LAW REVIEW, OCTOBER 1995

ENDANGERED SPECIES ACT REGULATES CRITICAL HABITAT MODIFICATION ON PRIVATE LAND

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Private property rights are not absolute. Most notably, local zoning ordinances may require a building permit before constructing certain home improvements, such as a deck or swimming pool. Similarly, federal environmental law, specifically the Endangered Species Act (ESA), may require a permit before a private landowner utilizes or develops his property in a manner which may harm the critical habitat of an ESA threatened or endangered species. On June 29, 1995, the Supreme Court of the United States issued the *Sweet Home* decision described below. By a 6-3 vote, the Court upheld the statutory authority of the Secretary of the Interior to include "habitat modification and degradation" as conduct which constitutes "harm" under the ESA. Accordingly, under the existing interpretation of the ESA, private land use which results in such "harm" is illegal in the absence of a permit from the U.S. Fish and Wildlife Service.

As the 104th Congress considers reauthorization of the ESA, there are provisions in several bills which would effectively reverse *Sweet Home* and limit ESA violations to the intentional harm or taking of a threatened or endangered species. In most instances, such intent would be hard to prove. Moreover, the ESA specifically recognized that most "harm" to a threatened or endangered species is the product of critical habitat destruction, rather than hunting or trapping. More often than not, the loss of critical habitat is the result of landowner ignorance or indifference, rather than a specific intent to destroy a particular species listed as threatened or endangered under the ESA. Consequently, a reauthorized ESA which expressly precludes "habitat modification and degradation" from the statutory definition of "harm," would no longer be able to address the major cause of species extinction, i.e. loss of critical habitat through private or public land use.

NO HARM, NO FOWL

In the case of *Babbitt v Sweet Home Chapter of Communities for a Great Oregon*, 115 S.Ct. 2407 (U.S. 1995), the plaintiffs, Sweet Home Chapter of Communities for a Great Oregon (Sweet Home), were described as "a group of small landowners, logging companies, and families dependent on the forest products industries in the Pacific Northwest and in the Southeast, and organizations that represent their interests." In their complaint, Sweet Home alleged that the Secretary of the Interior had exceeded his regulatory authority under the ESA. Section 9 of the ESA makes it unlawful for any person to "take" any endangered or threatened species and provides the following protection for endangered species:

> The Act defines the term "endangered species" to mean "any species which is in danger of extinction throughout all or a significant portion of its range... With respect to any

> endangered species of fish or wildlife listed pursuant to section 1533 of this [ESA] title it is unlawful for any person subject to the jurisdiction of the United States to take any such species within the United States or the territorial sea of the United States. 16 U.S.C. § 1538(a)(1).
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> The term "take" means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. 16 U.S.C. § 1532(19).

In 1982, Congress amended the ESA and limited the Section 9 "take" prohibition. Specifically, Congress authorized "the Secretary to grant a permit for any taking otherwise prohibited by Section 9(a)(1)(B) 'if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity'." 16 U.S.C. § 1539(a)(1)(B). The ESA, therefore, does not impose an absolute ban on the utilization or development of private property containing the critical habitat of a species listed as threatened or endangered. Instead, it requires the landowner to secure a federal permit before conducting land uses which may result in a "taking" under the ESA. Like a local building permit, such ESA permits usually allow for development activities subject to conditions designed to eliminate or mitigate an ESA "taking" of a listed species.

KILLING ME SOFTLY?

The ESA provides no further statutory definition of the term "take" beyond those cited above: "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." As a result, pursuant to its statutory authority to implement the ESA, the Interior Department, through the Fish and Wildlife Service, promulgated the following regulation that defined the statute's prohibition on takings to include "significant habitat modification or degradation where it actually kills or injures wildlife."

> Harm in the definition of 'take' in the Act means an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering." 50 CFR § 17.3 (1994).

In their lawsuit, Sweet Home contended that the Secretary's "application of the 'harm' regulation to the red-cockaded woodpecker, an endangered species, and the northern spotted owl, a threatened species, had injured them economically." The federal district (i.e., trial) court dismissed Sweet Home's complaint. In the opinion of the district court, "Congress intended an expansive interpretation of the word 'take,' an interpretation that encompasses habitat modification." The federal appeals court, however, reversed.

In so doing, the appeals court applied a rule of statutory construction (*noscitur a sociis)* which holds that "a word is known by the company it keeps." While acknowledging "the potential breadth" of the word "harm," the appeals court concluded that "the immediate statutory context in which 'harm'

appeared counseled against a broad reading." Rather, like the other words in the definition of "take," the appeals court concluded that "the word 'harm' should be read as applying only to the perpetrator's direct application of force against the animal taken." Specifically, the appeals court found that "forbidden acts" under the ESA must "fit, in ordinary language, the basic model 'A hit B'. "

Based upon the legislative history of the ESA, the appeals court found "Congress must not have intended the purportedly broad curtailment of private property rights that the Secretary's interpretation permitted." Accordingly, the appeals court held that "Congress had not intended the s 9 "take" prohibition to reach habitat modification." The United States Supreme Court granted the Secretary of the Interior's petition to review this determination.

In this particular instance, the Supreme Court found allegation that Sweet Home had a "desire to harm either the red-cockaded woodpecker or the spotted owl. On the contrary, the Court noted that the Sweet Home groups "merely wish to continue logging activities that would be entirely proper if not prohibited by the ESA." However, within the context of Sweet Home's specific challenge to ESA regulatory authority, the Court assumed that "those activities will have the effect, even though unintended, of detrimentally changing the natural habitat of both listed species and that, as a consequence, members of those species will be killed or injured."

BUY IT, BEFORE I KILL AGAIN

In addition to the statutory provisions described above, Section 5 of the ESA authorizes the Secretary to purchase the lands on which the survival of the species depends. Accordingly, Sweet Home maintained that this Section 5 authority was "the Secretary's only means of forestalling that grave result [i.e. possible extinction of a listed species]--even when the actor [here the private logging operation] knows it is certain to occur."

In response, the Secretary argued that "the Section 9 prohibition on takings, which Congress defined to include "harm," places on Sweet Home a duty to avoid harm that habitat alteration will cause the birds unless Sweet Home groups first obtain a permit pursuant to Section 10." The Supreme Court agreed, finding "the Secretary's interpretation is reasonable." In particular, the Court noted that "an ordinary understanding of the word 'harm' supports it.

> The dictionary definition of the verb form of "harm" is "to cause hurt or damage to: injure." Webster's Third New International Dictionary 1034 (1966). In the context of the ESA, that definition naturally encompasses habitat modification that results in actual injury or death to members of an endangered or threatened species.
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> Sweet Home argues that the Secretary should have limited the purview of "harm" to direct applications of force against protected species, but the dictionary definition does not include the word "directly" or suggest in any way that only direct or willful action that leads to injury constitutes "harm."

The Supreme Court also found as follows that "the broad purpose of the ESA supports the Secretary's decision to extend protection against activities that cause the precise harms Congress enacted the statute to avoid."

> In *TVA v. Hill*, 437 U.S. 153, 98 S.Ct. 2279, 57 L.Ed.2d 117 (1978), we described the Act as "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." As stated in Section 2 of the Act, among its central purposes 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).
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> In *Hill*, we construed [the ESA]... as precluding the completion of the Tellico Dam because of its predicted impact on the survival of the snail darter. Both our holding and the language in our opinion stressed the importance of the statutory policy. "The plain intent of Congress in enacting this statute," we recognized, "was to halt and reverse the trend toward species extinction, whatever the cost. This is reflected not only in the stated policies of the Act, but in literally every section of the statute."

Accordingly, the Supreme Court held that "Congress' intent to provide comprehensive protection for endangered and threatened species supports the permissibility of the Secretary's 'harm' regulation."

> Given Congress' clear expression of the ESA's broad purpose to protect endangered and threatened wildlife, the Secretary's definition of "harm" is reasonable... [T]he fact that Congress in 1982 authorized the Secretary to issue permits for takings... "if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity," strongly suggests that Congress understood Section 9 to prohibit indirect as well as deliberate takings.
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> The permit process requires the applicant to prepare a "conservation plan" that specifies how he intends to "minimize and mitigate" the "impact" of his activity on endangered and threatened species, 16 U.S.C. § 1539(a)(2)(A), making clear that Congress had in mind foreseeable rather than merely accidental effects on listed species... Congress' addition of the Section 10 permit provision supports the Secretary's conclusion that activities not intended to harm an endangered species, such as habitat modification, may constitute unlawful takings under the ESA unless the Secretary permits them.

CHEAP TRICK?

On appeal, Sweet Home had contended that "the Government lacks any incentive to purchase land under Section 5 when it can simply prohibit takings under Section 9. The Supreme Court rejected this argument. In the opinion of the Court, characterizing the Secretary's Section 9 authority to regulate critical habitat as a cheap alternative to Section 5 land acquisition authority "ignores the practical

considerations that attend enforcement of the ESA"

> Purchasing habitat lands may well cost the Government less in many circumstances than pursuing civil or criminal penalties... In addition, the Section 5 procedure allows for protection of habitat before the seller's activity has harmed any endangered animal, whereas the Government cannot enforce the Section 9 prohibition until an animal has actually been killed or injured. The Secretary may also find the Section 5 authority useful for preventing modification of land that is not yet but may in the future become habitat for an endangered or threatened species.

LEGISLATIVE ROAD KILL

Based upon the following legislative history of the statute, the Supreme Court concluded that "the Secretary's definition of 'harm' rests on a permissible construction of the ESA."

> The Committee Reports accompanying the bills that became the ESA do not specifically discuss the meaning of "harm," but they make clear that Congress intended "take" to apply broadly to cover indirect as well as purposeful actions. The Senate Report stressed that " '[t]ake' 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." S.Rep. No. 93-307, p. 7 (1973).
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> The House Report stated that "the broadest possible terms" were used to define restrictions on takings. H.R.Rep. No. 93-412, p. 15 (1973). The House Report underscored the breadth of the "take" definition by noting that it included "harassment, whether intentional or not." The Report explained that the definition "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."

Accordingly, the Supreme Court found that the legislative history of the ESA "supported the Secretary's interpretation that the term 'take' in Section 9 reached far more than the deliberate actions of hunters and trappers." In addition, the Court noted that the legislative history of the 1982 amendment, which" gave the Secretary authority to grant permits for 'incidental' takings provides further support for his reading of the Act."

> The House Report expressly states that "[b]y use of the word 'incidental' the Committee intends to cover situations in which it is known that a taking will occur if the other activity is engaged in but such taking is incidental to, and not the purpose of, the activity." H.R.Rep. No. 97-567, p. 31 (1982).
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> This reference to the foreseeability of incidental takings undermines Sweet Home's

> argument that the 1982 amendment covered only accidental killings of endangered and threatened animals that might occur in the course of hunting or trapping other animals. Indeed, Congress had habitat modification directly in mind: both the Senate Report and the House Conference Report identified as the model for the permit process a cooperative state-federal response to a case in California where a development project threatened incidental harm to a species of endangered butterfly by modification of its habitat. S.Rep. No. 97-418, p. 10 (1982); H.R.Conf.Rep. No. 97-835, pp. 30-32 (1982).
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> Thus, Congress in 1982 focused squarely on the aspect of the "harm" regulation at issue in this litigation. Congress' implementation of a permit program is consistent with the Secretary's interpretation of the term "harm."

Given the "latitude the ESA gives the Secretary in enforcing the statute, together with the degree of regulatory expertise necessary to its enforcement," the Court further acknowledged that "we owe some degree of deference to the Secretary's reasonable interpretation."

> When it enacted the ESA, Congress delegated broad administrative and interpretive power to the Secretary. See 16 U.S.C. §§ 1533, 1540(f). The task of defining and listing endangered and threatened species requires an expertise and attention to detail that exceeds the normal province of Congress. Fashioning appropriate standards for issuing permits under Section 10 for takings that would otherwise violate Section 9 necessarily requires the exercise of broad discretion. The proper interpretation of a term such as "harm" involves a complex policy choice. When Congress has entrusted the Secretary with broad discretion, we are especially reluctant to substitute our views of wise policy for his.

As a result, based upon "the text, structure, and legislative history of the ESA," the Supreme Court concluded that "the Secretary reasonably construed the intent of Congress when he defined 'harm' to include 'significant habitat modification or degradation that actually kills or injures wildlife'." The Supreme Court, therefore, reversed the judgment of the federal appeals court. In so doing, the Supreme Court laid to rest, at least for the time being, the notion that the term "harm" in the ESA "should be read as applying only to the perpetrator's direct application of force against the animal taken."