Stop before You Shoot but Not before You Destroy

Tara L. Mueller
All things are the works of the Great Spirit. We should know that He is within all things; the trees, the grasses, the rivers, the mountains and all the four-legged animals, and the winged peoples.¹

Over twenty years after it was enacted, the Endangered Species Act of 1973² remains perhaps the most significant piece of environmental legislation ever passed by any nation.³ At its core, the ESA rejects humankind’s traditional anthropocentric view in favor of a biocentric philosophy that puts the needs of other species at least on a par with human needs. As the United States Supreme Court stated in the landmark case of Tennessee Valley Authority v. Hill, the “plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost.”⁴ In enacting the ESA, “Congress was concerned about the unknown uses that endangered species might have and about the unforeseeable place such creatures may have in the chain of life on this planet.”⁵ The ESA therefore affords endangered species protection the “highest of priorities.”⁶

In a direct assault on these goals, the D.C. Circuit has held that the ESA’s protections do not extend to the habitat upon which endangered and threatened species depend for their survival. In Sweet Home Chapter of Communities v. Babbitt,⁷ the court struck down the United States Fish and Wildlife Service (hereinafter “USFWS”) regulation defining “harm” (for purposes of the ESA’s “take” prohibition) to include habitat destruction and modification.⁸ This decision strikes at the heart of the ESA and exemplifies the growing controversy over whether destruction and adverse modification of habitat can ever “harm” a listed species within the meaning of the ESA’s prohibition against “taking” such species. The significance of this controversy cannot be overestimated.

¹ Ms. Mueller is a Staff Attorney with the Natural Heritage Institute, a public interest, non-profit natural resources law and consulting firm. She is the author of the Guide to the Federal and California Endangered Species Laws (1994), published by the Planning and Conservation League Foundation. Ms. Mueller has also recently been appointed to the Executive Committee of the California State Bar Environmental Law Section. The author would like to thank the following individuals for their most helpful comments and suggestions on this article: Brian Gaffney, Esq., Professor Brian Gray, Hastings College of Law, and Michael Sherwood, Esq., Sierra Club Legal Defense Fund. The opinions expressed in this article are solely those of the author, however.

² A shorter version of this article, entitled D.C. Circuit’s Invalidation of “Harm” Regulation Harms Implementation of Endangered Species Act, appears in the Spring 1995 issue of ENVIRONMENTAL LAW NEWS, published by the Environmental Law Section of the California State Bar.


⁶ 4. Id. at 168, 184 (emphasis added).

⁷ 5. Id. at 178-79 (emphasis in original).

⁸ 6. Id. at 185, 194.

⁹ 7. 1 F3d 1 (D.C. Cir 1993) (hereinafter “Sweet Home I”).

Habitat destruction is the primary cause of species decline and extinction. If such destruction is not prohibited under the ESA, then this statute, considered the foremost protector of the nation's priceless biodiversity, is rendered a wholly ineffective tool for accomplishing its goal of preserving and recovering endangered and threatened species.

No doubt in part because the Sweet Home II decision conflicts with the Ninth Circuit's decisions in the Palila v. Hawaii Dep't of Land and Natural Resources cases, which upheld the same regulation, the United States Supreme Court granted the United States Solicitor General's petition for a writ of certiorari. The case was argued in April and is expected to be decided by July of 1995. Practitioners on both sides of the issue are anxiously awaiting the fate of the Sweet Home II opinion. If the high court upholds the D.C. Circuit's decision, its opinion will have significant adverse nationwide implications for the protection of endangered and threatened species on non-federal lands. California hosts more endangered and threatened species than any other state in the nation. It also has one of the highest growth rates and the highest population of any state. Given these circumstances, unless species' habitats are protected under the ESA, we are fighting a losing battle to protect our state's precious natural heritage.

If upheld on appeal, the Sweet Home II decision would also significantly reduce incentives for participating in habitat conservation planning, which has been touted as a key means of protecting species while reducing human-species conflicts. A number of important multi-jurisdictional and multi-species habitat conservation plans (hereinafter "HCPs") have been or are being prepared in California, such as the kangaroo rat and fringe-toed lizard HCPs in Riverside County. Even the state's much-heralded voluntary Natural Communities Conservation Planning program to protect coastal sage scrub habitat in southern California would be threatened, for participation in the program is driven primarily by the threat of federal prosecution for habitat destruction under the "take" provision. So, too, would the viability of a number of local agency habitat conservation planning programs, such as San Diego County's Multiple Species Conservation Plan and Multiple Habitat Conservation Program, be called into question.

This Article briefly summarizes the federal ESA's key provisions and the Sweet Home II decision, and then provides a point-by-point critique of the Sweet Home II court's reasoning. The Article argues that the D.C. Circuit's decision should not withstand the high court's scrutiny, and that, if it does, implementation of the ESA will be significantly impeded. This Article is the first of two parts. Part II will analyze the Supreme Court's decision in the Sweet Home case after it is issued.

I. BASIC OVERVIEW OF THE ESA

The ESA is renowned as one of the strongest federal environmental laws in existence. Its fundamental purpose is to "provide a means whereby the ecosystems upon which endangered...and threatened species depend may be conserved (and) to provide a program for the conservation of such endangered...and threatened species." "Conserve" and "conservation" in turn are defined as "the use of all methods and procedures which are necessary to bring any endangered...or threatened species to the point at which the measures provided by this chapter are no longer necessary," i.e. to the point of full recovery.

The ESA accomplishes these ambitious goals...
through a variety of enforcement mechanisms and prohibitions, the most important of which are the "jeopardy" prohibition of section 7 and the "take" prohibition of section 9. This latter prohibition was the one at issue in Sweet Home II. Section 9 provides that it is unlawful for any person, including a private individual, government agency, or corporation, to "take" a fish or wildlife species listed as endangered. "Take" is defined by the ESA as to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect [an endangered species], or to attempt to engage in any such conduct." By regulation, the USFWS has extended this "take" prohibition to all species listed as threatened. The USFWS and the National Marine Fisheries Service (hereinafter "NMFS") have also promulgated a joint regulation elaborating on the "harm" component of the ESA's "take" prohibition, which is not defined in the ESA itself. The regulation defines "harm" as "an act which actually kills or injures wildlife," including "significant habitat modification or degradation where it actually kills or injures wildlife by impairing essential behavioral patterns, including breeding, feeding or sheltering." This was the regulation struck down in Sweet Home II. Section 9 may be enforced by the federal government or by a private citizen via the ESA's citizen suit provision. Remedies include civil and criminal penalties (for knowing violations) as well as injunctive relief.

To mitigate the effects of section 9's absolute "take" prohibition on private landowners' activities, in 1982 Congress enacted an amendment to the ESA which provides an important exception to section 9. This amendment, known as the section 10(a)(1) "incidental take" provision, allows the USFWS to permit a taking if such taking will be "incidental to, and not the purpose of" an otherwise lawful activity. To apply for an "incidental take" permit under section 10(a), a person must prepare an HCP (which specifies, among other things, the steps he or she will undertake to "monitor, minimize and mitigate" the impacts of the anticipated taking, including conservation of the species' habitat. The USFWS will issue the "incidental take" permit if it finds, inter alia, that the habitat destruction and associated taking of species will not appreciably reduce the species' likelihood of survival and recovery in the wild.

II. NINTH CIRCUIT CASE LAW ON THE "TAKE" PROHIBITION

The USFWS "harm" regulation has been implicitly and explicitly upheld in two landmark Ninth Circuit cases interpreting the "take" prohibition, Palila I and Palila II. Plaintiffs in Palila I brought an action for declaratory and injunctive relief in the name of the Palila, an endangered Hawaiian bird species. They contended that defendant, Hawaii Department of Land and Natural Resources, was "taking" the bird in violation of the ESA by maintaining feral sheep and goat populations on state lands containing mamane forests, upon which the Palila depend for breeding, feeding and sheltering. These sheep and goats ate the shoots and sprouts of young mamane trees, causing the Palila's habitat to degenerate progressively. The district court held that defendant's actions "harmed" the Palila within the meaning of the USFWS' definition of that term.

On appeal, the Ninth Circuit affirmed, holding that the defendant's actions in maintaining the feral sheep and goats in the Palila's habitat "harmed" the species because "it was shown that the Palila was endangered by the activity." The court went on to note that the "district court's conclusion is consistent with the ESA's legislative history that Congress was informed that the greatest threat to endangered species is the destruction of their natural habitat." Palila II involved a similar factual scenario. This

20. See 16 U.S.C. § 1532(19) (1989) (defining "person" in part as "an individual, corporation, partnership, trust or any other private entity, or any officer, employee, agent, department, instrumentality of the Federal Government, of any State, municipality, or political subdivision of a State").
22. 50 C.F.R. § 17.3(a) (1991). This regulation was upheld in Sweet Home I, 1 F.3d at 5-6, a holding which was undisturbed by Sweet Home II.
24. It is important to note, however, that the court only explicitly struck down the USFWS harm regulation. Sweet Home II, 17 F.3d at 1464. This creates an ambiguity as to the status of the NMFS "harm" regulation.
25. 16 U.S.C. § 1540(a), (b), (e), (g) (1939).
27. 16 U.S.C. § 1539(a)(1)(B) (1939) The term "incidental" is not defined in the statute or its implementing regulations.
29. 16 U.S.C. § 1539(a)(2)(B) (1939) This standard is essentially equivalent to the section 7 "jeopardy" standard. See supra note 18.
31. Palila I, 639 F.2d at 497.
32. Id. at 493 (citing TVA v. Hill, 437 U.S. at 179).
time, the challenge was directed to mouflon sheep, which, like the feral sheep and goats, were destroying the mamane forests upon which the Palila depend for their survival. In the interim, in response to the Palila decision, the USFWS had redefined the definition of “harm” to stress that habitat modification and destruction must result in death or “actual injury” to a fish or wildlife species to constitute a “taking” under the ESA. In light of this redefinition, the defendants argued that “a showing of ‘actual injury’ requires[d] plaintiff to show a present pattern of decline in the number of Palila.” Because there was no evidence that the Palila’s population was in decline, defendants contended, the mouflon sheep could not be “harming” the Palila. Defendants also argued that the definition only prohibited “present” as opposed to “potential” harm, and that the sheep presented only a potential harm to the Palila, since the birds ate seeds and sprouts, while the sheep ate mamane shoots and sprouts.

The district court rejected both of these arguments. The court stated that:

Refuse[d] to accept... and Congress could not have intended, such a shortsighted and limited interpretation of “harm.” 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 ESA.

The court went on to note that, in enacting the ESA, Congress was aware that the primary threat to species was the destruction of habitat. It also observed that one of the main purposes of the ESA was to conserve and preserve ecosystems upon which endangered species depend. Therefore, the court concluded, “It is clear... that Congress intended to prohibit habitat destruction that harms an endangered species.” Further, the court said, since an endangered species is by definition “hovering at or near the critical population mark... it should not be necessary for a species to dip closer to extinction before the prohibitions of section 9 come into force.”

On appeal, the Ninth Circuit affirmed, although on narrower grounds. Defendants argued in part that the district court erred in concluding that the ESA prohibits actions which could potentially (as opposed to certainly) drive a species to extinction. In rejecting this argument, the court held that the district court’s interpretation was consistent with the USFWS’ revised definition of “harm.” Moreover, the court stated:

[the USFWS'] inclusion of habitat destruction that could result in extinction follows the plain language of the [ESA] because it serves the overall purpose of the Act, which is “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved....”

The [USFWS'] construction of harm is also consistent with the policy of Congress evidenced by the legislative history. For example, in the Senate Report on the [ESA]: “ ‘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.”

where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering 6 Fed Reg 54750 (1989).

33. 46 Fed. Reg. 29490, 29492 (1981) (proposed rule); 46 Fed. Reg. 54748 (1981) (final rule). As originally promulgated, the USFWS definition of “harm” read as follows:

“Harm” in the definition of “take” in the [ESA] 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.” 40 Fed. Reg. 44412 (1979).

In an attempt to dispel the notion that habitat modification alone, without attendant death or injury, was sufficient to constitute a “taking,” the USFWS amended its “harm” regulation to the present wording:

“Harm” in the definition of “take” in the [ESA] means an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation

34. Palila v. Hawaii Dep’t of Land and Natural Resources, 649 F.2d at 1070 (D. Haw. 1980).

35. Defendants so argued notwithstanding that even their own experts had conceded that the mouflon sheep were reversibly degrading the mamane forest and that continued degradation of the forest could drive the Palila to extinction. Id.

36. Id.

37. Id. at 1076.

38. Id. at 1077.

39. Palila II, 852 F.2d at 1108 (citing 16 U.S.C. § 1531(b) (1989)).

40. Palila II, 852 F.2d at 1108.
Applying the USFWS' definition of "harm" to the facts of the case, the court upheld the district court's decision on the ground that the evidence showed that the activities of the mouflon sheep could drive the Palilla to extinction.\(^\text{41}\) In light of this conclusion, the court expressly did not reach the question whether "harm includes habitat degradation that merely retards \{species\} recovery.\(^\text{43}\)

The Ninth Circuit recently reaffirmed its Palilla II holding, in a case decided after the Sweet Home II court rendered its opinion, without even giving Sweet Home II the benefit of a citation.\(^\text{49}\) In NWF v. Burlington Northern, the Ninth Circuit again held that "the definition of 'harm' in the ESA includes habitat degradation that could result in extinction."\(^\text{23}\) Plaintiff in Burlington Northern alleged an unlawful "take" of grizzly bears under section 9 of the ESA. Plaintiff claimed that accidental corn spills along defendant's train tracks had harmed and were continuing to harm the bears by modifying their habitat, thereby adversely affecting their feeding behavior. Plaintiff sought an injunction to prevent future corn spills.

Although the Ninth Circuit affirmed the district court's denial of an injunction for lack of proof, the case nevertheless is significant for its reaffirmation of Palilla II. The court acknowledged that habitat modification could be a taking in circumstances where a plaintiff can show "significant impairment of the species' breeding or feeding habits" and significant habitat modification and degradation "that prevents, or possibly, retards, recovery of the species."\(^\text{45}\) In fact, the court's statement that habitat modification sufficient to prevent a species' recovery (not merely survival) qualifies as a taking, and that mere retardation of recovery may even be sufficient to be a taking, appears to expand the Palilla II holding.\(^\text{46}\)

Even more recently, in Forest Conservation Council v. Rosboro Lumber Co., the Ninth Circuit clarified that the concept of "harm" also prohibits "future injury to an endangered or threatened species and is actionable under the ESA."\(^\text{47}\) This holding overturned a district court decision that "harm" only "includes actions that constitute a past or current injury to an endangered or threatened species, or actions that threaten such species with extinction." The Ninth Circuit reasoned that "the ESA's language, purpose and structure authorize citizens to seek an injunction against an imminent threat of harm to a protected species."\(^\text{48}\)

In reaching this conclusion, the court rejected the defendant's argument that the reference to "actually kills or injures" in the definition of "harm" requires a plaintiff to show that a challenged action has caused or is already causing harm to the species in question. The court explained that:

\[\text{[t]he Secretary of the Interior's use of the term "actually was not intended to foreclose claims of an imminent threat of injury to wildlife. Rather, because the Secretary was concerned that [the previous] definition of "harm" could be read to mean habitat modification alone, the Secretary inserted the phrase "actually kills or injures wildlife" to preclude claims that only involve habitat modification without any attendant requirement of death or injury to protected wildlife.}\]

Nowhere does the re-definition of "harm" or its explanatory commentary require historic injury to protected wildlife. So long as some injury to wildlife occurs, either in the past, present or future, the injury requirement of the Secretary's new definition of "harm" is satisfied.\(^\text{49}\)

The court further supported this conclusion based on the purpose and structure of the ESA and case law interpreting that statute, noting that "[a]ny ambiguity in what Congress meant by the term 'harm' is resolved by looking to the underlying purpose of the ESA."\(^\text{50}\) A conclusion that claims of imminent threat to a protected species are foreclosed by the ESA, the court said, would be contrary to the statute's express purposes to provide a

\begin{itemize}
  \item \text{41. Palilla II, 852 F.2d at 1110.}
  \item \text{42. Id.}
  \item \text{43. National Wildlife Fed'n v. Burlington Northern R.R. Inc., 23 F.3d 1508, 1512-13 (9th Cir. 1994) (hereinafter "Burlington Northern").}
  \item \text{44. Id. at 1512 (citing Palilla II, 852 F.2d at 1110-11).}
  \item \text{45. Burlington Northern, 23 F.3d at 1513 (citing 50 C.F.R. § 17.3 (1991)) (emphasis added).}
  \item \text{46. Palilla II, 852 F.2d at 1110. Notwithstanding these explicit Ninth Circuit holdings, some industry groups are arguing that Sweet Home II applies nationwide, because the harm regulation was invalidated in its entirety. For example, shortly after the decision in Sweet Home II, timber industry groups filed a 60-day notice of intent to sue to prevent the USFWS from implementing and applying the harm regulation anywhere in the United States. See Notice of an ESA Citizen Suit on the "Harm" Regulation, filed with the Dept. of the Interior by the American Forest and Paper Ass'n et al., May 27, 1994. This argument recently was soundly rejected by a federal district judge in Washington state, who held that "[t]he Palilla case, upholding the USFWS regulation, is the law of the Ninth Circuit until and unless changed by the Supreme Court or by the circuit itself." Seattle Audubon Soc'y v. Lyons, 1994 U.S. Dist. LEXIS 10736 at p. 29 (W.D. Wash. 1994), see also Marbled Murrelet v. Pacific Lumber Co., No. C93-1400, slip op 2 (N.D. Cal. 1995) (Bechtle, J.).}
  \item \text{47. Id.}
  \item \text{48. Id.}
  \item \text{49. Id. at 3761}
  \item \text{50. Id.}
\end{itemize}
means to conserve the ecosystems of endangered and threatened species and to halt and reverse the trend toward species extinction, whatever the cost.\textsuperscript{51} Moreover, it noted, "[e]nvironmental injury, by its very nature, can seldom be adequately remedied by money damages," and forcing plaintiffs to wait until such injury has been sustained would render their claims moot before they even become ripe.\textsuperscript{52} Likewise, the structure of the ESA pointed to the conclusion that an imminent threat of harm is enjoinable. It observed that both the ESA's citizen suit and Attorney General enforcement provisions authorize suits for injunctive relief, which by definition seek to prevent prospective harm. Finally, the court noted, numerous other cases supported its holding, including Palila II, which enjoined the state's actions on the ground that they could drive the Palila to extinction, and T.V.A. v. Hill, which enjoined construction of a dam on the ground that it would cause an endangered snail to become extinct.\textsuperscript{53}

III. THE SWEET HOME DECISIONS

In the Sweet Home I case, several lumber companies, a lumber trade association, and others brought a facial challenge to certain regulations promulgated by the USFWS, including the USFWS regulation defining "harm" for purposes of the ESA's "take" prohibition. The district court upheld all of the regulations.\textsuperscript{54} On appeal, plaintiffs argued that the "harm" regulation violated the ESA "because the statute excludes habitat modification from the types of forbidden actions that qualify as 'take' of species."\textsuperscript{55} The D.C. Circuit rejected this argument, affirming the district court's decision. Chief Justice Mikva wrote the majority opinion, Justice Williams concurred, and Justice Sentelle dissented. The court held, \textit{per curiam}, that the regulation did not violate the ESA "by including actions that modify habitat among prohibited 'take' prohibitions."\textsuperscript{56} The court similarly rejected the plaintiffs' argument that the "harm" definition was void for vagueness.\textsuperscript{57}

On the plaintiffs' petition for rehearing, however, the D.C. Circuit reversed its earlier decision as to the "harm" regulation, without the benefit of further oral argument or briefing.\textsuperscript{58} This time, Justice Williams wrote the majority opinion, Justice Sentelle concurred, and Chief Justice Mikva dissented. The court denied the USFWS' petition for rehearing \textit{en banc} on August 12, 1994.\textsuperscript{59} In Sweet Home II, the court rejected the USFWS' arguments that the regulation defining "harm" to include habitat destruction and modification was authorized by the ESA as enacted in 1973, and that, even if not authorized initially, this definition was explicitly and/or implicitly ratified by Congress' enactment of the section 10(a) "incidental take" permit process in 1982. The court held that the "definition of 'harm' was neither clearly authorized by Congress nor a 'reasonable interpretation' of the statute [and] that no later action of Congress supplied the missing authority."\textsuperscript{60}

A. The ESA as Enacted in 1973

To reach the above conclusion, the court first analyzed whether the USFWS' definition of "harm" was authorized by the ESA as enacted in 1973. It began its analysis of the 1973 Act with a quotation from \textit{Lucas v. South Carolina Coastal Council},\textsuperscript{61} a Fifth Amendment regulatory takings case. In the Lucas case, the Supreme Court stated that "the distinction between 'harm-preventing' and 'benefit-conferring' regulations is often in the eye of the beholder."\textsuperscript{62} This passage was part of the Court's discussion of the broad "nuisance exception" to the Fifth Amendment takings doctrine. Before \textit{Lucas}, which narrowed the nuisance exception, governmental entities could prohibit certain uses of private property by regulation without compensating the landowner, provided these uses were deemed to "harm" the community.\textsuperscript{63}

The D.C. Circuit lifted this "harm-preventing v. benefit-conferring" concept from the Fifth Amendment regulatory takings context (as distinguished from "take" of listed species) and used it to

---

\textsuperscript{51} [51.] Id. (citing T.V.A. v. Hill, 437 U.S. at 184).

\textsuperscript{52} [52.] Rosboro Lumber, 95 Daily J. D.A.R. at 3761 (citing Amoco Production Co. v. Gambell, 480 U.S. 531, 543 (1987)).

\textsuperscript{53} [53.] Rosboro Lumber, 95 Daily J. D.A.R. at 3762.

\textsuperscript{54} [54.] Sweet Home Chapter of Communities v. Lujan, 806 F. Supp. 279 (D.D.C. 1992) (hereinafter "Sweet Home v. Lujan"). The district court held that the "harm" regulation did not violate the ESA because "Congress made clear that the definition of 'take' was to be interpreted 'in the broadest possible manner to include every conceivable way in which a person can take or attempt to take any fish or wildlife.'" Id. at 283 (quoting S. Rep. No. 307, 93d Cong., 1st Sess 7 (1973)). The district court also noted that "[c]ourts interpreting the 'take' definition have consistently upheld the Secretary's definition of 'harm' under the ESA." Id. at 284 (quoting Palila I and Palila II).

\textsuperscript{55} [55.] Sweet Home I, 1 F.3d at 3.

\textsuperscript{56} Id.

\textsuperscript{57} [57.] Id. at 5. As mentioned above, the court also upheld the USFWS' regulation extending the "take" prohibition to all threatened species. Id. at 8.

\textsuperscript{58} [58.] Sweet Home II, 17 F.3d 1463

\textsuperscript{59} [59.] Sweet Home Chapter of Communities v. Babbitt, 30 F.3d 190

\textsuperscript{60} [60.] Sweet Home II, 17 F.3d at 1464

\textsuperscript{61} [61.] U.S. __, 112 S. Ct. 2886 (1992) (hereinafter "Lucas")

\textsuperscript{62} [62.] Id. at 2897.

\textsuperscript{63} [63.] See Lucas v. South Carolina Coastal Council, 404 S.E. 2d
justify a restrictive reading of the word "harm" in the ESA. The court noted:

- [as] a matter of pure linguistic possibility one can easily recast any withholding of a benefit as an infliction of harm.... [I]t is linguistically possible to read "harm" as referring to a landowner's withholding of the benefits of a habitat that is beneficial to a species. A farmer who harvests crops or trees on which a species may depend harms it in the sense of withdrawing a benefit; if the benefit withdrawn be important, then the USFWS' regulation sweeps up the farmer's decision.64

In other words, according to the D.C. Circuit, the very habitat upon which a species depends for survival is simply a "benefit" conferred upon that species by a landowner.

Using this play on words to guide its analysis, the Sweet Home II court next examined the language and structure of section 9's "take" prohibition to determine whether the USFWS' interpretation of the word "harm" was a permissible one. To answer this question, the majority applied a seldom invoked principle of statutory construction, noscitur a sociis (meaning "a word is known by the company it keeps"). The court held that "the words of the definition of [take] contemplate the perpetrator's direct application of force against the animal taken: 'harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect' "45 Unlike these verbs, the court stated, habitat modification as a type of "harm" does not involve direct application of force against a member of a species, and therefore, the USFWS' definition of that term gave "unintended breadth" to section 9.66

The court noted that this restrictive "plain language" interpretation of section 9 was supported by "the implications in terms of...private rights" because "[s]pecies dependency on habitat may be very broad."67 For example, it pointed out, as many as 35 to 42 million acres may be necessary to ensure survival of the grizzly bear.68 The court also stated that the structure and history of the ESA supported its reading of section 9. It observed that the ESA directly addresses habitat preservation in only two ways: through the federal land acquisition program of section 569 and federal agencies' duty to avoid adverse modification or destruction of designated "critical habitat" under section 7.70 Thus, the majority stated, "on a specific segment of society, the federal government, the [ESA] imposes very broad burdens, including the avoidance of adverse habitat modifications; on a broad segment, every person, it imposes relatively narrow ones."71 The court supported this conclusion with several ambiguous comments made by individual legislators during floor debate on the ESA.72 Finally, the court said, the fact that Congress had failed to enact a proposed definition of "take" which would have explicitly included habitat modification was persuasive evidence that Congress did not intend the term "take" to be construed so broadly.73 Therefore, the D.C. Circuit concluded, the USFWS' regulation defining "harm" to include habitat modification was an impermissible construction of the 1973 ESA.

1. The USFWS "harm" regulation deserves deference under Chevron

There are several fundamental errors in the majority's reasoning. First, as Chief Justice Rehnquist's dissenting opinion points out, the court inexplicably fails to give the USFWS definition of "harm" the proper degree of deference required under the doctrine of Chevron U.S.A. v. Natural Resources Defense Council74 and its progeny. The Chevron standard of review is supposed to govern a court's review of an agency's construction of a statute that the agency is charged with implementing. Under Chevron, a court's first task is to determine whether Congress has "directly spoken to the precise question at issue."75 "If the intent of Congress is clear, that is the end of the matter, for the court, as well as the agency, must give deference to the unambiguously expressed intent of Congress."76 However, if Congress:

64. Sweet Home II, 17 F.3d at 1464-65.
65. Id. at 1465.
66. Id. at 1465-66.
67. Id. at 1465.
68. Id.
70. 16 U.S.C. § 1536(a)(2) (1989); Sweet Home II, 17 F.3d at 1466.
71. Sweet Home II, 17 F.3d at 1466.
72. Id. at 1463 (statement of Sen. Tom Harkin).
73. Sweet Home II, 17 F.3d at 1457
75. Id. at 842 (emphasis added).
76. Id. at 842-43
has not directly addressed the precise question at issue, the court does not simply impose its own construction of the statute.... 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....

The power of an administrative agency to administer a congressionally created...program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress."**77**

In cases where Congress has implicitly left a gap for the agency to fill, the court may not substitute its judgment for that of the agency.**78** Further, it need not conclude that the agency's construction of the statute is "the reading the court would have reached if the question initially had arisen in a judicial proceeding."**79** Rather, the court's only role is to ascertain whether the agency's construction of the statute is a reasonable one.**80**

Since Congress did not speak directly to the definition of "harm" in either the ESA itself or its legislative history but rather left an implicit gap in the statute, the USFWS' interpretation of that term is entitled to deference under the second analytical step of *Chevron*. By failing to give the USFWS' definition any deference, the majority opinion impermissibly placed the burden on the USFWS to justify its regulation, rather than requiring the plaintiff to demonstrate that the agency's interpretation was unreasonable.**81** In fact, contrary to the command of *Chevron*, the court goes out of its way to strike down the USFWS' definition of "harm," relying on speculative and unsupported assumptions and ignoring clear evidence in support of the regulation's validity.

If the majority had properly applied *Chevron*, it would have held that the USFWS' interpretation of "harm" is a reasonable construction of section 9, which finds affirmatively support in both the ESA itself and its legislative history. The fundamental purpose of the ESA is to conserve (i.e., recover**82**) endangered and threatened species and the habitat upon which they depend for survival.**83** For this reason, the ESA directs the USFWS to consider loss of habitat when determining whether to list a species in the first instance.**84** This express congressional recognition of the importance of habitat to species survival and habitat modification as a major cause of species endangerment alone supports the USFWS' "harm" regulation.

The legislative findings in support of the ESA and the Supreme Court's holding in *T.V.A. v. Hill* provide further support for the USFWS' interpretation, demonstrating that Congress intended the ESA's enforcement provisions, including section 9, to be construed broadly to effectuate maximum protection for endangered species and their habitats.**85** Indeed, the Supreme Court in *T.V.A. v. Hill* implicitly condoned the notion that "harm" includes habitat modification and degradation.**86** The legislative history of section 9 similarly states that "[a]ny...
that no actual harm will be
that the likelihood of harm is sufficiently imminent
cause of death or injury to the species in question.3
challenged activity was not shown to be the actual
denied relief under section
sets a relatively high threshold for establishing that
harm to endangered mouse). 432
harm to endangered fish); American Bald
F.2d
Supp. at 284.
'dam would eliminate the last remaining habitat of the endangered
Wildlife
by
716
First, the court's "plain language" interpretation
of the "take" prohibition and its reliance on noscitur a sociis is fundamentally flawed. Section 9 cannot
reasonably be interpreted to allow only direct applications of force against a species. As
Chief Justice Mikva points out in his dissenting opinion, "harm" is not a single elastic word among
many ironclad ones but an ambiguous term sur-
that destruction and modification within the meaning of "harm." See
Michael Field, The Evolution of the Wildlife Taking Concept, From Its Beginning To Its Culmination In the Endangered Species Act, 21 Hous. L. Rev. 457, 490 (1984). This absurdity is highlighted by the facts of the
T.V.A. v. Hill case, in which the parties conceded that the proposed
dam would eliminate the last remaining habitat of the endangered
snail darter, thereby causing its extinction.

88. 50 C.F.R. § 17.3 (1991); see also Sweet Home v. Lujan, 805 F. Supp. at 284.
90. See Pyramid Lake Paiute Tribe v. U.S. Dept. of the Navy, 898 F.2d 1410, 1420 (9th Cir. 1990) (water diversions not shown to cause
harm to endangered fish); American Bald Eagle v. Bhatti, 9 F.3d 163, 166 (1st Cir. 1993) (feed shots in deer carcasses not shown to cause
harm to endangered bald eagle); Morrill v. Lujan, 802 F. Supp. 424, 432 (S.D. Ala. 1992) (development project not shown to cause harm
to endangered mouse).
F.2d 589 (D.C. Cir. 1980).
92. See Bob Jones University v. United States, 461 U.S. 574, 599 (1983) (holding that Congress' failure to amend the Internal
majority's focus on the question whether a broad reading of "take" would lead to an "extinction of private rights," instead of focusing on the real question
at hand; that is, whether the USFWS' interpretation of "take" is reasonable and furthers the ESA's goals of
preventing the extinction of species.93 Since a Fifth Amendment takings claim was not before the court, the
effect of the USFWS' "harm" regulation on private
rights was irrelevant to the question whether
that regulation is a permissible construction of the
ESA.94

The D.C. Circuit's misapplication of the Chevron
standard of review is reason enough for the Sweet
Home II opinion to be overruled.

2. Regardless of the proper application of Chevron, the
majority's reasoning is fundamentally flawed
Putting aside the question of Chevron deference and examining the majority's reasoning in its
own right, the opinion does not withstand close scrutiny.
In fact it is the court's, not the USFWS', interpretation of "harm" which is unreasonable, for the reasons
explained below.95

a. "Take" includes indirect means of
harming a species
First, the court's "plain language" interpretation
of the "take" prohibition and its reliance on noscitur a sociis is fundamentally flawed. Section 9 cannot
reasonably be interpreted to allow only direct applications of force against a species. As
Chief Justice Mikva points out in his dissenting opinion, "harm" is not a single elastic word among
many ironclad ones but an ambiguous term sur-

Revenue Code to violate certain IRS rulings was persuasive evidence
that Congress intended to acquiesce in the IRS' interpretation of the statute)
93. Sweet Home II, 17 F3d at 1455 (emphasis added).
94. In his opinion dissenting from the majority's denial of
rehearing en banc, Justice Silberman raised the question whether
Chevron deference was proper in light of the fact that violations of
section 9 are punishable by criminal as well as civil penalties. Sweet
Home II, 30 F3d at 194. This issue also was raised in the Sweet Home
plaintiffs' opposition to the Solicitor's petition for certiorari. See
Respondent's Brief at 20-22, Sweet Home II. The criminal enforce-
ment issue is somewhat of a red herring, however. There is no reason
why a court cannot give deference to the civil application of the "harm"
regulation under Chevron and construe the same regulation
more narrowly for purposes of an as applied challenge in a criminal
case. Moreover, the standard for proving a violation of the "harm"
requirement is in fact higher in criminal cases and cases where
penalties are being imposed. In these circumstances, only "knowing
Further, a threat of imminent harm, while sufficient for purposes
of injunctive relief, may be insufficient to support civil or
criminal penalties. Restor Lumber, 95 Daily Journal D.A.R. at 3765
n 3.
95. Ironically, these failings in the court's reasoning further
point to the reasonableness of the USFWS' reading of the "harm" provision.
rounded by other ambiguous terms," some broad, some narrow. Indeed, the majority itself acknowledges that some of the words in the ESA's definition of "take," such as killing or trapping, may involve the application of force that is not "instantaneous or immediate." 97

Moreover, the majority's opinion, that "take" cannot include indirect means of injuring listed species, renders the term "harm" superfluous, for all conceivable direct means of injuring species are adequately covered by the other terms in the "take" definition. Thus, despite its apparent affinity for the majority definition, the majority seems to have forgotten one of the most well estab-

9 98

...
c. The structure of the ESA and its legislative history do not support the argument that Congress intended private parties to bear no habitat conservation responsibilities under the ESA.

Finally, there is nothing in the ESA or its legislative history to support the D.C. Circuit's conclusion that the ESA protects habitat solely through section 5's federal land acquisition program and federal agencies' section 7 duty to avoid adverse modification or destruction of designated critical habitat. The fact that two sections of the ESA specifically address the habitat preservation responsibilities of the federal government does not necessarily imply that Congress thereby meant to allow habitat modification by non-federal entities under section 9.

Furthermore, contrary to the D.C. Circuit's conclusion, the comments of various legislators, made during floor debate on the ESA, do not support a distinction between federal government and private party responsibilities to conserve habitat. The general rule is 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." More importantly, the comments cited by the court simply demonstrate that the speakers had argued that the federal government should bear some responsibility for conserving habitat under sections 5 and 7, but do not demonstrate that private landowners should not be required to do so under section 9.

Sections 5 and 7 alone are inadequate mechanisms for fully effectuating Congress' intent to protect endangered and threatened species and their habitats. With respect to section 5, it is unrealistic to expect that the ESA's broad species conservation and recovery goals can be accomplished solely by preserving existing federal lands. At the same time, the federal government is financially unable to purchase enough private lands necessary to conserve listed species. With respect to section 7, the federal government's duties apply only to formally designated critical habitat. Large areas of habitat important to species breeding, feeding, sheltering, and reproduction may not be included within this designation, or critical habitat may not be designated for a particular species at all. Even formal designation of critical habitat does not provide an absolute level of protection for a listed species. Designation only restricts federal agency actions on those lands, and even those actions can go forward if an "incidental take" statement is issued.

Moreover, interpreting the ESA as imposing habitat protection duties only on the federal government, but not on private parties, creates an inconsistency in the Act. Under this interpretation, a private party who needs a federal permit (such as a "dredge and fill" permit under section 404 of the Clean Water Act) to proceed with a project located within an area designated as critical habitat will be required to conserve habitat through the section 7 consultation process. On the other hand, a party who need not obtain a federal permit will not be required to conserve habitat at all. This distinction makes little sense.

Finally, Congress' failure to enact an expanded definition of "take" which would have included habitat modification similarly does not support the court's strained reading of the "take" prohibition. As Chief Justice Mikva notes, there is no indication in the legislative history as to why Congress chose one definition of "take" over the other or that Congress' choice expressly was intended to exclude habitat modification from that definition. Congress' action just as readily may be con-

106. See e.g., Sweet Home v. Lujan, 805 F. Supp. at 283 ("the language and legislative history of § 1534 clearly indicate that Congress considered land acquisition a critical tool in preserving habitat, but they do not suggest that Congress intended it to be the only tool").

107. Sweet Home II, 17 F.3d at 1476 (Mikva, C.J. dissenting) (quoting Duplex Printing Co. v. Deening, 294 U.S. 443, 474 (1939)).

108. For example, the USFWS or NMFS may exclude an area from a critical habitat designation if it determines that the economic and other benefits of excluding the area outweigh the benefits of including it within the designation. 16 U.S.C. § 1533(b)(2) (1989).

109. For example, the USFWS need not designate critical habitat if it not "prudent" or if such habitat cannot be determined. See 16 U.S.C. §§ 1533(a)(3)(A), 1533(b)(6)(C)(ii) (1989). In the latter case, the USFWS may postpone critical habitat designation for up to one year after promulgation of the final rule listing the species.

Moreover, the USFWS is extremely backlogged on designation of critical habitat, having formally designated critical habitat for only 185 out of 896 listed species (about 20%) (U.S. General Accounting Office, Endangered Species Act: Types and Number of Implementing Actions 28-29 (May 1972))

110. 16 U.S.C. § 1533(b)(4) (1989) An incidental take statement allows the taking of a certain number of individuals of the species provided the continued existence of the species will not be jeopardized or critical habitat will not be adversely modified or destroyed. Compliance with the terms of an "incidental take" statement is not considered a taking under section 9. (16 U.S.C. § 1533(a)(2) (1983)). For this reason, a broad interpretation of "take" to include habitat modification does not render federal agencies' section 7 duty to avoid adverse habitat modification superfluous. To the contrary, the two processes are closely coordinated and do not overlap.

111. 33 U.S.C. § 1344 (1959)

112. Sweet Home II, 17 F.3d at 1476 (Mikva, C.J. dissenting). See also Sweet Home v. Lujan, 805 F. Supp. at 283 ("[t]here is absolutely nothing in the legislative history of the ESA to indicate that the Senate repeated the definition [of take] in § 1933 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").
tered as a decision to use the general word “harm” to “cover the entire landscape” of that method of “taking” a species, as opposed to specifically defining “harm” to include only habitat modification. Also, the definition of “harm” rejected by Congress was much broader than the USFWS’ current definition, since the former definition would have made habitat modification, no matter how slight, a per se taking. Moreover, inclusion of the word “harm” in the ESA’s definition of “take” was never voted on by a Committee; rather, the term was added to the definition during the Senate floor debate on the ESA. This leads to the conclusion that, if anything, Congress intended to broaden the definition of “take,” not to restrict it. Lastly, as explained below, the majority’s emphasis on congressional failure to act as a reliable indicator of congressional intent is curiously inconsistent with a subsequent portion of the opinion.

Thus, as demonstrated above, the court’s conclusion that the USFWS regulation defining “harm” to include habitat modification is an unreasonable interpretation of the ESA is unsupported by the plain language, structure and legislative history of the ESA.

B. 1982 Amendments to the ESA

Having rejected the USFWS’ arguments based on the 1973 ESA, the court next rejected the agency’s alternative argument that the 1982 section 10(a) “incidental take” amendment to the ESA either explicitly or implicitly ratified the agency’s definition of “harm.”

1. Express ratification of habitat modification

In repudiating the express ratification argument, the court reasoned that enactment of section 10(a) (under which an “incidental take” of a listed species may be permitted if any adverse effects on the species are mitigated by an HCP), does not necessarily imply that Congress assumed incidental takings would include habitat modification. Rather, the court said, “[h]arms involving the direct applications of force...pose the problem of incidental takings... In fact, 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,” such as the entrapment or impingement of Sturgeon eggs by a nuclear power plant intake structure. Moreover, the court stated, section 10(a)’s focus on “habitat conservation” implies nothing about the nature of the prohibited taking, since that section simply addresses the type of relief that must be provided if an otherwise prohibited taking is allowed to occur. Thus, the majority concluded, the implicit assumptions underlying section 10(a) do not “embrace the idea that ‘take’ included any significant habitat modification injurious to wildlife.”

Again, there are several basic problems with this unusually constrained reading of the ESA. First, the court ignores the very purpose of the section 10(a) amendment, which was enacted in response to the USFWS’ “harm” regulation and the Ninth Circuit’s decision in Palila I. The HCP process specifically was designed to provide a means by which private development projects could proceed notwithstanding their adverse impact on endangered and threatened species and habitat. In fact, Congress modelled the HCP process directly after a conservation plan prepared by a housing developer in San Mateo County, California, who proposed to set aside habitat on San Bruno Mountain for the endangered Mission blue butterfly in exchange for being allowed to develop some of that habitat without violating the ESA’s “take” prohibition. The Senate Report on the section 10(a) amendment states:

“In some cases, the overall effect of a project can be beneficial to a species, even though some incidental taking may occur. An example is the development of some 3000 dwelling units on the San Bruno Mountain near San Francisco. The site is also habitat for three endangered butterflies... The proposed amendment should lead to resolution of potential conflicts between endangered species and the actions of private developers, while at the same time encouraging these developers to become more actively involved in the conservation of these species.”

Since housing development primarily impacts species through destruction and adverse modification of their habitat, the only reasonable conclusion to be drawn from the above quoted language and the section 10(a) amendment to the ESA is that

113. Sweet Home II, 17 F.3d at 1476 (Mikva, C.J. dissenting).
115. Sweet Home II, 17 F.3d at 1476 (Mikva, C.J. dissenting).
116. Id. at 1467 (majority opinion).
117. Id. at 1468-69.
118. Id. at 1465.
Congress assumed that "take" includes habitat modification and destruction. This interpretation effectuates both the purpose and the applicability of section 10(a). In contrast, the majority's strained interpretation of section 10(a) as limited to those rare circumstances in which the project at issue involves the immediate application of force against a species "trapped by a human enterprise" renders this provision virtually meaningless. There are few proposed projects that will result in the "immediate destruction" and "entrapment" of listed species in the same manner as an intake structure for a nuclear power plant. The opinion thus renders the vast majority of "incidental take" permits, which are almost exclusively prepared for land use development and resource extraction projects, an exercise in futility.

2. Implied ratification of habitat modification

Next, the Sweet Home II court dismissed the USFWS' argument that the 1982 Congress implicitly had adopted the USFWS' definition of "harm" because Congress: (1) was aware of that interpretation but nevertheless chose not to exclude habitat modification from section 9's definition of "take"; and (2) did not enact an amendment that would have excluded habitat modification from the definition of "take." The court reasoned that the Supreme Court has generally refused to infer congressional ratification of an agency interpretation of a statute based on Congress' refusal to amend the statute expressly to disclaim the offending interpretation.

However, the D.C. Circuit's opinion disregarded established Supreme Court precedent to the contrary. In fact, the court acknowledged that these precedents exist, but nevertheless failed to distinguish them from the Sweet Home II case. Under the "doctrine of ratification by implication," an agency interpretation of a statute which "has been "fully brought to the attention of the public and the Congress" and which Congress "has not sought to alter...although it has amended the statute in other respects," may be persuasive evidence of congressional intent regarding the proper interpretation of the unamended statutory provision. Here, Congress was aware of the USFWS' interpretation of "harm," and yet did not amend section 9 to exclude habitat modification and destruction as a form of "harm" (and in fact rejected a bill which would have done this explicitly). At the same time, Congress added the section 10(a) "incidental take" permit process to the ESA. This is persuasive evidence that Congress intended to affirm the USFWS' definition of "harm." It is true, as the Sweet Home II majority points out, that the intent of the enacting Congress generally should control a court's interpretation of a statute. But when the legislative history does not provide "clear and convincing evidence" of the enacting Congress' intent, subsequent legislative history may be used as a guide in ascertaining that intent. Here, the intent of the 1973 Congress is at least ambiguous on the question whether "harm" includes habitat modification, if not supportive of the USFWS' definition of that term. For this reason, Congress' actions in 1982 which shed light on the proper reading of "harm" (i.e. enacting section 10(a), failing to overturn the USFWS' interpretation of "harm," and refusing to enact a definition of "harm" that would have excluded habitat modification) are persuasive and reliable evidence of congressional intent regarding the scope of the "take" prohibition.

Furthermore, the Sweet Home II court's summary refusal to give any weight to Congress' failure to enact a definition of "take" in 1982 that would have specifically excluded habitat modification is plainly inconsistent with an earlier portion of the opinion. In reasoning that the USFWS' definition "harm" was not clearly authorized by the 1973 Congress, the court gave great weight to Congress' refusal to enact a pro-

---

121. See Field, supra note 86, at 502 ("[t]he San Bruno Plan Is the strongest indication to date that Congress intends the expansive view of taking to prevail and that indirect and remote actions that destroy the ecosystems on which endangered species depend are to be addressed by the section 9 taking prohibitions.").

122. See Michael Bean et al., Reconciling Conflicts under the Endangered Species Act: The Habitat Conservation Planning Experience (1991) (case studies summarizing numerous HCPs prepared for land use development projects). This conclusion applies equally to most "incidental take" statements, the section 7 parallel to section 10(a) "incidental take" permits.

123. Sweet Home II, 17 F3d at 1469.


125. Contrary to the majority opinion's assertion, there is substantial evidence that Congress as a whole, and not simply a congressional subcommittee, was aware of the USFWS' Interpretation of "harm." See 1982 House Hearings at pp. 240, 262, 273, 290-93, 325-29, 331 and 343, cited in Petition for Certiorari at n.17 and n.21; see also Sweet Home v. Lujan, 605 F. Supp. at 284.

126. See North Haven Bd. of Educ. v. Bell, 456 U.S. at 534-35 (finding that subsequent legislative history was persuasive evidence of congressional intent, particularly where Congress refused to enact a bill that would have eliminated the agency's interpretation at issue while amending the statute in other respects); Sweet Home v. Lujan, 605 F. Supp. at 284 ("[t]he reauthorization bill that was eventually adopted by Congress did not amend the original definition of 'take' to exclude the word 'harm' or to correct the Secretary's definition of that term. Instead, it amended the provisions of the Section 10(a) permit process 'to encourage creative partnerships between the public and private sectors...in the interest of species and habitat conservation'").


129. See discussion supra Section II.
posed definition of “take” which included the habitat modification concept.\textsuperscript{130} Apparently, the majority favors reliance on congressional failure to act when doing so furthers the court’s own agenda, but disfavors such reliance when the result is unpalatable.

Thus, the 1982 ESA and its legislative history fail to support the court’s strained construction of the statute.

\textbf{IV. CONCLUSION}

As Chief Justice Mikva stated in his \textit{Sweet Home} II dissent:

there is nothing in the ESA itself, or in its legislative history, that unambiguously demonstrates that the term “harm” in the definition of “take” does not encompass habitat modification. Indeed, there is evidence to the contrary. \textit{Chevron} commands that [a court] defer to an agency’s interpretation of a statute it is entrusted to administer, unless that interpretation is contrary to Congress’s unambiguous command or an unreasonable exercise of Congress’s vague or ambiguous delegation.\textsuperscript{131}

In its haste to reach a particular result, the \textit{Sweet Home} II majority failed to abide by fundamental rules of statutory construction. But apart from its questionable legal reasoning, the opinion is likely to have a disastrous effect on protection of endangered and threatened species. At best, the decision raises the degree of proof necessary to show that habitat modification or destruction will result in a “taking” of a listed species, requiring showing that habitat modification or destruction will result in death or manifest physical injury to individual members of a listed species. At worst, habitat modification or destruction, no matter how extensive, may never be a taking under \textit{Sweet Home} II. Clearly, a showing that the activity merely impedes or prohibits a species’ recovery is not enough under \textit{Sweet Home} II. Whether a showing that a species’ population is declining is sufficient is unclear.

Regardless of the spin one puts on the decision, however, developers, mining and timber companies, and other individual entities now are likely to have little incentive to participate in a biologically sound habitat conservation planning process under section 10(a).\textsuperscript{132} In fact, the \textit{Sweet Home} II opinion is likely to encourage wholesale destruction of species’ habitat by those who assume that their activities are not prohibited under section 9.\textsuperscript{133} If habitat-destroying activities are permitted under the ESA, the statute is rendered a wholly ineffective tool for accomplishing Congress’ goal of conserving (i.e., recovery) endangered and threatened species and the ecosystems upon which they depend. It is difficult to believe that Congress could have intended such a result. As Michael Field so aptly stated:

the expansive view of taking is the only logical approach to use in order to provide any hope for saving endangered species. By definition, an endangered species is on the brink of survival. To purport to place a high national priority on saving such species and then not to prohibit actions that destroy the only habitat in which the species can survive is the height of hypocrisy.\textsuperscript{134}

This is not the end of the story, however, for the Supreme Court now has an opportunity to set the record straight. Even if the Court overrules the D.C. Circuit’s decision, though, Congress may enact amendments codifying \textit{Sweet Home} II when the ESA is reauthorized later this year. For the sake of our nation’s irreplaceable biodiversity, we must hope that such an amendment does not come to pass.

\textsuperscript{130} \textit{Sweet Home} II, 17 F.3d at 1467.

\textsuperscript{131} Id. at 1478 (Mikva, C.J. dissenting).

\textsuperscript{132} See \textit{Appellate Ruling Called a Threat to Endangered Species Act}, N.Y. TIMES, Nov. 22, 1994, at C6.

\textsuperscript{133} The opinion may even jeopardize issuance of Incidental take statements for destruction and adverse modification of critical habitat under section 7.

\textsuperscript{134} Field, supra note 86, at 502.