuses particularly on when modification or destruction of a listed endangered or threatened species' habitat constitutes a "take." This section of the article identifies situations where uncertainty exists in determining when modification or alteration of a wildlife habitat constitutes a "take" in violation of these regulations; also, various interpretations of the regulations are suggested. These suggested interpretations may be adopted by the Fish and Wildlife Service as formal amendments to their regulations. This adoption would give more guidance to courts and persons subject to regulation under the Endangered Species Act and further the Act's purposes.<sup>29</sup>

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*cert. denied*, 490 U.S. 1114 (1989). See also Patricia A. Hageman, Comment, *Fifth Amendment Takings Issues Raised by Section 9 of the Endangered Species Act*, 9 J. LAND USE & ENVTL. L. 375 (1994); see also Michelle Desiderio, *The ESA: Facing Hard Truths and Advocating Responsible Reform*, 8 NAT. RESOURCES & ENV'T, Summer 1993, at 37, 80-81. This article will not analyze the issue of when a prohibition on land development or habitat modification, under the Endangered Species Act's "takings" provision, constitutes a taking of private property without just compensation in violation of the Fifth Amendment of the United States Constitution.

29. An alternative to adopting formal amendments to Fish and Wildlife Service regulations would be pre-land development rulings by the Fish and Wildlife Service as to whether a specific use or development of a particular parcel of private or public land would "take" a listed endangered or threatened species of wildlife by destroying or modifying wildlife habitat. See Steven P. Quarles et al., *The Unsettled Law of ESA Takings*, 8 NAT. RESOURCES & ENV'T, Summer 1993, at 10, 61. There are "several practicable difficulties with this approach." *Id.* Consequently, formal amendment of the Fish and Wildlife Service regulation defining when a "take" occurs under the Endangered Species Act, through notice-and-comment procedures of the Administrative Procedure Act, 5 U.S.C. § 553 (1988), is a preferable approach for providing the public and the courts with guidance as to when modification of wildlife habitat constitutes a "take" in violation of the Endangered Species Act. Such guidance might be provided by the Fish and Wildlife Service stating "informally that it will not prosecute some types of land use activities as takings." Quarles et al., *supra*, at 61.

Finally, this article analyzes the opinions of the Ninth Circuit and District of Columbia Courts of Appeal that have addressed the validity of the Fish and Wildlife Service's regulation defining when "harm" (and therefore a "take") occurs under the Endangered Species Act. The article concludes that the Fish and Wildlife Service regulation defining "harm" is not facially void for vagueness in violation of the Due Process Clause of the Fifth Amendment of the United States Constitution, and the United States Supreme Court should uphold the Fish and Wildlife Service regulation as a reasonable agency interpretation of an ambiguous provision of the Endangered Species Act, using the standard of *Chevron U.S.A., Inc. v. Natural Resources Defense Council*.<sup>30</sup>

## II. PROHIBITIONS ON TAKINGS OF ENDANGERED AND THREATENED SPECIES

Except as provided in two provisions of the Endangered Species Act,<sup>31</sup> section 9(a)(1)(B)<sup>32</sup> of the Endangered Species Act of 1973 makes it unlawful for any person,<sup>33</sup> within the United States or the territorial sea of the United States, to take endangered species<sup>34</sup> of fish or wildlife listed pursuant to section 4<sup>35</sup> of the Act.<sup>36</sup> Section 9 only

30. 467 U.S. 837 (1984).

31. 16 U.S.C. §§ 1535(g)(2), 1539 (1988). See *infra* notes 50-85 and accompanying text.

32. 16 U.S.C. § 1538(a)(1)(B) (1988).

33. "Person" is defined under the Act by 16 U.S.C. § 1532(13) (1988). See *supra* note 23. American Indians are within the Act's definition of "person." *United States v. Billie*, 667 F. Supp. 1485, 1491 (S.D. Fla. 1987). Enforcement of the Act's taking prohibition against a state, a state agency, and a state employee does not violate either the Tenth or Eleventh Amendment of the United States Constitution. *Palila v. Hawaii Dep't of Land & Natural Resources*, 471 F. Supp. 985 (D. Haw. 1979), *aff'd*, 639 F.2d 495 (9th Cir. 1981).

34. "Endangered species" is defined under the Act by 16 U.S.C. § 1532(6) (1988). See *supra* note 8.

35. 16 U.S.C. § 1533 (1988).

36. Section 9(1)(C) of the Endangered Species Act, 16 U.S.C. § 1538(a)(1)(C) (1988), also makes it unlawful for any person subject to the jurisdiction of the United States to take upon the high seas any endangered species of fish or wildlife listed under section 4 of the Act, *id.* at § 1533 (1988), except as provided in 16 U.S.C. §§ 1535(g)(2) & 1539.

The Endangered Species Act, however, does not make it illegal for a person to "take" an endangered plant species that has been listed under section 4 of the Act. Section 9(a)(2)(B), 16 U.S.C. § 1538(a)(2)(B) (1988), of the Act, as implemented by Fish and Wildlife Service regulations, 50 C.F.R. § 17.61(c)(1) (1993), however, makes it illegal, except as provided in 16 U.S.C. § 1535(g)(2) or 16 U.S.C. § 1539, for any person subject to the jurisdiction of the United States, to remove and reduce to possession any listed endangered species of plants:

from areas under Federal jurisdiction; maliciously damage or destroy any such species on any such area; or remove, cut, dig up, or damage or destroy any such species on any other area in knowing violation of any law or regulation of any State or in the course of any violation of a State criminal trespass law.

This provision makes it illegal to remove an endangered plant species from private land only if a person knowingly violates *state law* or

prohibits the taking of endangered species of fish and wildlife, not the taking of threatened species of fish and wildlife. The Fish and Wildlife Service, however, has adopted a regulation<sup>37</sup> that provides, subject to some exceptions, that it is unlawful for any person to take any listed threatened species of wildlife.

The Fish and Wildlife Service adopted this regulation on the basis of authority provided by section 4(d) of the Endangered Species Act, which provides in pertinent part:

Whenever any species is listed as a threatened species . . . , 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 1538(a)(1) of this title, in the case of fish or wildlife . . . .<sup>38</sup>

The Fish and Wildlife Service through regulation<sup>39</sup> "established a regime in which the prohibitions established for endangered species are extended automatically to all threatened species by a blanket rule and then withdrawn as appropriate by special rule for particular species and by permit in particular situations."<sup>40</sup> This regulation was challenged in *Sweet Home Chapter v. Babbitt*<sup>41</sup> (*Sweet Home I*), on two grounds: first, that section 4(d) of the Endangered Species Act requires the Fish and Wildlife Service to extend the Act's endangered species

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violates a state trespass law in doing so. Subject to some exceptions, the prohibition on removing and reducing to possession endangered plants from an area under Federal jurisdiction, has been extended to threatened plants. 50 C.F.R. § 17.71(a) (1993). This article will only analyze the Endangered Species Act's prohibitions on the taking of endangered and threatened species of fish and wildlife.

37. 50 C.F.R. § 17.31(a) (1993).

38. 16 U.S.C. § 1533(d) (1988).

39. 50 C.F.R. § 17.31(a) (1993).

40. *Sweet Home Chapter v. Babbitt*, 1 F.3d 1, 5 (D.C. Cir. 1993), *modified on other grounds*, 17 F.3d 1463 (D.C. Cir. 1994), *reh'g denied*, 30 F.3d 190 (D.C. Cir. 1994), *cert. granted*, 115 S. Ct. 714 (Jan. 6, 1995) (No. 94-859). The Fish and Wildlife Service regulation generally prohibits the taking of threatened species of wildlife, "except as provided in subpart A of this part, or in a permit issued under . . . subpart [D]." 50 C.F.R. § 17.31(a) (1993). The Fish and Wildlife Service "actually issued special rules for a substantial number of the fish and wildlife species listed as threatened." See 50 C.F.R. §§ 17.40-48. *Sweet Home Chapter v. Babbitt*, 1 F.3d at 7. In addition, Fish and Wildlife Service permits under 50 C.F.R. § 17.32 authorizing the taking of threatened species of wildlife "are more readily available" than are permits under 50 C.F.R. §§ 17.22-.23 authorizing the taking of endangered species of wildlife. *Sweet Home Chapter v. Babbitt*, 1 F.3d at 7. This article will not further discuss these special rules, 50 C.F.R. §§ 17.40-48 (1993), which authorize certain takings of specific threatened species.

41. 1 F.3d 1 (D.C. Cir. 1993), *modified on petition for reh'g*, 17 F.3d 1463 (D.C. Cir. 1994), *reh'g denied*, 30 F.3d 190 (D.C. Cir. 1994), *cert. granted*, 115 S. Ct. 714 (Jan. 6, 1995) (No. 94-859).

prohibitions to threatened species only on a species-by-species basis; and, second, that the Fish and Wildlife Service can extend the Act's endangered species prohibitions to a threatened species of wildlife only after making a specific and formal finding and explanation that such an extension was "necessary and advisable" within the meaning of the first sentence of section 4(d) of the Act.<sup>42</sup> A panel of the United States Court of Appeals for the District of Columbia rejected both of these arguments in *Sweet Home I*. This panel upheld the Fish and Wildlife Service's regulation generally prohibiting the taking of all listed threatened species of wildlife "as a reasonable interpretation of the statute," "in light of the substantial deference" the court owes the agency under the principles of *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*<sup>43</sup> The court stated that "[t]he statute does not unambiguously compel the agency to expand regulatory protection for threatened species only by promulgating regulations that are specific to individual species."<sup>44</sup> The panel also held that the Fish and Wildlife Service was not required to make a "necessary and advisable" finding before promulgating the regulation on the grounds that "the two sentences of § 1533(d) represent separate grants of authority. The second sentence gives the [Fish and Wildlife Service] discretion to apply any or all of the § 1538(a)(1) prohibitions to threatened species without obligating it to support such actions with findings of necessity."<sup>45</sup>

#### A. Definition of "Take" Under the Endangered Species Act

The Endangered Species Act of 1973 defines "take" to mean "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."<sup>46</sup> This broad

42. See *Sweet Home Chapter v. Babbitt*, 1 F.3d at 5-6.

43. 467 U.S. 837 (1984). See *infra* notes 238-40, 392-96, 453 and accompanying text.

44. *Sweet Home Chapter v. Babbitt*, 1 F.3d at 6. The panel reviewed the singular vs. plural issue in 16 U.S.C. § 1533(d) (1988), and legislative history of the Endangered Species Act, and concluded that "the possible conflict" between the Senate and House Reports on the Endangered Species Act and "apparent inconsistency within [16 U.S.C. § 1533(d)] itself as to singular and plural, shows the perils of attempting to use ambiguous legislative history to clarify ambiguous words within statutes." 1 F.3d at 6.

45. 1 F.3d at 7-8. The panel stated that "[o]nly the first sentence of § 1533(d) contains the 'necessary and advisable' language and mandates formal individualized findings. This sentence requires the [Fish and Wildlife Service] to issue whatever other regulations are 'necessary and advisable,' including regulations that impose protective measures beyond those contained in § 1538(a)(1)." *Id.* at 8.

46. 16 U.S.C. § 1532(19) (1988). Fish and Wildlife Service regulations also define "take" in this manner. 50 C.F.R. § 10.12 (1993). A court will engage in *de novo* judicial review of a claim that certain conduct constitutes a "take" in violation of section 9 of the Endangered Species Act when the takings claim does not involve an examination of the consultation process between a federal agency and the Fish and Wildlife Service under section 7 of the Endangered Species

definition seemingly does not require that an animal be killed. The Act's definition of "take" also does not, on its face, require that a person know, or have reason to know, that their conduct will "take" a listed endangered or threatened species of wildlife. Although the Act does not define any of the terms included within the Act's definition of "take," the Fish and Wildlife Service has promulgated regulations<sup>47</sup> defining the terms "harass" and "harm" in the Act's definition of "take." These Fish and Wildlife Service regulations define "harm" to include "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering."<sup>48</sup> The Service's definitions of "harm" and "harass" are analyzed later in this article<sup>49</sup> following analysis of exemptions from the Act's takings prohibitions, enforcement of the Act's takings prohibitions, and comparison of habitat protection under sections 7 and 9 of the Act.

### B. Exemptions from the Act's Takings Prohibitions

"Congress has drawn several extraordinarily narrow exceptions to the Act's prohibitions."<sup>50</sup> Although section 9(a)(1)<sup>51</sup> contains explicit exceptions to the general prohibitions on taking endangered species of fish or wildlife under 16 U.S.C. §§ 1535(g)(2) and 1539, Fish and Wildlife Service regulations and other provisions of the Act contain additional exceptions.<sup>52</sup> There are several provisions of the Act which

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Act, 16 U.S.C. § 1536 (1988). See *Sierra Club v. Yeutter*, 926 F.2d 429, 438 (5th Cir. 1991) (dictum).

47. 50 C.F.R. § 17.3 (1993).

48. *Id.*

49. See *infra* notes 128-229 and accompanying text.

50. *United States v. Billie*, 667 F. Supp. 1485, 1488 (S.D. Fla. 1987).

51. 16 U.S.C. § 1538(a)(1) (1988).

52. Fish and Wildlife Service regulations provide that notwithstanding the general prohibitions on the takings of endangered and threatened species, "any person may take endangered [or threatened wildlife] in defense of his own life or the lives of others." 50 C.F.R. §§ 17.21(c)(2), .31(a) (1993). Fish and Wildlife Service regulations also authorize permits for takings of endangered and threatened species of wildlife "to prevent undue economic hardship." 50 C.F.R. §§ 17.23, .32(a) (1993). These regulations arguably are authorized by 16 U.S.C. § 1540(f) (1988), which authorizes the Secretary of the Interior "to promulgate such regulations as may be appropriate to enforce" the Endangered Species Act. Similarly, a person who acts "on a good faith belief that he was acting to protect himself or herself, a member of his or her family, or any other individual from bodily harm, from any endangered or threatened species" is exempt from civil penalties, 16 U.S.C. § 1540(a)(3) (1988), and criminal penalties, *id.* § 1540(b)(3), for illegally taking an endangered or threatened species of fish or wildlife. Fish and Wildlife Service special rules, 50 C.F.R. §§ 17.40-48 (1993), authorize takings of specific threatened species under certain circumstances. See *supra* note 40.

In addition, the Secretary of the Interior's authority to "issue such regulations as he deems necessary and advisable to provide for the conservation of" listed threatened species, 16 U.S.C. § 1533(d) (1988), and the Act's definition of "conservation"—which "in the extraordinary case

may exempt a person, engaging in land development activities that modify or destroy wildlife habitat, from the Act's prohibitions on takings.

First, the Secretary of the Interior may permit a taking of wildlife, otherwise prohibited by section 9(a)(1)(B)<sup>53</sup> of the Act, "if such taking is incidental to, and not [for] the purpose of, the carrying out of an otherwise lawful activity."<sup>54</sup> To obtain an incidental takings permit, a

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where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking." *id.* § 1532(3)—permit the secretary to issue regulations authorizing the taking of a threatened species if he has determined that "population pressures within . . . [the animal's] ecosystem cannot otherwise be relieved." *Sierra Club v. Clark*, 755 F.2d 608, 613 (8th Cir. 1985) (dictum). See *Fund for Animals, Inc. v. Turner*, No. CIV. A. 91-2201 (MB), 1991 WL 206232 (D.D.C. Sept. 27, 1991); Note, *The Taking of Threatened Species Under the Endangered Species Act: Fund for Animals v. Turner*, 30 IDAHO L. REV. 109 (1993).

Under section 10(e), 16 U.S.C. § 1539(e) (1988), of the Endangered Species Act, any Indian, Aleut, or Eskimo who is an Alaskan Native residing in Alaska, "and any non-native permanent resident of an Alaskan native village," is not subject to the Endangered Species Act's prohibitions on the taking of endangered or threatened species, "if such taking is primarily for subsistence purposes," *id.* § 1539(e)(1), and is not "accomplished in a wasteful manner." *Id.* § 1539(e)(2). This exemption does "not apply to any non-native resident of an Alaskan native village found by the Secretary to be not primarily dependent upon the taking of fish and wildlife for consumption or for the creation and sale of authentic native articles of handicrafts and clothing." *Id.* § 1539(e)(1). The Secretary of the Interior or Commerce may regulate such subsistence takings wherever the Secretary determines "that such taking materially and negatively affects the threatened or endangered species." *Id.* at § 1539(e)(4). See 50 C.F.R. § 17.5 (1993). While one court held that the Act's prohibitions on takings are not applicable to other Indians who take endangered or threatened species on an Indian reservation for non-commercial purposes pursuant to treaty rights, *United States v. Dion*, 752 F.2d 1261, 1270 (8th Cir. 1985) (en banc), *rev'd on other grounds*, 476 U.S. 734 (1986), another court has held that Indians are exempt from the Act's prohibition on takings only to the extent provided in 16 U.S.C. § 1539(e). *United States v. Billie*, 667 F. Supp. 1485 (S.D. Fla. 1987).

Section 10(a)(1)(A), 16 U.S.C. § 1539(a)(1)(A) (1988), of the Endangered Species Act authorizes the Secretary of the Interior or Commerce to issue permits authorizing otherwise prohibited takings of endangered or threatened species of wildlife "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 [16 U.S.C. § 1539(j) (1988)]." See 50 C.F.R. §§ 17.22(a), .32(a) (1993).

Fish and Wildlife Service regulations authorize certain federal and state employees and agents, when acting within the scope of their official duties, to take endangered and threatened species without a permit, "to aid a sick, injured, or orphaned specimen," to "dispose of a dead specimen," to "[s]alvage a dead specimen which may be useful for scientific study," or to "remove specimens which pose a demonstrable but nonimmediate threat to human safety." 50 C.F.R. §§ 17.21(c)(3), .21(c)(4), .31(a) (1993). In addition, qualified employees or agents of a state conservation agency that have a "Cooperative Agreement with the Fish and Wildlife Service in accordance with section 6(c) [16 U.S.C. § 1535(c) (1988)] of the Act," are authorized to take endangered or threatened species under the agreement for conservation purposes. 50 C.F.R. §§ 17.21(c)(5), .31(b) (1993). These regulations apparently are based upon authority conferred on the Secretary of the Interior under 16 U.S.C. § 1540(f) (1994) to promulgate regulations needed to enforce the Act.

53. 16 U.S.C. § 1538(a)(1)(B) (1994).

54. *Id.* § 1539(a)(1)(B). Fish and Wildlife Service regulations regarding the permits for endangered species of wildlife are at 50 C.F.R. § 17.22(b) (1993). The Fish and Wildlife Service

person must submit a habitat conservation plan (HCP) to the Fish and Wildlife Service that will minimize and mitigate the impacts of such incidental taking to the maximum extent practicable. The Fish and Wildlife Service must also find that "the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild."<sup>55</sup> Although a section 10 incidental takings permit may allow land development to modify or destroy wildlife habitat, development of an HCP can be expensive, complicated and time-consuming.<sup>56</sup>

Notwithstanding the Act's prohibitions against taking endangered and threatened species of wildlife, any taking that complies with the specific terms and conditions of a written statement under section 7(b)(4)(C)(iv)<sup>57</sup> is not "a prohibited taking."<sup>58</sup> The Fish and Wildlife Service must provide a written statement to a federal agency when the Service, after consultation with the agency pursuant to section 7(a)(2)<sup>59</sup> of the Act:

concludes that—

(A) the agency action will not violate such subsection, or offers reasonable and prudent alternatives which the Secretary believes would not violate such subsection;

(B) the taking of an endangered species or a threatened species incidental to the agency action would not violate such subsection; and

has adopted regulations authorizing permits for incidental taking of threatened species of wildlife. 50 C.F.R. § 17.32(b) (1993).

55. 16 U.S.C. § 1539(a)(2)(B)(iv) (1988). "Section 10(a) provides procedural means by which to improve the trade-off between protecting endangered species and permitting normal development. Firms whose activities might incidentally 'take' members of an endangered species can get *advanced* protection from legal liability, but only if they convince the Secretary that the plan uses the maximum devices possible to mitigate and minimize species loss, and that the resulting losses will not unduly harm the species. See § 10(a)(2)(B)(ii) & (iv). 16 U.S.C. § 1539(a)(2)(B)(ii) & (iv)." *Sweet Home Chapter v. Babbitt*, 17 F.3d 1463, 1468 (D.C. Cir. 1994) (*Sweet Home II*), *reh'g denied*, 30 F.3d 190 (D.C. Cir. 1994), *cert. granted*, 115 S. Ct. 714 (Jan. 6, 1995) (No. 94-859). The majority in *Sweet Home II* concluded that an "incidental taking" for which a permit can be issued under section 10(a)(1)(B) of the Act does not include "significant habitat modification injurious to wildlife." *Id.* See *infra* notes 357-63 and accompanying text. The dissent in *Sweet Home II* argued that an "incidental taking" under section 10(a)(1)(B) can include habitat modification that constitutes a "take" under 50 C.F.R. § 17.3. 17 F.3d at 1477 (Mikva, C.J., dissenting). See *infra* notes 428-31 and accompanying text.

56. See Robert D. Thornton, *The Search for a Conservation Planning Paradigm: Section 10 of the ESA*, 8 NAT. RESOURCES & ENV'T, Summer 1993, at 21 [hereinafter Thornton, *Conservation Planning Paradigm*]; Robert D. Thornton, *Takings Under Endangered Species Act Section 9*, 4 NAT. RESOURCES & ENV'T, Spring 1990, at 7, 9, 50 [hereinafter Thornton, *Takings*].

Habitat conservation plans for section 10(a) incidental take permits can cover "large tracts of land. . . . The plan to protect the California gnatcatcher, for example, covers 3.8 million acres." *Sweet Home Chapter v. Babbitt*, 30 F.3d 190, 192 (D.C. Cir. 1994), *cert. granted*, 115 S. Ct. 714 (Jan. 6, 1995) (No. 94-859).

57. 16 U.S.C. § 1536(b)(4)(C)(iv) (1988).

58. *Id.* at § 1536(o)(2).

59. *Id.* at § 1536(a)(2). See *infra* notes 114-27, 340-56 and accompanying text.

(C) if an endangered or threatened species of a marine mammal is involved, the taking is authorized pursuant to [16 U.S.C. § 1371(a)(5)].<sup>60</sup>

The statement must specify the terms and conditions that the federal agency, applicant, or both, must comply with to implement specified reasonably prudent measures, minimizing the incidental taking. The statement must also adopt necessary measures to comply with 16 U.S.C. § 1371(a)(5) regarding marine mammals.<sup>61</sup>

This "exemption," however, can only be triggered by a section 7 consultation. Conversely, a section 7 consultation requires some federal agency action. Thus, before a private landowner can take a listed species under section 7, there must be a "nexus between the proposed taking and a federal agency action."<sup>62</sup> This nexus only exists if the private landowner's taking results from an "action authorized, funded, or carried out" by a federal agency.<sup>63</sup> Furthermore, this exemption does not apply to a taking, resulting from an existing physical condition, that is the subject of an incidental taking statement under section 7(b)(4) of the Act.<sup>64</sup>

To qualify for this exemption, a federal "agency must obtain an incidental taking statement before it takes the protected species."<sup>65</sup> A Fish and Wildlife Service statement "does not retroactively excuse the takings that occurred before the Secretary [of the Interior] issued the statement."<sup>66</sup> However, if a federal agency can show that it subsequently obtained authorization from the Fish and Wildlife Service and complied with the requirements of a section 7(b)(4) incidental taking statement, a court should lift an injunction against the agency action constituting a taking under the Endangered Species Act.<sup>67</sup>

When federal agency action or private action is authorized or funded by a federal agency,<sup>68</sup> section 7(o)(1) provides an alternate method of exempting land development activities.<sup>69</sup> Section 7(o)(1) provides that, notwithstanding the Act's prohibitions, any exempt

60. 16 U.S.C. § 1536(b)(4) (1988).

61. *Id.* § 1536(b)(4)(C). Regulations implementing this exemption are at 50 C.F.R. § 402.14(i) (1993).

62. Thornton, *Takings*, *supra* note 56, at 8.

63. 16 U.S.C. § 1536(a)(2) (1988). See Deborah L. Freeman, *Reinitiation of ESA § 7 Consultations over Existing Projects*, 8 NAT. RESOURCES & ENV'T, Summer 1993, at 17, 17-18; see also *infra* notes 118-20 and accompanying text.

64. See *Swan View Coalition, Inc. v. Turner*, 824 F. Supp. 923, 937 (D. Mont. 1992).

65. *Defenders of Wildlife v. EPA*, 882 F.2d 1294, 1301 (8th Cir. 1989).

66. *Id.*

67. *Id.*

68. See *supra* notes 62-63 and accompanying text; see also *infra* notes 114-27, 340-56 and accompanying text.

69. 16 U.S.C. § 1536(o)(1) (1988).

action under section 7(h)<sup>70</sup> of the Act "shall not be considered to be a taking of any endangered or threatened species with respect to any activity which is necessary to carry out such action."<sup>71</sup> The Endangered Species Committee (the so-called "God Squad"<sup>72</sup>) is required to issue exemptions under 7(h) if it makes determinations that: "there are no reasonable and prudent alternatives to the agency action"; the action's benefits "clearly outweigh" the benefits of alternative courses of action "consistent with conserving the species or its critical habitat, and such action is in the public interest"; and the action is regionally or nationally significant.<sup>73</sup> An additional finding that the Committee must make in order to be required to issue a section 7(h) exemption is that the action "establishes such reasonable mitigation and enhancement measures . . . as are necessary and appropriate to minimize the adverse effects of the agency action upon the endangered species, threatened species, or critical habitat concerned."<sup>74</sup> The Committee, however, has granted only a few exemptions under section 7(h).<sup>75</sup>

In states that are parties to cooperative agreements under section 6(c)<sup>76</sup> of the Endangered Species Act, land development modifying wildlife habitat may be exempted, under sections 4(d) and 6(g)(2)(A),<sup>77</sup> from the Act's takings prohibitions. Where the habitat

70. *Id.* § 1536(h).

71. *Id.* § 1536(o)(1).

72. Wm. Robert Irvin, *The Endangered Species Act: Keeping Every Cog and Wheel*, 8 NAT. RESOURCES & ENV'T, Summer 1993, at 36, 39.

73. *Id.* § 1536(h)(1)(A). Section 7(p), 16 U.S.C. § 1536(p) (1988), authorizes the President, when acting under the Disaster Relief and Emergency Assistance Act, 42 U.S.C. § 5121, to make the determinations required by sections 7(g) and (h), 16 U.S.C. § 1536(g) & (h) (1988), for any project repairing or replacing a public facility in a designated major disaster area, "which the President determines (1) is necessary to prevent the recurrence of such a natural disaster and to reduce the potential loss of human life, and (2) to involve an emergency situation which does not allow the ordinary procedures of [section 7] to be followed." The Committee is required to accept the President's determinations under section 7(p). 16 U.S.C. § 1536(p) (1988).

74. *Id.* § 1536(h)(1)(B). Regulations governing issuance of exemptions by the Endangered Species Committee are at 50 C.F.R. §§ 450.01-453.06 (1993).

Section 7(j), 16 U.S.C. § 1536(j) (1988), alternatively provides that "[n]otwithstanding any other provision of [the Endangered Species Act], the Committee shall grant an exemption for any agency action if the Secretary of Defense finds that such exemption is necessary for reasons of national security." See 50 C.F.R. § 453.03(d) (1993).

Section 7(i), 16 U.S.C. § 1536(i) (1988), prohibits the Committee "from considering for exemption any application" for proposed agency action if the Secretary of State, after following prescribed procedures, certifies in writing to the Committee that the granting of the exemption and the implementation of the action would violate an international treaty or commitment of the United States.

75. As of the summer of 1993, the Committee had met only three times during the nearly 15 years of section 7(h)'s existence. Irvin, *supra* note 72, at 36, 40.

76. 16 U.S.C. § 1535(c) (1988).

77. *Id.* §§ 1533(d), 1535(g)(2)(A).

modification is not an unlawful taking of an endangered or threatened species under state law, the exemption may be nullified by section 6(f)<sup>78</sup> of the Act. Section 6(g)(2)(A) provides that prohibitions against the taking of endangered and threatened species:

shall not apply with respect to the taking of any resident endangered species or threatened species (other than species listed in Appendix I to the Convention [on International Trade in Endangered Species of Wild Fauna and Flora, signed on March 3, 1973, and the appendices thereto] or otherwise specifically covered by any other treaty or Federal law) within any State—

(A) which is then a party to a cooperative agreement with the Secretary [of the Interior] pursuant to subsection (c) of this section (except to the extent that the taking of any such species is contrary to the law of such State) . . . .<sup>79</sup>

Section 4(d) of the Act provides that Fish and Wildlife Service regulations, regarding the taking of threatened resident species of fish or wildlife, apply in any state that is party to a cooperative agreement under section 1535(c) only to the extent that such regulations are incorporated into state law.<sup>80</sup> Such cooperative agreements can be entered into by the Fish and Wildlife Service and a state "which establishes and maintains an adequate and active program for the conservation of endangered species and threatened species."<sup>81</sup>

Section 6(f) of the Act provides, however, that state laws or regulations governing the taking of endangered or threatened species may be more restrictive than section 6(f) or the accompanying regulations, but may not be less restrictive.<sup>82</sup> Furthermore, *Swan View Coalition, Inc. v. Turner*<sup>83</sup> held that section 6(f) of the Act means that state takings provisions for a member of a section 6(c) cooperative agreement are preempted when the state's definition of take does not include "harm" and "significant habitat modification." The court in *Swan View Coalition* consequently held that the Endangered Species Act's "take" prohibitions, which include "harm" and "significant habitat modification," were applicable in a state that is party to a section 6(c)

78. *Id.* § 1535(f).

79. *Id.* § 1535(g)(2)(A).

80. *Id.* § 1533(d). See *Swan View Coalition, Inc. v. Turner*, 824 F. Supp. 923, 938 (D. Mont. 1992).

81. 16 U.S.C. § 1535(c)(1) (1988). A state which has entered into such a cooperative agreement is eligible for federal assistance covering up to 90% of the estimated program cost stated in the agreement. *Id.* § 1535(d).

82. *Id.* § 1535(f). Any less restrictive state law is preempted by section 6(f) of the Act. See *United States v. Glenn-Colusa Irrigation Dist.*, 788 F. Supp. 1126, 1134 (E.D. Cal. 1992); *Swan View Coalition, Inc. v. Turner*, 824 F. Supp. 923, 938 (D. Mont. 1992).

83. 824 F. Supp. at 938.

cooperative agreement but that has a less restrictive state takings prohibition.<sup>84</sup>

This holding in *Swan View Coalition* means that section 6(f) of the Endangered Species Act nullifies any exemption from the Act's takings prohibitions provided under section 6(g)(2)(A) or section 4(d), because *Swan View Coalition's* interpretation of section 6(f) requires that a state's definition of "take" mirror the definition of "take" under the Endangered Species Act and Fish and Wildlife Service regulations. If section 6(f) requires a state's taking law to be the same as federal takings prohibitions, under the Endangered Species Act, neither section 6(g)(2) nor section 4(d) of the Act can make the federal prohibitions regarding taking endangered or threatened species through "significant habitat modification" inapplicable in a cooperative agreement state.<sup>85</sup>

### C. Enforcement of the Prohibitions on Takings

The Endangered Species Act enforces its prohibitions on the takings of endangered and threatened species through civil penalties, criminal penalties, and injunctive relief.<sup>86</sup> "The Endangered Species Act does not expressly condition the enforcement of the prohibition on taking a protected species to takings occurring after the agency adopts a recovery plan, identifies critical habitat or issues protective regulations."<sup>87</sup> Furthermore, completion of an environmental impact statement, in compliance with section 102(2)(C)<sup>88</sup> of the National Environmental Policy Act of 1969, is not a prerequisite to enforcement of the Endangered Species Act's prohibitions on takings.<sup>89</sup>

Any person who knowingly violates the Endangered Species Act's prohibitions regarding the taking of an endangered species, or any permits or implementing regulations issued under the Act, is subject a civil penalty of up to \$25,000 for each violation<sup>90</sup> and criminal penalties of a fine, imprisonment, or both.<sup>91</sup> Any person who

84. *Id.*

85. Furthermore, a person's state water law rights do not exempt a person from the Endangered Species Act's prohibition on takings. *United States v. Glenn-Colusa Irrigation Dist.*, 788 F. Supp. at 1134.

86. See Eileen Sobek, *Enforcement of the Endangered Species Act*, 8 NAT. RESOURCES & ENV'T, Summer 1993, at 30.

87. *United States v. Glenn-Colusa Irrigation Dist.*, 788 F. Supp. at 1134-35.

88. 42 U.S.C. § 4332(C) (1988).

89. *United States v. Glenn-Colusa Irrigation Dist.*, 788 F. Supp. at 1135.

90. 16 U.S.C. § 1540(a)(1) (1988).

91. *Id.* § 1540(b)(1). The 1984 Sentencing Reform Act and the 1987 Criminal Fines Improvement Act, 18 U.S.C. §§ 3559(a)(6), 3571(b), (e) (1988 & Supp. 1993), increased the maxi-

knowingly violates the Fish and Wildlife Service regulations<sup>92</sup> prohibiting the taking of a threatened species of fish or wildlife is subject to assessment of a civil penalty by the Secretary of the Interior or Commerce of up to \$12,000 for each violation<sup>93</sup> and criminal penalties of a fine or imprisonment.<sup>94</sup> An individual could escape civil or criminal penalties by demonstrating "a good faith belief that he was acting to protect himself or herself, a member of his or her family, or any other individual from bodily harm, from any endangered or threatened species."<sup>95</sup>

The Endangered Species Act does not specify whether "knowingly" violating the prohibitions under the Act and Fish and Wildlife Service regulations requires actual knowledge—at the time of the taking—that the conduct constituted a prohibited taking under the Act. Several courts have held, however, that a person only has to act with a "general intent" to "knowingly" violate the Act's prohibitions on takings.<sup>96</sup> Under this approach, a person "knowingly" takes a protected species, for purposes of the Act's criminal penalty provisions, if the person's actions were voluntary and intentional and not due to mistake or accident.<sup>97</sup> To "knowingly" violate the Act's takings prohibitions the person does not have to know the particular species or subspecies of the animal taken, know that the species taken was listed under the Act as endangered or threatened, or know that the Act applied to the lands where the taking occurred.<sup>98</sup>

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mum criminal penalties for each violation under the Endangered Species Act, to a \$100,000 fine, one year imprisonment, or both, for an individual, and to a \$200,000 fine for a corporation.

92. 50 C.F.R. § 17.31(a) (1993).

93. 16 U.S.C. § 1540(a)(1) (1988).

94. *Id.* § 1540(b)(1). See *supra* note 91.

95. *Id.* §§ 1540(a)(3), (b)(3).

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

97. *Billie*, 667 F. Supp. at 1492.

98. *Id.* at 1492-94. The court in *United States v. St. Onge*, 676 F. Supp. 1044 (D. Mont. 1988), concluded that the interpretation of the Act in *United States v. Billie* was "supported by the legislative history," *id.* at 1045, and stated that:

The critical issue is whether the act was done knowingly, not whether the defendant recognized what he was shooting. The scienter element applies to the act of taking; thus defendant could only claim accident or mistake if he did not intend to discharge his firearm, or the weapon malfunctioned, or similar circumstances occurred.

*Id.* In *St. Onge*, the court found that the defendant's belief that he was shooting an elk would not be a defense to a criminal charge of knowingly taking a threatened grizzly bear in violation of 16 U.S.C. § 1540(b)(1). 676 F. Supp. at 1044. The court also held in *St. Onge* that the government, in order to convict the defendant of the charged crime, only had to prove that the defendant knowingly took a grizzly

A person engaged in an activity that constitutes a prohibited taking under the Act can also be enjoined from taking a protected species. Section 11(e)(6)<sup>99</sup> of the Endangered Species Act provides that "[t]he Attorney General of the United States may seek to enjoin any person who is alleged to be in violation of any provision" of the Act or any "regulation issued under authority thereof." This provision authorizes the Attorney General to file a civil suit, seeking injunctive relief, against a person engaging in conduct that takes endangered or threatened fish or wildlife in violation of the Endangered Species Act.

In addition, "the [Endangered Species Act] provides a private right of action to enjoin violations of the Act."<sup>100</sup> This citizen suit provision<sup>101</sup> authorizes any person, with standing, to enforce the Act through injunctive relief by filing suit against any person alleged to be in violation of any provision of the Act or regulation issued under the Act.<sup>102</sup> "Congress thus encouraged citizens to 'bring civil suits . . . to force compliance with any provision of the Act.'"<sup>103</sup> In order for a person "to be in violation of" the Endangered Species Act's takings prohibitions and subject to a citizen suit, the person must be engaged in continuous, ongoing conduct that constitutes a prohibited taking,

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bear and that the defendant had no federal permit to take the bear. *Id.* at 1045.

Similarly, in *United States v. Nguyen*, 916 F.2d 1016 (5th Cir. 1990), the defendant was charged under the Endangered Species Act of the crime of knowing possession, importation, or attempting to possess a listed threatened species. The Fifth Circuit held that the legislative history of section 11 of the Act, 16 U.S.C. § 1540 demonstrates Congress' intent to make its violation "a general intent crime." *Id.* at 1018. The Fifth Circuit stated that Congress' purpose is reflected in the 1978 amendment of 16 U.S.C. § 1540(b)(1) by substituting "knowingly" for "willfully." 916 F.2d at 1018-19 (citing H.R. R EP. No. 1625, 95th Cong., 2d Sess. 26; H.R. C ONF. REP. No. 1804, 95th Cong., 2d Sess. 26). "The committee explicitly stated that it did 'not intend to make knowledge of the law an element of either civil penalty or criminal violations of the Act.'" 916 F.2d at 1019 (citation omitted). The Fifth Circuit therefore held in *Nguyen* that the government in a criminal prosecution under section 11 of the Act does not have to prove that the defendant knew that his conduct was illegal, knew the species of the animal in question or knew that the species was a listed threatened species. *Id.* at 1018.

Without supporting analysis or citations, one federal district court has stated in dictum that 16 U.S.C. §§ 1540(a) and (b) require that the defendant knew that the conduct for which he is assessed civil penalties or criminally prosecuted was unlawful. *Sweet Home Chapter v. Lujan*, 806 F. Supp. 279, 286 (D.D.C. 1992), *aff'd sub nom. Sweet Home Chapter v. Babbitt*, 1 F.3d 1 (D.C. Cir. 1993), *modified on petition for reh'g*, 17 F.3d 1463 (D.C. Cir. 1994), *reh'g denied*, 30 F.3d 190 (D.C. Cir. 1994), *cert. granted*, 115 S. Ct. 714 (Jan. 6, 1995) (No. 94-859).

99. 16 U.S.C. § 1540(e)(6) (1988).

100. *Defenders of Wildlife v. EPA*, 882 F.2d 1294, 1299 (8th Cir. 1989).

101. 16 U.S.C. § 1540(g)(1)(A) (1988).

102. *Id.* § 1540(g)(1).

103. *Defenders of Wildlife v. EPA*, 882 F.2d at 1300 (quoting *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 181 (1978)).

both at the time the citizen suit is filed and when the citizen suit comes to trial.<sup>104</sup>

Courts differ as to the standard a court should follow in determining whether a permanent injunction should be issued against conduct that constitutes a prohibited taking in violation of the Endangered Species Act. A number of courts hold that courts should not engage in the traditional balancing of equities when an injunction is sought against conduct that constitutes a prohibited taking of an endangered or threatened species. Following this approach, the Ninth Circuit Court of Appeals held, in a citizen suit seeking an injunction against an alleged taking of an endangered species, that courts do not have "their traditional equitable discretion in injunction proceedings of balancing the parties' competing interests," because Congress has determined under the Endangered Species Act "that the balance of hardships and the public interest tips heavily in favor of protected species."<sup>105</sup> One court followed this approach in an Endangered Species Act citizen suit and issued an injunction against a federal agency action, stating that "[w]hen an injunction is sought under the . . . [Endangered Species Act], the traditional balancing of equities is abandoned in favor of an almost absolute presumption in favor of the endangered species."<sup>106</sup>

Under this no-balancing-of-equities approach, a court would grant an injunction if an action constitutes a prohibited taking of an endangered species unless unusual circumstances exist "where the

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104. *Cf. Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49 (1987) (holding that § 505(a) of the Clean Water Act requires a good faith allegation of an ongoing violation of the act).

105. *National Wildlife Fed'n v. Burlington N. R.R.*, 23 F.3d 1508, 1511 (9th Cir. 1994) (affirming denial of motion for preliminary injunction, but stating principles apparently governing all injunction proceedings under the Endangered Species Act). The Ninth Circuit in *Burlington Northern Railroad*, however, affirmed the district court's denial of a motion for a preliminary injunction against the railroad that would have required the railroad's trains to reduce speed at locations where corn had accidentally spilled, and to obtain an incidental taking permit under section 10(a)(1)(B), 16 U.S.C. § 1539(a)(1)(B), although the railroad's trains had struck and killed seven grizzly bears attracted to the spilled corn. Because the district court found that the railroad's cleanup efforts had "substantially minimized" "the attractiveness of the corn spill sites as food sources" and because "[t]he fact that no bears have been killed by BN trains in three years supports an inference that the cleanup was effective," the Ninth Circuit held that the district court did not "clearly err" in denying the preliminary injunction on the grounds that the plaintiff "failed to establish the likelihood of irreparable future injury." *Id.* at 1511. See *infra* notes 111-12 and accompanying text.

106. *Defenders of Wildlife v. EPA*, 688 F. Supp. 1334, 1355 (D. Minn. 1988), *aff'd in part and rev'd in part*, 882 F.2d 1294 (8th Cir. 1989). In this case, the Eighth Circuit held that the district court had properly enjoined the EPA from continuing registration of strychnine under the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136-136y (1982 & Supp. IV 1986), when such registration constituted a prohibited taking of endangered species of wildlife. 882 F.2d at 1301. See *infra* note 167.

ecological harm caused by . . . granting . . . [the] injunction would be greater than if no injunction [was] issued."<sup>107</sup> Courts following this approach take the position that because Congress intended to afford endangered species "the highest of priorities,"<sup>108</sup> the United States is entitled to an injunction against a prohibited taking of a threatened species of wildlife in violation of the Act if injury to the species is "likely and irreparable."<sup>109</sup> Similarly, a court held, in a citizen suit seeking to enjoin a prohibited taking of an endangered species, that when a taking creates "an actual present negative impact on the [species'] population that threatens the continued existence and recovery of the species . . . , the Endangered Species Act leaves no room for balancing policy considerations," and a court must order cessation of the activity that constitutes the prohibited taking.<sup>110</sup>

A court following this no-balancing-of-equities approach, however, "must look at the likelihood of future harm before deciding whether to grant an injunction under the [Endangered Species Act]."<sup>111</sup> To obtain an injunction against a person who allegedly will continue to take a protected species in violation of the Act, the plaintiff "must prove that there is a reasonable likelihood of future violations of the [Endangered Species Act]."<sup>112</sup>

Several courts, however, following the more traditional balancing-of-equities approach, have held that in order for plaintiffs to obtain a

107. *National Wildlife Fed'n v. Hodel*, 23 Env't Rep. (BNA) 1089 (E.D. Cal. 1985). In this case, the court issued a preliminary injunction against the Secretary of the Interior and the Director of the Fish and Wildlife Service prohibiting the defendants from authorizing the hunting of migratory birds with lead shot in certain areas, in part because this authorization constituted a prohibited taking of endangered bald eagles that were wounded or killed by lead shot. See *infra* note 167.

108. *United States v. Glenn-Colusa Irrigation Dist.*, 788 F. Supp. 1126, 1132 (E.D. Cal. 1992) (quoting *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 174 (1978)). The court in *Glenn-Colusa* enjoined an irrigation district from pumping water from the Sacramento River at a particular facility during the threatened winter-run chinook salmon's peak downstream migration season, because that conduct constituted a prohibited taking of the salmon by killing salmon. 788 F. Supp. at 1135.

109. *United States v. Glenn-Colusa Irrigation Dist.*, 788 F. Supp. at 1132.

110. *Palila v. Hawaii Dep't of Land & Natural Resources*, 649 F. Supp. 1070, 1082 (D. Haw. 1986), *aff'd*, 852 F.2d 1106 (9th Cir. 1988). The Ninth Circuit in *Palila* upheld the district court's issuance of an injunction requiring the State of Hawaii to remove all mouflon sheep from the critical habitat of the endangered palila bird species, because the presence of the mouflon sheep in that habitat constituted "harm" and a "take" of the palila in violation of the Endangered Species Act. 852 F.2d at 1110; see *infra* notes 207-58 and accompanying text.

111. *National Wildlife Fed'n v. Burlington N. R.R.*, 23 F.3d 1506, 1511 (9th Cir. 1994). See *supra* note 105.

112. *Id.* Future harm of a protected species does not have to "be shown with certainty before an injunction may issue," but "[t]he plaintiff must make a showing that a violation of the [Endangered Species Act] is at least likely in the future." *Id.* Although "a threat of extinction to the species" is not required before an injunction may be issued under the Act, there must be "a definitive threat of future harm to protected species, not mere speculation." *Id.* at 1511 n.8.

permanent injunction against a prohibited taking, "the [p]laintiffs must establish four facts: (1) actual success on the merits, (2) a substantial threat of irreparable harm absent an injunction, (3) that the irreparable harm threatened is greater than that caused by the injunction, and (4) the public interest would be served by the injunction."<sup>113</sup>

### III. PROTECTION OF WILDLIFE HABITAT UNDER SECTION 7 OF THE ENDANGERED SPECIES ACT

In analyzing the issue of whether modification of wildlife habitat is regulated under the Endangered Species Act's takings prohibitions, the regulation of habitat modification under section 7<sup>114</sup> of the Act should be considered. Section 7 of the Act can prohibit federal agency action that will destroy or modify the habitat of endangered or threatened species of fish or wildlife.<sup>115</sup> Section 7(a)(2)<sup>116</sup> of the Endangered Species Act provides:

Each Federal agency shall, in consultation with and with the assistance of the Secretary [of the Interior or Commerce], insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary . . . to be critical, unless such agency has been granted an exemption for such action by the [Endangered Species] Committee pursuant to subsection (h) of this section . . . .<sup>117</sup>

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113. *Sierra Club v. Lyng*, 694 F. Supp. 1260, 1277 (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); *see also* *Sierra Club v. Lujan*, 36 Env't. Rep. Cas. (BNA) 1533, 1554 (W.D. Tex. 1993) (quoting *Lyng's* four facts). In *Lyng*, the court issued a permanent injunction against certain national forest management practices of the United States Forest Service, which were found to be a taking in violation of the Endangered Species Act as well as in violation of section 7, 16 U.S.C. § 1536, of the Act. *See infra* notes 183-206 and accompanying text. The *Lyng* court issued the permanent injunction on the grounds that otherwise irreparable harm would result to an endangered species of woodpecker that was on the "verge of extinction" because of a "steadily declining population," that "the harm to the woodpecker through extinction would outweigh any harm caused by [the] injunction," and "that the public interest . . . [would] be served by the attempt to preserve [the] species." 694 F. Supp. at 1277. The court in *Lujan* ordered the Texas Water Commission to prepare a plan to assure that withdrawals of water from groundwater would not cause spring flow levels in two springs to drop below levels that result in endangered and threatened species being taken in violation of the Endangered Species Act. 36 Env't. Rep. Cas. (BNA) at 1558.

114. 16 U.S.C. § 1536 (1988).

115. *See* *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 173 (1978); *Sierra Club v. Marsh*, 816 F.2d 1376, 1383 (9th Cir. 1987).

116. 16 U.S.C. § 1536(a)(2) (1988).

117. Section 7 of "[t]he Act prescribes a three-step process to ensure compliance" by federal agencies with section 7(a)(2)'s "substantive provisions," with each of the first two steps serving

Section 7(a)(2) only applies to action authorized, funded or carried out by a federal agency;<sup>118</sup> it consequently does not apply to private action or state or local government actions that are not authorized, funded, or carried out by a federal agency.<sup>119</sup> The Endangered Species Act's prohibitions regarding taking endangered and threatened species of fish and wildlife, however, apply to any person, including private individuals, corporations, states, municipalities, state political subdivisions, and employees and agents of the federal government, a state, a municipality, or a political subdivision of a state.<sup>120</sup> Although federal agency action that destroys or adversely modifies a protected species' habitat may violate section 7(a)(2)'s prohibition of actions that "jeopardize the continued existence of any endangered species or threatened species,"<sup>121</sup> this prohibition only applies to actions that may kill *all* members of the endangered or threatened species (resulting in the species becoming extinct).<sup>122</sup> The

"a screening function to determine if the successive steps are required." *Thomas v. Peterson*, 753 F.2d 754, 763 (9th Cir. 1985). These three procedural "steps" are:

1) A federal agency shall inquire of the Fish and Wildlife Service whether any threatened or endangered species "may be present" in the area of the agency's proposed action. 16 U.S.C. § 1536(c)(1) (1988).

2) Preparation by the agency of a biological assessment if the Secretary finds that a threatened or endangered species may be present. The biological assessment, which may be part of an environmental impact statement or environmental assessment under the National Environmental Policy Act of 1969, 42 U.S.C. § 4332(2)(C) (1988), is to be conducted "for the purpose of identifying any endangered species or threatened species which is likely to be affected by such action." 16 U.S.C. § 1536(c)(1) (1988).

3) Formal consultation by the agency with the Fish and Wildlife Service if the biological assessment determines that a threatened or endangered species "is likely to be affected" by the agency action. *Id.* § 1536(a)(2). Following this formal consultation, the Fish and Wildlife Service is required to issue a "biological" "opinion . . . detailing how the agency action affects the species or its critical habitat." 16 U.S.C. § 1536(b)(3)(A). If the biological opinion concludes that the proposed agency action would jeopardize a listed species or adversely modify its critical habitat, then the agency action would violate 16 U.S.C. § 1536(a)(2) and cannot be undertaken unless the Fish and Wildlife Service, pursuant to its duty under 16 U.S.C. § 1536(b)(3)(A) (1988), has suggested a reasonable and prudent alternative which it believes the agency or applicant can take without violating section 7(a)(2) of the Act. *Thomas v. Peterson*, 753 F.2d 754, 763 (9th Cir. 1985). If the biological opinion concludes that the agency action will not violate section 7(a)(2), the Fish and Wildlife Service may under 16 U.S.C. § 1536(b)(4)(ii)-(iii) require reasonable and prudent measures to minimize takings of endangered or threatened species incidental to the agency action. *Thomas v. Peterson*, 753 F.2d at 763. The National Marine Fisheries Service and the Fish and Wildlife Service have adopted joint regulations that interpret and implement sections 7(a)-(d), 16 U.S.C. § 1536(a)-(d) (1988), of the Endangered Species Act. 50 C.F.R. §§ 402.01-.16 (1993). See Freeman, *supra* note 63, at 17; William H. Satterfield et al., *Who's Afraid of the Big Bad Beach Mouse*, 8 NAT. RESOURCES & ENV'T, Summer 1993, at 13.

118. See Proffitt v. Dep't of Interior *ex rel.* Lujan, 825 F. Supp. 159, 164 (W.D. Ky. 1993).

119. See Freeman, *supra* note 63, at 37-38.

120. See *supra* notes 22-23 and accompanying text.

121. See *Sierra Club v. Marsh*, 816 F.2d 1376, 1385 (9th Cir. 1987).

Act's general prohibition of taking endangered or threatened species of fish or wildlife is violated, however, when only one animal within the species is killed or otherwise taken,<sup>123</sup> even if the species' continued existence is not jeopardized by the killing of one or a few members of the endangered or threatened species.<sup>124</sup>

Section 7(a)(2)'s alternative prohibition of federal agency action that may result in the destruction or modification of critical habitat<sup>125</sup> of an endangered species only applies when the habitat has been

122. See *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 156, 171-72, 174 (1978) (finding that section 7 will be violated by a federal agency project that extinguishes the existence of an entire species). Joint regulations of the National Marine Fisheries Service and the Fish and Wildlife Service, which interpret and implement section 7(a)(2), define "[j]eopardize the continued existence of" to mean "to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species." 50 C.F.R. § 402.02 (1993).

123. Endangered and Threatened Wildlife and Plants, 46 Fed. Reg. 54,748 (1981) (codified at 50 C.F.R. § 17.3) (redefining "harm" within the meaning of "take" under the Endangered Species Act) (stating that "section 9's threshold does focus on individual members of a protected species").

124. See *Palila v. Hawaii Dep't of Land & Natural Resources*, 649 F. Supp. 1070, 1077 (D. Haw. 1986), *aff'd*, 852 F.2d 1106 (9th Cir. 1988) (holding that the population of an endangered species does not have "to dip closer to extinction before the [takings] prohibitions of section 9 come into force").

125. "Critical habitat" for a threatened or endangered species is defined to mean:

- (i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section [4 of the Act, 16 U.S.C. § 1533 (1988)] . . . , on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and (ii) specific areas outside the geographical area occupied by the species at the time it is listed . . . , upon a determination by the Secretary that such areas are essential for the conservation of the species.

16 U.S.C. § 1532(5)(A) (1988). Judge Stephen Williams, in a statement joined by Judge Sentelle in support of denial of appellees' petition for rehearing of *Sweet Home Chapter v. Babbitt*, 17 F.3d 1463 (D.C. Cir. 1994), *reh'g denied*, 30 F.3d 190 (D.C. Cir. 1994), *cert. granted*, 115 S. Ct. 714 (Jan. 6, 1995) (No. 94-859), *see infra* notes 345-56 and accompanying text, stated that section 7(a)(2)'s prohibition of the federal government's "destruction or adverse modification of habitat . . . which is determined . . . to be critical," "seems to be simply another way of referring to habitat modifications so significant to the species that they might lead to death (or at least some very serious injury) for members of the species." *Sweet Home Chapter v. Babbitt*, 30 F.3d 190, 192 (D.C. Cir. 1994) (statement of Williams, J.), *cert. granted*, 115 S. Ct. 714 (Jan. 6, 1995) (No. 94-859).

determined critical by the Secretary of the Interior or Commerce.<sup>126</sup> Consequently, if section 9's takings prohibitions can be violated by habitat modification, its takings prohibitions can extend to habitat modifications by private individuals, corporations and state and local governments that are not authorized or funded by a federal agency, and to habitat modification that only kills or injures a single or a few animals within a protected species—habitat modifications that can not be prohibited under section 7(a)(2).<sup>127</sup>

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126. Procedures for designation of critical habitat for endangered and threatened species are set forth in 16 U.S.C. §§ 1533(a)(3), (b)(2), (b)(6)(c) (1988) and in 50 C.F.R. §§ 424.01-.21 (1993). Areas that have been listed as critical habitat are set forth at 50 C.F.R. § 17.95 (fish and wildlife) and § 17.96 (plants) (1993). The areas listed in § 17.95 (fish and wildlife) and § 17.96 (plants) and referred to in the lists at §§ 17.11 and 17.12 have been determined by the Director to be "Critical Habitats". *Id.* at § 17.94 (a). Fish and Wildlife Service regulations specify that "[a]ll Federal agencies must insure that any action authorized, funded, or carried out by them is not likely to result in the destruction or adverse modification of the constituent elements essential to the conservation of the listed species within these defined Critical Habitats." *Id.*

Judge Stephen Williams, in a statement joined in by Judge Sentelle in support of denial of appellees' petition for rehearing of *Sweet Home Chapter v. Babbitt*, 17 F.3d 1463 (D.C. Cir. 1994), *see infra* notes 345-56 and accompanying text, concluded that "[i]n looking at the Department's regulations [50 C.F.R. § 17.94 (1993)] discussing modifications of 'critical' habitat under § 7, and habitat modifications that are forbidden under the Department's view of § 9, we are unable to discern any substantive, operational difference, and the government has not identified any . . . . If there are 'essential' habitat elements whose removal or destruction causes no injury, the government cites no example and it is hard to imagine one." *Sweet Home Chapter v. Babbitt*, 30 F.3d at 192 (statement of Williams, J.) (citations omitted).

127. *See Comment, What Does It Take to Take and What Does It Take to Jeopardize? A Comparative Analysis of the Standards Embodied in Sections 7 and 9 of the Endangered Species Act*, 7 TUL. ENVTL. L.J. 197 (1993). The Endangered Species Act's only remedy for a violation of section 7's substantive provisions, or a substantial violation of section 7's procedural requirements, is issuance by a court, without the traditional balancing of equities, of an injunction against the action. *See Tennessee Valley Auth. v. Hill*, 437 U.S. 153 (1978); *Thomas v. Peterson*, 753 F.2d 754 (9th Cir. 1985); *Sierra Club v. Marsh*, 816 F.2d 1376, 1383 n.10 (9th Cir. 1987). The Endangered Species Act does not impose civil penalties or criminal punishment upon persons violating section 7 of the Act, although persons who violate the Act's prohibitions or takings of endangered and threatened species are subject to civil penalties and criminal punishment. *See supra* notes 86-98 and accompanying text.

Judge Stephen Williams, in a statement joined in by Judge Sentelle in support of denial of appellees' petition for rehearing of *Sweet Home Chapter v. Babbitt*, 17 F.3d 1463 (D.C. Cir. 1994), *see infra* notes 345-56 and accompanying text, states that:

Michael Bean, Senior Counsel for the Environmental Defense Fund, recognized the virtual identity between what the Senate deleted from § 9 and what it retained in § 7 when he wrote, not long after the Act passed, "if 'taking' [sic] comprehends habitat destruction, then it is at least doubtful whether section 7 of the Act is even necessary." MICHAEL J. BEAN, *THE EVOLUTION OF NATIONAL WILDLIFE LAW* 397 (1977). *But see* MICHAEL J. BEAN, *THE EVOLUTION OF NATIONAL WILDLIFE LAW* 342 (Revised & Expanded Edition 1983).

*Sweet Home Chapter v. Babbitt*, 30 F.3d 190, 192 (D.C. Cir. 1994) (statement by Williams, J.), *cert. granted*, 115 S. Ct. 714 (Jan. 6, 1995)(No. 94-859). This analysis by Judge Williams ignores the differences between sections 9 and 7(a)(2) of the Endangered Species

#### IV. FISH AND WILDLIFE SERVICE'S 1975 REGULATION DEFINING "HARM" AND "HARASS"

##### A. History of the Regulation

In 1975, the Fish and Wildlife Service adopted a regulation, which is still in effect, that defines "harass" (in the Endangered Species Act's definition of "take") to mean:

[A]n 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 or sheltering.<sup>128</sup>

When the Fish and Wildlife Service adopted this definition of "harass" on September 26, 1975, it did not explain the definition's basis.<sup>129</sup> The House Report on the Endangered Species Act of 1973 may give some insight into the basis for the definition of "harass:"

[Take] 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.<sup>130</sup>

The Fish and Wildlife Service's final definition of "harass" differs from its proposed definition of "harass," which was:

[A]n act which either actually or potentially harms wildlife by killing or injuring it, or by annoying it to such an extent as to cause serious disruption in essential behavior patterns, such as feeding, breeding or sheltering; significant environmental modification or degradation which has such effects is included within the meaning of "harass."<sup>131</sup>

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Act discussed in this section of the article. *See supra* notes 114-27 and accompanying text; *see also infra* notes 345-56 and accompanying text.

128. 50 C.F.R. § 17.3 (1993). Fish and Wildlife Service regulations define "wildlife" to mean the same as "fish or wildlife." *Id.* at § 10.12. "Fish or wildlife" in turn is defined to mean "any wild animal, whether alive or dead, including without limitation any wild mammal, bird, reptile, amphibian, fish, mollusk, crustacean, arthropod, coelenterate, or other invertebrate, whether or not bred, hatched, or born in captivity, and including any part, product, egg, or offspring thereof." *Id.* Fish and Wildlife Service regulations at 50 C.F.R. § 10.11 (1993) provide that words in singular form shall include plural, and words in plural form shall include singular.

129. *See* 40 Fed. Reg. 44,412-16 (Sept. 26, 1975) (codified at 50 C.F.R. § 17.3).

130. H.R. REP. NO. 412, 93d Cong., 1st Sess. 11 (1973).

131. 40 Fed. Reg. 28,714 (July 8, 1975).

This proposed definition of "harass" was the basis for a final definition of "harm," which the Fish and Wildlife Service defined as follows on September 26, 1975:

"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 are not limited to, breeding, feeding or sheltering; significant environmental modification or degradation which has such effects is included within the meaning of "harm" . . . .<sup>132</sup>

The definition of "harm" adopted in 1975 differed from the proposed definition of "harass" by including the words: "or omission" after "act" and by substituting the words: "which actually injures or kills wildlife, including acts which annoy it to such an extent as to significantly disrupt essential behavioral patterns, which include, but are not limited to, breeding, feeding or sheltering" for the words: "which either actually or potentially harms wildlife by killing or injuring it, or by annoying it to such an extent as to cause serious disruption in essential behavioral patterns, such as feeding, breeding or sheltering."<sup>133</sup>

In adopting these final definitions of "harass" and "harm" in 1975, the Fish and Wildlife Service explained:

The definition of "harass" has been retained in a modified form in this final rulemaking, to make it applicable to actions or omissions with the potential for injury. The concept of environmental damage being considered a "taking" has been retained, but is now found in a new definition, of the word "harm." "Harm" covers actions or omissions which actually (as opposed to potentially), cause injury. In addition, the definition of "harass" has been modified by restricting its application to acts or omissions which are done intentionally or negligently. In the proposal, "harass" would have applied to any action, regardless of intent or negligence . . . .

By moving the concept of environmental degradation to the 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 . . . .

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132. 50 C.F.R. § 17.3 (1975). This 1975 definition of "harm" was amended in 1981. See *infra* notes 149-62 and accompanying text.

133. Compare 40 Fed. Reg. 28,714 (July 8, 1975) with 40 Fed. Reg. 44,416-17 (Sept. 26, 1975) (codified at 50 C.F.R. § 17.3).

It should be noted that this definition of "harm" which includes significant environmental modification, does not permanently limit the environmental modifications that are permissible for the habitat of a listed species of fish or wildlife . . . . [T]he species could recover completely and be delisted altogether. Finally, the species in question could abandon its use of the area. In all of these situations, the limited restrictions on environmental modification under the definition of "harm" would be removed.<sup>134</sup>

The Fish and Wildlife Service's definition of "harass" consequently should be interpreted to exclude destruction or modification of wildlife habitat because the Service's final definition of "harass" was intended to exclude "significant environmental [habitat] modification or degradation."<sup>135</sup> The Service intended that such habitat destruction or modification be included only in its definition of "harm."<sup>136</sup>

134. *Id.* at 44,413.

135. 40 Fed. Reg. 28,714 (July 8, 1975).

136. There have not been any judicial interpretations of the Service's definition of "harass" in any specific factual situation, although Chief Judge Mikva of the United States Court of Appeals for the District of Columbia has observed that the prohibition against "harassment" "can limit a private landowner's use of his land in a rather broad manner." *Sweet Home Chapter v. Babbitt*, 1 F.3d 1, 10 (D.C. Cir. 1993) (Mikva, C. J., concurring in section II(A)(1) of the opinion), *modified on reh'g*, 17 F.3d 1463 (D.C. Cir. 1994), *reh'g denied*, 30 F.3d 190 (D.C. Cir. 1994), *cert. granted*, 115 S. Ct. 714 (Jan. 6, 1995)(No. 94-859).

The Service's definition of "harass" is drafted in such a manner that "harass" includes an intentional act or omission that creates the requisite likelihood of injury to wildlife, even if the person had no intent to injure or kill wildlife, and even if the person had no knowledge, or reason to know, that their act or omission created the requisite injury to wildlife. Chief Judge Mikva has stated that "the prohibition against harassment can be used to suppress activities that are in no way intended to injure an endangered species." *Sweet Home Chapter v. Babbitt*, 1 F.3d at 10 (Mikva, C. J., concurring in section II(A)(1) of the opinion). The Service's definition of "harass," however, does not define "intentional." "Intentional" act or omission might be interpreted the same as "voluntary act or omission" is defined in criminal law, meaning an act or omission that is the product of free and conscious will or of a situation where the person had the choice and opportunity to act differently. See WAYNE LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW, § 3.2(c), at 197-200 (3d ed. 1986); Kilbride v. Lake, N.Z.L. Rev. 590 (1961), *cited in* JOSEPH G. COOK & PAUL MARCUS, CRIMINAL LAW 128-33 (2d ed. 1988). Under such an interpretation, an act or omission would not be intentional if the act or omission occurred while the person was asleep or unconscious. See LAFAVE & SCOTT, *supra*, at § 3.2(c). Such an interpretation of an "intentional act or omission" would essentially be the same as the definition of what constitutes a "knowing" violation of the Endangered Species Act's takings prohibitions for purposes of imposition of civil penalties and criminal punishment under the Act. See *supra* notes 96-98 and accompanying text. Almost any act or omission engaged in by a person would be "intentional" under this interpretation if the person was not asleep or unconscious when the act or omission occurred; therefore there would be no need to determine if the act or omission was "negligent."

The Fish and Wildlife Service's definition of "harass" does not define "negligent." In order for a person's act or omission to be "negligent" within the meaning of "harass," the person probably would have to have breached a duty to an endangered or threatened species of wildlife, proximately causing injury by creating "the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns." 50 C.F.R. § 17.3 (1993). Under traditional tort principles, a person would have such a duty if the person's act or

B. *Palila v. Hawaii Department of Land & Natural Resources*  
(*Palila I*)

The Fish and Wildlife Service's 1975 definition of "harm" was interpreted in 1979 in *Palila v. Hawaii Department of Land & Natural Resources*<sup>137</sup> (*Palila I*). The district court in *Palila I* held that acts and omissions of Hawaiian officials, in maintaining populations of feral sheep and goats on state-owned land which was a critical habitat of the endangered palila bird species, constituted a taking in violation of section 9138 of the Endangered Species Act of 1973, under the Fish and Wildlife Service's definition of "harm" in the Act's definition of "take."<sup>139</sup> The district court in *Palila I* granted plaintiffs' motion for summary judgment in a citizen suit under the Endangered Species Act and ordered that all of the feral sheep and goats be removed from the palila's critical habitat, on the grounds that the palila required all of its critical habitat to survive.<sup>140</sup>

The district court based this judgment upon its findings that the feral sheep and goats within the palila's critical habitat ate seedlings and shoots of the mamane trees and leaves of the naio trees,<sup>141</sup> which provided food, shelter and nest sites for the palila in its critical habitat<sup>142</sup> and prevented regeneration of the mamane-naio forest, causing a "relentless decline" of the palila's designated critical habitat.<sup>143</sup> The district court concluded "that the feral sheep and goats maintained by defendants . . . [were] the major cause of that habitat's degradation,"<sup>144</sup> and that the acts and omissions of the defendants were "clearly within" the Fish and Wildlife Service's definition of "harm" as "significant environmental modification or degradation" which actually injures or kills wildlife.<sup>145</sup>

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omission created a foreseeable risk of such injury to wildlife. See FOWLER W. HARPER, FLEMING JAMES, JR., & OSCAR S. GRAY, *THE LAW OF TORTS* § 18.2, at 654-55 (2d ed. 1986). A person would breach such a duty if he or she fails to exercise reasonable care, exposing protected species of wildlife to an unreasonable risk of injury. See *id.* § 16.9, at 466-67. The degree of care required in a particular situation traditionally is determined by consideration of the gravity of the harm threatened by the person's conduct and the likelihood that the person's conduct will cause that harm, weighed against the costs that would be incurred if the person acted to avoid that risk. *Id.* at 467-68.

137. 471 F. Supp. 985 (D. Haw. 1979), *aff'd*, 639 F.2d 495 (9th Cir. 1981).

138. 16 U.S.C. § 1538 (1976).

139. The district court also held that enforcement of the Endangered Species Act's takings prohibition against the state, state agencies and state employees does not violate either the Tenth or Eleventh Amendment of the United States Constitution. 471 F. Supp. at 992-99.

140. *Id.* at 991.

141. *Id.* at 990.

142. *Id.* at 989.

143. *Id.* at 990.

144. *Id.* at 991.

145. *Id.* at 995.

The Ninth Circuit Court of Appeals affirmed the district court's judgment in *Palila I*, holding that "[t]he defendants' action in maintaining feral sheep and goats in the critical habitat . . . [was] a violation of the Act since it was shown that the Palila was endangered by the activity"<sup>146</sup> and that "[t]he district court's conclusion . . . [was] 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."<sup>147</sup> *Palila I* is the only major judicial decision interpreting the Fish and Wildlife Service's 1975 definition of "harm."<sup>148</sup> Subsequently, the Fish and Wildlife Service modified its definition of "harm" in 1981.

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146. 639 F.2d at 497.

147. *Id.* at 498 (citing *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 179 (1978)).

In 1986, Chief Judge Samuel King explained that in his 1979 decision in *Palila I* "[he] did not find that habitat modification alone caused harm to 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." *Palila v. Hawaii Dep't of Land & Natural Resources*, 649 F. Supp. 1070, 1076 n.21 (D. Haw. 1986), *aff'd*, 852 F.2d 1106 (9th Cir. 1988) (*Palila II*). Chief Judge King added in *Palila II* that:

Continued destruction of the forest would have driven the bird into extinction . . . [and] [a]t the time . . . , 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 sheeps and goats in *Palila I*.

649 F. Supp. at 1078. Chief Judge King added that in *Palila I* he did not interpret the Fish and Wildlife Service's 1975 definition of "harm" "to require an actual decline in population of an endangered species." *Id.* at 1076 n.21. The Ninth Circuit Court of Appeals stated in 1988 in its *Palila II* decision that "[i]n *Palila I*, the district court construed harm to include habitat destruction that could result in the extinction of the Palila." 852 F.2d at 1108.

148. In *Tennessee Valley Auth. v. Hill*, 437 U.S. 153 (1978), the United States Supreme Court, although primarily addressing the issue of whether operation of the Tellico Dam would violate section 7, 16 U.S.C. § 1536, of the Endangered Species Act, by jeopardizing the continued existence of the endangered snail darter fish, indicated that the operation of the dam might "harm" the snail darter within the meaning of the Fish and Wildlife Service's 1975 definition of "harm" and violate section 9, 16 U.S.C. § 1538, of the Act. The Supreme Court noted that the district court had found that the reservoir that would be created by the dam would have a low oxygen content, while the snail darter needed a clear, flowing river with a high oxygen content, that the low oxygen and high silt levels in the water in the reservoir would not be suitable for snail darter spawning, and that the snail darter's primary source of food would probably not survive in a reservoir environment. 437 U.S. at 165-66 n.16 (citing 419 F. Supp. at 756). Emphasizing that the Fish and Wildlife Service's 1975 definition of "harm" included "significant environmental modification or degradation" which "actually kills or injures wildlife" by "significantly disrupting essential behavioral patterns," the Supreme Court stated: "[w]e do not understand how TVA intends to operate Tellico without 'harming' the snail darter." 437 U.S. at 184-85 n.30. See *Palila v. Hawaii Dep't of Land & Natural Resources*, 649 F. Supp. 1070, 1077-78 n.22 (D. Haw. 1986), *aff'd*, 852 F.2d 1106 (9th Cir. 1988).

## V. FISH AND WILDLIFE SERVICE'S 1981 REDEFINITION OF "HARM"

### A. History of the Regulation

In 1981, the Fish and Wildlife Service proposed a regulation that would have redefined "harm" as "an act . . . which injures or kills wildlife,"<sup>149</sup> on the grounds that its original 1975 definition of "harm" could be interpreted to include "significant environmental [habitat] modification or degradation" as a prohibited taking "without further proof of actual injury or death to a listed species."<sup>150</sup> The Fish and Wildlife Service noted that under such an interpretation, a showing of significant habitat modification or degradation alone would be sufficient to invoke the criminal penalties of section 9, 16 U.S.C. § 1538, of the Endangered Species Act, "regardless of whether an actual killing or injuring of a listed species of wildlife is demonstrated."<sup>151</sup>

The Fish and Wildlife Service did not adopt this proposed redefinition of "harm," instead adopting on November 4, 1981, a regulation that redefined "harm" (in the Act's definition of "take") to mean "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."<sup>152</sup> The Fish and Wildlife Service stated that "harm" was being redefined:

to mean any action, including habitat modification, which actually kills or injures wildlife, rather than the present interpretation which might be read to include habitat modification or degradation alone without further proof of death or injury. Habitat modification as injury would only be covered by the new definition if it significantly impaired essential behavioral patterns of a listed species.<sup>153</sup>

The Service added that its revised definition of "harm" was not limited to:

direct physical injury to an individual member of the wildlife species . . . . The purpose of the redefinition was to preclude claims of a section 9 taking for habitat modification alone without any attendant death or injury of the protected wildlife. Death or injury, however,

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149. 46 Fed. Reg. 29,490 (1981) (proposed June 2, 1981).

150. *Id.*

151. *Id.*

152. 50 C.F.R. § 17.3 (1993).

153. 46 Fed. Reg. 54,748 (1981) (codified at 50 C.F.R. § 17.3).

may be caused by impairment of essential behavioral patterns which can have significant and permanent effects on a listed species. 154

The Fish and Wildlife Service also stated, in the preamble to its regulation redefining "harm," that *Palila I*<sup>155</sup> can "be read to incorrectly imply that under the Services [sic] definition of 'harm' a taking may occur from habitat modification alone."<sup>156</sup> The Fish and Wildlife Service stressed that under its redefinition of "harm":

[H]abitat modification or degradation, standing alone, is not a taking pursuant to section 9. 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. The word "impair" was substituted for "disrupt" to limit harm to situations where a behavioral pattern was adversely affected and not simply disturbed on a temporary basis with no consequent injury to the protected species. 157

Habitat modification does not constitute "harm" under this new 1981 definition unless the habitat modification causes death or injury to members of a protected species.<sup>158</sup> Under this new definition of "harm," however, modification of the habitat of a listed wildlife species constitutes "harm" when the habitat modification "causes ascertainable physical injury or death to an individual member of a listed species."<sup>159</sup> The new definition of "harm" does not "require an actual decline in population of an endangered species"<sup>160</sup> and "does not indicate that threatened extinction is necessary for a finding of harm."<sup>161</sup> Scientific evidence demonstrating that habitat modification is impairing a species' essential behavioral patterns, however, is not a

154. *Id.*

155. See *supra* notes 137-47 and accompanying text.

156. 46 Fed. Reg. 54,749 (1981) (emphasis added) (codified at 50 C.F.R. § 17.3). Responding to this statement by the Fish and Wildlife Service, Chief Judge Samuel King, the author of the district court opinion in *Palila I*, asserted in 1986 of his 1979 decision in *Palila I* "I did not find that habitat modification alone caused harm to the *Palila*." *Palila v. Hawaii Dep't of Land & Natural Resources*, 649 F. Supp. 1070, 1076 n.21 (D. Haw. 1986), *aff'd*, 852 F.2d 1106 (9th Cir. 1988). See *supra* note 147.

157. 46 Fed. Reg. 54,750 (1981) (emphasis added) (codified at 50 U.S.C. § 17.3).

158. *Palila*, 649 F. Supp. at 1077, *aff'd*, 852 F.2d 1106 (9th Cir. 1988); *Morrill v. Lujan*, 802 F. Supp. 424, 430 (S.D. Ala. 1992). See *American Bald Eagle v. Bhatti*, 9 F.3d 163 (1st Cir. 1993) (stating that a showing of actual injury to a listed species is required in order for there to be "harm" and a "taking" in violation of section 9 of the Endangered Species Act; a "one in a million risk of harm is [not] sufficient"); see also *Pyramid Lake Paiute Tribe v. United States Dept. of Navy*, 898 F.2d 1410, 1419-20 (9th Cir. 1990).

159. *Sweet Home Chapter v. Babbitt*, 1 F.3d 1, 5 (D.C. Cir. 1993), *modified on other grounds*, 17 F.3d 1463 (D.C. Cir. 1994), *reh'g denied*, 30 F.3d 190 (D.C. Cir. 1994), *cert. granted*, 115 S. Ct. 714 (Jan. 6, 1995) (No. 94-859).

160. *Palila*, 649 F. Supp. at 1076 n.21.

161. *Swan View Coalition, Inc. v. Turner*, 824 F. Supp. 923, 938 (D. Mont. 1992).

sufficient basis to infer, for purposes of this new definition of "harm," that death or injury is necessarily occurring.<sup>162</sup>

*B. Questions Raised by the Regulation and Suggested Interpretations*

The Service's definition of "harm" does not define when habitat modification or degradation is "significant." Habitat modification or degradation that "actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering,"<sup>163</sup> should be "significant." The determination of whether habitat modification constitutes "harm" under the new definition, however, generally "requires an evaluation of the species involved, the biological needs of that species, and the degree of habitat modification."<sup>164</sup>

One question not answered by either the Endangered Species Act's definition of "take" or the Fish and Wildlife Service's definition of "harm" is whether an action of federal, state or local government, permitting or authorizing another person to engage in conduct that kills or injures endangered or threatened wildlife, is a prohibited taking in violation of the Endangered Species Act. The Fish and Wildlife Service, at least in California, has taken the position in letters to municipal and county officials that such officials can violate the Act's takings prohibition if they approve, through zoning actions, proposed development of land that serves as habitat for a listed protected species.<sup>165</sup>

When such governmental authorization is a legal prerequisite to private action that modifies the habitat of endangered or threatened species and causes the death or injury of members of that species, that governmental authorization is a cause-in-fact of such death or injury<sup>166</sup> and should be found, along with such private action, to have "harmed" and "taken" protected species in violation of the Endangered

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162. *Id.* at 939.

163. 46 Fed. Reg. 54,750 (codified at 50 C.F.R. § 17.3).

164. *Sweet Home Chapter v. Lujan*, 806 F. Supp. 279, 286 (D.D.C. 1992), *aff'd sub nom. Sweet Home Chapter v. Babbitt*, 1 F.3d 1 (D.C. Cir. 1993), *aff'd in part and rev'd in part on other grounds*, 17 F.3d 1463 (D.C. Cir. 1994), *reh'g denied*, 30 F.3d 190 (D.C. Cir. 1994), *cert. granted*, 115 S. Ct. 714 (Jan. 6, 1995) (No. 94-859).

165. See Thornton, *Takings*, *supra* note 56, at 50-51.

The Fish and Wildlife Service also reportedly has advised county officials in California that the County could be responsible for a "take" in violation of the Act if it recommended that private landowners clear flammable brush in the endangered Stephens' Kangaroo rat habitat in order to create a preemptive firebreak. See Rep. Al McCandless, *Letter to the Editor—Homes Burned So Rats Nests Could Survive*, WASH. POST, Sept. 6, 1994, at A16.

166. See *infra* notes 178-80 and accompanying text (including "but for" and substantial factor causation).

Species Act. Thus, the Fish and Wildlife Service's redefinition of "harm" should be interpreted to mean that "harm" includes federal, state or local government action that authorizes or permits a person to engage in conduct that kills or injures protected species of wildlife, when such governmental authorization or permission is a legal prerequisite for that other person's action.<sup>167</sup>

A more troublesome issue under the takings prohibitions of the Endangered Species Act is whether a granting of funds by federal, state or local government to a person, who utilizes such funds to undertake an action, constitutes a prohibited taking when that person's action kills or injures a protected species of wildlife. Government funds granted to a person should be held to "harm" and "take" a protected species if there is a finding that the person's action that killed or injured wildlife would not have occurred "but for" the granting of government funds, or that the government's grant was a substantial factor in the person's action that killed or injured a protected species.<sup>168</sup> The Fish and Wildlife Service's definition of "harm" should also be interpreted to mean that a governmental granting of funds constitutes "harm" in such a situation.

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167. One court, without explicitly discussing the issue of whether a governmental body "takes" wildlife when it authorizes or permits action by another person that kills or injures wildlife, held that the Environmental Protection Agency's (EPA) registration of pesticides containing strychnine, causing the death of endangered species that ate strychnine-laced rodent bait (or rodents that had been poisoned by such bait), constituted a prohibited taking of an endangered species in violation of the Endangered Species Act. *Defenders of Wildlife v. EPA*, 882 F.2d 1294, 1301 (8th Cir. 1989). The Eighth Circuit reasoned in this case that: (1) "a taking occurs when the challenged activity has 'some prohibited impact on an endangered species,'" *id.* at 1300-01 (quoting *Palila v. Hawaii Dep't of Land & Natural Resources*, 639 F.2d 495, 497 (9th Cir. 1981)); and (2) that the EPA's strychnine registrations had a prohibited impact on endangered species because endangered species had died after eating strychnine bait and because "strychnine can be distributed only if it is registered. Consequently, the EPA's decision to register pesticides containing strychnine or to continue these registrations was critical to the resulting poisoning of endangered species." 882 F.2d at 1301. Because the Eighth Circuit found that "[t]he relationship between the registration decision and the deaths of endangered species . . . [was] clear," the EPA's registration of strychnine was held to constitute the taking of endangered species. *Id.* The court's reasoning suggests that it was applying a "but for" causation test—that "but for" EPA's registration of strychnine, endangered species would not eat strychnine bait and be killed.

Another court, without supporting reasoning, held that the federal government's authorization of the use of lead shot by hunters, when such lead shot causes the death of wild bald eagles through lead poisoning when eagles consume other birds that have consumed lead shot or been wounded or killed by lead shot, constituted a taking in violation of section 9 of the Endangered Species Act. *National Wildlife Fed'n v. Hodel*, 23 Env't Rep. (BNA) 1089 (E.D. Cal. 1985). See also *Sierra Club v. Lyng*, 694 F. Supp. 1260 (E.D. Tex. 1988), *aff'd in part and vacated in part sub nom. Sierra Club v. Yeutter*, 926 F.2d 429 (5th Cir. 1991) (stating that Forest Service's management practices and policies, allowing private timber companies to cut timber in national forests within endangered species habitats, "harm" the species by causing a severe decline in the species population). See *infra* notes 183-206 and accompanying text.

168. See *infra* notes 178-80 and accompanying text.

Another issue not explicitly addressed by either the Endangered Species Act's definition of "take" or the Fish and Wildlife Service's definition of "harm," is whether an omission, such as the failure of a governmental official or agency to perform a mandatory duty, or exercise discretionary powers, to prevent another person from killing or injuring an endangered or threatened species of wildlife, can constitute a prohibited taking. The Fish and Wildlife Service's definition of "harass"<sup>169</sup> applies to either an "act" or "omission," as did the Fish and Wildlife Service's 1975 definition of "harm";<sup>170</sup> but the Service's 1981 redefinition of "harm" only refers to an "act which actually kills or injures wildlife."<sup>171</sup>

The 1981 redefinition of "harm" might be interpreted as only applying to affirmative acts that kill or injure wildlife. However, when it adopted its redefinition of "harm" in 1981, the Service stated that it deleted the phrase "or omission" from its definition of "harm" since the term "act" . . . [was] inclusive of either commissions or omissions which would be prohibited by section 9."<sup>172</sup> The Fish and Wildlife Service's 1981 redefinition of "harm" therefore should be interpreted to mean that "harm" occurs when a governmental agency or official fails to perform a mandatory duty, prescribed by statute, regulation, court order, etc., or fails to exercise discretionary powers conferred by statute or regulation, to prevent another person from killing or injuring an endangered or threatened species of wildlife.

In the case of federal departments and agencies such an interpretation of "harm" is consistent with "the policy of Congress [under the Endangered Species Act] that all Federal departments and agencies . . .

169. 50 C.F.R. § 17.3 (1993).

170. 40 Fed. Reg. 44,415 to 44,416 (Sept. 26, 1975) (codified at 50 C.F.R. § 17.3 (1975)) (current version at 50 C.F.R. § 17.3 (1993)).

171. 50 C.F.R. § 17.3 (1993).

172. 46 Fed. Reg. 54,750 (Nov. 4, 1981) (codified at 50 C.F.R. § 17.3).

In 1994, however, the United States contended, in a petition for rehearing of *Sweet Home Chapter v. Babbitt*, 17 F.3d 1463 (D.C. Cir. 1994), see *infra* notes 345-56 and accompanying text, that the Service's 1981 redefinition of harm required that "habitat modification involve 'affirmative action which creates death or disturbance to essential behavioral patterns with significant and permanent, injurious effects.'" *Sweet Home Chapter v. Babbitt*, 30 F.3d 190, 192 (D.C. Cir. 1994) (statement of Williams, J.) (quoting Petition for Rehearing), cert. granted, 115 S. Ct. 714 (Jan. 6, 1995) (No. 94-859). Judge Stephen Williams, in his statement joined in by Judge Sentelle, explaining his vote in favor of the court's *per curiam* denial of the appellee's petition for rehearing, asserted that the regulation "in fact requires no 'affirmative action.'" *Id.* After quoting the Service's 1981 statement, Judge Williams accused the federal government of misrepresenting the regulation. *Id.* Judge Williams argued that "the Department [of Interior] inserted the word 'actually' before 'kills or injures' in its redefinition of harm merely to underscore the need for a causal link—a showing that the 'significant and permanent effects' on the species have been 'due to a party's actions.'" *Id.* (quoting 46 Fed. Reg. 54,748 to 54,749 (Nov. 4, 1981)).

shall utilize their authorities in furtherance of the purposes of [the Act].<sup>173</sup> This interpretation of "harm" also would be consistent with tort standards of causation-in-fact because it would apply the definition of "harm" to omissions by federal, state and local government agencies and officials that are "but for" causes of, or a substantial factor in, the death or injury of protected species of wildlife.<sup>174</sup>

Also troublesome is whether a private, non-governmental person can "harm" and "take" a protected species of wildlife through an omission or failure to protect a listed endangered or threatened species of wildlife from death or injury. A non-governmental person should only be liable under the Endangered Species Act, through an omission, when the person has killed or injured an endangered or threatened species by breaching a legal duty, imposed by statute, regulation, judicial order, or common law, to protect the wildlife from such harm.<sup>175</sup> If a private person's liability for a "taking" under the Act through an omission is not limited to when he or she breaches a legal duty to a protected species, a private landowner might have to "spend money to affirmatively manipulate their lands to improve habitat conditions for listed species"<sup>176</sup> anytime listed wildlife was threatened with death or physical injury from hunters, animal predators, disease, other action by third parties, or other natural causes.

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173. 16 U.S.C. § 1531(c)(1) (1988).

174. See *infra* notes 178-80 and accompanying text.

Without explicitly addressing the issue of whether "harm" can occur through an omission, one court held that the failure or refusal of the Secretary of the Interior and the Fish and Wildlife Service to perform its non-discretionary duty under section 4(f), 16 U.S.C. § 1533(f) (1988), to develop and implement a recovery plan for an endangered species of fish, constituted a taking of the endangered species in violation of section 9 of the Act because members of the endangered species were being killed, damaged, or destroyed. *Sierra Club v. Lujan*, 36 Env't. Rep. Cas. (BNA) 1533 (W.D. Tex. 1993).

*Sierra Club v. Yeutter*, 926 F.2d 429, 438-39 (5th Cir. 1991), supports an interpretation of "harm" as including a failure of a government agency to comply with requirements the agency has adopted to protect an endangered species. See *infra* note 200-01 and accompanying text. See also Quarles et al., *supra* note 29, at 12.

175. Such an approach to a private person's liability for "harm," through an omission, would be similar to the criminal law principles governing a person's liability for criminal homicide (murder or manslaughter) for an omission. In order to be guilty of either murder or manslaughter, a person must unlawfully kill another human being. See LAFAVE & SCOTT, *supra* note 136, § 7.1 at 605 & § 7.9 at 652. American courts hold that a person can "kill" another human being through an omission and be guilty of murder or manslaughter as a result of the omission, only if the person had a legal duty (which is recognized only in limited circumstances under the criminal law) to the alleged victim of the criminal homicide and if the person's failure to perform that duty proximately caused the victim's death. See *id.* § 3.3 at 202-12. A similar approach to criminal liability under the Endangered Species Act for "killing" an endangered or threatened species through an omission is appropriate in view of the Act's purpose of insuring the survival and recovery of protected species.

176. See Quarles et al., *supra* note 29, at 12.

Yet another issue not addressed by the Fish and Wildlife Service's redefinition of "harm" is the type of evidentiary showing required to show that habitat modification has killed or injured endangered or threatened species. When modification of wildlife habitat involves the cutting down of a tree inhabited by wildlife and the tree falls upon an animal and kills it, or otherwise directly kills a protected wildlife species, the person who cut the tree down has violated section 9's taking provision. Similarly, a person would kill wildlife (and commit a prohibited taking through habitat modification) if he or she struck and killed an endangered or threatened wildlife species, while operating earthmoving equipment (such as a bulldozer or grader) to clear and develop land.

In each of these two examples, a person's modification of wildlife habitat constitutes a prohibited "take" in violation of section 9 of the Endangered Species Act because the person's actions would directly kill a protected wildlife species. There would be no need to determine if the habitat modification constituted "harm" under the Fish and Wildlife Service's regulation. However, when there is no evidence that habitat modification has directly killed an endangered or threatened species of wildlife, questions arise as to when habitat modification constitutes "harm" under the Fish and Wildlife Service's regulation.

The Fish and Wildlife Service's definition of "harm" does not state whether a showing that a particular animal was killed must exist for a court to find a "harm," "kill," or "take" of a protected wildlife species, nor does it state whether a showing that a person's actions or habitat modification, causing a decrease in the population of a protected species of wildlife, is sufficient to support a finding of a "harm," "take," or "kill." Several courts, however, have held that a showing of "harm" does not require proof of the death of individual members of an endangered or threatened species of wildlife.<sup>177</sup>

If the death of an individual wild animal is relied upon to show "harm" or a "kill" in violation of the Endangered Species Act, a number of issues may arise regarding when modification of a species' habitat is alleged to have actually killed those specific animals. When the body of a dead animal is found on modified or altered land that is part of the animal's habitat, the Fish and Wildlife Service's definition of "harm" does not state what type of evidence or showing is required

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177. *Palila v. Hawaii Dep't of Land & Natural Resources*, 649 F. Supp. 1070, 1075 (D. Haw. 1986), *aff'd*, 852 F.2d 1106 (9th Cir. 1988); *Sierra Club v. Lyng*, 694 F. Supp. 1260, 1270 (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).

in order for a court to find that the habitat modification actually killed that specific animal. The Service's definition of "harm" does not state whether, or when, modification or alteration of a species' habitat can be found to be a "harm" to, or a "kill" of, a dead animal, if the direct cause of the animal's death appears to be shooting by a hunter, the act of an animal predator, disease, malnutrition, starvation, or unknown (natural) causes.

The Fish and Wildlife Service's definition of "harm" should be interpreted to mean that the modification or degradation of wildlife habitat will be found to have actually killed an individual member of the species, if there is a finding that "but for" the habitat modification or degradation the specific dead animal would not have been killed, or that the habitat modification was a substantial factor in the killing of the animal. Such an approach would follow the "but for" and substantial factor tests used by courts in civil torts cases to determine whether a defendant's tortious conduct was the cause-in-fact of the plaintiff's injury,<sup>178</sup> and would further Congress' intent to give "take" a broad, protective definition<sup>179</sup> and to protect and conserve the habitat of endangered and threatened species of wildlife.<sup>180</sup> Under such an interpretation, habitat modification could be considered to have actually killed an animal that was shot by a hunter or killed by an animal predator if there is a finding that the animal would not have died when it did but for the habitat modification, or that the habitat modification was a substantial factor in causing the animal's death. Such a finding might be made when the habitat modification destroyed an animal's food supply, shelter or protective vegetative cover, causing the animal to migrate to a new habitat where it was vulnerable to the hunter or animal predator that killed it.

Similarly, if a specific animal died as a result of starvation or malnutrition, habitat modification that destroyed or reduced the animal's food supply should be found to have actually killed the animal if there is a finding that the animal would not have died but for the damage to its food supply, or that the damage to its food

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178. See Bert Black & David H. Hollander, Jr., *Unravelling Causation: Back to the Basics*, 3 U. BALT. J. ENVTL. L. 1 (1993). In civil torts cases, a plaintiff is required to show that the defendant's tortious conduct was both the cause-in-fact of the plaintiff's injury and the proximate cause of the plaintiff's injury. See *id.* at 1-2. Traditionally, proof of causation-in-fact requires the plaintiff to show that his or her injury would not have occurred "but for" the defendant's conduct. *Id.* at 4. However, many courts today hold that a defendant's conduct can be held to be the cause-in-fact of the plaintiff's injury if the defendant's conduct was a "substantial factor" in causing the plaintiff's injury. *Id.* at 5-6. See *United States v. Glenn-Colusa Irrigation District*, 788 F. Supp. 1126, 1133-34 (E.D. Cal. 1992).

179. See *infra* notes 245-46 and accompanying text.

180. See *supra* note 7 and accompanying text.

supply was a substantial factor in causing the animal's death. 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<sup>181</sup> 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. Alternatively, it could be found that the habitat modification was the cause-in-fact of the animal's death even if the animal had never been on the altered or degraded habitat.<sup>182</sup>

Some courts hold that modification of wildlife habitat can constitute "harm" when it causes a decrease in the population of the protected species. In *Sierra Club v. Lyng*, the court held that the management practices of the National Forest Service in eastern Texas' national forests significantly modified the old growth pine tree habitat of the endangered red-cockaded woodpecker.<sup>183</sup> The court held that the resulting decline in the species' population within the national forests' modified habitat was "harm" within the meaning of the Fish and Wildlife Service's 1981 redefinition.<sup>184</sup> The district court in *Lyng* found that the case involved "not merely a situation where the *recovery* of the species . . . [was] impaired by the agency's practices, . . . but rather the

181. Proving that a particular dead animal had used the modified habitat may be difficult when the animal is found dead on land outside the modified habitat, unless the dead animal had peculiar identifying characteristics and had been observed within the modified habitat prior to its death. Because such evidence usually will not be present, a court in such a case might presume that the dead animal spent at least part of its life on the modified habitat if: (1) the modified habitat, prior to its modification, had characteristics that made it suitable habitat for the dead animal's species; and (2) the place where the dead animal's body was found was close enough to the modified habitat to be within the range of members of the species. See Robert J. Taylor, *Biological Uncertainty in the Endangered Species Act*, 8 NAT. RESOURCES & ENV'T, Summer 1993, at 6 (discussing the range and migratory habits of certain species protected under the Endangered Species Act).

182. This latter type of situation might occur if habitat modification caused hunters or animal predators to move their hunting from the modified habitat to another area used by the specific dead animal for its habitat, resulting in the animal being killed by the relocated predator or hunter.

183. 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).

184. 694 F. Supp. at 1271-72. The Forest Service's "even-aged management" practices at issue in *Lyng* involved clear-cutting, shelterwood cutting, and seed-tree cutting. See *id.* at 1263 n.2.

The district court in *Lyng* also held that the defendants' actions violated section 7(a)(2) of the Endangered Species Act. 694 F. Supp. at 1272-73 (interpreting U.S.C. § 1536(a)(2)); see *supra* notes 114-27 and accompanying text. However, the defendants' actions did not violate the Wilderness Act. 694 F. Supp. at 1273-75 (interpreting 16 U.S.C. §§ 1131-36).

agency's practices themselves . . . caused and accelerated the decline in the species."<sup>185</sup>

Specifically, the *Lyng* court determined the Forest Service's management practices implicated all four factors of the Fish and Wildlife Service's definition of "harm."<sup>186</sup> First, the district court found that "essential behavioral patterns of the woodpeckers . . . [were] impaired by isolation of woodpecker colonies from one another," because the Forest Service's management practices altered "the customary habits of the birds to survive and produce young" by making "woodpecker colonies particularly susceptible to outbreaks of southern pine beetles" and by contributing "to woodpecker abandonment of cavity trees" used by the woodpeckers for their nests.<sup>187</sup> Second, the district court found that the "isolation of particular colonies interfere[d] with breeding practices," contributing to population decline because "males . . . [could not] find females [with whom] to breed."<sup>188</sup> Third, the district court found that the Forest Service's management practices reduced the woodpecker's food supply and foraging areas. Fourth, the court found that the management practices reduced the number of cavity trees used as nests.<sup>189</sup>

The district court concluded in *Lyng* that the practices and policies of the Forest Service, "when taken as a whole, detrimentally impact[ed] upon the woodpecker and . . . [were] largely responsible for the rapid decline of the remaining birds in Texas."<sup>190</sup> In short, the court held that the Forest Service's management practices caused "harm" to the endangered red-cockaded woodpecker because the practices significantly modified or degraded the woodpecker's habitat, by significantly impairing essential behavioral patterns—including breeding, feeding and sheltering—and actually killed endangered woodpeckers, causing a decline in the woodpecker's population within the national forests.<sup>191</sup>

However, the district court in *Lyng* did not explain how it found that woodpecker deaths, or the significant modification of the wood-

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185. *Id.* at 1271 (emphasis added).

186. *Id.* (listing essential behavioral patterns, breeding, feeding and sheltering, as the four factors constituting "harm").

187. *Id.*

188. *Id.* at 1271-72. The court added that "[i]solation also causes the gene pool to be reduced with fewer birds in a given area, causing genetic problems and abnormalities in the subsequent generations." *Id.* at 1272.

189. *Id.*

190. *Id.*

191. The district court in *Lyng* found that the "severe decline in the population of woodpeckers . . . in the past ten years," *id.* at 1270, was due to "large percentages of the few remaining birds" dying, *id.* at 1271.

peckers' habitat resulting from the Forest Service's management practices, caused the decline in the woodpecker population. The finding that the population decline was due to deaths of woodpeckers apparently was based upon the fact that "[t]he last remaining populations of these birds . . . [were] concentrated in the national forests, primarily because the old growth pines on private lands . . . [had] largely been eliminated."<sup>192</sup> The district court in *Lyng* implicitly found that the woodpeckers had not migrated to private lands when their habitat in the eastern Texas national forests was significantly modified. In the absence of evidence that woodpeckers had migrated to other habitat, the decline in woodpecker population could only be due, as found by the district court, to "large percentages of the few remaining birds hav[ing] died."<sup>193</sup> Since there was no allegation or showing that the deaths and population decline of the species were caused by something independent of the modification of the species' habitat, the district court apparently found that the deaths and declining population of red-cockaded woodpeckers within national forests were caused by the significant habitat modification resulting from the Forest Service's management practices.<sup>194</sup>

On appeal, the Fifth Circuit Court of Appeals implicitly recognized the possibility that the deaths and decline of the red-cockaded woodpecker might have been caused by some other act independent of the Forest Service's management practices, by stating that "the [red-cockaded woodpecker] population ha[d] not fallen as a result of permits granted under section 1539(a)(1)."<sup>195</sup>

The Fifth Circuit concluded that the district court in *Lyng* "did not err in finding that the government violated ESA section 9,"<sup>196</sup> but vacated the district court's orders so far as they mandated the specific features of a Forest Service timber management plan for national forests in Texas.<sup>197</sup> The Fifth Circuit noted that the district court in *Lyng* determined that the Forest Service's management practices "resulted in significant habitat modification" and "caused and accelerated the decline in the [red-cockaded woodpecker] species."<sup>198</sup>

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192. *Id.* at 1265.

193. *Id.* at 1271.

194. *Id.* at 1263.

195. *Sierra Club v. Yeutter*, 926 F.2d 429, 438 (5th Cir. 1991).

196. *Id.* at 439.

197. *Id.* at 440. The Fifth Circuit held that the district court had not erred in determining that the defendants' actions violated section 7 of the Endangered Species Act (16 U.S.C. § 1536), 926 F.2d at 439, but held that the district court "exceeded its authority to enjoin violations of the [Endangered Species Act]" because "[t]he court's injunction eviscerated the [section 7] consultation process by effectively dictating the result of that process." *Id.* at 440.

198. *Id.* at 438 (quoting 694 F. Supp. at 1260).

In addition, the Fifth Circuit noted that the Forest Service had not completely implemented its wildlife management handbook, which specified silvicultural practices that should be followed in order to protect red-cockaded woodpeckers, by permitting clearcutting within two hundred feet of woodpecker cavity trees and by not removing midstory hardwood. This lack of implementation led to the woodpeckers' abandonment of cavity trees.<sup>199</sup> The Fifth Circuit stated that the Forest Service's:

course of conduct certainly impair[ed] the [red-cockaded woodpecker's] "essential behavioral patterns, including . . . sheltering," 50 C.F.R. § 17.3, and thus result[ed] in a violation of section 9 . . . . Because the dictates of the USFS's handbook were intended to preserve the dwindling [red-cockaded woodpecker] population, it . . . [was] not unreasonable to conclude that failure to observe the handbook would result in a "taking" of the [red-cockaded woodpecker].<sup>200</sup>

The Fifth Circuit then concluded "that the district court did not err in finding that the government violated ESA section 9."<sup>201</sup> Therefore, *Sierra Club v. Lyng*, as affirmed by the Fifth Circuit Court of Appeals, stands for the proposition that "harm" to an endangered or protected species occurs when that species' population declines after there is significant modification of that species' habitat which significantly impairs the species' breeding, feeding or sheltering, in the absence of a showing that the decline in the species' population is due either to the death of members of the species by independent causes or to migration of members of the species to new habitat, without resulting injury to the migrating animals.

Since the Fish and Wildlife Service's definition of "harm" requires actually killing or injuring wildlife, there must be a finding either: (1) that the decline in population was due to the death of species caused by the habitat modification, or (2) that the decline in population was due to members of the species migrating to new habitat because of the modification of their habitat and that the habitat modification caused "injury" (either to the migrating members of the species or to members

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199. *Id.*

200. *Id.* at 438-39 (footnote omitted).

201. *Id.* at 439 (citation and footnote omitted). The reasoning of the Fifth Circuit implies that the term "act" in the Fish and Wildlife Service's redefinition of "harm" can be interpreted to include an omission or failure to act, at least when a federal government agency fails to comply with policies it adopted to protect an endangered or listed species. See *supra* notes 169-74 and accompanying text.

of the species that remain within the modified habitat, or both).<sup>202</sup> Proof of the death of individual members of a protected species, by producing evidence of dead bodies of animals, should not be required in order to prove a "kill" or "harm" of a protected species. Furthermore, an affirmative showing that members of the species have died, or migrated to new habitat with resultant "injury" to the species, is not required, in order to find harm within the meaning of Fish and Wildlife Service regulations.

The Fish and Wildlife Service's definition of "harm" should be interpreted to mean that "harm" includes significant modification or degradation of a protected species' habitat, which significantly impairs essential behavioral patterns, including breeding, feeding or sheltering, when there is a decline in the population of the species within a particular habitat after, or during, modification or degradation of part or all of that habitat.<sup>203</sup> The burden should be on the person who allegedly engaged in or caused the habitat modification or degradation, to show that either: (1) the decline in the species' population was due to death of members of the species caused by something independent of the habitat modification or degradation,<sup>204</sup> or (2) the decline in the species' population was due to the migration of members of the species to a new habitat and that such migration did not cause "injury" to members of the species. Under this approach, a court will presume that the population decrease was caused by the significant habitat modification, if evidence exists that the population, within a particular protected species' habitat, has decreased after or during significant habitat modification. This presumption is consistent with the policy of the Endangered Species Act to protect the habitat of endangered and threatened species of wildlife, and it is rational because wildlife usually is killed or injured

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202. See *infra* notes 207-29 and accompanying text (discussing the interpretation of "injury" within the Fish and Wildlife Service's definition of "harm").

203. In order to invoke this presumption, a court would first have to geographically define the habitat of a species. The species' habitat for purposes of this presumption may be a greater area than the area that has been modified or altered, as determined by the characteristics that make an area suitable habitat for a particular species and by the range and migratory habits of that species. See Taylor, *supra* note 181. A court also would have to determine the species' population both before and after the habitat modification, in order to determine if the species' population had declined after or during the habitat modification. See *Sierra Club v. Lyng*, 694 F. Supp. 1260 (E.D. Tex. 1988), *aff'd in part and vacated in part sub nom. Sierra Club v. Yeutter*, 926 F.3d 429 (5th Cir. 1991).

204. Even if the death of a specific animal was directly caused by a hunter shooting a predatory animal, or by starvation, malnutrition, or disease, modification of that animal's habitat may still be the cause-in-fact of that animal's death and considered a "harm" to that animal if it is found that the animal would not have died or been killed at that time "but for" the modification of its habitat, or that the habitat modification was a substantial factor in causing the animal's death. See *supra* notes 177-82 and accompanying text.

when modification of their habitat significantly impairs their breeding, feeding or shelter.<sup>205</sup> The presumption that the death of animals and a decline in wildlife species population results from significant modification of that species' habitat could be overcome by evidence that the decline in population is due to the death of members of the species caused by some other act independent of the habitat modification, or by non-injurious migration of members of the species to a new habitat.<sup>206</sup>

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

Such a presumption is also arguably rational because the population of endangered and threatened species should increase as a result of recovery plans developed and implemented by the Secretary of the Interior under section 4(f), 16 U.S.C. § 1533(f), of the Act. The goal of such recovery plans is "the conservation and survival of the species" so "that the species [can] be removed from the list" of endangered or threatened species. *Id.* at § 1533(f)(1)(B)(i)-(ii). Under the Endangered Species Act, however, "[o]nly two domestic species have been delisted due to recovery from endangerment," and only "a minority of listed species boasts recovery plans, and few of the 345 approved recovery plans have been implemented." Desiderio, *supra* note 28, at 41, 80.

[O]f the hundreds of species listed as endangered or threatened by [the Fish and Wildlife Service] since 1973, most remain poised today on the brink of extinction. Less than a handful of species have recovered in numbers sufficient to warrant a change in their condition. Importantly, more species have become extinct than those that have been recovered.

*Id.* at 41. In light of these facts, a broad interpretation of "harm," to include an unexplained decline in a species' population when its habitat has been significantly modified, would further the purposes of the Endangered Species Act to protect endangered and threatened species of wildlife and their habitat.

The birth of new members of a species, of course, may affect the extent to which the population of a particular species in a specific area will decline when modification of the species' habitat causes the death of members of that species. In some cases, population of a species in a particular area may not decline during a particular period of time even though modification of the species' habitat causes the death of some members of that species, when the number of new members of the species that are born during a particular period of time equals or exceeds the number of members of the species that die during that period. In the absence of evidence that modification of a species' habitat has caused a decline in the species' population, some other evidence that modification of a species' habitat has killed or injured members of the species would be required to establish that the habitat modification was a taking prohibited by section 9 of the Endangered Species Act.

206. Such a rebuttable presumption, which shifts the burden of proof to the person accused of a "taking" to show that the decline of a species' population was not caused by that person's modification of the species' habitat, is arguably similar to the approach followed by Judge Jenkins in *Allen v. United States*, 588 F. Supp. 247 (D. Utah 1984), *rev'd on other grounds*, 816 F.2d 1417 (10th Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988). *Allen* involved an action brought against the United States under the Federal Torts Claims Act, 28 U.S.C. §§ 1291, 1346, 2671-80 (1988), by approximately 1200 individuals, alleging that nearly 500 deaths and cancer were caused by radioactive fallout from atmospheric detonation of atomic bombs in Nevada in the 1950's and early 1960's. Since Judge Jenkins found that the cancers suffered by the plaintiffs could be caused by natural, unknown, or "spontaneous" causes as well as by radiation and that science could not distinguish between cancers caused by radiation and cancers caused by other

The Fish and Wildlife Service's redefinition of "harm" does not define what types of harm "injure" wildlife. The Service's definition of "harm" indicates, however, that "harm" includes, but is not limited to, "significantly impairing essential behavioral patterns, including breeding, feeding or sheltering" by significant habitat modification or degradation.<sup>207</sup> The Service's definition of "harm," however, does not require proof of *physical injury* (serious or otherwise) to an individual animal in order for an act to "injure" wildlife.

The Service's definition of "harm" should be interpreted to mean that "harm" occurs either if an act or omission causes physical injury, whether serious or otherwise, to an individual animal, or significantly impairs essential behavioral patterns of a wildlife species, including breeding, feeding or sheltering, through significant habitat modification or otherwise. Such an interpretation would include within "injury" both direct physical injury to specific, individual animals, *and* "injury" to a large number of animals and even an entire species resulting from adverse impacts on feeding, breeding, sheltering, or other essential behavioral patterns of one or more members of a species of wildlife. Such an interpretation of "harm" recognizes the importance of a species' habitat in providing food, shelter, protection, breeding and reproduction sites, and nesting sites for the rearing of young,<sup>208</sup> and recognizes the Endangered Species Act's policy of protecting the habitat of listed species.<sup>209</sup> Such an

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sources, he adopted the following test for determining if the federal government's atomic bomb tests were the cause-in-fact of the plaintiff's cancer:

Where a defendant who negligently creates a radiological hazard which puts an identifiable population group at increased risk, a member of that group at risk develops a biological condition which is consistent with having been caused by the hazard to which he has been negligently subjected, such consistency having been demonstrated by substantial, appropriate, persuasive, and connecting factors, a fact finder may reasonably conclude that the hazard caused the condition absent persuasive proof to the contrary offered by the defendant.

588 F. Supp. at 415. Similarly, when the population of a species within its habitat has declined after its habitat has been modified, it is possible that the population decline is the result of deaths of animals from some other act independent of the habitat modification or migration of animals to new habitat, rather than the habitat modification. As in *Allen*, considerations of fairness support a shifting of the burden of proof to the person who modified a species' habitat to prove that the modification of habitat did not kill or injure members of the species.

207. 50 C.F.R. § 17.3 (1993).

208. See *supra* notes 1-6 and accompanying text.

209. See *supra* note 7 and accompanying text.

interpretation is consistent with the 1986 district court decision in *Palila v. Hawaii Department of Land & Natural Resources (Palila II)*.<sup>210</sup>

C. *Palila v. Hawaii Department of Land & Natural Resources (Palila II)*

In *Palila II*, the district court held that the conduct of state officials, in permitting mouflon sheep in the endangered palila bird species' designated critical habitat, constituted a prohibited "take" under the Fish and Wildlife Service's 1981 redefinition of "harm."<sup>211</sup> The district court in *Palila II* found that this conduct constituted "harm" within the meaning of the Service's definition of "harm" because:

(1) the eating habits of the sheep destroyed the mamane woodland and thus caused habitat degradation that could result in extinction; [and] (2) were the mouflon to continue eating the mamane [trees], the woodland would not regenerate and the Palila population would not recover to a point where [the Palila] could be removed from the Endangered Species list."<sup>212</sup>

The district court reasoned in *Palila II* that "harm" under the Service's 1981 redefinition, "would include activities that significantly impair essential behavioral patterns to the extent that there is an actual negative impact or injury to the endangered species, threatening its continued existence or recovery," and "[u]nder both the original definition and the definition as amended in 1981, 'harm' may include significant habitat destruction that injures protected wildlife."<sup>213</sup>

The district court also stated in *Palila II* 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.<sup>214</sup>

Although the court stated that Congress intended under the Endangered Species Act "to prohibit habitat destruction that harms an endangered species,"<sup>215</sup> the court added that:

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210. 649 F. Supp. 1070 (D. Haw. 1986), *aff'd*, 852 F.2d 1106 (9th Cir. 1988).

211. 649 F. Supp. at 1080.

212. 852 F.2d at 1107.

213. 649 F. Supp. at 1075.

214. *Id.*

215. *Id.* at 1076.

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. . . . [H]owever, this injury to the species does not necessitate a finding of death to individual species members . . . [and] a showing of "harm" similarly does not require a decline in population numbers. . . . Until [a listed species] has reached a sufficiently viable population to be delisted, it should not be necessary for it to dip closer to extinction before the prohibitions of section 9 come into force. The key to the Secretary's definition is harm to the species as a whole through habitat destruction or modification. If the habitat modification prevents the population from recovering, then this causes injury to the species and should be actionable under section 9.<sup>216</sup>

Finding that the "mouflon sheep are having the same destructive impact on the mamane as the feral sheep [in *Palila I* 217]"<sup>218</sup> and that "the Palila population may be as large as it can be now, given the condition of the mamane"<sup>219</sup> in the Palila's designated critical habitat, the district court, per Judge King, found that:

Continued grazing by mouflon will continue to suppress mamane growth and regeneration. This in turn will harm the Palila in one of two ways. Either the mouflon sheep will further degrade the mamane ecosystem, thus decreasing the remaining Palila habitat and further depressing the Palila population. Or, at best, the mouflon will merely slow or prevent the recovery of the mamane forest, suppressing the available food supply and nesting sites for Palila, and thus preventing the Palila population from expanding toward recovery.<sup>220</sup>

This finding led Judge King to conclude in *Palila II* that:

[T]he mouflon sheep are harming the Palila within the definition of 50 C.F.R. § 17.3. The mouflon are having a significant negative impact on the mamane forest, on which the Palila is wholly dependent for breeding, feeding and sheltering. This significant habitat degradation is *actually presently injuring* the Palila by decreasing food and nesting sites, so that the Palila population is suppressed to its

216. *Id.* at 1077 (footnote omitted). An example of no adverse impact on a species resulting from a habitat modification or degradation is "if the State were to mow the lawn within the Palila's critical habitat, this modification would not in and of itself result in a taking under section 9. There would have to be a showing of concomitant injury to Palila, such as a significant impairment of Palila breeding or feeding habits." *Id.* at 1077 n.24.

217. *Palila v. Hawaii Dep't of Land & Natural Resources*, 471 F. Supp. 985 (D. Haw. 1979), *aff'd*, 639 F.2d 495 (9th Cir. 1981). See *supra* notes 137-47 and accompanying text.

218. 649 F. Supp. at 1079.

219. *Id.* at 1079-80.

220. *Id.*

current critically endangered levels. If the mouflon continue eating the mamane, the forest will not regenerate and the Palila population will not recover to a point where it can be removed from the Endangered Species List. Thus, the presence of mouflon sheep on Mauna Kea threatens the continued existence and the recovery of the Palila species. If the Palila is to have any hope of survival, the mouflon must be removed to give the mamane forest a chance to recover and expand.<sup>221</sup>

Judge King rejected the state's argument that multiple use of the palila's critical habitat on Mauna Kea by mouflon sheep and the palila should be allowed, on the grounds that once the plaintiffs have shown the "significant negative impact" of mouflon sheep "'harming' the Palila population within the meaning of 50 C.F.R. § 17.3, . . . the [Endangered Species] Act leaves no room for mixed use or other management strategies or policies."<sup>222</sup>

Judge King concluded in *Palila II* that:

[T]he presence of the mouflon sheep in numbers sufficient for sport-hunting purposes is harming the Palila. They degrade the mamane ecosystem to the extent that there is an actual present negative impact on the Palila population that threatens the continued existence and recovery of the species. Once this determination has been made, the Endangered Species Act leaves no room for balancing policy considerations, but rather requires me to order the removal of the mouflon sheep from Mauna Kea. . . . [T]he mouflon sheep are to be removed from the critical habitat of the Palila on Mauna Kea.<sup>223</sup>

Unlike the court in *Sierra Club v. Lyng*,<sup>224</sup> which held that there was "harm" to an endangered species when the habitat modification caused the population of the species within the habitat to decline, Judge King in *Palila II* held that significant habitat modification of an endangered species' habitat was "injury" and "harm" to that species either when the habitat modification suppresses the species' population level at current levels, threatening the continued existence of the species, or when the habitat modification prevents the species' population from recovering and increasing to an extent that species could be removed from the Endangered Species List. Judge King explicitly stated that an "injury" to a protected species did not require proof of either the death of individual members of a species or a decline in the species' population; he implicitly held that a finding of "injury" to a

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221. *Id.* 1080 (emphasis added) (footnotes omitted).

222. *Id.* at 1081.

223. *Id.* at 1082-83.

224. 694 F. Supp. 1260 (E.D. Tex. 1988), *aff'd in part and vacated in part sub nom.* *Sierra Club v. Yeutter*, 926 F.2d 429 (5th Cir. 1991). See *supra* notes 183-206 and accompanying text.

listed species does not require proof of physical injury, serious or otherwise, to individual members of a species. Judge King in *Palila II* interprets "injury" as including "injury" to the entire species caused by habitat modification that adversely affects a species' breeding, feeding, or sheltering and prevents an increase of the species' population, when that species thereby is either threatened with extinction or prevented from recovering.

In 1988, the United States Court of Appeals for the Ninth Circuit affirmed<sup>225</sup> Judge King's order in *Palila II*, on the grounds that habitat destruction that could result in a species' extinction causes "harm."<sup>226</sup> The Ninth Circuit in *Palila II* upheld, as not clearly erroneous, Judge King's findings that the state's action, permitting mouflon sheep in the Palila's designated critical habitat, constituted a "taking" of the Palila's habitat.<sup>227</sup> The Ninth Circuit held that "the district court's (and the Secretary's) interpretation of harm as including habitat destruction that could result in extinction, and findings to that effect are enough to sustain an order for the removal of the mouflon sheep."<sup>228</sup> The Ninth Circuit did "not reach the issue of whether the district court properly found that harm included habitat degradation that prevents recovery of an endangered species."<sup>229</sup>

In *Palila II*, the Ninth Circuit also held that the Fish and Wildlife Service's 1981 regulation redefining "harm" "serves the overall purpose of the [Endangered Species Act] . . . [and] is also consistent with the policy of Congress evidenced by the legislative history."<sup>230</sup> The Service's 1981 redefinition of "harm," however, was not directly challenged as invalid in *Palila II*. The Ninth Circuit in *Palila II* implicitly noted this fact when it stated—in addressing the state's argument that the district court incorrectly interpreted the Act's definition of "harm" to include habitat destruction which could drive the palila to

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225. *Palila v. Hawaii Dep't of Land & Natural Resources*, 852 F.2d 1106 (9th Cir. 1 988).

226. *Id.* at 1110.

227. *Id.*

228. *Id.* (footnote omitted).

229. *Id.* at 1110-11. In 1994, the Ninth Circuit stated that its *Palila II* decision "held that the definition of 'harm' in the [Endangered Species Act] includes habitat degradation that could result in extinction," but had "specifically declined to 'reach the issue of whether harm includes habitat degradation that merely retards recovery.'" *National Wildlife Fed'n v. Burlington N. R.R.*, 23 F.3d 1508, 1511 (9th Cir. 1994) (quoting *Palila II*, 852 F.2d at 1110-11). In *Burlington*, the Ninth Circuit further stated that "in order to reach a similar finding of harm using our *Palila II* analysis," the plaintiff "would have to show significant impairment of the species' breeding or feeding habitats and prove that the habitat degradation prevents, or possibly retards, recovery of the species." 23 F.3d at 1511. This recent statement by the Ninth Circuit indicates that the Ninth Circuit today might affirm Judge King's holding in *Palila II* that "harm" to a species occurs when the species' habitat is modified to an extent that it prevents recovery and delisting of the species.

230. 852 F.2d at 1108.

extinction—that "[w]e inquire whether the district court's interpretation is consistent with the Secretary's construction of the statute since he is charged with enforcing the Act, and entitled to deference if his regulation is reasonable and not in conflict with the intent of Congress."<sup>231</sup>

The Ninth Circuit in *Palila II* did not cite or discuss the Supreme Court's approach in *Chevron U.S.A. v. National Resources Defense Council*<sup>232</sup> to judicial review regarding the validity of an agency's statutory construction. The Ninth Circuit in *Palila II*, however, cited *United States v. Riverside Bayview Homes, Inc.*,<sup>233</sup> for the proposition that "the Secretary's construction of the statute [is] . . . entitled to deference if . . . reasonable and not in conflict with the intent of Congress."<sup>234</sup> *Riverside Bayview Homes*<sup>235</sup> cites *Chevron U.S.A.* for the proposition that "[a]n agency's construction of a statute it is charged with enforcing is entitled to deference if it is reasonable and not in conflict with the expressed intent of Congress."<sup>236</sup>

The Ninth Circuit in *Palila II* stated that the Fish and Wildlife Service's definition of "harm" "is entitled to deference if . . . [the regulation] is reasonable and not in conflict with the intent of Congress."<sup>237</sup> This analysis is essentially identical to *Chevron U.S.A.*'s requirements that a court and administrative agency are required to follow the "clear" and "unambiguously expressed intent of Congress."<sup>238</sup> *Chevron U.S.A.* also states that a court is required to follow an agency's resolution of a specific statutory question and not substitute the court's own construction of a statutory provision when the statute is silent or ambiguous with respect to the specific question and

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231. *Id.* (citing *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131 (1985)).

232. 467 U.S. 837 (1984).

233. 474 U.S. 121 (1985).

234. 852 F.2d at 1108.

235. 474 U.S. at 131.

236. *Id.* at 131 (citing *Chevron U.S.A.*, 467 U.S. at 837).

237. 852 F.2d at 1108.

238. 467 U.S. at 842-43. "The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." *Id.* at 843 n.9. The Supreme Court in *Chevron U.S.A.* indicated that a court is permitted to use "traditional tools of statutory construction" to determine if there is "clear" and "unambiguous" intent by Congress; "[i]f a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." 467 U.S. at 843 n.9; see *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446-50 (1987); *Michigan Citizens for an Indep. Press v. Thornburgh*, 868 F.2d 1285, 1292-93 (D.C. Cir.), *aff'd per curiam by equally divided court*, 493 U.S. 38 (1989); *Sweet Home Chapter v. Babbitt*, 30 F.3d 190, 193 (D.C. Cir. 1994) (statement by Williams, J.), *cert. granted*, 115 S. Ct. 714 (Jan. 6, 1995) (No. 94-859); see *infra* notes 379, 387-99, 435-61 and accompanying text.

the agency's interpretation of the statute is a "permissible construction"<sup>239</sup> or a "reasonable interpretation"<sup>240</sup> of the statute.

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239. 467 U.S. at 843.

240. *Id.* at 844, 845. See *infra* note 393-94 and accompanying text. *Chevron U.S.A.* also states, however, that "[i]f Congress has explicitly left a gap for the agency to fill" by "explicit" "legislative delegation to an agency on a particular question," *id.* at 843-44, "there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Id.* (citations omitted). This arbitrary and capricious standard of review under *Chevron U.S.A.* does not apply to the Fish and Wildlife Service's 1981 redefinition of "harm," because this regulation was not promulgated under "an express delegation of authority to the agency to elucidate a *specific* provision of the statute by regulation." *Id.* (emphasis added). Rather, the Fish and Wildlife Service's 1981 redefinition of "harm" was promulgated under section 11(f), 16 U.S.C. § 1540(f) (1988), of the Endangered Species Act, which authorizes the Secretary of the Interior "to promulgate such regulations as may be appropriate to enforce this chapter," which is "implicit" "legislative delegation" to the Fish and Wildlife Service on the "particular question" of how "harm" should be defined, see 467 U.S. at 844, thus requiring a court under *Chevron U.S.A.* to defer to, and uphold, the Service's 1981 redefinition of "harm" if it is a "reasonable interpretation" of the Endangered Species Act. *Id.*

Judge Silberman's dissenting opinion, joined by Chief Judge Mikva and Judge Wald, in *Sweet Home Chapter v. Babbitt*, 17 F.3d 1463 (D.C. Cir. 1994), *reh'g denied*, 30 F.3d 190 (D.C. Cir. 1994), *cert. granted*, 115 S. Ct. 714 (Jan. 6, 1995) (No. 94-859), raised the issue of whether *Chevron U.S.A.* was inapplicable to judicial review of the Service's 1981 redefinition of "harm" because "we are dealing with a criminal statute." See *infra* notes 321-461 and accompanying text; cf. *United States v. Thompson/Center Arms Co.*, 112 S. Ct. 2102, 2110 & nn.9-10 (1992) (plurality opinion). "That is to say, the *Chevron U.S.A.* presumption—that Congress has delegated primary authority to the administrative agency to reconcile ambiguities in statutory language—may not apply when the statute contemplates criminal enforcement. Cf. *Kelley v. EPA*, 15 F.3d 1100, 1107 (D.C. Cir. 1994). The petitioner does not raise that concern, but it surely is not a separate claim that the petitioner has affirmatively waived." *Sweet Home Chapter v. Babbitt*, 30 F.3d 190, 194 (D.C. Cir. 1994) (Silberman, J., dissenting from the denial of rehearing en banc), *cert. granted*, 115 S. Ct. 714 (Jan. 6, 1995) (No. 94-859). The issue of whether *Chevron U.S.A.* applies when a statute contemplates criminal enforcement also was not addressed in *Palila II*. This issue arguably is present in *Sweet Home I*, *Sweet Home II* and in *Palila II* because the Endangered Species Act's prohibition of taking endangered and threatened species is subject to enforcement through criminal penalties, as well as through civil penalties and injunctive relief. See *supra* notes 86-113 and accompanying text.

No statement by the Supreme Court in *Chevron U.S.A.* indicates that the *Chevron* standard of judicial review regarding an agency's interpretation of a statute is inapplicable when the statute is subject to criminal enforcement or when the agency's statutory interpretation is at issue in a criminal prosecution. The plurality opinion in *Thompson/Center Arms Co.* cited by Judge Silberman addresses the issue of the applicability in a civil setting of the rule of lenity in construing a criminal statute, not the issue of the application of the *Chevron U.S.A.* standard in a civil case to a statute that can be enforced through a criminal prosecution. The opinion in *Kelley v. EPA*, 15 F.3d at 1107, which was cited by Judge Silberman also failed to address the issue of the applicability of *Chevron U.S.A.* to a statute subject to criminal enforcement. Denying a petition for rehearing of *Kelley v. EPA* in *Michigan v. EPA*, 38 Env't Rep. Cas. (BNA) 2068 (D.C. Cir. 1994), Judge Silberman indicated that the issue presented in *Kelley* was whether *Chevron U.S.A.* should apply "[w]hen Congress treats an agency only as a prosecutor without specific authority to issue regulations bearing on the questions prosecuted." *Michigan*, 38 Env't Rep. Cas. at 2072. Under the Endangered Species Act, however, Congress has given the Fish and Wildlife Service authority "to promulgate such regulations as may be appropriate to enforce" the Act. 16 U.S.C. § 1533(d) (1988). Because the judges deciding *Sweet Home I*, *Sweet Home II* and *Palila II* applied the *Chevron U.S.A.* standard to determine the validity of the Fish

In *Palila II*, the Ninth Circuit, in addressing the state's argument that the district court erred in interpreting the definition of "harm" under the Endangered Species Act to include habitat destruction that could drive an endangered species to extinction, emphasized that the Secretary of the Interior, when promulgating the redefinition of "harm" in 1981, "noted that harm include[d] not only direct physical injury, but also injury caused by impairment of essential behavior patterns via habitat modification that can have significant and permanent effects on a listed species."<sup>241</sup> The Ninth Circuit also stated that the Secretary of the Interior, in the 1981 notice promulgating the redefinition of "harm," "let stand the district court's construction of harm in *Palila I* . . . [that] include[d] habitat destruction that could result in the extinction of the Palila—exactly the same type of injury at issue here."<sup>242</sup>

The Ninth Circuit concluded that "the district court's inclusion within the definition of harm of habitat destruction that could drive the Palila to extinction falls within the Secretary's interpretation."<sup>243</sup> Thus, the Ninth Circuit implicitly found that the district court deferred to the Fish and Wildlife Service's definition of "harm" and had "not substitute[d] its own construction of a statutory provision," as required by *Chevron U.S.A.*<sup>244</sup>

The Ninth Circuit in *Palila II* then found that the Secretary's inclusion of habitat destruction that could result in extinction within the definition of "harm" "follow[ed] the plain language of the statute, . . . which is 'to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved. . . .' 16 U.S.C. § 1531(b). The definition serves the overall purpose of the Act since it conserves the Palila's threatened ecosystem."<sup>245</sup> The Ninth Circuit also added:

The Secretary's construction of harm is also consistent with the policy of Congress evidenced by the legislative history. For example, in the Senate Report on the Act: "'Take' is defined in . . . the broadest possible manner to include every conceivable way in which a person can 'take' or attempt to 'take' any fish or wildlife." . . . The House Report said that the "harassment" form of taking would "allow, for

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and Wildlife Service's 1981 redefinition of "harm," this article will not further address the issue of whether a standard other than the *Chevron U.S.A.* standard should be applied by a court to determine the validity of the Service's 1981 redefinition of "harm."

241. 852 F.2d at 1108 (citing 46 Fed. Reg. 54,748, 54,750 (1981) (codified at 50 C.F.R. § 17.3)).

242. *Id.* (citing 46 Fed. Reg. 54,749-50 (1981) (codified at 50 C.F.R. § 17.3) and *Palila I*, 471 F. Supp. at 985).

243. *Id.*

244. 467 U.S. at 844.

245. 852 F.2d at 1108.

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." . . . If the "harassment" form of taking includes activities so remote from actual injury to the bird as birdwatching, then the "harm" form of taking should include more direct activities, such as the mouflon sheep preventing any mamane from growing to maturity. 246

Although the Ninth Circuit did not explicitly find a clear, unambiguous congressional intent on the issue of whether "harm" included significant habitat modification within the meaning of the *Chevron U.S.A.* doctrine, the Ninth Circuit, in analyzing the "plain language" and legislative history of the Endangered Species Act, held that the Fish and Wildlife Service's 1981 redefinition of "harm" was a "reasonable interpretation" and a "permissible construction" of the Act within the meaning of *Chevron U.S.A.*

#### *D. Validity of the Fish and Wildlife Service's Definition of Harm*

The *Palila II* holding should be followed and upheld by other courts because the Ninth Circuit's deference to the Service's redefinition of "harm" is consistent with the Supreme Court's application of *Chevron U.S.A.* in *United States v. Riverside Bayview Homes, Inc.*<sup>247</sup> In *Riverside Bayview*, the Supreme Court stated that under *Chevron U.S.A.*, judicial review of an agency's interpretation of a statute was "limited to the question whether . . . [the agency's exercise of jurisdiction was] reasonable, in light of the language, policies and legislative history of the Act."<sup>248</sup> The Supreme Court in *Riverside Bayview* upheld, under this *Chevron U.S.A.* standard, Corps of Engineers' regulations broadly defining "waters of the United States" under the Clean Water Act<sup>249</sup> to include certain wetlands. This decision was based on the grounds that the Clean Water Act's legislative history indicated that Congress intended the term "waters of the United States" to have a broad, expansive definition.<sup>250</sup> In *Palila II*, the Ninth Circuit similarly found, after examining the language and the legislative history of the Endangered Species Act, that Congress intended "take" to be construed broadly and to protect the habitat of listed species. This interpretation requires a court to uphold, under the

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246. *Id.* at 1108-09 (citations omitted).

247. 474 U.S. 121 (1985).

248. *Id.* at 131.

249. 33 U.S.C. § 1362(7) (1982).

250. *See* 474 U.S. at 133-34.

principles of *Chevron U.S.A.* and *Riverside Bayview*, the Service's definition of "harm" as including significant habitat modification.

In upholding the Service's definition of "harm," the Ninth Circuit's approach in *Palila II* is also similar to the Supreme Court's approach in *Chevron U.S.A.*, where the EPA's interpretation of a provision<sup>251</sup> of the Clean Air Act, with respect to a situation when the statutory language and legislative history did not address the specific issue in question, was upheld by the Supreme Court as "a reasonable accommodation of manifestly competing interests. . . . [Because] the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involve[d] reconciling conflicting policies."<sup>252</sup> The Endangered Species Act's "regulatory scheme," with respect to takings, similarly can be characterized as "technical and complex"; the Fish and Wildlife Service's 1981 redefinition of "harm" reconciled "conflicting policies" in "a detailed and reasoned fashion."<sup>253</sup>

The Ninth Circuit in *Palila II* also stated, in a footnote that might be interpreted as an alternate ground for holding the Service's definition of "harm" to be valid, that:

In addition, the Secretary's interpretation is consistent with the presumption that Congress is "aware of an administrative or judicial interpretation of a statute and [adopts] that interpretation when it reenacts a statute without change."<sup>254</sup>

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251. 42 U.S.C. § 7502(b)(6) (1982).

252. 467 U.S. at 865 (footnotes omitted).

253. *Id.*

254. 852 F.2d at 1109 n.6 (citing *Lindahl v. Office of Personnel Management*, 470 U.S. 768, 782 n.15 (1985) (quoting *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978))). The *Pons* case actually dealt with Congress' enactment of a new law that incorporated sections of an earlier law. The Supreme Court in *Pons* also stated that Congress normally can be presumed to have had knowledge of the judicial interpretation given to the earlier law incorporated into the new law, at least insofar as it affects the new statute. 434 U.S. at 581. In *Pons*, the Supreme Court, following the statement quoted in *Lindahl* and *Palila II*, cited *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 414 n.8 (1975), *NLRB v. Gullett Gin Co.*, 340 U.S. 361, 366 (1951), and *National Lead Co. v. United States*, 252 U.S. 140, 147 (1920). The *Albermarle Paper Co.* and *Gullett Gin Co.* cases held that Congress, in reenacting a statutory provision, approved of prior judicial or administrative interpretations of the provision, when those judicial or administrative interpretations of the reenacted provision had been cited approvingly in Senate, House or Conference Committee reports on the bill that reenacted the provision at issue. The *National Lead Co.* case upheld an executive department's interpretation of a statutory provision which had been reenacted by Congress, by simply stating that Congress, in reenacting a statutory provision, "is presumed to have legislated with knowledge of such an established usage of an executive department of the Government." 252 U.S. at 147. In *National Lead Co.*, however, unlike *Albermarle Paper Co.* and *Gullett Gin Co.*, the Supreme Court did not refer to citation or discussion of the department's interpretation of the statute in any committee reports on the bill that reenacted the provision at issue.

Apparently relying on this presumption, the Ninth Circuit in *Palila II*, after tracing the evolution of the Service's redefinition of "harm," stated: "Congress presumably was aware of the current interpretation of harm when it amended the Act in 1982. But Congress did not modify the taking prohibition in any matter. Thus Congress' failure to act indicates satisfaction with the current definition of harm and its interpretation by the Secretary and the judiciary."<sup>255</sup>

However, the Ninth Circuit's reliance in *Palila II*, upon a principle that applies when Congress "reenacts a statute without change," was incorrect because the Endangered Species Act's definition of "take" under section 3(19)<sup>256</sup> was not reenacted by Congress in 1982.<sup>257</sup> Consequently, this apparent alternative ground in *Palila II* for upholding the Fish and Wildlife Service's 1981 redefinition of "harm" is not a valid legal argument.<sup>258</sup> However, the Ninth Circuit's reliance upon the *Chevron U.S.A.* doctrine to uphold the Service's 1981 redefinition of "harm" is a sufficient and independent ground for upholding the regulation as valid under the Endangered Species Act.

In 1994, as a result of Judge Stephen F. Williams' change of position, a divided panel of the United States Court of Appeals for the District of Columbia invalidated the Fish and Wildlife Service's inclusion of habitat modification within its definition of "harm" and altered a previous opinion,<sup>259</sup> issued in 1993, that upheld the Fish and Wildlife Service's 1981 redefinition of "harm."<sup>260</sup> A disagreement now

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255. 852 F.2d at 1109 n.6.

256. 16 U.S.C. § 1532(19) (1982).

257. See 852 F.2d at 1106, 1109 n.6; Sweet Home Chapter v. Babbitt, 17 F.3d 1463, 1472 (D.C. Cir. 1994), *reh'g denied*, 30 F.3d 190 (D.C. Cir. 1994), *cert. granted*, 115 S. Ct. 714 (Jan. 6, 1995) (No. 94-859). The only amendment in the 1982 Endangered Species Act relating to the Act's takings prohibitions was the enactment of section 10(a)(1)(B), 16 U.S.C. § 1539(a)(1)(B) (1988), which authorized the Fish and Wildlife Service to issue incidental takings permits. See *supra* notes 53-56 and accompanying text; see also *infra* notes 357-63, 428-34 and accompanying text. Furthermore, although a House subcommittee conducting hearings on the 1982 amendments to the Endangered Species Act had notice of the Fish and Wildlife Service's 1981 redefinition of "harm," 50 C.F.R. § 17.3 (1981), and the Ninth Circuit's decision in *Palila I*, 639 F.2d 495 (9th Cir. 1981), neither the Service's redefinition nor *Palila I* were cited approvingly in Senate or House reports on the 1982 amendments or in floor debates on the 1982 amendments, see Sweet Home Chapter v. Babbitt, 17 F.3d at 1469, unlike the situation in *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 414 n.8 (1975); *NLRB v. Gullett Gin Co.*, 340 U.S. 361, 366 (1951). See *supra* note 254.

258. See *infra* notes 364-78 and accompanying text.

259. Sweet Home Chapter v. Babbitt, 17 F.3d 1 (D.C. Cir. 1993), *modified on reh'g*, 17 F.3d 1463 (D.C. Cir. 1994), *reh'g denied*, 30 F.3d 190 (D.C. Cir. 1994), *cert. granted*, 115 S. Ct. 714 (Jan. 6, 1995) (No. 94-859).

260. Sweet Home Chapter v. Babbitt, 17 F.3d 1463 (D.C. Cir. 1994). Later in 1994, this divided panel, *per curiam*, denied the appellees' petition for rehearing (with Chief Judge Abner Mikva stating that he would grant the petition for rehearing). Sweet Home Chapter v. Babbitt, 30 F.3d 190 (D.C. Cir. 1994), *cert. granted*, 115 S. Ct. 714 (Jan. 6, 1995) (No. 94-859). The *en banc* United States Court of Appeals for the District of Columbia denied the appellees' suggestion

exists between the Ninth Circuit and District of Columbia Courts of Appeals as to whether the Fish and Wildlife Service's 1981 regulation redefining "harm" is valid.

*E. Sweet Home Chapter v. Babbitt (Sweet Home I)*

In 1993, the majority of this panel of the United States Court of Appeals for the District of Columbia (per Chief Judge Abner Mikva), rejected, in *Sweet Home Chapter v. Babbitt*<sup>261</sup> (*Sweet Home I*), a facially-void-for-vagueness challenge to the Fish and Wildlife Service's 1981 redefinition of "harm"<sup>262</sup> and held, "*per curiam*, that the 'harm' regulation does not violate the ESA by including actions that modify habitat among prohibited 'takings.'"<sup>263</sup> Writing in *Sweet Home I* for a majority of the panel, Chief Judge Mikva stated that the Fish and Wildlife Service's 1981 redefinition of "harm" would be held facially void for vagueness in such a pre-enforcement challenge<sup>264</sup> only if the regulation was impermissibly vague in all of its applications.<sup>265</sup>

This holding by Chief Judge Mikva was a correct decision. As noted by Chief Judge Mikva in *Sweet Home I*,<sup>266</sup> the Supreme Court has indicated<sup>267</sup> that when a statute or regulation does not affect First Amendment expressive freedoms,<sup>268</sup> the statute or regulation will be

for rehearing *en banc* (with four judges, including Chief Judge Mikva, dissenting from the denial of rehearing *en banc*). *Id.*

261. 1 F.3d 1 (D.C. Cir. 1993).

262. *Id.* at 3-5.

263. *Id.* at 3. This suit, which was brought by "various organizations, businesses and individuals, who depend directly or indirectly on the timber industry in the Pacific Northwest and in the Southeast for their livelihood," *Sweet Home Chapter v. Lujan*, 806 F. Supp. 279, 281 (D.D.C. 1992), *aff'd sub. nom. Sweet Home Chapter v. Babbitt*, 1 F.3d 1 (D.C. Cir. 1994), *aff'd in part and rev'd in part*, 17 F.3d 1463 (D.C. Cir. 1994), *reh'g denied*, 30 F.3d 190 (D.C. Cir. 1994), *cert. granted*, 115 S. Ct. 714 (Jan. 6, 1995) (No. 94-859), challenged the validity of the Fish and Wildlife Service's 1981 redefinition of "harm," 50 C.F.R. § 17.3 (1988), as well as the Service's regulation, *id.* at § 17.31(a), extending to threatened species the Service's regulations prohibiting takings of endangered species. See *supra* notes 37-45 and accompanying text. The district court rejected the plaintiff's challenges to these two regulations, granted the defendants' motion for summary judgment, and denied the plaintiffs' motion for summary judgment. 806 F. Supp. at 287.

264. The plaintiffs in *Sweet Home I*, who were "not currently the subject of an enforcement action under 50 C.F.R. § 17.3," 1 F.3d at 4, brought a civil suit directly challenging 50 C.F.R. § 17.3 as facially void for vagueness.

265. 1 F.3d at 4.

266. *Id.*

267. See *Village of Hoffman Estates v. Flipside*, 455 U.S. 489, 495, 498 (1982); *Smith v. Goguen*, 415 U.S. 566, 573 (1974). The *Goguen* case was cited and discussed by Chief Judge Mikva in *Sweet Home I*, 1 F.3d at 4.

268. Chief Judge Mikva did not explicitly hold in *Sweet Home I* that the plaintiff's actions regulated by 50 C.F.R. § 17.3 were not protected First Amendment expressive freedoms, but he did hold that, "the conduct implicated by this case is economic activity," "which modern vagueness cases have invariably afforded less protection" than to First Amendment expressive freedoms. 1 F.3d at 4. Chief Judge Mikva explained that the plaintiffs contended that 50 C.F.R.

held to be facially void for vagueness "only if the enactment is impermissibly vague in all of its applications."<sup>269</sup>

Chief Judge Mikva also noted in *Sweet Home I* that the void for vagueness doctrine requires "regulations with criminal sanctions [to] '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.'"<sup>270</sup> He stated that "[t]his principle, however, does not lead to the conclusion that any person can have a regulation wiped off the books, or prompt a limiting judicial construction of the regulation, merely by

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§ 17.3 would "inhibit their ability to develop their land, especially by harvesting timber," but that "[t]o the degree that [plaintiffs] contend that the regulation results in a 'taking' of their property in the Fifth Amendment sense, their remedy would be compensation, not a voiding of the regulation." 1 F.3d at 4. *Kolender v. Lawson*, 461 U.S. 352 (1983), states that a statute can be challenged as facially void for vagueness (even when it is not impermissibly vague in all possible applications) when it "reaches, 'a substantial amount of constitutionally protected conduct,'" *id.* at 358 (quoting *Village of Hoffman Estates v. Flipside*, 455 U.S. 489, 494 (1982)). *Kolender* made clear, however, that such facial vagueness challenges are permitted only "where free speech or free association are affected" by the statute or regulation," 461 U.S. at 358 n.8, because of the Supreme Court's "concern . . . 'upon the potential for arbitrarily suppressing First Amendment liberties.'" *Id.* at 358 (quoting *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 90 (1965)). Chief Judge Mikva in *Sweet Home I* similarly concluded that the reference to an enactment implicating "constitutionally protected conduct" in *Village of Hoffman Estates v. Flipside*, 455 U.S. 489, 495 (1982), was "referring primarily to the First Amendment expressive freedoms, which have long received special protection in vagueness cases." 1 F.3d at 4 (citing *Smith v. Goguen*, 415 U.S. 566, 573 (1974)).

Even if a facial taking challenge was permitted under *Kolender* when a statute or regulation constituted a taking of property, in violation of the Fifth Amendment of the United States Constitution, and reached a "substantial amount of constitutionally protected conduct" within the meaning of *Kolender*, 461 U.S. at 358, the plaintiffs in *Sweet Home I* neither alleged nor established that the Fish and Wildlife Service's 1981 redefinition of "harm" constituted, in a substantial amount of situations, a Fifth Amendment taking of property without just compensation. The plaintiffs in *Sweet Home I* also did not allege or establish that 50 C.F.R. § 17.3 reached a substantial amount of conduct that was free speech or free association protected under the First Amendment of the United States Constitution. Chief Judge Mikva therefore ruled correctly in *Sweet Home I* that the plaintiffs could not succeed in their facial void for vagueness challenge "unless the regulation is impermissibly vague in all of its applications." 1 F.3d at 4.

269. *Sweet Home I*, 1 F.3d at 4 (quoting *Village of Hoffman Estates v. Flipside*, 455 U.S. 489, 495 (1982)).

270. *Id.* (quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)). Although not stated by Chief Judge Mikva in *Sweet Home I*, "the more important aspect of the vagueness doctrine 'is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement.'" *Kolender*, 461 U.S. at 357 (quoting *Smith v. Goguen*, 415 U.S. 566, 574 (1974)). Another basic principle of the vagueness doctrine also not discussed by Chief Judge Mikva in *Sweet Home I* is that a statute or regulation "is not unconstitutional merely because it throws upon [persons] the risk of rightly estimating a matter of degree." *International Harvester Co. v. Kentucky*, 234 U.S. 216, 223 (1914). Consequently, words or phrases in a statute or regulation can be held to be certain enough for vagueness doctrine purposes "notwithstanding an element of degree in the definition as to which estimates might differ." *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926).

showing that it will be impermissibly vague in the context of some hypothetical application."<sup>271</sup>

Chief Judge Mikva found in *Sweet Home I* that the provision in the Fish and Wildlife Service's definition of "harm" requiring an act that "actually kills or injures wildlife," and the requirement that the government must prove that a party knowingly violated the statute or regulation in order to establish a civil or criminal violation<sup>272</sup> of the Endangered Species Act's "take" provision, were "features that prevent [the regulation] from being invariably vague as applied."<sup>273</sup> Although the plaintiffs in *Sweet Home I* argued that the Service's definition of "harm" was impermissibly vague in referring to, but not defining, "significant" habitat modification, "significantly" impairing, and "essential" behavioral patterns,<sup>274</sup> Chief Judge Mikva found that "there are obviously types of activity, including habitat modification, that 50 C.F.R. § 17.3 clearly prohibits without a hint of vagueness."<sup>275</sup> He cited, as examples of conduct "obviously" forbidden by the regulation, "habitat modification that causes ascertainable physical injury or death to an individual member of a listed species" and "major acts of habitat degradation that destroy a species' ability to breed, feed, or shelter. For instance, a person aware of the regulation would undoubtedly be held accountable for clear-cutting an entire forested area known to be populated by spotted owls."<sup>276</sup>

Because he correctly concluded that the Fish and Wildlife Service's definition of "harm" was "not vague in all of its applications," Chief Judge Mikva held in *Sweet Home I* that the court "may not declare it void on its face."<sup>277</sup> He noted, however, that "[s]pecific vagueness concerns about the regulation can be addressed when and if they are properly raised in the framework of a concrete challenge to a particular application of the regulation."<sup>278</sup> As stated by the district court in *Sweet Home I*, when a statute or regulation is not impermissibly vague in all of its possible applications, "[v]agueness

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271. 1 F.3d at 4.

272. 16 U.S.C. §§ 1540(a)-(b) (1988).

273. 1 F.3d at 4. Chief Judge Mikva added, "The Supreme Court has recognized that 'a scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed.'" *Id.* (quoting *Village of Hoffman Estates v. Flipside*, 455 U.S. 489, 499 (1982)).

274. 1 F.3d at 4.

275. *Id.* at 4-5.

276. *Id.* at 5.

277. *Id.*

278. *Id.*

challenges to statutes which do not involve First Amendment freedoms must be examined in light of the facts of the case at hand."<sup>279</sup>

A majority of the panel also held in *Sweet Home I*, "*per curiam*, that the 'harm' regulation does not violate the [Endangered Species Act] by including actions that modify habitat among prohibited 'takings.'"<sup>280</sup> In his opinion for the court, Judge Mikva noted that the plaintiffs argued that Congress did not intend to include habitat modification within "harm" in the Act's definition of "take" and "that the meaning of harm should therefore be limited to direct physical injury to an identifiable member of a listed wildlife species."<sup>281</sup> Judge Mikva also noted, in a separate opinion concurring in this *per curiam* holding, that the plaintiffs in *Sweet Home I* also argued that Congress, although intending under the Endangered Species Act to halt injurious habitat modification, "did not mean to combat habitat degradation on private lands through the prohibition against takings in 16 U.S.C. § 1538 . . . [and] that Congress intended to combat the problem solely through § 1534's provision for federal land acquisition."<sup>282</sup>

Chief Judge Mikva, in his separate concurring opinion, joined the holding that the "harm" definition does not violate the Endangered Species Act on the grounds that "the 'harm' regulation conflicts with neither the [Endangered Species Act] itself nor its ambiguous legislative history and is unquestionably a permissible and reasonable construction of the statute"<sup>283</sup> which a court must uphold under the *Chevron U.S.A.*<sup>284</sup> standard.

He noted in this concurring opinion that the plaintiffs' argument, that the Act's "taking" provision was not intended to include habitat modification, in part was based on the fact that the Endangered Species Bill reported to the Senate by the Senate Commerce Committee in 1973 did not refer to habitat modification in its definition of "take," although the definition of "take" in S. 1983—the first endangered species bill referred to the committee in 1973—included within

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279. *Sweet Home Chapter v. Lujan*, 806 F. Supp. 279, 286 (D.D.C. 1992) (quoting *United States v. Mazurie*, 419 U.S. 544, 550 (1975)), *aff'd sub nom. Sweet Home Chapter v. Babbitt*, 1 F.3d 1 (D.C. Cir. 1993), *aff'd in part and rev'd in part on other grounds*, 17 F.3d 1463 (D.C. Cir. 1994), *reh'g denied*, 30 F.3d 190 (D.C. Cir. 1994), *cert. granted*, 115 S. Ct. 714 (Jan. 6, 1995) (No. 94-859).

280. 1 F.3d at 3.

281. *Id.*

282. *Id.* at 8-9 (Mikva, C.J., concurring). 16 U.S.C. § 1534(a) (1988) (authorizing the Secretaries of the Interior and Agriculture—in the case of National Forest System lands—to acquire land as part of "a program to conserve fish, wildlife, and plants, including those which are listed as endangered or threatened species").

283. 1 F.3d at 8 (Mikva, C.J., concurring).

284. *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). See *infra* notes 387-99, 434-61 and accompanying text.

the definition of "take" the "destruction, modification, or curtailment of [an endangered species'] habitat or range" in the definition of "take."<sup>285</sup> The plaintiffs argued that the Committee's deletion of references to habitat modification in the reported bill's definition of "take" "evinced Congress' intent not to include habitat modification within the scope of prohibited 'takings.'"<sup>286</sup> Chief Judge Mikva, however, found the Act's "legislative history to be most ambiguous regarding whether Congress intended to include habitat modification within the meaning of 'take,'" noting that there was no indication of why the Senate Commerce Committee excluded habitat modification from the definition of "take."<sup>287</sup> He asserted that the Committee may have acted in this manner because the original bill (S. 1983) would have made habitat modification a *per se* taking under the Act. However, he stated that the Committee may not have intended to preclude the Fish and Wildlife Service from adopting, as it did, a regulation providing that habitat modification constitutes a taking when it causes actual injury or death to a protected species.<sup>288</sup> Thus, Chief Judge Mikva found no clear Congressional intent to exclude habitat modification from the Act's definition of "take," noting that the Senate Committee Report on its Endangered Species Bill states that "[t]ake' is defined . . . in the broadest possible manner to include every

285. *Id.* at 9 (citing S. 1983, 93d Cong., 1st Sess., § 3(6) (1973)). See *Sweet Home Chapter v. Babbitt*, 17 F.3d 1463, 1467 (D.C. Cir. 1994), *cert. granted*, 115 S. Ct. 714 (Jan. 6, 1995) (No. 94-859); see *infra* notes 343-44 and accompanying text.

286. 1 F.3d at 9 (Mikva, C.J., concurring).

287. *Id.*

288. *Id.* The district court in *Sweet Home I*, whose judgment initially was affirmed by the court of appeals, noted that:

S. 1983 was only one of two endangered species bills under consideration by the Senate Committee on Commerce at that time. The other bill, S. 1592, defines 'take' exactly as it now appears in the statute. From this legislative history, the Court can conclude no more than that the Senate chose to adopt the definition in one bill over that in another. There is absolutely nothing in the legislative history of the [Endangered Species Act] to indicate that the Senate rejected the definition in S. 1983 specifically because it wanted to exclude habitat modification from the definition of take. In fact, the Senate Report indicates just the opposite, that "take" was being defined "in the broadest possible manner."

It may be, as defendants suggest, that the Senate rejected the definition of "take" in S. 1983 because it did not want habitat modification *per se* to constitute a taking, or it may be that the Senate chose to leave the decision of whether to define takings to include habitat modification in the hands of the Secretary. However, the Court will not rely upon such speculation to deduce legislative intent.

*Sweet Home Chapter v. Lujan*, 806 F. Supp. 279, 283 (D.D.C. 1992) (emphasis added), *aff'd sub nom.* *Sweet Home Chapter v. Babbitt*, 1 F.3d 1 (D.C. Cir. 1993), *aff'd in part and rev'd in part*, 17 F.3d 1463 (D.C. Cir. 1994), *reh'g denied*, 30 F.3d 190 (D.C. Cir. 1994), *cert. granted*, 115 S. Ct. 714 (Jan. 6, 1995) (No. 94-859).

conceivable way in which a person can 'take' or attempt to 'take' any fish or wildlife."<sup>289</sup>

The plaintiffs in *Sweet Home I*, in support of their argument that the service's definition of "harm" was invalid, also referred to floor statements<sup>290</sup> by some members of Congress that allegedly suggested that some members of Congress might have desired land acquisition under section 5(a)<sup>291</sup> of the Endangered Species Act to be the sole method under the Act of dealing with habitat modification.<sup>292</sup> The plaintiffs further argued that "Congress *must* have intended land acquisition to be the exclusive mechanism for preventing such habitat modification . . . . Otherwise . . . agency officials would always choose the free alternative of prohibiting a damaging land use under the 'take' provision, rather than paying to acquire the affected land."<sup>293</sup>

Chief Judge Mikva, however, found that "[n]othing in the language of 16 U.S.C. § 1534 or in the legislative history establishes that Congress meant land acquisition to be the only mechanism for habitat protection on private lands."<sup>294</sup> He asserted that the floor statements by individual members of Congress cited by the plaintiffs "are not a safe guide . . . in ascertaining the meaning and purpose of the law-making body,"<sup>295</sup> and that the statements cited "do not establish that even the speakers themselves intended land acquisition to be the *exclusive* protective mechanism for habitats on private lands."<sup>296</sup> He also argued that extending the Act's taking prohibition to habitat modification on private land would not make land acquisition under section 5<sup>297</sup> of the Act a nullity. The Act would be valid because federal wildlife managers might wish to acquire private lands, rather than simply forbidding damaging activity on private lands under the Act's taking prohibition, because they could engage in more protective conservation programs on "preserves," "owned and controlled" by the federal government.<sup>298</sup>

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289. 1 F.3d at 9 (Mikva, C.J., concurring) (quoting S. REP. NO. 307, 93d Cong., 1st Sess. 7 (1973)).

290. *Id.* (citing 119 CONG. REC. S25,669 (daily ed. July 24, 1973) (including statement of Sen. Tunney) and 119 CONG. REC. S25,691 (1973) (including statement of Sen. Nelson)).

291. 16 U.S.C. § 1534(a) (1988).

292. *See* 1 F.3d at 9 (Mikva, C.J., concurring).

293. *Id.* (emphasis added).

294. *Id.*

295. *Id.* at 10 (quoting *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 474 (1921)).

296. *Id.* (Mikva, C.J., concurring) (emphasis added).

297. 16 U.S.C. § 1534 (1988).

298. 1 F.3d at 10 (Mikva, C.J., concurring). *See Sweet Home Chapter v. Babbitt*, 17 F.3d 1463, 1466 (D.C. Cir. 1994); *see infra* notes 341-42 and accompanying text.

Chief Judge Mikva then rejected, in *Sweet Home I*, the plaintiffs' argument that under the *noscitur a sociis* principle of statutory construction<sup>299</sup> the Fish and Wildlife Service must narrowly interpret "harm" to exclude habitat modification. The plaintiffs asserted that the other words used in the Act's definition of "take" do not apply to land use that only indirectly injures wildlife.<sup>300</sup> Chief Judge Mikva rejected the plaintiffs' argument on the grounds that other terms used in the Act's definition of "take," such as "harass," "can limit a private landowner's use of his land in a rather broad manner . . . to suppress activities that are in no way intended to injure an endangered species."<sup>301</sup>

Finally, Chief Judge Mikva concluded in his concurring opinion in *Sweet Home I* that the enactment by Congress in 1982 of section 10(a)(1)(B)<sup>302</sup> of the Act "strongly suggests that Congress did in fact intend to include habitat modification within the meaning of 'take.'"<sup>303</sup> Section 10(a)(1)(B) of the Act authorizes the Fish and Wildlife Service to issue a permit authorizing any "taking otherwise prohibited by [16 U.S.C. § 1538 (a)(1)(B)] if such taking is incidental to, and not [sic] the purpose of, the carrying out of an otherwise lawful activity."<sup>304</sup> Chief Judge Mikva found that Congress' enactment of section 10(a)(1)(B), which authorizes the issuance of a permit for "incidental takings," "implicitly confirmed" that incidental takings, which he interprets as including habitat modification,<sup>305</sup> "were otherwise forbidden by the Act."<sup>306</sup>

Chief Judge Mikva concluded his concurring opinion in *Sweet Home I* by stating that "[o]verall, there is nothing in the [Endangered

299. "[U]nder the principle of statutory construction known as *noscitur a sociis*, a general term in a list should be interpreted narrowly 'to avoid the giving of unintended breadth to the Acts of Congress.'" 1 F.3d at 10 (Mikva, C.J., concurring) (quoting *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961)) (emphasis added).

300. *Id.* (Mikva, C.J., concurring).

301. *Id.*; see *infra* notes 311, 316, 326-39, 400-10 and accompanying text.

302. 16 U.S.C. § 1539(a)(1)(B) (1988).

303. 1 F.3d at 10 (Mikva, C.J., concurring).

304. Under section 10(a)(1)(B), a person "whose activities might incidentally 'take' members of an endangered species can get *advance* protection from legal liability, but only if they convince the Secretary that [their habitat conservation] plan uses the maximum devices possible to mitigate and minimize species loss, and that the resulting losses will not unduly harm the species." *Sweet Home Chapter v. Babbitt*, 17 F.3d 1463, 1468 (D.C. Cir. 1994) (emphasis added). See *supra* notes 53-56 and accompanying text.

305. See 1 F.3d at 11 (Mikva, C.J., concurring) ("[I]t is hard to imagine what 'incidental takings' might be other than habitat modification.")

306. *Id.*; see *infra* notes 309-11 and accompanying text; see also *Sweet Home Chapter v. Babbitt*, 17 F.3d 1463, 1467-69 (D.C. Cir. 1994), *cert. granted*, 115 S. Ct. 714 (Jan. 6, 1995) (No. 94-859); *id.* at 1477-78 (Mikva, C.J., dissenting); see also *infra* notes 357-66, 428-34 and accompanying text.

Species Act] or in its legislative history that unambiguously demonstrates that the term 'take' does not encompass habitat modification"<sup>307</sup> and that "*Chevron* commands that unless it is absolutely clear that an agency's interpretation of a statute, entrusted to it to administer, is contrary to the will of Congress, courts must defer to that interpretation so long as it is reasonable."<sup>308</sup>

Judge Stephen Williams also wrote a separate opinion in *Sweet Home I* concurring in section II(A)(1) of the majority's opinion, in which he stated that he agreed that the Service's definition of "harm" "complies with the Endangered Species Act—but only because of the 1982 amendments to the [Act]."<sup>309</sup> Judge Williams added that the enactment in 1982 of section 10(a)(1)(B), authorizing permits for incidental takings, "support[s] the inference that the [Endangered Species Act] otherwise forbids some such incidental takings, including some habitat modification."<sup>310</sup> He concluded his concurring opinion, however, by stating that "but for the 1982 amendments, I would find Judge Sentelle's analysis highly persuasive—including his discussion of the *noscitur a sociis* canon."<sup>311</sup>

Judge Sentelle dissented in *Sweet Home I*, arguing that while the *Chevron U.S.A.* doctrine requires a court to defer to an agency's reasonable and consistent interpretation of a statute, which is silent or ambiguous with respect to the issue,<sup>312</sup> he could "see no reasonable way that the term 'take' can be defined to include 'significant habitat modification or degradation' as it is defined in 50 C.F.R. § 17.3."<sup>313</sup> He analogized the Fish and Wildlife Service's definition of "harm" to a hypothetical agency regulation, prohibiting "chewing and spitting of tobacco," purportedly promulgated under a federal statute authorizing the posting of "No Smoking" signs, under which "smoking" was defined to include "lighting, burning, puffing, inhaling, and otherwise employing the noxious nicotine-bearing tobacco products."<sup>314</sup> He argued that in both the case of the Fish and Wildlife

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307. 1 F.3d at 11.

308. *Id.* (quoting *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984)).

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

310. *Id.*

311. *Id.* (citing *RLEA v. NMB*, 988 F.2d 133, 144 (D.C. Cir. 1993) (Williams, J., dissenting) (characterizing the canon as a "powerful linguistic norm")).

312. *Id.* (Sentelle, J., dissenting).

313. *Id.* at 12 (interpreting 50 C.F.R. § 17.3 (1993)). Judge Sentelle asserted that the second prong of the *Chevron U.S.A.* doctrine places limits on the judiciary's power to question administrative actions. *Id.* (citing *Nuclear Info. Resources Serv. v. Nuclear Regulatory Comm'n*, 986 F.2d 1169, 1173 (D.C. Cir. 1992) (en banc)).

314. *Id.* at 11-12.

Service's definition of "harm" and his hypothetical regulation, the agency engaged in an "unreasonable expansion of terms."<sup>315</sup>

Judge Sentelle also invoked the *noscitur a sociis* principle of statutory construction. He argued that all the terms other than "harm" that are used in the definition of "take" under the Endangered Species Act:

relate to an act which a specifically acting human does to a specific individual representative of a wildlife species. In fact, they are the sorts of things an individual . . . commonly does when he intends to "take" an animal. Otherwise put, if I were intent on taking a rabbit, a squirrel, or a deer, as the term "take" is used in common English parlance, I would go forth with my dogs or my guns or my snares and proceed to "harass, . . . pursue, hunt, shoot, wound, kill, trap, capture, or collect" one of the target species. 16 U.S.C. § 1532(19). If I succeeded in that endeavor, I would certainly have "taken" the beast. If I failed, I would at least have "attempt[ed] to engage in . . . such conduct."<sup>316</sup>

According to Judge Sentelle, the unreasonableness of the Fish and Wildlife Service's definition of "harm" was not alleviated by the statement in the Senate Commerce Committee's report that "'take' is defined . . . in the broadest possible manner,"<sup>317</sup> because that legislative history did not convince him that Congress "intended to deprive the definition of any bounds whatsoever and turn the word into a free form concept inclusive of anything an agency might wish it to cover."<sup>318</sup>

Finally, Judge Sentelle asserted that the Service's definition of "harm" violated "the presumption against surplusage" principle of statutory construction.<sup>319</sup> The Service's definition of "harm" made every other term in the Act's definition "superfluous" since "[e]very single one of those acts . . . falls within the definition of 'harm' as understood by the agency."<sup>320</sup>

#### F. Sweet Home Chapter v. Babbitt (*Sweet Home II*)

On petition for rehearing, Judge Sentelle's position in *Sweet Home I* prevailed, with Judge Williams changing his earlier position, without

315. *Id.* at 12.

316. *Id.* at 12 & n.1 ("The only word replaced by ellipses is "harm," the word under examination."); see also *infra* notes 328-39, 400-08 and accompanying text.

317. *Id.* at 12 (quoting S. REP. NO. 307, 93d Cong., 1st Sess. 7 (1973)).

318. *Id.* at 13 (Sentelle, J., dissenting).

319. *Id.*

320. *Id.*

additional oral arguments or additional briefing.<sup>321</sup> Judge William's majority opinion in *Sweet Home II* held "invalid the Fish & Wildlife Service regulation defining 'harm' to embrace habitat modifications."<sup>322</sup> In *Sweet Home II*,<sup>323</sup> Judge Williams held that the Service's regulation defining "harm" was invalid because the definition "was neither clearly authorized by Congress nor a 'reasonable interpretation' of the statute, see *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, . . . [and] no later action of Congress supplied the missing authority."<sup>324</sup>

Although Judge Williams referred to the *Chevron U.S.A.* doctrine in the court's *Sweet Home II* holding, his decision invalidating the Fish and Wildlife Service's definition of "harm" violated the *Chevron U.S.A.* doctrine. The court violated *Chevron U.S.A.* because it erroneously imposed its own construction of the statute's definition of "harm" instead of deferring to the Service's reasonable interpretation of "harm."<sup>325</sup> In reversing his earlier position, Judge Williams first relied on the *noscitur a sociis* maxim of statutory construction.<sup>326</sup> After concluding that the word "harm" could be broadly and variously construed "[a]s a matter of pure linguistic possibility,"<sup>327</sup> Judge Williams found that all of the words except "harm" in the Endangered Species Act's definition of "take" "contemplate the perpetrator's direct

321. See *Sweet Home Chapter v. Babbitt*, 17 F.3d 1463, 1473 (D.C. Cir. 1994) (*Sweet Home II*) (Mikva, C.J., dissenting) *reh'g denied*, 30 F.3d 190 (D.C. Cir. 1994), *cert. granted*, 115 S. Ct. 714 (Jan. 6, 1995) (No. 94-859).

322. *Id.* at 1472. Later in 1994, this divided panel, *per curiam*, denied the appellees' petition for rehearing. *Sweet Home Chapter v. Babbitt*, 30 F.3d 190 (D.C. Cir. 1994), *cert. granted*, 115 S. Ct. 714 (Jan. 6, 1995) (No. 94-859). Judge Williams issued a statement, which was joined by Judge Sentelle, in support of his vote to deny the petition for rehearing; this statement defended and interpreted his decision in *Sweet Home II*. *Id.* at 191-93. Chief Judge Mikva stated that he would grant the petition for rehearing. *Id.* at 191. At the same time that the panel denied the appellees' petition for rehearing, the *en banc* United States Court of Appeals of the District of Columbia denied the appellees' suggestion for rehearing *en banc*. *Id.* at 191. Four judges, including Chief Judge Mikva, dissented from the denial of rehearing *en banc*. *Id.* at 194.

On January 6, 1995, the United States Supreme Court granted the federal government's petition for certiorari in this case to address the validity on its face of the Fish and Wildlife Service's regulation that makes significant habitat modification a prohibited taking under the Endangered Species Act. *Babbitt v. Sweet Home Chapter*, 115 S. Ct. 714 (Jan. 6, 1995) (No. 94-854). Oral arguments in this case are expected to be scheduled for April 1995.

323. *Sweet Home Chapter v. Babbitt*, 17 F.3d 1463 (D.C. Cir. 1994) (*Sweet Home II*), *reh'g denied*, 30 F.3d 190 (D.C. Cir. 1994), *cert. granted*, 115 S. Ct. 714 (Jan. 6, 1995) (No. 94-859).

324. *Id.* at 1464 (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-44 (1984)). Chief Judge Mikva, who wrote the opinion for the court in *Sweet Home I*, 1 F.3d 1 (D.C. Cir. 1993), dissented in *Sweet Home II*, 17 F.3d at 1473-78 (Mikva, C.J., dissenting).

325. See *Chevron U.S.A.*, 467 U.S. at 844.

326. 17 F.3d at 1465; see *supra* notes 299-301, 311, 316 and accompanying text; see also *infra* notes 400-14 and accompanying text.

327. 17 F.3d at 1464.

application of force against the animal taken,"<sup>328</sup> although in some cases "the application of force may not be instantaneous or immediate, and the force may not involve a bullet or blade."<sup>329</sup>

Judge Williams then approvingly discussed *United States v. Hayashi*,<sup>330</sup> where the Ninth Circuit Court of Appeals interpreted the term "harass" in the definition of "take" under the Marine Mammal Protection Act.<sup>331</sup> The court in *Hayashi* held that the defendant's firing of a rifle into water behind porpoises did not "harass" the porpoises in violation of the Marine Mammal Protection Act, because the defendant's acts were not "direct and significant intrusions upon the mammal's ordinary activities."<sup>332</sup> The Ninth Circuit in *Hayashi* reasoned that:

The [Marine Mammal Protection Act] (MMPA) groups "harass" with "hunt," "capture," and "kill" as forms of prohibited "taking." 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 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.<sup>333</sup>

Judge Williams asserted in *Sweet Home II* that:

[T]he nine verbs accompanying "harm" [in the Endangered Species Act's definition of "take"] all involve a substantially direct application of force, which the Service's concept of forbidden habitat modification altogether lacks.<sup>334</sup>

328. *Id.* at 1465.

329. *Id.* Judge Williams added:

In the case of "pursue", the perpetrator does not necessarily catch or destroy the animal, but pursuit would always or almost always be a step toward deliberate capture or destruction, and so would be picked up by § 1532(19)'s reference to "attempt[s]". While one may "trap" an animal without being physically present, the perpetrator will have previously arranged for release of energy that directly captures the animal. And one may under some circumstances "harass" an animal by aiming sound or light in its direction, but the waves and particles are themselves physical forces launched by the perpetrator.

*Id.*

330. 5 F.3d 1278 (9th Cir. 1993).

331. 17 F.3d at 1465 (citing *Hayashi*, 5 F.3d at 1282). Under the Marine Mammal Protection Act, which makes it unlawful for any person to take a marine mammal, 16 U.S.C. 1372(a)(2)(A) (1988), "take" is defined as activity which may "harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal." 16 U.S.C. § 1362(13) (1988).

332. 5 F.3d at 1282.

333. *Id.*

334. 17 F.3d at 1465. "Of course, each of the terms in the 'take' definition itself implies some degree of habitat modification. Setting a trap for an animal certainly modifies its habitat,

In effect, Judge Williams in *Sweet Home II* held that to "take" a protected species in violation of the Endangered Species Act, a person must exert direct force (although not necessarily instantaneous or immediate force) against a protected animal.<sup>335</sup> Under this reasoning, killing or injuring an animal indirectly through habitat modification can never be held to be a "take" of a protected species under the Endangered Species Act, as "harm," "harass," or any of the other terms used in the Act to define "take."<sup>336</sup>

Judge Williams, in further support of this interpretation of "take" under the Act, asserted in *Sweet Home II* that "[t]he implications of the Service's definition suggest its improbable relation to congressional intent."<sup>337</sup> After noting the large amount of land that may be needed for the survival of the grizzly bear and the criminal penalties for knowing violations of the Endangered Species Act's takings prohibitions, Judge Williams stated that "the gulf between the Service's habitat modification concept of 'harm' and the other words of the statutory definition, and the implications in terms of the resulting extinction of private rights, counsel application of the maxim *noscitur a sociis*."<sup>338</sup> Judge Williams asserted that "the Service's interpretation

as in a slightly different sense, does firing bullets at it. This obviously does not imply that habitat modifications as the Service uses the term are also encompassed." *Id.* at 1465 n.1.

335. *Id.* at 1465.

336. Although not cited by Judge Williams in his opinion in *Sweet Home II*, *California v. Watt*, 520 F. Supp. 1359 (C.D. Cal. 1981), *aff'd in part and rev'd in part on other grounds*, 683 F.2d 1253 (9th Cir. 1982), *rev'd in part on other grounds sub nom. Secretary of Interior v. California*, 464 U.S. 312 (1984), adds support to his claim that the Endangered Species Act requires direct application of force against a protected animal. In *California v. Watt*, the court held that the proposed leasing of tracts on the Outer Continental Shelf, for oil and gas exploration, did not constitute a "take" under the Endangered Species Act, either as "harm," "attempted harm," or "harass," under the Fish and Wildlife Service's 1975 definitions of those terms, *see supra* notes 128-48 and accompanying text, even assuming that the leasing constituted a threat to the continued survival of a species protected under the Endangered Species Act, because the Act requires a more immediate injury. 520 F. Supp. at 1387.

337. 17 F.3d at 1465.

338. *Id.* Judge Williams later explained in his statement (joined by Judge Sentelle) in denying the appellees' petition for rehearing of *Sweet Home II*, that this

grizzly example . . . makes quite clear that the panel understood that the regulation addressed habitat modifications that would be fatal to members of the species.

It refers to a contention that "as many as 35 million to 42 million acres of land are necessary to the survival of grizzlies." If that habitat is "necessary to [the grizzlies'] survival," then any material curtailment must involve death for members of the species.

*Sweet Home Chapter v. Babbitt*, 30 F.3d 190, 191 (D.C. Cir. 1994) (statement of Williams, J.) (citations and footnote omitted) (quoting *Sweet Home II*, 17 F.3d at 1465), *cert. granted*, 115 S. Ct. 714 (Jan. 6, 1995) (No. 94-859).

appears to yield precisely the 'unintended breadth' that use of the maxim properly prevents."<sup>339</sup>

An additional reason given by Judge Williams in support of his holding in *Sweet Home II* was that "[t]he [Endangered Species] Act addresses habitat preservation in two ways—the federal land acquisition program and the directive to federal agencies to avoid adverse impacts."<sup>340</sup> Judge Williams found that the legislative history with respect to the Endangered Species Act's federal land acquisition program "confirms the intention to assign the primary task of habitat preservation to the government."<sup>341</sup> "[T]he floor managers [of the House and Senate versions of the Endangered Species Act of 1973] differentiated loss of habitat from the hazard that was the target of the 'taking' ban and the other prohibitions of § 9."<sup>342</sup> He then stated that

339. 17 F.3d at 1465 (noting that the Supreme Court stated in *Janecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961), that this maxim is usually applied to avoid giving an unintended breadth to Congress' Acts when a word is ambiguous); see *supra* notes 299-301, 311, 316 and accompanying text; see also *infra* notes 400-08 and accompanying text. Judge Williams in *Sweet Home II* referred to the statement in *Dole v. Steelworkers*, 494 U.S. 26, 36 (1990), that "words grouped in a list should be given related meaning." 17 F.3d at 1466.

340. 17 F.3d at 1466. The federal land acquisition program to which Judge Williams referred is pursuant to section 5 of the Endangered Species Act, 16 U.S.C. § 1534 (1988). The directive to federal agencies to avoid adverse impacts to which Judge Williams referred is in section 7 of the Act, *id.* § 1536. See *supra* notes 114-27 and accompanying text.

341. 17 F.3d at 1466. Judge Williams referred to floor statements by R representative Sullivan, the floor manager of the House version of the Endangered Species Act of 1973 in which Representative Sullivan stated that H.R. 37 (the house version of the Endangered Species Act of 1973):

will meet this problem [of adverse impacts on wildlife from destruction of their habitat] by providing funds for acquisition of critical habitat through the use of the land and water conservation fund. It will also enable the Department of Agriculture to cooperate with willing landowners who desire to assist in the protection of endangered species, but who are understandably unwilling to do so at excessive cost to themselves.

*Id.* (quoting 119 Cong. Rec. H30,162 (daily ed. Sept. 18, 1973) (statement of Rep. Sullivan)). According to Judge Williams, "Representative Sullivan saw the Act as providing duties for the government [for habitat modification], with private persons acting only in the form of 'willing landowners' assisted by the Department of Agriculture." *Id.* Judge Williams also quoted the following statement by Senator Tunney, the floor manager of the Senate version of the Endangered Species Act of 1973: "Through these land acquisition provisions, we will be able to conserve habitats necessary to protect fish and wildlife from further destruction." *Id.* (quoting 119 Cong. Rec. S25,669 (daily ed. July 24, 1973) (statement of Sen. Tunney)); see *supra* notes 290-98 and accompanying text.

342. 17 F.3d at 1466. In support of this latter statement, Judge Williams once again quotes:

"Congress's deliberate deletion of habitat modification from the definition of 'take' strengthens . . . [the] conclusion,"<sup>343</sup> and that "in rejecting the Service's understanding of 'take' to encompass habitat modification, 'we are mindful that Congress had before it, but failed to pass, just such a scheme.'"<sup>344</sup>

Judge Williams, in his subsequent statement (joined in by Judge Sentelle) in denying the appellees' petition for rehearing of *Sweet Home II*, noted that:

The government argues that the panel misstated the legislative history when it suggested a parallel between the ban on habitat modification retained in the Act as applied to federal government actors, 17 F.3d at 1466, and the "habitat modification" explicitly deleted [in § 9] from the draft provision governing private actors, *id.* at 1467. See Petition at 8. The panel made the point both in noting the apparent structure of the Act (contrasting the imposition of "very broad burdens" on a narrow segment of society, the federal government, and relatively narrow burdens on all others), and in suggesting the significance of the Senate Committee's deletion of the bill's reference to "habitat modification" as one of the ways in which a person might "take" members of an endangered species. The suggested parallelism is false, says the government, because the statutory ban on habitat modifications by federal agencies is far

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*Another hazard to endangered species arises from those who would capture or kill them for pleasure or profit. There is no way that the Congress can make it less pleasurable for a person to take an animal, but we can certainly make it less profitable for them to do so.*

*Id.* (quoting 119 CONG. REC. H30,162 (daily ed. Sept. 18, 1973) (statement of Rep. Sullivan) (emphasis added by Judge Williams)). Judge Williams then quoted the following floor statement by Senator Tunney:

Although most endangered species are threatened primarily by the destruction of their natural habitats, a significant portion of those animals are subject to *predation by man for commercial, sport, consumption, or other purposes*. The provisions in S. 1983 would prohibit the commerce in or the importation, exportation, or taking of endangered species except where permitted by the Secretary.

17 F.3d at 1466-67 (quoting 119 CONG. REC. S25,669 (daily ed. July 24, 1973) (emphasis added by Judge Williams)).

343. 17 F.3d at 1467. Judge Williams then discussed the fact that S. 1983, as introduced to the Senate Commerce Committee in 1973, defined "take" to include "the destruction, modification, or curtailment of [a species'] habitat or range," *id.*, but that the definition of "take" in the version of the Endangered Species Bill reported out of the Committee to the Senate deleted the language in the original version of S. 1983 referring to habitat modification. *Id.* (citing 119 CONG. REC. S25,663 (daily ed. July 24, 1973) (statement of Sen. Tunney)); see *supra* notes 285-89 and accompanying text.

344. 17 F.3d at 1467 (quoting *John Hancock Mutual Life Ins. Co. v. Harris Trust & Sav. Bank*, 114 S. Ct. 517, 526 (1993)).

broader, reaching such modifications "whether destruction of the habitat would actually kill or injure the species."<sup>345</sup>

Judge Williams responded in this statement by asserting that "the government misrepresents,"<sup>346</sup> and first concluded that section 7(a)(2)'s prohibition of "destruction or adverse modification of habitat . . . which is determined . . . to be critical,"<sup>347</sup> "seems to be simply another way of referring to habitat modifications so significant to the species that they might lead to death, or at least some very serious injury, for members of the species."<sup>348</sup> Judge Williams also stated an inability "to discern any substantive, operational difference" between the Service's regulations [50 C.F.R. § 17.94 (1993)] governing "modifications of 'critical' habitat," and the Service's regulations defining "harm" under section 9 to include habitat modification.<sup>349</sup> Judge Williams in this statement also referred to "the virtual identity between what the Senate deleted from § 9 and what it retained in § 7."<sup>350</sup> He said this was recognized by Michael Bean, Senior Counsel for the Environmental Defense Fund, when Bean wrote that "'if 'taking' comprehends habitat destruction, then it is at least doubtful whether Section 7 of the Act is even necessary.'"<sup>351</sup>

Section 7, however, imposes procedures upon federal agencies that are designed to protect endangered and threatened species.<sup>352</sup> These procedures are not imposed upon persons under section 9 of the Endangered Species Act. Consequently, section 9 does not simply duplicate section 7(a)(2) if section 9 is interpreted to prohibit habitat modifications proscribed by the Fish and Wildlife Service's 1981 redefinition of "harm."

Judge Williams' analysis in denying the appellees' petition for rehearing in *Sweet Home II* also ignores the differences in habitat protection under sections 7 and 9 discussed previously in this article.<sup>353</sup> In particular, Judge Williams fails to discuss section 7(a)(2)'s alternative prohibition of conduct that may "jeopardize the continued existence of any endangered or threatened species,"<sup>354</sup> and he also fails to consider the significance of the fact that section 7 of the Endangered

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345. *Sweet Home Chapter v. Babbitt*, 30 F.3d 190, 192 (D.C. Cir. 1994) (statement of Williams, J.) (citation omitted), *cert. granted*, 115 S. Ct. 714 (Jan. 6, 1995) (No. 94-859).

346. *Id.*

347. 16 U.S.C. § 1536(a)(2) (1988).

348. 30 F.3d at 192.

349. *Id.*; see *supra* notes 125-27 and accompanying text.

350. 30 F.3d at 192.

351. *Id.* (quoting MICHAEL J. BEAN, *THE EVOLUTION OF NATURAL WILDLIFE LAW* 397 (1977)).

352. See *supra* note 117.

353. See *supra* notes 114-27 and accompanying text.

354. See *supra* notes 116-17, 121-24 and accompanying text.

Species Act only applies to actions "authorized, funded or carried out" by a federal agency, whereas section 9 applies to any person, including private individuals, corporations, and state and local governments and their agents and employees.<sup>355</sup> Even if in some situations habitat modification might be prohibited by both sections 9 and 7(a)(2) of the Endangered Species Act, Congress is not prohibited from subjecting the same act to regulation and/or punishment (even criminal) under two different statutory provisions.<sup>356</sup>

Judge Williams' opinion in *Sweet Home II*, also examined the significance of the 1982 amendments to the Endangered Species Act.

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355. See *supra* notes 118-20 and accompanying text.

Judge Williams also argued, in his subsequent statement in support of denial of the appellees' petition for rehearing of *Sweet Home II*, that "[t]o the extent that there may be some theoretical difference between habitat modification under § 7 and under the Department's regulations purporting to implement § 9, practical realities limit . . . [§ 9's] role to pure theory," *Sweet Home Chapter v. Babbitt*, 30 F.3d 190, 192 (D.C. Cir. 1994) (statement of Williams, J.), *cert. granted*, 115 S. Ct. 714 (Jan. 6, 1995) (No. 94-859), because modification that would constitute a prohibited taking under the Service's 1981 redefinition of "harm" may only proceed pursuant to an "incidental taking" permit under section 10(a), 16 U.S.C. § 1539(a) (1988), of the Endangered Species Act, see *supra* notes 54-56 and accompanying text, and because "the Department [of Interior] explicitly recognizes the restrictions that it imposes under § 10 (a) as 'equivalent' to those it imposes under § 7 to protect 'critical habitat.'" 30 F.3d at 192-93 (citing Special Rule Concerning Take of the Threatened Coastal California Gnatcatcher, 58 Fed. Reg. 65,088-90 (Dec. 10, 1993) (to be codified at 50 C.F.R. pt. 17) (taking permitted under a § 10(a) plan for California gnatcatcher "'will not appreciably reduce the likelihood of survival and recovery of the gnatcatcher in the wild; this criteria is equivalent to the regulatory definition of 'jeopardy' under section 7(a)(2) of the Act'").

Judge Williams' assertion, that habitat conservation plans under section 10(a) incidental taking permits are equivalent to restrictions imposed under section 7 to protect "critical habitat," is not supported by the citation to the gnatcatcher special rule, however, because the quotation from the special gnatcatcher rule refers to the jeopardy clause of section 7(a)(2), a clause which is separate and distinct from section 7(a)(2)'s prohibition of the destruction or alteration of designated critical habitat. See *supra* note 117 and accompanying text. Even if this assertion by Judge Williams is correct, section 7(a)(2) would not prohibit modification of a species' habitat that is *not* designated critical habitat unless the habitat modification would violate section 7(a)(2)'s prohibition against action that may jeopardize the continued existence of a species (by threatening the species with extinction). See *supra* notes 121-24 and accompanying text.

Judge Williams' assertion in this statement also fails to recognize, as does Judge Williams' earlier opinion in *Sweet Home II*, see *infra* notes 360-63 and accompanying text, that if section 9 does not apply to habitat modification, habitat conservation plans under section 10(a) incidental take permits would not regulate habitat modification. Also, section 7(a)(2) would regulate the modification of habitat only if the modification was caused by "action authorized, funded, or carried out" by a federal agency and the habitat modification either may threaten the continued existence of the species or would destroy or adversely modify designated critical habitat. Section 7(a)(2) does not regulate modification of habitat that has not been designated as critical habitat and which would not threaten the species with extinction. See *supra* notes 114-27 and accompanying text.

356. See *United States v. Halper*, 490 U.S. 435, 448-49 (1989) (stating that Congress is not prohibited by Double Jeopardy Clause of the Fifth Amendment of the United States Constitution from subjecting a person to criminal punishment under one statute, and remedial civil sanctions under another statutory provision *for the same act*).

He noted that "the only legislative act [in 1982] from which the government claims support" was the enactment in 1982 of sections 10 (a)(1)(B) & (a)(2)<sup>357</sup> of the Endangered Species Act, which authorize the Fish and Wildlife Service to issue incidental take permits.<sup>358</sup> He concluded that these 1982 amendments had neither sufficiently "altered the *context* of the definition of 'take' as to render the Services's [sic] interpretation reasonable, or even, conceivably, to reflect express congressional adoption of that view," nor, by bringing "the Service's regulation and a judicial interpretation to the attention of a . . . subcommittee, [did they] constitute[ ] a ratification of the regulation."<sup>359</sup>

Judge Williams held in *Sweet Home II* that the incidental taking permits authorized by section 10 (a)(1)(B) of the Endangered Species Act do not include the habitat modifications included within the Fish and Wildlife Service's definition of "harm."<sup>360</sup> He found that "the problem of incidental takings" are posed by "[h]arms involving the direct applications of force that characterize the nine other verbs of § 1532 (19)," such as when "[t]he trapping of a nonendangered animal . . . may incidentally trap an endangered species."<sup>361</sup> He stated that "the key example of the sort of problem to be corrected by § 10(a)(1)(B) involved the *immediate destruction* of animals that would be *trapped* by a human enterprise," where eggs of a protected species would be immediately destroyed by being crushed or captured "as a direct result of a human enterprise," when entrained or impinged by a nuclear power plant water intake structure.<sup>362</sup> Judge Williams concluded his analysis of this issue by finding that the enactment of the section 10(a)(1)(B) incidental taking permit provision "involved no assumptions supporting the Service's position on habitat modification. So far as the creation of the permit plan is concerned, the implicit assumptions simply do not embrace the idea that 'take' included any significant habitat modification injurious to wildlife."<sup>363</sup>

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357. 16 U.S.C. §§ 1539 (a)(1)(B) & (a)(2) (1988).

358. See *supra* notes 54-56, 302-06, 310-11 and accompanying text; see also *infra* notes 428-34 and accompanying text.

359. 17 F.3d at 1467 (emphasis added). In addition, Senator Garn in 1982 withdrew a proposed bill that would have been "a wholesale 'rewrite,'" of the Endangered Species Act and would have excluded "effects from normal forestry, farming, ranching, or water management practices," from the Act's definition of "take." *Id.* at 1469 & n.3. Judge Williams concluded in *Sweet Home II* that "[t]he record reveals nothing to suggest any relation between Senator Garn's decision and congressional sentiment on the habitat modification issue." *Id.* at 1469.

360. *Id.* at 1467-68.

361. *Id.* at 1467.

362. *Id.* (emphasis added).

363. *Id.* at 1468.

Regarding the federal government's alternative theory that Congress in 1982 ratified the Fish and Wildlife Service's definition of "harm" in the process of amending the Endangered Species Act, Judge Williams in *Sweet Home II* interpreted references in the 1982 Conference Report<sup>364</sup> regarding the 1982 amendments to "habitat conservation" under section 10 (a) of the Act, as referring to the fact "that *relief* under the § 10 (a) permit scheme would include habitat conservation [and] does not imply an assumption that *takings* encompass habitat modification."<sup>365</sup> Judge Williams added that "although § 10(a) relief contemplates advancing 'the interest of endangered species', it does not follow that every act detrimental to an endangered species constitutes a forbidden taking."<sup>366</sup>

Judge Williams also held that awareness by a congressional subcommittee of the Service's redefinition of "harm" and of the Ninth Circuit's *Palila I* decision,<sup>367</sup> upholding the application of the Endangered Species Act to habitat modification, would not be interpreted as ratification by Congress of the Service's 1981 redefinition of "harm,"<sup>368</sup> when there was no showing that "congressional awareness of the Service's regulation or of *Palila I* [I] reached the floor of either House."<sup>369</sup> He based this holding on analysis<sup>370</sup> of decisions by the United States Supreme Court<sup>371</sup> and the United States Court of Appeals for the District of Columbia,<sup>372</sup> which he concluded "may ultimately not be fully reconcilable."<sup>373</sup> These decisions address the

364. *Id.* (citing H.R. REP. NO. 835, 97th Cong., 2d Sess. 30-31 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2871-72).

365. 17 F.3d at 1468 (emphasis added).

366. *Id.* at 1469. Judge Williams, later in his opinion in *Sweet Home II*, added that Congress' "creation of the permit scheme is fully consistent with the meaning of 'take' as enacted in 1973." *Id.* at 1472.

367. *Palila v. Hawaii Dep't of Land of & Natural Resources*, 639 F.2d 495 (9th Cir. 1981). See *supra* notes 137-48 and accompanying text.

368. 17 F.3d at 1472.

369. *Id.* at 1469.

370. *Id.* at 1469-72.

371. *Id.* (citing *Girouard v. United States*, 328 U.S. 61 (1946); *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825 (1988); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987); *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985); *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983); *Tennessee Valley Auth. v. Hill*, 437 U.S. 153 (1978); *United States v. Board of Comm'rs*, 435 U.S. 110 (1978)).

372. 17 F.3d at 1471 (citing *Ohio v. U.S. Dep't of the Interior*, 880 F.2d 432 (D.C. Cir. 1989)).

373. 17 F.3d at 1472.

Judge Williams, however, did not refer to the apparent alternative holding in *Palila v. Hawaii Dep't of Land & Natural Resources*, 852 F.2d 1106 (9th Cir. 1988), that "Congress' failure" to "modify the taking prohibition in any matter . . . indicates satisfaction with the current definition of harm and its interpretation by the Secretary and the judiciary" and that "the Secretary's interpretation is consistent with the presumption that Congress is 'aware of an administrative or judicial interpretation of a statute and [adopts] that interpretation when it re-

issue of when Congress' action or inaction constitutes ratification of an earlier judicial or administrative agency interpretation of a statute.

Judge Williams concluded that "[a]lthough the precedents are hardly in perfect harmony, the Supreme Court has generally refused to infer ratification from mere amendment of adjacent clauses in these circumstances."<sup>374</sup> He also added that "[a]s [Congressional] inaction is inadequate to *repeal* a law, it should be inadequate to *modify* a law. Yet modification is required to sustain an interpretation that is invalid as against the original legislation."<sup>375</sup> He asserted:

that the cases drawing inferences from [Congress'] inaction typi cally fail to address the serious jurisprudential problems of doing so— especially those captured in Judge Wald's observation that there are

enacts a statute without change." *Id.* at 1109 & n.6 (quoting *Lindahl v. Office of Personnel Management*, 470 U.S. 768, 782 n.15 (1985)); see *supra* notes 254-58 and accompanying text. Judge Williams also failed to cite or analyze *Lindahl* in his opinion for the court in *Sweet Home II*.

In his analysis of decisions dealing with whether congressional action or inaction constitutes ratification of an earlier judicial or administrative interpretation of a statute, Judge Williams in *Sweet Home II* stated:

"Although we are chary of attributing significance to Congress' failure to act, a refusal by Congress to overrule an agency's construction of legislation is at least some evidence of the reasonableness of that construction, particularly where the administrative construction has been brought to Congress' attention through legislation specifically designed to supplant it."

17 F.3d at 1471 (quoting *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985)). Judge Williams, however, did not explicitly apply this principle to the facts of the case in *Sweet Home II*. He failed to consider that Congress' failure to amend the Act's definition of "take" in 1982, when members of a congressional subcommittee had knowledge of the Service's 1981 redefinition of "harm" and the *Palila I* decision, was at least some evidence of the reasonableness of the Service's interpretation of the Act. See *id.* at 1469.

The support provided by Congress' failure in 1982 to amend the Endangered Species Act's definition of "take" is weaker, however, than the situation in *Riverside Bayview*. In *Riverside Bayview*, Congress had considered, but did not enact, bills that would have changed the Corps of Engineers' regulations providing that certain wetlands were within the definition of "waters of the United States," under the Clean Water Act, 33 U.S.C. § 1362 (7) (1982), and there was discussion of the Corps' interpretation both in Committee reports and on the floors of both houses of Congress. See 474 U.S. at 135-39.

However, when Congress amended the Endangered Species Act in 1982, a bill was introduced that would have amended the Act's definition of "take" to exclude some types of habitat modification but it was later withdrawn. 17 F.3d at 1467-69. Neither that withdrawn bill nor the Service's 1981 redefinition of "harm" was cited or discussed in Committee reports or floor debates. See *id.*

374. 17 F.3d at 1469. Congress in 1982 did not reenact or amend section 3(19), 16 U.S.C. § 1532(19) (1976), of the Endangered Species Act. See *Palila v. Hawaii Dep't of Land & Natural Resources*, 852 F.2d 1106, 1109 n.6 (9th Cir. 1988); 17 F.3d at 1472.

375. 17 F.3d at 1471 (emphasis added).

plenty of statutes "on the books for which no congressional majority could presently be generated either to reenact *or* to repeal." It hardly seems consistent to enforce such statutes yet to accept non-amendment of an interpretation as the equivalent of congressional endorsement.<sup>376</sup>

Judge Williams then concluded his analysis regarding whether Congress in 1982 had ratified the Fish and Wildlife Service's 1981 regulation redefining "harm" as follows:

*If the 1982 Congress had reenacted the pertinent sections of the . . . [Endangered Species Act] and "voice[d] its approval" of the . . . [Fish and Wildlife Service's] interpretation, it might be appropriate to treat the reenactment as an adoption of that interpretation. Here, however, Congress neither reenacted the section having to do with "take," nor "voiced its approval" of the harm regulation. . . . [I]ts creation of the [§ 10 (a)(1)(B)] permit scheme is fully consistent with the meaning of "take" as enacted in 1973; the other developments show no more than awareness of the Service's view, its survival in *Palila I*, and the absence of any action to endorse or repudiate those developments.*<sup>377</sup>

Accordingly, Judge Williams invalidated the Fish and Wildlife Service's regulation defining "harm" to include habitat modification and reversed the judgment of the district court "to that extent," but otherwise left the judgment of the court in *Sweet Home I* "unaltered."<sup>378</sup>

Subsequently, in his statement (joined in by Judge Sentelle) supporting the denial of appellees' petition for rehearing of *Sweet Home II*, Judge Williams noted that:

The government faults the panel [in *Sweet Home II*] for failing to specify whether the regulation's excess of statutory authority failed under the first or second "step" of the analysis set forth in *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984), Petition at 9-10, and in a more general way for failing to give the agency the deference that is its due under *Chevron*. Because the court in determining whether Congress "unambiguously expressed" its intent on the issue, *see* 467 U.S. at 843, is to employ all the "traditional tools of statutory construction," *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 (1987), the factors involved in the first "step" are also pertinent to whether an agency's interpretation is "reasonable". Thus the exact point where an agency interpretation falls down may be unclear. Indeed, the

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376. *Id.* at 1472 (citation omitted) (quoting *Ohio v. U.S. Dep't of the Interior*, 880 F.2d at 458).

377. *Id.* (citation omitted) (emphasis added).

378. *Id.*

*Chevron* Court itself never specified which step it was applying at any point in its analysis, see 467 U.S. at 859-66.

Nonetheless, we conclude that the statute, fairly read in the light of the "traditional tools of statutory interpretation", manifests a clear determination by Congress that the prohibitions of § 9 should not reach habitat modifications as defined by the Department, where there is no direct action by the defendant against any member of the species. Extending the word "harm" to reach habitat modification as so conceived carries § 9's prohibition far beyond the reach effected by all the other terms used in the definition; it applies to every citizen duties the Act expressly imposed only on federal government agencies; and it ignores the plausible inferences from the Senate's deletion of the phrase "habitat modification" from the draft bill. The extension vests the Department with authority to supervise the use of privately owned land in vast tracts of the United States, even to the point of forbidding modest clearing efforts conducted in the interest of fire protection in populated areas. Congress clearly did not hang so massive an expansion of government power on so slight a nail as § 9's provision that no one should "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect" an endangered species.<sup>379</sup>

Judge Williams in *Sweet Home II* changed his position from his concurrence in *Sweet Home I*, in which he had agreed that the Fish and Wildlife Service's 1981 redefinition of "harm" "complies with the Endangered Species Act-but *only* because . . . the 1982 amendments to the . . . [Act, enacting the section 10(a)(1)(B)<sup>380</sup> incidental take permit provision] support the inference that the . . . [Act] otherwise forbids some such incidental takings, including some habitat modification."<sup>381</sup> In *Sweet Home II*, Judge Williams changed his position with respect to section 10(a)(1)(B) and held that section 10(a)(1)(B) only applied to a "take" involving the direct application of force and did not "include the habitat modifications embraced by the Service's definition of 'harm.'"<sup>382</sup> Having changed his interpretation of section 10(a)(1)(B), which had been the only basis of his concurrence in *Sweet Home I*, Judge Williams joined Judge Sentelle in *Sweet Home II* to hold invalid the Fish and Wildlife Service's regulation defining "harm" to include habitat modification.

In *Sweet Home II*, Judge Sentelle concurred with Judge Williams' decision to reverse the district court judgment in part and stated that

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379. *Sweet Home Chapter v. Babbitt*, 30 F.3d 190, 193 (D.C. Cir. 1994) (statement of Williams, J.) (citations omitted), *cert. granted*, 115 S. Ct. 714 (Jan. 6, 1995) (No. 94-859).

380. 16 U.S.C. § 1539(a)(1)(B) (1988).

381. 1 F.3d at 11 (Williams, J., concurring) (emphasis added).

382. 17 F.3d at 1467.

he remained of the view expressed in his *Sweet Home I*<sup>383</sup> dissent that the Service's definition of "harm" "cannot reasonably be defined to include the broadly prohibited habitat modification encompassed in the challenged regulation."<sup>384</sup> Judge Sentelle stated that he found "the words and structure of the Act sufficiently clear as to require no resort to legislative history."<sup>385</sup> He therefore concurred with "those portions of Judge Williams' opinion that . . . [relied] on the structure of the Act and on the maxim of *noscitur a sociis*," and noted, as in his dissent in *Sweet Home I*, "that to define 'harm' as broadly as does the Secretary is to render all other words in the statutory definition of 'taking' superfluous in violation of the presumption against surplusage."<sup>386</sup>

Chief Judge Mikva dissented in *Sweet Home II*,<sup>387</sup> arguing<sup>388</sup> that Judge Williams' majority decision on rehearing violated the *Chevron U.S.A.*<sup>389</sup> doctrine.<sup>390</sup> Chief Judge Mikva noted<sup>391</sup> that Judge Williams only cited *Chevron U.S.A.* once in *Sweet Home II*, after he stated that the Fish and Wildlife "Service's definition of 'harm' was neither clearly authorized by Congress nor a 'reasonable interpretation' of the statute."<sup>392</sup> Chief Judge Mikva quoted<sup>393</sup> the following paragraph from *Chevron U.S.A.*:

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.<sup>394</sup>

Chief Judge Mikva then stated that:

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383. 1 F.3d at 11 (Sentelle, J., dissenting). See *supra* notes 312-20 and accompanying text.

384. 17 F.3d at 1472 (Sentelle, J., concur ring).

385. *Id.*

386. *Id.*

387. *Id.* at 1473 (Mikva, C.J., dissenting).

388. *Id.* at 1473-78.

389. *Chevron U.S.A v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

390. See *supra* notes 236-40 and accompanying text.

391. 17 F.3d at 1473 (Mikva, C.J., dissenting).

392. 17 F.3d at 1464.

393. *Id.* at 1473 (Mikva, C.J., dissenting).

394. *Id.* (quoting 467 U.S. at 842-43 (footnotes omitted)).

Plainly, *Chevron* does not place the burden on the responsible agency to show that its interpretation is clearly authorized or reasonable. On the contrary, the burden is on the party seeking to overturn such an interpretation to show that Congress has clearly spoken *to the contrary*, or that the agency's interpretation is *unreasonable*. The whole point of *Chevron* deference is that when Congress has *not* given a clear command, we presume that it has accorded discretion to the agency to clarify any ambiguities in the statute it administers. In requiring the agency to justify its regulation by reference to such a clear command, the majority confounds its role. Ties are supposed to go to the dealer under *Chevron*.<sup>395</sup>

Chief Judge Mikva's dissent also criticized Judge Williams' majority opinion for failing to clarify whether the court was invalidating the Service's regulation defining "harm" under step one of *Chevron U.S.A.* because Congress clearly and unambiguously addressed the issue of whether "harm" includes "significant habitat modification [that] actually kills or injures wildlife," or under step two of *Chevron U.S.A.* because the Service's definition was not a permissible or reasonable interpretation of an ambiguous statute.<sup>396</sup> Chief Judge Mikva argued that the Endangered Species Act, regarding step one of *Chevron U.S.A.*, "surely . . . is silent, or at best ambiguous on this question,"<sup>397</sup> so that the only question under step two of the *Chevron U.S.A.* doctrine is:

whether the . . . [Service's] interpretation of the word "harm" constitutes a "permissible" reading of the ambiguous language. The question is *not* whether we think it constitutes the best reading . . . Under . . . [*Chevron U.S.A.*], "[t]he court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, *or even the reading the court would have reached if the question initially had arisen in a judicial proceeding.*"<sup>398</sup>

Chief Judge Mikva asserted in his dissent in *Sweet Home II* that the majority violated the *Chevron U.S.A.* standard by substituting "its own favorite reading of the Endangered Species Act for that of the agency," when "the only question is the reasonableness of the agency's interpretation. A fair reading allows for no other conclusion than that the agency's interpretation is reasonable."<sup>399</sup>

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395. *Id.* (Mikva, C.J., dissenting) (emphasis added).

396. *Id.* at 1473-74.

397. *Id.*

398. *Id.* at 1474 (quoting *Chevron U.S.A.*, 467 U.S. 837, 843 & n.11) (alteration in original) (emphasis added).

399. *Id.*; see *infra* note 453.

Chief Judge Mikva's dissent then criticized the majority for relying on the "seldom-invoked" *noscitur a sociis* principle of statutory construction.<sup>400</sup> He argued that this principle was incorrectly applied by the majority,<sup>401</sup> because the principle is applicable "when a potentially broad word appears in a definition . . . with a list of narrow words," while the Act's definition of "take" includes several words, including "harass," "wound" and "kill," which "might be read as broadly, or nearly as broadly, as 'harm.'"<sup>402</sup>

In his analysis of the *noscitur a sociis* maxim, Chief Judge Mikva distinguished the holding of *United States v. Hayashi*,<sup>403</sup> upon which Judge Williams relied in his majority opinion,<sup>404</sup> on the grounds that the Marine Mammal Protection Act's definition of "take"<sup>405</sup> only includes the terms "harass," "hunt," "capture," and "kill," but not the "more expansive" terms "harm," "wound," and "pursue," found in the Endangered Species Act's definition of "take."<sup>406</sup> Chief Judge Mikva also noted that *Hayashi* was decided by the Ninth Circuit Court of Appeals, which held in *Palila II*<sup>407</sup> that the Service's "interpretation of 'harm' to include significant habitat modification is consistent with the language, purpose, and legislative history" of the Endangered Species Act.<sup>408</sup>

In his *Sweet Home II* dissent, Chief Judge Mikva also asserted that Judge Sentelle's use of the presumption against surplusage<sup>409</sup> was "[e]qually [as] inappropriate" as his use of the *noscitur a sociis* principle of statutory construction.<sup>410</sup> Although conceding that "[t]here is no reasonable definition of the word 'harm' (or, for that matter, the word 'harass') that would not render superfluous some of the other defined

400. 17 F.3d at 1774. Chief Judge Mikva also concluded in *Sweet Home I*, 1 F.3d at 10 (Mikva, C.J., concurring), that the Fish and Wildlife Service's definition of "harm" was not impermissible under the *noscitur a sociis* maxim. See *supra* notes 299-301 and accompanying text.

401. 17 F.3d at 1475.

402. *Id.* at 1474. Chief Judge Mikva commented that the Fish and Wildlife Service "has defined . . . 'harass' nearly as broadly as the term 'harm,'" and that the definition of "harass" had not been challenged. *Id.* at 1474-75.

403. 5 F.3d 1278 (9th Cir. 1993).

404. See *supra* notes 330-36 and accompanying text.

405. 16 U.S.C. § 1362(13) (1988). See *supra* note 331.

406. 17 F.3d at 1475 (Mikva, C.J., dissenting).

407. *Palila v. Hawaii Dep't of Land & Natural Resources*, 852 F.2d 1106, 1107-09 (9th Cir. 1988).

408. 17 F.3d at 1475 (Mikva, C.J., dissenting). See *supra* notes 230-53 and accompanying text. Judge Mikva contended that "today's contrary decision thus creates a foolish circuit conflict." 17 F.3d at 1475 (Mikva, C.J., dissenting).

409. See *id.* at 1472 (Sentelle, J., concurring); *Sweet Home v. Babbitt*, 1 F.3d 1, 13 (D.C. Cir. 1993) (Sentelle, J., dissenting). See also *supra* notes 319-20, 386 and accompanying text.

410. 17 F.3d at 1475 (Mikva, C.J., dissenting).

terms," and that "one cannot 'kill' or 'wound' an animal without also 'harming' it, even under the narrowest conceivable interpretation of 'harm',"<sup>411</sup> Chief Judge Mikva argued that the majority's holding "read[s] 'harm' out of the statute altogether."<sup>412</sup> This result contradicts "Congress's [sic] intent . . . to define takings 'in the broadest possible manner to include any conceivable way in which a person can "take" or attempt to "take" any fish or wildlife."<sup>413</sup> He added that:

[d]efining "harm" to include "significant habitat modification" renders no more terms superfluous than would a definition that did not include habitat modification but did include "direct" forms of killing and wounding. And indeed, the majority's holding that "harm" cannot include indirect means of injuring wildlife may render "harm" itself superfluous, or nearly so, as "direct" means of injury are well covered by the other terms.<sup>414</sup>

Chief Judge Mikva also contended that the legislative history relating to the Endangered Species Act's taking provision,<sup>415</sup> was "most ambiguous regarding whether Congress intended to include habitat modification within the meaning of 'take,'"<sup>416</sup> contrary to the majority's conclusion that this legislative history of the "take" provision establishes that Congress "deliberate[ly] delet[ed] . . . habitat modification from the definition of 'take.'"<sup>417</sup> Chief Judge Mikva pointed out in his *Sweet Home II* dissent, as well as his *Sweet Home I* concurrence,<sup>418</sup> that there is nothing in the legislative history of the Act indicating why the Senate Commerce Committee adopted the definition of "take" in S. 1592 rather than S. 1983's definition of "take," which included habitat "destruction, modification, or curtailment."<sup>419</sup> He also noted that the term "harm" was added to the Act's definition of "take" on the floor of the Senate without a committee vote on the issue.<sup>420</sup> Arguing that the floor addition of "harm" to the Act's definition of "take" "can only have broadened the definition from the bill reported out of Committee—'clarifying' that 'take' should be defined 'in the broadest possible manner,'"<sup>421</sup> Chief Judge Mikva asserted that for purposes of the *Chevron* doctrine:

411. *Id.*

412. *Id.*

413. *Id.* (quoting S. REP. NO. 307, 93d Cong., 1st Sess. 7 (1973)).

414. 17 F.3d at 1475 (Mikva, C.J., dissenting).

415. See *supra* notes 285-89, 340-44 and accompanying text.

416. 17 F.3d at 1476 (Mikva, C.J., dissenting).

417. *Id.* at 1467. See *supra* notes 343-44 and accompanying text.

418. 1 F.3d at 9 (Mikva, C.J., concurring). See *supra* notes 285-89 and accompanying text.

419. 17 F.3d at 1474-76 (Mikva, C.J., dissenting).

420. *Id.* at 1476.

421. *Id.* (quoting S. REP. NO. 307, 93d Cong., 1st Sess. 7 (1973)).

[T]here is nothing to suggest that Congress chose the definition it did in order to *exclude* habitat modification. The Committee may have rejected the S. 1983 definition only because it apparently would have made habitat modification a *per se* violation of the [Endangered Species Act], as opposed to leaving such determinations to the discretion of the responsible agency . . . . Surely there is nothing to indicate that the Committee intended to foreclose an administrative regulation prohibiting habitat modification—particularly a prohibition . . . requiring that there be actual injury or death to wildlife.<sup>422</sup>

As in his *Sweet Home I*<sup>423</sup> concurring opinion, Chief Judge Mikva argued in his *Sweet Home II* dissent that "[n]othing in the language of 16 U.S.C. § 1534 or in the legislative history" establishes "that Congress intended land acquisition to be the exclusive instrument for curbing habitat modification on private lands."<sup>424</sup> He noted that Judge Williams referred only to floor statements by members of Congress<sup>425</sup> to support his "totally speculative" "contention that Congress intended land acquisition [under 16 U.S.C. § 1534] to be the exclusive instrument for curbing habitat modification on private lands." Chief Judge Mikva argued "that 'debates in Congress expressive of the views and motives of individual members are not a safe guide . . . in ascertaining the meaning and purpose of the law-making body.'"<sup>426</sup> He added that "[i]n any case, these statements do not establish that even the speakers themselves intended land acquisition to be the *exclusive* protective mechanism for habitats on private lands."<sup>427</sup>

In his *Sweet Home II* dissenting opinion, Chief Judge Mikva found, as he had in his concurring opinion in *Sweet Home I*,<sup>428</sup> that the Service's definition of "harm" was supported by Congress' enactment in 1982 of section 10(a)(1)(B)'s incidental take permit provision.<sup>429</sup> He interpreted the term "incidental takings" in section 10(a)(1)(B) as meaning habitat modification, which would be prohibited under the Act without a permit.<sup>430</sup> Although he implied that the enactment in 1982 of this incidental take permit provision alone does not support a

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422. 17 F.3d at 1476 (Mikva, C.J., dissenting) (emphasis added).

423. 1 F.3d at 9-10 (Mikva, C.J., concurring). See *supra* notes 294-98 and accompanying text.

424. 17 F.3d at 1476.

425. See *supra* notes 341-42 and accompanying text.

426. 17 F.3d at 1476 (quoting Duplex Printing Press. Co. v. Deering, 254 U.S. 443, 474 (1921)).

427. *Id.* (Mikva, C.J., dissenting) (emphasis added).

428. 1 F.3d at 10-11 (Mikva, C.J., concurring). See *supra* notes 302-06 and accompanying text.

429. 17 F.3d at 1477-78 (Mikva, C.J., dissenting).

430. *Id.* at 1477.

decision to uphold the Service's definition of "harm,"<sup>431</sup> he asserted that the 1982 amendments to the Endangered Species Act "indicate that Congress in 1982 probably believed that habitat modification was properly covered by the prohibition on takings."<sup>432</sup> He conceded that "the 1982 amendments prove little about Congress's [sic] intent in 1973," but he noted that Congress in 1973 "was silent on the question" of whether "take" includes habitat modification.<sup>433</sup> He argued that "[c]onsequently, the 1982 amendments . . . lend some weight to the reasonableness of the agency's definition—if Congress in 1982 believed the definition was reasonable, and the agency believed it was reasonable, then Chevron [sic] demands that we uphold the regulation unless we find solid evidence to the contrary. No such evidence exists."<sup>434</sup>

Based on his analysis of "the language, structure, purpose, [and] legislative history"<sup>435</sup> of the Endangered Species Act of 1973, and of the 1982 amendments to the Act and its legislative history, Chief Judge Mikva concluded in his *Sweet Home II* dissent that Congress had not "unambiguously command[ed]" that "harm" does not include habitat modification.<sup>436</sup> He stated that "the statute . . . [was] silent, or at best ambiguous,"<sup>437</sup> on the question of whether "harm" includes "significant habitat modification [that] actually kills or injures wildlife."<sup>438</sup> Thus, a court could not, under *Chevron U.S.A.*, invalidate the Fish and Wildlife Service's 1981 redefinition of "harm" on the grounds that it is contrary to the clear or unambiguously expressed intent of Congress.<sup>439</sup>

This conclusion by Chief Judge Mikva is clearly a correct application of *Chevron U.S.A.* There is no clear language in the Endangered Species Act of 1973, the 1982 amendments to the Act, or legislative history of either, that expressed an unambiguous intent by Congress regarding whether "harm" includes "significant habitat modification [that] actually kills or injures wildlife."<sup>440</sup> Furthermore, the *noscitur a sociis* and presumption against surplusage maxims do not demon-

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431. *Id.* ("[Judge Williams in *Sweet Home I*] was wrong to rely solely on the 1982 amendments for his decision; I agree that they do not alone support its weight.").

432. *Id.*

433. *Id.* at 1477-78.

434. *Id.* at 1478.

435. *Id.* at 1476.

436. *Id.* at 1478.

437. *Id.* at 1473-74.

438. *Id.*

439. *Id.* at 1476, 1478.

440. *Id.* at 1473-74.

strate an "unambiguously expressed intent of Congress"<sup>441</sup> on this question within the meaning of the *Chevron U.S.A.* doctrine. Consequently, because Congress has not unambiguously spoken to provide its clear intent on whether "harm" includes habitat modification, *Chevron U.S.A.* prohibits a court from imposing its own construction of the silent or ambiguous statute,<sup>442</sup> and requires the court to uphold the Fish and Wildlife Service's definition of "harm" if it is a permissible or reasonable interpretation of the Act.<sup>443</sup>

Judge Williams in his majority opinion in *Sweet Home II* incorrectly placed the burden on the Fish and Wildlife Service to show that Congress clearly authorized the Service's definition of "harm."<sup>444</sup> As Chief Judge Mikva noted in his dissenting opinion in *Sweet Home II*, *Chevron U.S.A.* "does not place the burden on the responsible agency to show that its interpretation is clearly authorized or reasonable. On the contrary, the burden is on the party seeking to overturn such an interpretation to show that Congress has clearly spoken *to the contrary*, or that the agency's interpretation is *unreasonable*."<sup>445</sup>

Applying this interpretation of *Chevron U.S.A.*, Chief Judge Mikva concluded in his *Sweet Home II* dissent that the Service's definition of "harm" "is a permissible exercise of its discretion as delegated by Congress," and therefore should be upheld under the *Chevron U.S.A.* doctrine.<sup>446</sup> Chief Judge Mikva argued that the Service's definition was supported by legislative history of the Endangered Species Act of 1973 "which suggest[s] that Congress envisioned a broad interpretation of 'take,' even before the crucial word 'harm' was added to the definition of that term,"<sup>447</sup> as well as by the 1982 enactment of

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441. *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984).

442. *Id.* at 843-44.

443. *Id.* at 843-45.

444. 17 F.3d at 1464 ("We find that the Service's definition of 'harm' was neither clearly authorized by Congress nor a 'reasonable interpretation' of the statute."). This statement by Judge Williams, however, does not explicitly place the burden on the federal government to show that the Service's 1981 redefinition of "harm" is a reasonable interpretation of the Act, as Chief Judge Mikva contended. See *supra* note 395 and accompanying text.

445. *Id.* at 1473 (Mikva, C.J., dissenting) (emphasis added); see *supra* notes 395-96 and accompanying text.

446. 17 F.3d at 1476 (Mikva, C.J., dissenting).

447. *Id.* at 1477 (citing S. REP. NO. 307, 93d Cong., 1st Sess. 7 (1973) ("Take' is defined . . . in the broadest possible manner."); H.R. REP. NO. 412, 93d Cong., 1st Sess. 15 (1973) ("[The Act] includes, in the broadest possible terms, restrictions on the taking, importation and exportation, and transportation of [endangered] species, as well as other specified acts."); *Sweet Home I*, 1 F.3d at 11 (stating that "[h]arass' includes activities of bird watchers 'where the effect of those activities might disturb the birds and make it difficult for them to hatch or raise their young'") (quoting S. REP. NO. 307, 93d Cong., 1st Sess. 7 (1973)). Chief Judge Mikva also referred "to the floor amendment that added the word 'harm,' purportedly to 'clarify' language that was 'omitted' from the draft that emerged from Committee." 17 F.3d at 1477 (quoting 119 CONG. REC. S25,683 (July 24, 1973) (statement by Sen. Tunney)).

the section 10(a)(1)(B) incidental take permit provision.<sup>448</sup> As Chief Judge Mikva stressed in his *Sweet Home II* dissent, the majority in *Sweet Home II* made:

no effort . . . to determine whether the agency could reasonably have relied on such [1982] amendments as persuasive evidence supporting its interpretation. Instead, the agency . . . [was] asked to prove that the best interpretation of "harm" encompasses habitat modification. Beginning from a wrong premise, applying a wrong standard, it is not surprising that the wrong result . . . [was] achieved.<sup>449</sup>

He added that the majority's decision created a split among the circuit court of appeals because "[t]he Ninth Circuit determined, in *Palila v. Hawaii Department of Land and Natural Resources*, . . . that the [Fish and Wildlife Service's] 'harm' definition was a permissible interpretation of the statute."<sup>450</sup>

## VI. CONCLUSION

Judge Williams' majority opinion in *Sweet Home II* should be reversed by the United States Supreme Court. The Fish and Wildlife Service's definition of "harm" should be upheld by the Supreme Court under the *Chevron U.S.A.* doctrine as a reasonable and permissible interpretation of the Endangered Species Act, for the reasons set forth by the Ninth Circuit in *Palila II*,<sup>451</sup> and by Chief Judge Mikva in his concurring opinion in *Sweet Home I*<sup>452</sup> and in his dissenting opinion in *Sweet Home II*.<sup>453</sup> The reasons for upholding the Service's definition of

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448. 17 F.3d at 1477-78 (Mikva, C.J., dissenting). See *supra* notes 429-39 and accompanying text.

449. 17 F.3d at 1478 (Mikva, C.J., dissenting).

450. *Id.* (citing 852 F.2d 1106 (9th Cir. 1988)). See *supra* notes 229-55 and accompanying text.

451. *Palila v. Hawaii Dep't of Land & Natural Resources*, 852 F.2d 1106, 1108-09 (9th Cir. 1988). See *supra* notes 230-53 and accompanying text.

452. *Sweet Home Chapter v. Babbitt*, 1 F.3d 1, 8 (D.C. Cir. 1993) (Mikva, C.J., concurring), *modified on other grounds*, 17 F.3d 1463 (D.C. Cir. 1994), *reh'g denied*, 30 F.3d 190 (D.C. Cir. 1994), *cert. granted*, 115 S. Ct. 714 (Jan. 6, 1995) (No. 94-859). See *supra* notes 283-308 and accompanying text.

453. *Sweet Home Chapter v. Babbitt*, 17 F.3d 1463, 1473 (D.C. Cir. 1994) (Mikva, C.J., dissenting), *cert. granted*, 115 S. Ct. 714 (Jan. 6, 1995) (No. 94-859). Judge Silberman, in a dissenting opinion, joined by Chief Judge Mikva and Judge Wald, argued that:

Assuming the challenge to the regulation is ripe and that Chevron [sic] controls our review, I think the Chief Judge [Mikva] has the better of the argument . . . . I do not think . . . that the majority has submitted to the discipline of the Chevron [sic] framework and given the Department of Interior its due deference. It was certainly not apparent whether the majority's initial opinion rested on Chevron [sic] Step I or Step II. In its response to the government's petition for rehearing, the panel majority appears to shift perceptibly to a Step I "clear determination by

"harm," as a reasonable and permissible interpretation of the Endangered Species Act, include: (1) that the Service's definition furthers both the Act's purpose of conserving wildlife habitat and Congress' intent to define "take" as broadly as possible to protect wildlife;<sup>454</sup> and (2) Congress' enactment in 1982 of the section 10(a)(1)(B) incidental taking permit provision provides reasonable support for the Service's interpretation of "harm" to include habitat modification.<sup>455</sup> The Fish and Wildlife Service's definition of "harm" should not be found to be unreasonable or impermissible under a *Chevron U.S.A.* analysis, either because habitat modification was deleted from the original version of S. 1983,<sup>456</sup> because of the legislative history with respect to the federal land acquisition program under section 4 of the Act,<sup>457</sup> or because of the statutory construction maxims of *noscitur a sociis*<sup>458</sup> or surplusage.<sup>459</sup> Chief Judge Mikva in

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Congress," against which no deference to the agency's interpretation is appropriate. I do not find in either the statutory language or the legislative history any such fixed view. And at the second step (which is where I would analyze the case), maxims of statutory construction like *noscitur a sociis*, although not totally irrelevant, certainly have less force. See *Michigan Citizens for an Indep. Press v. Thornburgh*, 868 F.2d 1285, 1292-93 (D.C. Cir.), *aff'd per curiam by an equally divided court*, 493 U.S. 38 (1989). I quite agree with the panel that "the factors involved in the first 'step' are also pertinent to whether an agency's interpretation is 'reasonable;' . . . but when thinking of the statute at that second step, one must assume that the statute has more than one plausible construction as it applies to the case before you. If the agency offers one—it prevails.

*Sweet Home Chapter v. Babbitt*, 30 F.3d 190, 194 (D.C. Cir. 1994) (Silberman J., dissenting from the denial of rehearing *en banc*) (some citations omitted), *cert. granted*, 115 S. Ct. 714 (Jan. 6, 1995) (No. 94-859). Judge Silberman's opinion in *Michigan Citizens for an Indep. Press v. Thornburgh*, 868 F.2d at 1292, states that:

*Chevron* implicitly precludes courts picking and choosing among various canons of statutory construction to reject reasonable *agency* interpretations of ambiguous statutes. If a statute is ambiguous, a reviewing court cannot reverse an agency decision merely because it failed to rely on any one of a number of canons of construction that might have shaded the interpretation a few degrees in one direction or another.

*Id.*

454. See *Palila II*, 852 F.2d at 1108-09; *Sweet Home Chapter v. Babbitt*, 1 F.3d at 8-9 (Mikva, C.J., concurring); *Sweet Home Chapter v. Babbitt*, 17 F.3d at 1476-77 (Mikva, C.J., dissenting). See *supra* notes 245-46 and accompanying text.

455. See *Sweet Home Chapter v. Babbitt*, 17 F.3d at 1477-78 (Mikva, C.J., dissenting). See *supra* notes 428-39 and accompanying text.

456. See 17 F.3d at 1467. See *supra* notes 343-44 and accompanying text.

457. See 17 F.3d at 1466. See *supra* notes 340-42 and accompanying text.

458. See 1 F.3d at 12-13 (Sentelle, J., dissenting). See *supra* notes 316-18 and accompanying text.

459. See 1 F.3d at 13 (Sentelle, J., dissenting). See *supra* notes 319-20 and accompanying text.

his *Sweet Home I*<sup>460</sup> concurrence and in his *Sweet Home II*<sup>461</sup> dissent presented reasonable rebuttals to each of these arguments. The Fish and Wildlife Service's 1981 regulation redefining "harm" is a reasonable interpretation of ambiguous provisions of the Endangered Species Act and should be upheld under the *Chevron U.S.A.* doctrine.

Furthermore, courts should liberally construe the Service's 1981 redefinition of "harm." This liberal construction should prohibit acts, including habitat modification, that kill or physically injure individual wild animals *and* acts, including habitat modification, that adversely impact entire species'—or a large number of animals'—breeding, feeding, or sheltering, causing a decline in the species' population and threatening the species with extinction or preventing the species from recovering.

The Service's definition of "harm" also should be interpreted to prohibit local, state, or federal governmental officials or agencies from permitting, licensing, or funding another person's act that would "take" an endangered or threatened species, when such authorization or funding is a prerequisite to that other person's act. In addition, the failure of a person or agency to perform a duty should be a "harm" that is prohibited by the Service's regulations and the Act when that omission causes death or injury to a protected species.

As noted by Chief Judge Mikva in his dissent in *Sweet Home II*, "[t]he purpose of the Endangered Species Act, lest we forget, is to protect endangered species. In [*Sweet Home II*'s] abandonment of [the panel's] decision of less than a year ago, [the] court . . . [took] a large step backward from that purpose. The majority [in *Sweet Home II*] may believe it . . . [made] good policy—but that is not [a court's] job."<sup>462</sup>

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460. 1 F.3d at 8-11 (Mikva, C.J., concurring). See *supra* notes 283-308 and accompanying text.

461. 17 F.3d at 1473-78 (Mikva, C.J., dissenting). See *supra* notes 387-450 and accompanying text.

462. 17 F.3d at 1478 (Mikva, C.J., dissenting); see 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).