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Shelli Lyn Iovino

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HABITAT MODIFICATION AND ESA TAKINGS UNDER
BABBITT v. SWEET HOME CHAPTER OF
COMMUNITIES FOR A GREAT OREGON

I. Introduction

The Endangered Species Act of 1973 (ESA)\(^1\) protects species in danger of extinction through a comprehensive ecosystem preservation program.\(^2\) The ESA is indisputably the most powerful and sweeping wildlife legislation to date.\(^3\) Its regulatory provisions encompass a wide variety of public and private land uses.\(^4\) Potential liability under ESA is therefore quite extensive.\(^5\) One of ESA's most controversial regulations is the section 9 taking provision.\(^6\) Section 9 prohibits the taking of an endangered species by any person.\(^7\) An


4. Some of the key regulatory provisions of ESA should be briefly noted. ESA § 3, 16 U.S.C. § 1532 defines the statutory terms. ESA § 4, 16 U.S.C. § 1533 requires the Secretary of the Interior to list endangered and threatened species, and authorizes the Secretary to promulgate regulations. ESA § 5, 16 U.S.C. § 1534 permits the federal government to acquire private land to preserve endangered and threatened species. ESA § 7, 16 U.S.C. § 1536 prohibits any activity by a federal agency, including habitat modification or degradation and the issuance of licenses and permits, that would jeopardize the critical habitat of an endangered species. ESA § 9, 16 U.S.C. § 1538 lists acts that are prohibited under the statute. ESA § 10, 16 U.S.C. § 1539 creates a permit system that allows incidental takings of endangered and threatened species otherwise prohibited under § 9.


6. ESA § 9(a)(1)(B), 16 U.S.C. § 1538(a)(1)(B). This provision of ESA makes it unlawful for any person to "take" any endangered species of fish or wildlife within the United States or the territorial seas of the United States. Id.

7. ESA defines "take" as "to harass, harm, pursue, hunt, shoot, wound, kill,
ESA taking includes "harm" to any endangered or threatened species; however, ESA fails to define this vague term.\(^8\) ESA instead authorizes the Secretary of the Interior, through the Director of the United States Fish and Wildlife Service (USFWS), to promulgate regulations that further define the terms specified in ESA.\(^9\)

This Note examines the challenge to the USFWS regulation defining "harm"\(^10\) under the section 9 taking provision of ESA as addressed in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon (Sweet Home IV).*\(^11\) Part II establishes trends of judicial interpretation of ESA's taking prohibition and methods of statutory construction. The factual background and complex procedural history of *Sweet Home IV* is then discussed in Part III. Part IV provides a narrative analysis of the court's rationale. Part V analyzes the consistency of the holding in light of section 9 case law, the propriety of using various methods of statutory interpretation, and the standard of review. Finally, Part VI addresses the impact of *Sweet Home IV* on land use restrictions and deference to agency discretion.

II. TRENDS OF JUDICIAL INTERPRETATION

A. Construction of the Section 9 Taking Provision

The body of case law interpreting ESA's section 9 taking prohibition is at best muddled.\(^12\) The holdings in these section 9 cases, based on diverse and specific fact patterns, reflect ad hoc decision making, and therefore represent no clear authority on the subject of takings.\(^13\) The USFWS definition of "harm," prohibited under section 9, includes significant habitat modifications.\(^14\) Consequently, most jurisdictions recognize that at least some forms of significant habitat modification could be considered "harmful" to trap, capture or collect, or to attempt to engage in any such conduct." ESA § 3(19), 16 U.S.C. § 1532(19).

8. *Id.*

9. Pursuant to ESA § 4(d), 16 U.S.C. § 1533(d), the Secretary of the Interior promulgated 50 C.F.R. § 17.3 (1994) which defines "harm" under the § 9 taking provision.

10. "Harm" is defined as "an act which actually kills or injures wildlife. Such an 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 C.F.R. § 17.3 (1994).


12. Courts disagree about the degree of habitat modification necessary to constitute a taking under § 9. For a further discussion of judicial interpretation of the taking provision, see *infra* notes 16-32 and accompanying text.


14. For the definition of "harm," see *infra* note 10 and accompanying text.
threatened or endangered species, and are therefore, prohibited under ESA.\textsuperscript{15}

\textit{Sierra Club v. Froehlke}\textsuperscript{16} represents one of the earliest interpretations of ESA's taking prohibition. In \textit{Froehlke}, the Eighth Circuit rejected a claim that habitat modifications resulting from the construction of a reservoir were significant enough to constitute "harassment" of bats.\textsuperscript{17} The United States Supreme Court expanded this restrictive interpretation of takings in \textit{Tennessee Valley Authority v. Hill}.\textsuperscript{18} The Court, in \textit{Hill}, recognized that the habitat modifications involved in the construction and operation of a dam could not be accomplished without "harming" the native snail darter.\textsuperscript{19} Despite this decision, district courts continued to narrowly construe the taking provision by requiring that the habitat modification pose an immediate threat to the endangered species.\textsuperscript{20}

The trend of narrow interpretation of the section 9 taking prohibition ended in \textit{Palila v. Hawaii Department of Land \& Natural Resources (Palila I)}.\textsuperscript{21} In \textit{Palila I}, the district court held that the habitat

\footnotesize{15. For a discussion of cases holding that significant habitat modification constituted an ESA taking, see infra notes 29-31 and accompanying text.}

\footnotesize{16. 534 F.2d 1289 (8th Cir. 1976).}

\footnotesize{17. Id. at 1304. The plaintiffs sought to enjoin the construction of the Meramec Park Lake Dam, arguing that the habitat modifications involved in the project constituted a taking of the Indiana bat under § 9 of ESA. Id. at 1291. The Eighth Circuit held that although the project would necessarily involve flooding caves in which the bats currently lived, these habitat modifications were not significant enough to constitute "harassment" or "harm" to the bats. Id. at 1304. The court also stressed that ESA must have a "reasonable construction." Id. The court attempted to balance the benefits of the project and the importance of conservation in holding that habitat modifications of this degree were not sufficient to warrant the injunction of a project of this magnitude. Id. at 1305.}

\footnotesize{18. 437 U.S. 153 (1978).}

\footnotesize{19. Id. at 184 n.30. In \textit{Hill}, the plaintiffs sought to enjoin the construction of the Tellico Dam because completion of the project would result in the extinction of the native snail darter. Id. at 161-62. Though the Court disposed of this issue under § 7 of ESA, which prohibits modification of the critical habitat of an endangered species by a federal agency, the decision also briefly mentioned the § 9 taking implications of such significant habitat modifications. Id. at 184-85 n.30. The Court, in granting the injunction, noted that the goal of ESA was to "halt and reverse the trend toward species extinction, whatever the cost." Id. at 184.}

\footnotesize{20. See California v. Watt, 520 F. Supp. 1359, 1388 (D.C. Cal. 1981) (holding that oil leases did not constitute § 9 takings because there was no immediate threat to endangered species), aff'd in part, rev'd in part, 683 F.2d 1253 (9th Cir. 1982), rev'd on other grounds, 464 U.S. 912 (1984); North Slope Borough v. Andrus, 486 F. Supp. 332, 362 (D.D.C. 1979) (denying injunction to stop oil leases because there was no imminent danger to whales, and possibility of future action did not amount to taking under ESA), aff'd in part, rev'd in part, 642 F.2d 589 (D.C. Cir. 1980); Barcelo v. Brown, 478 F. Supp. 646, 690 (D.P.R. 1979) (denying injunction to stop Navy exercises because of failure to show adverse effects upon species), aff'd in part, vacated in part, 643 F.2d 835 (1st Cir. 1981).}

\footnotesize{21. 471 F. Supp. 985 (D. Haw. 1979), aff'd, 639 F.2d 495 (9th Cir. 1981).}
modification constituted a taking even absent a showing of population decline among the endangered species.\(^\text{22}\) In response to *Palila I*, USFWS amended its definition of "harm" to include only those instances in which the habitat modification actually killed or injured the endangered species.\(^\text{23}\) Despite this alleged clarification,\(^\text{24}\) the confusion over what types of significant habitat modification amounted to section 9 takings continued.\(^\text{25}\)

In 1982, Congress amended ESA by implementing a permit system for incidental takings resulting from habitat modification.\(^\text{26}\) This narrow exception to the taking prohibition increased the flexibility of ESA and reduced section 9 liability.\(^\text{27}\) As a result, courts began to liberalize their interpretation of habitat modification prohibited under section 9, including activities that only indirectly killed members of the species.\(^\text{28}\)

Additionally, the Ninth Circuit revisited the issue of section 9 takings in *Palila v. Hawaii Department of Land & Natural Resources (Palila II).*\(^\text{29}\) In *Palila II*, the court held that an ESA taking included any significant habitat modification that may cause injury to an endangered species in the future. Reaching this conclusion, the court noted that the "harm" to the protected species did not have to be

\(^{22}\) *Palila I*, 471 F. Supp. at 995. In *Palila I*, the plaintiffs sought the removal of feral sheep and goats from the critical habitat of the endangered palila bird. *Id.* at 990. The keeping of sheep and goats, which ate the mamane and naio trees upon which the palila were dependent, in the palila's critical habitat constituted a taking under § 9. *Id.* at 995.

\(^{23}\) For the USFWS definition of "harm," see *supra* note 10 and accompanying text.

\(^{24}\) The new definition of "harm" with respect to habitat modification, requiring actual death or injury to the protected species, is still ambiguous because USFWS does not clearly define "injury." *See* Cheever, *supra* note 3, at 148 n.233.


\(^{26}\) ESA § 10(a)(1)(B), 16 U.S.C. § 1539(a)(1)(B). This provision authorizes USFWS to issue permits for takings that are incidental to an otherwise lawful activity. *Id.*


\(^{28}\) *See* National Wildlife Fed'n v. Hodel, 23 Env't Rep. (BNA) 1089, 1092 (E.D. Cal. 1985) (holding that authorization of lead-shot hunting constituted taking of bald eagles though protected species were only indirectly endangered by activity).

\(^{29}\) 649 F. Supp. 1070 (D. Haw. 1986), aff'd, 852 F.2d 1106 (9th Cir. 1988).
imminent. A majority of courts that have interpreted section 9 have followed and expanded the *Palila II* decision. Other courts, however, while consistently holding that some types of habitat modification may be significant enough to constitute a taking, were not yet ready to adopt the expansive position advanced by the court in *Palila II*.  

B. Methods of Statutory Interpretation

A court has many tools at its disposal for interpreting a statutory term. One common method of statutory construction is the principle *noscitur a sociis*. This doctrine maintains that a word gathers its meaning from its context, established by the surrounding words. Many courts use this approach to determine the meaning of ambiguous statutory terms. If necessary, a court may also review the legislative history of the statute to determine the meaning.

31. See American Bald Eagle v. Bhatti, 9 F.3d 163, 166 (1st Cir. 1993) (stating that § 9 liability results from significant habitat modifications that cause actual injury to endangered species); Sierra Club v. Yeutter, 926 F.2d 429, 438 (5th Cir. 1991) (holding that Forest Service’s timber management program constituted ESA taking because it significantly altered feeding patterns); Defenders of Wildlife v. EPA, 882 F.2d 1294, 1301 (8th Cir. 1989) (stating that registration of pesticides, although only indirect harm to endangered species, amounted to taking); United States v. Glenn-Colusa Irrigation Dist., 788 F. Supp. 1126, 1134 (E.D. Cal. 1992) (holding that placement of irrigation screen constituted a taking under § 9 even though it only indirectly caused harm to wildlife).
32. See National Wildlife Fed’n v. Burlington N.R.R., 23 F.3d 1508, 1512-13 (9th Cir. 1994) (holding that habitat modification must be direct and significant to constitute “harm” under § 9); Pyramid Lake Paiute Tribe of Indians v. United States Dep’t of the Navy, 898 F.2d 1410, 1420 (9th Cir. 1990) (stating that irrigation did not amount to significant habitat modification under ESA even though it lowered water levels in area); Morrill v. Lujan, 802 F. Supp. 424, 430 (S.D. Ala. 1992) (holding that habitat modification alone does not constitute “harm” under ESA, and requiring “critical link” between modification and injury to species under § 9); Swan View Coalition, Inc. v. Turner, 824 F. Supp. 923, 939 (D. Mont. 1992) (stating that § 9 liability is limited to substantial habitat modifications that cause direct and actual injury to protected species).
33. For a further discussion of the primary methods of statutory construction used in *Sweet Home IV*, see infra notes 67-71, 77-80, 93-98 and accompanying text.
34. Literally, *noscitur a sociis* means “it is known from its associates.” BLACK’S LAW DICTIONARY 956 (6th ed. 1990). “Under the doctrine of ‘noscitur a sociis,’ the meaning of questionable words or phrases in a statute may be ascertained by reference to the meaning of words or phrases associated with it.” Id. For a further discussion of the Court’s use of the *noscitur a sociis* principle in *Sweet Home IV*, see infra notes 67-71 and accompanying text.
35. See Dole v. United Steelworkers of Am., 494 U.S. 26, 36 (1990) (using *noscitur a sociis* to determine meaning of “reporting and recordkeeping”); Third Nat’l Bank v. Impac Ltd., Inc., 432 U.S. 312, 322 (1977) (holding that words that are grouped together have related meaning); Jarecki v. G.D. Searle & Co., 367 U.S. 303, 307 (1961) (stating that ambiguous word gathers meaning from words around it); United States v. Hayashi, 5 F.3d 1278, 1282 (9th Cir. 1993) (holding that harass-
of a particular term.  

Another tool of statutory construction employed by courts is the ratification principle. This method asserts that, by amending or reenacting a statutory provision, Congress impliedly ratifies not only adjacent clauses but also any regulations promulgated with respect to these provisions. Alternatively, a court may simply look to the plain meaning of the word.

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., provides guidance to courts forced to engage in statutory interpretation. When a reviewing court interprets statutory provisions, it

ment, in context with taking provision of Marine Mammal Protection Act, must involve direct action by perpetrator).

36. For a further discussion of the use of legislative history by the Sweet Home Court, see infra notes 93-98 and accompanying text. See generally Ratzlaf v. United States, 114 S. Ct. 655, 662 (1994) (stating that reference to legislative intent is unnecessary if statutory language is clear); Barnhill v. Johnson, 503 U.S. 393, 398 (1992) (holding that court should resort to legislative history only if there are statutory ambiguities).


38. See Immigration and Naturalization Serv. v. Cardoza-Fonseca, 480 U.S. 421, 431 (1987) (holding that plain meaning of words is important tool of statutory construction which is "not to be lightly discounted").

must give effect to the clear and unambiguous intent of Congress.\textsuperscript{40} If congressional intent is unclear, the court must examine the administrative agency’s interpretation of the statutory language.\textsuperscript{41} Under this standard of review, the court must defer to the agency interpretation if it is a permissible construction of the statutory terms.\textsuperscript{42} The \textit{Chevron} court further cautioned against substitution of judicial interpretation of a statute when a reasonable agency interpretation exists.\textsuperscript{43}

A court should not, therefore, casually dismiss agency authority and discretion to promulgate regulations.\textsuperscript{44} In using these various methods of construction, courts must strike a balance among legislative intent, agency discretion, and judicial activism.

III. Factual Background and Procedural History

In \textit{Sweet Home Chapter of Communities for a Great Oregon v. Lujan (Sweet Home I)}, groups dependent on the timber industry brought a declaratory judgment action in the United States District Court for the District of Columbia against the Secretary of the Interior and the Director of the United States Fish and Wildlife Service (USFWS).\textsuperscript{45} The plaintiffs included landowners, logging companies, families, and lumber trade associations dependent on the forest products industry in the Pacific Northwest and Southeast.\textsuperscript{46} These groups challenged the validity of the USFWS regulation defining “harm” as significant habitat modification and degradation.\textsuperscript{47} The plaintiffs also asserted that USFWS restrictions on timber harvesting, implemented to prevent take of the red-cockaded woodpecker, an endangered species,\textsuperscript{48} and the northern spot-

\textsuperscript{40} Id. at 842-43.
\textsuperscript{41} Id. at 843.
\textsuperscript{42} Id.
\textsuperscript{43} Id. at 844. In \textit{Chevron}, the Court held that judicial interpretation of a statute is appropriate only where there is no clear legislative intent or administrative construction. \textit{Id}. at 843.
\textsuperscript{44} The Court held that agency regulations should be given deference unless they are “arbitrary, capricious or manifestly contrary to the statute.” \textit{Chevron}, 467 U.S. at 844.
\textsuperscript{46} \textit{Sweet Home I}, 806 F. Supp. at 282.
\textsuperscript{47} Id. For the USFWS definition of “harm,” see supra note 10 and accompanying text.
\textsuperscript{48} ESA defines “endangered species” as: any species which is in danger of extinction throughout all or a signifi-
ted owl, a threatened species, caused them great economic loss.

These groups argued that Congress did not intend the section taking prohibition to include habitat modification and degradation, and claimed that the USFWS regulation defining "harm" as habitat modification was therefore invalid under ESA. The plaintiffs advanced three arguments in support of their claim. First, that the Senate deleted habitat modification from the definition of a taking in the original version of ESA. Second, Congress intended the ESA provision authorizing the federal government to purchase private property as the exclusive method to prevent habitat modification on private land. Third, the addition of "harm" to ESA's definition of "take" should not be expanded to include habitat modification because the definition was amended without full Senate debate.

The United States District Court for the District of Columbia rejected the plaintiffs' arguments and upheld the validity of the USFWS regulation. The United States Court of Appeals for the District of Columbia Circuit initially affirmed the district court's judgment. Upon rehearing, however, the court of appeals recent portion of its range other than a species of the Class Insecta determined by the Secretary [of the Interior] to constitute a pest whose protection under the provisions of this chapter would present an overwhelming and overriding risk to man.

ESA § 3(6), 16 U.S.C. § 1532(6).

49. ESA defines "threatened species" as "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." ESA § 3(20), 16 U.S.C. § 1532(20).

50. Sweet Home I, 806 F. Supp. at 282. These groups claimed that they suffered economic losses as a result of limitations on income from land, employee layoffs, and a reduction in the timber supply. Id.

51. Sweet Home IV, 115 S. Ct. at 2410.

52. Id. The original Senate draft of ESA included "destruction, modification or curtailment of [the] habitat or range" of fish or wildlife in the definition of "take." Id. at 2411-12 (quoting S. 1983, 93d Cong., 1st Sess. 27 (1973)). This language, however, was deleted from the Senate bill before enactment. Id. at 2411.

53. Id. ESA permits the federal government to purchase private land to prevent the modification or degradation of the habitat of an endangered or threatened species. ESA § 5, 15 U.S.C. § 1534.

54. Sweet Home IV, 115 S. Ct. at 2411. The Senate added "harm" to the definition of "take" in ESA in a floor amendment without debate. Id.

55. Sweet Home I, 806 F. Supp. at 285. The district court evaluated the definition of "harm" in light of legislative intent, the Ninth Circuit’s decision in Palila I, the ratification principle, and the incidental taking permit amendment to ESA. Id. at 284-85. The court concluded that the USFWS regulation was a reasonable interpretation of ESA under the standard of review mandated by Chevron, and therefore dismissed the plaintiffs’ complaint. Id. For a further discussion of the Chevron standard of review, see supra notes 39-44 and accompanying text.

56. Sweet Home II, 1 F.3d at 1.
versed its prior decision.\textsuperscript{57} In this rehearing, the court of appeals held that the USFWS definition of “harm” was unreasonable in light of legislative intent and was, therefore, invalid.\textsuperscript{58} Petition for a second rehearing was subsequently denied.\textsuperscript{59} The United States Supreme Court reversed the decision of the court of appeals, and held that the USFWS regulation was a reasonable interpretation of ESA.\textsuperscript{60} The United States Supreme Court’s ultimate resolution of whether habitat modification constitutes an ESA taking is the focus of this Note.

IV. \textbf{Narrative Analysis}

A. USFWS Definition of Harm Held Valid Under ESA

The Court began its analysis of ESA with a brief explanation of the general structure of this complex legislation.\textsuperscript{61} Justice Stevens, writing for the majority of the Court, emphasized that the primary purpose of ESA is to protect and save endangered and threatened species from extinction.\textsuperscript{62} The Court also summarized the arguments advanced in this appeal.\textsuperscript{63} The petitioners, the Secretary of

\textsuperscript{57} \textit{Sweet Home III}, 17 F.3d at 1472. On rehearing, the court of appeals reversed its initial judgment, and held that the USFWS regulation defining habitat modification as "harm" was an unreasonable and, therefore, invalid interpretation of ESA. \textit{Id.}

\textsuperscript{58} \textit{Id.} The court based its holding on the \textit{noscitur a sociis} principle, the narrow definition of "harassment" in the taking provision of the Marine Mammal Protection Act addressed in \textit{Hayashi}, the legislative history of ESA, the incidental taking permit amendment, and the general structure and purpose of ESA. \textit{Id.} The court of appeals held that "harm," prohibited by the § 9 taking provision, included only direct applications of force by a perpetrator against a member of a protected species. \textit{Id.} at 1465. This holding created a circuit split in light of the Ninth Circuit's expansive \textit{Palila II} decision.

\textsuperscript{59} \textit{Sweet Home}, 30 F.3d at 190.

\textsuperscript{60} \textit{Sweet Home IV}, 115 S. Ct. at 2418. Justice Stevens wrote the majority opinion of the Court, joined by Justices O'Connor, Kennedy, Souter, Ginsburg, and Breyer. \textit{Id.} at 2409.

\textsuperscript{61} \textit{Id.} at 2409-10. Justice Stevens briefly outlined relevant provisions and the general structure of ESA, including: (1) the definition of "take" (§ 3); (2) the authority of the Secretary of the Interior to list endangered and threatened species, and to promulgate regulations in furtherance of ESA (§ 4); (3) the federal land acquisition program (§ 5); (4) the prohibition of critical habitat modification or degradation applicable to federal agencies (§ 7); (5) the general taking prohibition (§ 9); and (6) the incidental taking permit amendment (§ 10). \textit{Id.} For a further discussion of these ESA provisions, see supra notes 4-6 and accompanying text. The Court also set forth the USFWS definition of "harm." \textit{Id.} at 2410. For the text of this definition, see supra note 10.

\textsuperscript{62} \textit{Sweet Home IV}, 115 S. Ct. at 2409.

\textsuperscript{63} \textit{Id.} at 2412. The Court made the following factual assumptions: (1) the respondents did not purposely intend to harm any native endangered or threatened species, but simply wanted to conduct otherwise lawful logging activities in the area; (2) the respondents' actions would detrimentally affect the natural
the Interior and the Director of USFWS, maintained that the section 9 taking prohibition prevented any habitat modification by the respondents that would injure or kill endangered native birds, unless these groups first obtained an incidental taking permit under ESA. The respondents, groups dependent on the timber industry, contended that the federal government's only means under ESA to prevent habitat modification on private land is to purchase the property.

Ultimately, the majority rejected the respondents' argument, and held that the USFWS definition of "harm" was a valid interpretation of the statutory language of ESA. The Court, however, first reviewed the plain meaning of the term "harm," and concluded that its definition obviously encompassed habitat modification that actually injured or killed endangered or threatened species. Furthermore, the Court rejected the respondents' claim that "harm" included only direct applications of force against a protected species. Justice Stevens noted the significance of Congress's deliberate selection and placement of "harm" in the definition of "take,"

habitats of the red-cockaded woodpecker and the northern spotted owl and; (3) as a result of this habitat modification and degradation, members of the protected species would be injured or killed. Id. Justice Stevens also noted that pursuant to 16 U.S.C. §§ 1540(a)(1), (b)(1), only a "knowing violation" of the statute or one of its implementing regulations results in criminal or serious civil liability under ESA. Id. at 2412 n.9. The Court additionally stated that ESA liability provisions implicitly incorporate the ordinary requirements of proximate causation and foreseeability, thereby eliminating § 9 liability where causation is speculative or remote. Id.

64. Id. at 2412.
65. Id.
66. Id. "Harm" was defined by USFWS as habitat modification.
67. Sweet Home IV, 115 S. Ct. at 2412. The dictionary definition of "harm" is "to cause hurt or damage to; injure." Id. (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1034 (1966)).
69. Id. at 2413. Justice Stevens noted that the dictionary definition does not limit "harm" to only direct or willful actions that result in injury. Id. The respondents argued that a wildlife taking includes only "efforts to exercise dominion over some creature." Id. at 2413 n.10. Additionally, the Court rejected respondents interpretation of "take," and stressed that the definition of this term was not an issue in Sweet Home IV because Congress explicitly defined "take" in ESA. Id. The scope of review was therefore limited to determining the reasonableness of the definition of "harm" under the USFWS regulation. Id.
70. Id. The Court reasoned that if "harm" did not include indirect as well as direct means of killing and injuring protected species, it would have no independent meaning within ESA's definition of "take." Id. at 2413 n.11. The Court noted that the other terms listed in the definition of "take," "harass," "pursue," "hunt," "shoot," "wound," "kill," "trap," "capture," and "collect," generally refer to direct and intentional actions. Id. "Harm," reasonably interpreted to include indirect actions such as habitat modification, does not therefore simply duplicate, but instead supplements, these other terms. Id. Justice Stevens added that any overlap in the meanings of the statutory terms reflects the broad purpose of ESA. Id.
and stressed the Court's reluctance to treat statutory language as surplusage.\textsuperscript{71}

The Court also emphasized the broad purposes of ESA: (1) to conserve the ecosystems upon which endangered and threatened species depend;\textsuperscript{72} (2) to prevent and reverse the trend toward species extinction;\textsuperscript{73} and (3) to provide comprehensive protection for endangered and threatened species.\textsuperscript{74} The majority further noted ESA's extensive application to both public and private actors on all land and territorial seas of the United States.\textsuperscript{75} In light of the general goals and broad scope of ESA, the Court concluded that the USFWS interpretation of "harm" as habitat modification was justified.\textsuperscript{76}

Justice Stevens offered ESA's incidental taking permit provision as additional support for the regulation's validity.\textsuperscript{77} The 1982 ESA amendment authorizes the Secretary of the Interior to issue permits for takings, incidental to a lawful activity, that would otherwise be prohibited under section 9.\textsuperscript{78} The Court reasoned that Congress, by implementing this incidental taking permit system, contemplated indirect takings.\textsuperscript{79} Incidental activities such as

\textsuperscript{71} Id. at 2413. The Court cited Mackey v. Lanier Collection Agency & Serv., Inc., 486 U.S. 825 (1988), to support this proposition. Id. For a further discussion of Mackey, see supra note 37 and accompanying text.

\textsuperscript{72} Sweet Home IV, 115 S. Ct. at 2413. Section 2(b) states that the general purpose of ESA is "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved. . . ." ESA § 2(b), 16 U.S.C. § 1531(b).

\textsuperscript{73} Sweet Home IV, 115 S. Ct. at 2413. The Court stressed the significance of its holding in Tennessee Valley Auth. v. Hill that congressional intent in enacting ESA was "to halt and reverse the trend toward species extinction, whatever the cost." Id. (quoting Tennessee Valley Auth. v. Hill, 437 U.S. 153, 184 (1978)). Justice Stevens also noted the Court's acceptance of the inclusion of habitat modification in the USFWS definition of "harm" in Hill. Id. at 2413-14. For a further discussion of Hill, see supra notes 18 & 19 and accompanying text.

\textsuperscript{74} Sweet Home IV, 115 S. Ct. at 2414.

\textsuperscript{75} Id. at 2413.

\textsuperscript{76} Id. at 2414. The respondents challenged the statutory validity of the "harm" regulation on its face and, therefore, requested that the Court invalidate USFWS's definition of "harm" even in cases where an actor intentionally and knowingly destroys the habitat of an endangered or threatened species. Id. The Court reiterated its conclusion that the ordinary requirements of proximate causation and foreseeability apply to the § 9 taking provision. Id. at 2414 n.13. Justice Stevens also noted that USFWS's use of the word "actually" in the definition of "harm" further limits § 9 liability. Id.

\textsuperscript{77} Id. at 2414.

\textsuperscript{78} ESA § 10(a)(1)(B), 16 U.S.C. § 1539(a)(1)(B).

\textsuperscript{79} Sweet Home IV, 115 S. Ct. at 2414. The Court concluded that Congress intended to reach indirect and unintentional takings through the § 10 permit process because an actor who plans deliberate, direct action against a protected species will not apply for an incidental taking permit. Id. Congress, therefore,
habitat modification, not intended to injure or kill an endangered species, may therefore constitute prohibited takings under section 9 unless the actor first obtains the requisite permit.80

B. Errors Committed by the Court of Appeals

The United States Court of Appeals for the District of Columbia Circuit had previously invalidated the USFWS regulation under the *noscitur a sociis* method of statutory construction.81 The court of appeals concluded that "harm," in light of the other terms listed in the definition of "take,"82 referred only to direct applications of force against a protected species.83 In *Sweet Home IV*, the Supreme Court rejected this approach and noted that the definition of "take" includes other actions that do not require direct force by the actor.84 The majority analyzed the independent meaning and function of "harm" in the definition of "take," and emphasized Congress's deliberate selection of this term.85

The court of appeals had also reasoned that the USFWS regulation undermined the federal government's incentive to purchase private land to prevent takings since it could simply prohibit takings under section 9.86 The Supreme Court rejected this assumption, and noted circumstances in which the purchase of private land by the federal government under section 5 could still be desirable.87

understood § 9 to prohibit both indirect and deliberate takings when it enacted the 1982 amendment. *Id.*

80. *Id.*

81. *Sweet Home III*, 17 F.3d at 1465-66. For a further discussion of the *noscitur a sociis* principle, see *supra* notes 34 & 35 and accompanying text.

82. For ESA's definition of "take," see *supra* note 7 and accompanying text.


84. *Id.* at 2414-15. Some of the terms listed in the definition of "take" that do not specifically refer to direct applications of force include "harass," "pursue," "wound," and "kill." *Id.* The Court noted that deliberate, direct action is not required for ESA liability. *Id.* Justice Stevens also criticized the court of appeals' reliance on *United States v. Hayashi* because the definition of "take" in the Marine Mammal Protection Act addressed by the Ninth Circuit in that case did not include "harm" and required a direct intrusion on wildlife. *Id.* at 2415 n.16. For a further discussion of *Hayashi*, see *supra* note 35 and accompanying text.

85. *Sweet Home IV*, 115 S. Ct. at 2415. The court of appeals erred by giving "harm" the exact same meaning as the other terms listed in the "take" definition, despite contrary congressional intent. *Id.* Justice Stevens emphasized that Congress intended the word "harm" to retain a meaning that is consistent with, but distinct from, the other statutory terms. *Id.*


87. *Sweet Home IV*, 115 S. Ct. at 2415. The Court listed three situations in which the federal government may elect to purchase private lands under § 5 instead of prosecuting the actor under § 9: (1) purchasing private lands may be less expensive than pursuing civil or criminal liability; (2) the federal government can prevent habitat destruction under § 5; however, § 9 cannot be enforced until a
Justice Stevens also emphasized the distinction between the general prohibition of takings by any person in section 9 and section 7’s directive to federal agencies to avoid the destruction or modification of a critical habitat.\textsuperscript{88}

C. The Standard of Review

In \textit{Sweet Home IV}, the Court also indicated that the USFWS regulation was a reasonable and permissible interpretation of ESA under the \textit{Chevron} analysis.\textsuperscript{89} ESA’s broad delegation of administrative and interpretive authority to the Secretary of the Interior,\textsuperscript{90} as well as the Secretary’s degree of regulatory expertise,\textsuperscript{91} justified the Court’s deference to the USFWS definition of “harm.”\textsuperscript{92} The Court also supported its conclusion with the legislative history of ESA.\textsuperscript{93} Senate and House Committee Reports suggest that Congress intended an expansive definition of “take” that included both direct and indirect actions.\textsuperscript{94} ESA’s legislative history also reveals a Senate bill amendment that added the term “harm” to the taking

\textsuperscript{88} \textit{Id.} Section 7 creates an affirmative duty to avoid adverse habitat modifications. ESA § 7, 16 U.S.C. § 1536. This section applies only to the federal government, and is not limited to those modifications that actually injure or kill a threatened or endangered species. \textit{Id.} Section 7 liability is limited to, however, only those actions that are likely to jeopardize the continued existence of any protected species and modification of a “critical habitat.” \textit{Id.} Section 9 prohibits habitat modifications that actually injure or kill a protected species. ESA § 9, 16 U.S.C. § 1538. This provision extends liability to any person. \textit{Id.} Justice Stevens noted that any overlap between §§ 7 and 9 provides further proof of ESA’s broad purpose. \textit{Sweet Home IV}, 115 S. Ct. at 2415-16.

\textsuperscript{89} \textit{Sweet Home IV}, 115 S. Ct. at 2416. For a further discussion of the \textit{Chevron} analysis, see supra notes 39-44 and accompanying text.

\textsuperscript{90} \textit{Sweet Home IV}, 115 S. Ct. at 2418. Section 4 authorizes the Secretary of the Interior to define and list threatened and endangered species. ESA § 4, 16 U.S.C. § 1533. Section 10 permits the Secretary of the Interior to establish standards for the issuance of incidental taking permits. ESA § 10, 16 U.S.C. § 1539.

\textsuperscript{91} \textit{Sweet Home IV}, 115 S. Ct. at 2416. The Court determined that the definition and listing of protected species by the Secretary of the Interior requires a great deal of expertise and discretion. \textit{Id.} at 2418.

\textsuperscript{92} \textit{Id.} at 2416.

\textsuperscript{93} \textit{Id.}

\textsuperscript{94} \textit{Id.}. The Senate Report stated 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.” \textit{Id.} (quoting S. Rep. No. 307, 93d Cong., 1st Sess. 7 (1973)). The House Report stated that: (1) prohibitions on takings were defined in the “broadest possible terms;” (2) the taking provision included “harassment, whether intentional or not;” and (3) activities of birdwatchers that indirectly disturb the birds may result in § 9 liability. \textit{Id.} (quoting H.R. Rep. No. 412, 93d Cong., 1st Sess. 15 (1973)).
provision.\textsuperscript{95}

The Court, however, disregarded the deletion of “habitat modification” from the definition of “take” in the original version of ESA.\textsuperscript{96} The majority instead focused upon the legislative history of the incidental taking permit amendment as proof of congressional intent to prohibit both indirect and direct takings.\textsuperscript{97} Based on ESA’s text, general structure, legislative history, and broad delegation of authority to the Secretary of the Interior, the Court upheld the Secretary’s definition of “harm” as a reasonable and valid interpretation of ESA.\textsuperscript{98}

D. The Concurring and Dissenting Opinions

Justice O’Connor filed a brief concurring opinion in Sweet Home IV.\textsuperscript{99} The concurrence was conditioned on two premises. First, the USFWS regulation is restricted to significant habitat modifications that cause actual injury or death to protected species.\textsuperscript{100} Second, the regulation’s application is confined to foreseeable takings.\textsuperscript{101} Justice O’Connor further limited the USFWS regulation to

\textsuperscript{95} Sweet Home IV, 115 S. Ct. at 2416-17. Though neither of the two original Senate bills, S. 1592 and S. 1983, 93d Cong., 1st Sess. (1973), included “harm,” this term was subsequently added to the definition of “take” by Senator Tunney in a floor amendment. \textit{Id.} This amendment was added “to achieve the purposes of the bill.” \textit{Id.} at 2417. Justice Stevens also noted the breadth of the added term and the significance of the amendment process. \textit{Id.}

\textsuperscript{96} Id. The original Senate draft included “the destruction, modification or curtailment of [the] habitat or range of fish or wildlife” in the definition of “take.” S. 1983, 93d Cong., 1st Sess. 7, 27 (1973). The Commerce Committee, however, removed this language from the bill before it went to the Senate floor. \textit{Sweet Home IV}, 115 S. Ct. at 2417. The majority disregarded this deletion because: (1) ESA’s legislative history does not indicate why the habitat modification language was deleted; (2) the original definition of “take” was much too broad because § 9 liability would not be limited to habitat modifications that actually injured or killed the species; and (3) the provision did not limit liability to significant habitat modifications. \textit{Id.}

\textsuperscript{97} Sweet Home IV, 115 S. Ct. at 2417. The House Report provides 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.” \textit{Id.} (quoting H.R. Rep. No. 567, 102d Cong., 1st Sess. 31 (1982)). The Court concluded, based on the legislative history of this amendment, that Congress enacted the incidental taking permit system with takings resulting from habitat modification specifically in mind. \textit{Sweet Home IV}, 115 S. Ct. at 2418.

\textsuperscript{98} Sweet Home IV, 115 S. Ct. at 2418.

\textsuperscript{99} Id. (O’Connor, J., concurring).

\textsuperscript{100} Id.

\textsuperscript{101} Id. Justice O’Connor stressed that the regulation’s application must be limited by the ordinary principles of proximate causation. \textit{Id.} The concurrence also questioned the validity of \textit{Palila II} in light of these limitations. \textit{Id.} For a further discussion of \textit{Palila II}, see supra notes 29 & 30 and accompanying text.
activities that actually injure or kill individual animals, as opposed
to future populations of the protected species. The concur-
rence, however, stipulated that impairment of an animal’s ability to
breed, or interference with the breeding process, may constitute
injury to the animal prohibited by section 9. Justice O’Connor
also addressed causation and section 9 liability. Although ESA
does not expressly state the degree of causation required for taking
liability, Justice O’Connor concluded that ESA impliedly invokes
the ordinary principles of proximate causation. Only habitat
modifications that cause foreseeable injury or death to an identifi-
able protected species, therefore, result in ESA liability.

Justice Scalia filed a lengthy dissent in Sweet Home IV. First,
the dissent recognized the economic injustice that would result
from the inclusion of habitat modification in the definition of
“harm.” Justice Scalia also discussed three fundamental flaws in
the USFWS regulation. First, even unintended and unforeseeable
takings would result in section 9 liability. Second, taking liability
can stem from either an act or omission. Third, the definition of
“harm” encompasses injury inflicted upon entire populations of en-

102. Sweet Home IV, 115 S. Ct. at 2418 (O’Connor, J., concurring).
103. Id. at 2419. Justice O’Connor emphasized that significant interference
with breeding actually injures the individual living creature by impairing “its most
essential physical functions and to render that animal, and its genetic material,
biologically obsolete.” Id. The concurrence also noted that impairment of repro-
duction resulting from habitat modification can cause actual injury to the individu-
al animal by restricting its ability to flee or protect itself and causing physical
complications during gestation. Id. According to Justice O’Connor, the USFWS
regulation, which requires actual injury or death of a protected species, does not
extend taking liability to hypothetical, nonexistent animals. Id.
104. Id. at 2420 (O’Connor, J., concurring).
105. Id. Justice O’Connor reasoned that use of the word “actually” in the
USFWS regulation invokes a proximate causation requirement, and therefore pre-
vents § 9 liability for remote or speculative consequences that result from the
habitat modification. Id.
106. Id.
107. Sweet Home IV, 115 S. Ct. at 2421 (Scalia, J., dissenting). Chief Justice
Rehnquist and Justice Thomas joined in the dissent. Id.
108. Id. Justice Scalia argued that the majority’s holding was fundamentally
unfair and would ultimately result in financial ruin for those who merely wished to
develop their private property. Id. Justice Scalia noted the two primary goals of
ESA: (1) to prevent the hunting and killing of protected species; and (2) to pre-
serve the habitat of endangered and threatened species through the acquisition
of private property by the federal government. Id.
109. Id. Justice Scalia argued that under the majority’s interpretation of § 9,
any habitat modification that in fact causes death or injury to protected wildlife
results in ESA liability, even if the link between the modification and the death or
injury is remote and speculative. Id. at 2421.
110. Id. at 2422. The current version of the USFWS regulation defining
“harm,” adopted in 1981, deletes the term “omission.” Id. USFWS states, however,
dangered and threatened species. The dissent emphasized that ESA did not authorize these three aspects of the regulation.

Justice Scalia also examined the various definitions of “take” used in wildlife legislation and treaties. The dissent stressed that the generally accepted statutory and common law meaning of a wildlife “taking” includes only direct and intentional acts against particular animals. He further noted that the section 9 taking prohibition regulates “all the stages of the process by which protected wildlife is reduced to man’s dominion and made the object of profit.” The dissent also evaluated the plain meaning of “harm,” and stressed that all of the other terms in the definition of “take” describe affirmative conduct intentionally directed at a particular protected animal. Justice Scalia also illustrated some

that the term “act” is “inclusive of either commissions or omissions which would be prohibited by § 1538(a)(1)(B).” Id. (quoting 46 Fed. Reg. 54748, 54750 (1981)).

111. Id. The dissent noted that the definition of “harm” promulgated by USFWS includes acts which “significantly impair essential behavioral patterns, including breeding.” Id. The term “harm” is thus not limited to the direct injury or death of an individual member of a protected species, but is expanded to preserve the entire population of animals. Id.

112. Sweet Home IV, 115 S. Ct. at 2422 (Scalia, J., dissenting).

113. Id. Justice Scalia noted the following common definitions of “take” used in reference to wild animals: (1) “to reduce those animals, by killing or capturing, to human control;” (2) “to catch, capture (a wild beast, bird, fish, etc.);” (3) “to catch or capture by trapping, snaring, etc., or as prey;” (4) “[A]ll the animals which can be taken upon the earth, in the sea, or in the air, that is to say, wild animals, belong to those who take them;” (5) “Every man . . . has an equal right of pursuing and taking to his own use all such creatures as are ferae naturae;” (6) “pursue, hunt, take, capture, kill, [or] attempt to take, capture, or kill;” and (7) “hunting, killing, and capturing.” Id. at 2422-23.

114. Id. at 2423. Justice Scalia emphasized that the common law definition of “take” did not include omissions or indirect or accidental acts directed at a population of protected animals. Id.

115. Id. at 2422. The dissent argued that the common meaning of “take” is consistent with the other provisions of § 9, which make it unlawful to: (1) import or export a protected species; (2) possess, sell, deliver, carry, transport, or ship a taken species; and (3) transport, sell, or offer to sell a protected species in interstate or foreign commerce. Id. Justice Scalia noted that ESA’s definition of “take” is expansive because it includes the entire process of “taking” and attempts to “take.” Id. at 2423.

116. Id. Justice Scalia listed the following common definitions of “harm:” (1) “to cause injury;” (2) “to do hurt or damage;” (3) “to hurt; to injure; to damage; to impair soundness of body, either animal or vegetable;” (4) “injury; damage; hurt; to do him bodily harm;” (5) specially focused hurt or injury, as if a personal injury has been anticipated and intended;” and (6) physical or mental distress to living things.” Id. The dissent emphasized that habitat modification is inconsistent with the plain and common meaning of the term “harm” because it is an unintentional act that only indirectly causes injury or death upon a population of animals. Id. Justice Scalia further noted that it is unlikely that “Congress has defined a term in a manner repugnant to its ordinary and traditional sense.” Id.

117. Sweet Home IV, 115 S. Ct. at 2423-24. Justice Scalia stressed that all of the
of the inconsistencies between an expansive definition of "harm" and the general structure of ESA, including: (1) the penalty provisions of ESA;118 (2) use of "take" in other ESA provisions;119 and (3) the habitat modification prohibition in section 7 as applicable to federal agencies.120

The majority's interpretation of the legislative history of ESA was another point of contention for the dissent.121 First, the dissent

other terms listed in the definition of "take" are consistent with the plain meaning of the word. Id. at 2423. For ESA's definition of "take," see supra note 7 and accompanying text. The dissent offered a legal opinion of the Solicitor of USFWS to support the common meaning of "take." Sweet Home IV, 115 S. Ct. at 2424. The Solicitor opined that ESA's "definition of 'take' contains a list of actions that illustrate the intended scope of the term. . . . Under the principle of statutory construction, ejusdem generis, . . . the term 'harm' should be interpreted to include only those actions that are directed against, and likely to injure or kill, individual wildlife." Id. (quoting 46 Fed. Reg. 29490, 29491 (1981)). Justice Scalia equated this approach to the noscitur a sociis method of statutory construction, and concluded that "harm" should be read in a manner that is consistent with the other terms in the definition of "take." Id. Justice Scalia also rejected the majority's contention that a narrow interpretation of "harm" added nothing to the definition of "take." Id.

118. Sweet Home IV, 115 S. Ct. at 2424 (Scalia, J., dissenting). Under ESA, an actor who knowingly violates the taking provision is subject to both criminal and civil penalties. Id. An actor "who otherwise violates" § 9 is subject only to a civil penalty of $500. Id. Justice Scalia argued that an expansive interpretation of "harm" is inconsistent with the penalty provisions of ESA because an actor may be subject to strict criminal and civil liability under § 9 for any habitat modifications that result in the indirect injury or death of a protected species even where the taking is unforeseeable and accidental. Id.

119. Id. at 2425. The dissent emphasized that USFWS's broad definition of "harm" is inconsistent with the use of "take" throughout ESA. Id. Justice Scalia noted the following examples from ESA in which the traditional meaning of "take" is employed: (1) "forfeiture of all guns, traps, nets, and other equipment . . . used to aid the taking, possessing, selling, . . . of protected animals;" (2) takings by Alaskan Indians and Eskimos are exempt "if such taking is primarily for subsistence purposes . . . non-edible byproducts of species taken pursuant to this section may be sold . . . when made into authentic native articles of handicrafts and clothing;" and (3) prohibition of the "possession, sale, and transport of species taken in violation of the Act." Id.

120. Id. Section 7 prohibits the destruction or adverse modification of the critical habitat of a threatened or endangered species by any federal agency. ESA § 7, 16 U.S.C. § 1536(a)(2). Justice Scalia argued that Congress's use of an express prohibition against habitat modification in § 7 prevents an inference of an implicit prohibition against habitat modification in § 9 because it is presumed that the exclusion of similar statutory language by Congress was deliberate. Sweet Home IV, 115 S. Ct. at 2425. Justice Scalia further stressed that the federal government is subject to both sections; therefore, an expansive definition of "harm" that includes habitat modification would be superfluous. Id. at 2426.

121. Sweet Home IV, 115 S. Ct. at 2426-27 (Scalia, J., dissenting). Justice Scalia categorized the statements in the Committee Reports to the ESA which defined "'take' . . . in the broadest possible manner to include every conceivable way in which a person can 'take' or attempt to 'take' any fish or wildlife," as "empty flourish." Id. at 2427.
rejected the Court's theory that the expansive "harm" regulation best served the purposes of ESA advanced by Congress.122 Second, Justice Scalia criticized Justice Steven's emphasis on the addition of the term "harm" to ESA's definition of "take,"123 and disregard for the removal of the "habitat modification" language from ESA.124 Third, the dissent stressed the importance of statements made by the Senate and House floor managers which clearly pronounced that habitat preservation on private property was to be achieved principally by section 5's federal land acquisition program.125 Fourth, Justice Scalia dismissed the significance of the incidental taking permit amendment.126 For the reasons stated above, Justice Scalia found the USFWS "harm" regulation to be an unreasonable and impermissible interpretation of the definition of "take" under

122. Id. at 2426. Justice Scalia argued that Congress did not necessarily intend for any regulatory interpretation that furthers the general purpose of a statute to be the law. Id. The dissent also rejected the majority's reliance on the dictum contained in a footnote in Tennessee Valley Auth. v. Hill in which the Court opined on the effect of the "harm" regulation in that case while assuming its validity. Id. at 2426 n.3. For a further discussion of Hill, see supra notes 18, 19, 73 and accompanying text.

123. Sweet Home IV, 115 S. Ct. at 2427 (Scalia, J., dissenting). The dissent argued that Justice Stevens inflated the significance of the Senate amendment that added "harm" to the definition of "take" to "help achieve the purposes of the bill." Id.

124. Id. Justice Scalia noted that the majority belittled the removal of "the destruction, modification or curtailment of [the] habitat or range" of fish and wildlife by Congress from the definition of "take" in the original version of ESA. Id.

125. Id. During congressional debate over ESA, the Senate floor manager, Senator Tunney, stated:

Through [the] land acquisition provisions, we will be able to conserve habitats necessary to protect fish and wildlife from further destruction. . . . Although most endangered species are threatened primarily by the destruction of their natural habitats, a significant portion of the animals are subject to predation by man for commercial, sport, consumption, or other purposes. . . .

Id. (quoting 119 Cong. Rec. 25,669 (1973)). The House floor manager, Representative Sullivan, added, "[T]he principal threat to animals stems from destruction of their habitat. . . . [The bill] will meet this problem by providing funds for acquisition of critical habitat. . . . Another hazard to endangered species arises from those who would capture or kill them for pleasure or profit. . . ." Id. (quoting 119 Cong. Rec. 30,162 (1973)). Justice Scalia offered these statements as proof that: (1) habitat modification and "takings" are two distinct problems under ESA and (2) habitat preservation on private property is to be accomplished through the federal land acquisition program. Id. at 2428.

126. Id. The dissent emphasized that the incidental taking permit amendment does not necessarily infer prohibition of habitat modification under § 9 because there are numerous substantial "otherwise lawful activities" beside habitat modification that might indirectly and accidentally result in a prohibited "taking." Id.
the *Chevron* standard of review.\textsuperscript{127}

V. CRITICAL ANALYSIS

A. Consistency with Section 9 Case Law

The United States Supreme Court's validation of the USFWS “harm” regulation in *Sweet Home IV* is consistent with jurisdictional trends.\textsuperscript{128} Though the body of section 9 case law is small and inconsistent, most jurisdictions recognize that at least some forms of significant habitat modification could be considered “harmful” to threatened and endangered species, and are therefore prohibited under ESA.\textsuperscript{129} By its holding, the Court significantly strengthened and expanded the proposition advanced in *Tennessee Valley Authority v. Hill*,\textsuperscript{130} that the primary goal of ESA is to halt and reverse the trend of species extinction at any cost.\textsuperscript{131}

B. Methods of Statutory Interpretation

The Court's use of methods of statutory interpretation in *Sweet Home IV* was appropriate. Justice Stevens examined the plain meaning of “harm,” correctly noting that application of the *nositur a sociis* principle\textsuperscript{132} to the terms used in the definition of “take” would effectively nullify both the independent meaning and Congress’s deliberate selection of the words.\textsuperscript{133} The Court’s thorough evaluation of the legislative history of ESA clearly indicated congressional intent.\textsuperscript{134} Furthermore, the majority fully analyzed the structure and general purposes of this sweeping and comprehensive wildlife

\textsuperscript{127} *Id.* at 2430.

\textsuperscript{128} For a further discussion of § 9 case law generally, see *supra* notes 16-32 and accompanying text.

\textsuperscript{129} For a list of cases in accord with the majority’s approach in *Sweet Home IV*, see *supra* notes 18, 19, 21, 22, 28-31 and accompanying text.

\textsuperscript{130} 437 U.S. 153, 184 n.30 (1978).

\textsuperscript{131} *Id.* The majority’s holding also ratified the Ninth Circuit’s controversial *Pailila II* decision. *Palila v. Hawaii Dep’t of Land & Natural Resources (Pailila II)*, 649 F. Supp. 1070 (D. Haw. 1986), *aff’d*, 852 F.2d 1106 (9th Cir. 1988). In *Palila II*, the Ninth Circuit upheld the USFWS “harm” regulation. *Id.* at 1110. *Sweet Home IV*, however, limited the application of *Pailila II* to significant habitat modifications that cause actual death to identifiable protected animals. *Sweet Home IV*, 115 S. Ct. at 2418 (O'Connor, J., concurring). For a further discussion of *Palila II*, see *supra* notes 30 & 31 and accompanying text.

\textsuperscript{132} For an explanation of the *nositur a sociis* principle, see *supra* notes 34 & 35 and accompanying text.

\textsuperscript{133} *Sweet Home IV*, 115 S. Ct. at 2412-13. For a further discussion of the Court’s rejection of the *nositur a sociis* theory, see *supra* notes 67-71 and accompanying text.

\textsuperscript{134} *Id.* at 2416. See *supra* notes 93-98 for a further discussion of the Court’s evaluation of the legislative history of ESA in *Sweet Home IV*. 

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legislation, appropriately affording threatened and endangered species ultimate protection under ESA.

C. The Standard of Review

Justice Stevens also properly applied the standard of review mandated by *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* in *Sweet Home IV*. Under *Chevron*, the reviewing court, when interpreting statutory provisions, must give effect to the clear and unambiguous intent of Congress. If congressional intent is unclear, the court must examine and defer to the agency interpretation if it is a reasonable and permissible construction of the statutory language. Since congressional intent, evidenced by the legislative history of ESA, is ambiguous, the Court appropriately adopted a reasonable interpretation of section 9 promulgated under USFWS's discretionary authority, thus satisfying the rigid standard of review imposed by *Chevron*.

D. Propriety of Reversing the Court of Appeals

The United States Supreme Court correctly reversed the decision of the United States Court of Appeals for the District of Columbia Circuit in *Sweet Home III*. The Court of appeals flatly rejected the inclusion of habitat modification in the definition of "harm." This extremely narrow interpretation of the section 9 taking provision was inconsistent with jurisdictional trends. The District of Columbia Circuit's holding created a significant circuit split on the important statutory question of ESA takings. The


137. *Id.* In *Chevron*, the United States Supreme Court held that judicial interpretation of a statute is appropriate only where there is no clear legislative intent or administrative construction. *Id.* Agency regulations should be given deference unless they are "arbitrary, capricious or manifestly contrary to the statute." *Id.* at 844.

138. For a discussion of the legislative history of ESA that supports validation of the USFWS regulation, see *supra* notes 93-98 and accompanying text. See *supra* notes 121-126 and accompanying text for a discussion of legislative history that negates the "harm" regulation.

139. *Sweet Home III*, 17 F.3d at 1472.

140. *Id.* at 1472. For a further discussion of the rationale of the court of appeals, see *supra* notes 81-83, 86 and accompanying text.

141. For a further discussion of cases that have upheld the validity of the USFWS "harm" regulation, see *supra* notes 18, 19, 21, 22, 28-31 and accompanying text.

142. The invalidation of the USFWS regulation in *Sweet Home III* by the court of appeals created a split of authority on ESA liability because the decision directly
court of appeals ignored virtually all section 9 case law in invalidating the USFWS "harm" regulation.\textsuperscript{143} The court, though acknowledging that a decision upholding the validity of the regulation did exist, failed to address the important and directly adverse \textit{Palila II} holding.\textsuperscript{144}

The District of Columbia Circuit had also abandoned the standard of review in \textit{Sweet Home III}. Given the ambiguous legislative history of ESA, the court of appeals had incorrectly rejected a reasonable and permissible interpretation of section 9 promulgated by USFWS.\textsuperscript{145} In so doing, the court ignored the rigid standard of review imposed by \textit{Chevron}.\textsuperscript{146}

The court of appeals had relied upon various methods of statutory interpretation to reach its conclusion, particularly the strength of the legislative history of ESA,\textsuperscript{147} and judicial rejection of the ratification principle.\textsuperscript{148} The clarity of the legislative intent of ESA, however, was somewhat misrepresented by the court.\textsuperscript{149} The nearly universal rejection of the ratification theory alleged by the court of appeals was also misleading.\textsuperscript{150} In light of the equally convincing support on both sides of the issues of legislative intent and the ratification principle, the District of Columbia Circuit's reliance on such methods, and complete disregard for section 9 case law, was unjustified.

\section*{VI. The Impact of \textit{Sweet Home IV}}

The United States Supreme Court's validation of the USFWS "harm" regulation resolved a circuit split created by \textit{Palila II} and the conflicted with the Ninth Circuit's holding in Palila v. Hawaii Dep't of Land & Natural Resources (\textit{Palila II}), 649 F. Supp. 1070 (D. Haw. 1986), aff'd, 852 F.2d 1106 (9th Cir. 1988).

\textsuperscript{143} The court of appeals relied solely upon the various methods of statutory construction to invalidate the "harm" regulation. \textit{Sweet Home III}, 17 F.3d at 1464-72.

\textsuperscript{144} \textit{Id.} at 1469. The court of appeals simply stated that the Ninth Circuit had upheld the USFWS regulation. \textit{Id.} The court, however, failed to state the significance of the fact that its holding in \textit{Sweet Home III} created a circuit split.

\textsuperscript{145} \textit{Id.} at 1472.

\textsuperscript{146} For a further discussion of the \textit{Chevron} standard of review, see supra notes 39-44 and accompanying text.

\textsuperscript{147} \textit{Sweet Home III}, 17 F.3d at 1466-67.

\textsuperscript{148} \textit{Id.} at 1467-72.

\textsuperscript{149} For a discussion of legislative history in support of the USFWS regulation, see supra notes 93-98 and accompanying text. See supra notes 121-126 and accompanying text for a discussion of legislative history that negates the "harm" regulation.

\textsuperscript{150} For a general discussion of the ratification principle, see supra note 37 and accompanying text.
District of Columbia Circuit's decision in *Sweet Home III*. Prior to this resolution, courts had little guidance in the complex and controversial area of ESA takings. Courts now have a clear and concise interpretation of the section 9 taking prohibition.

By adopting USFWS's interpretation of "harm," *Sweet Home IV* also exemplifies the Supreme Court's willingness to defer to agency expertise and ESA's broad delegation of authority to the Secretary of the Interior. Validation of the "harm" regulation, therefore, strengthened the discretion of federal agencies generally to promulgate regulations that represent a reasonable construction of the statutory language.151

The decision in *Sweet Home IV* also confirmed many of the fears and criticisms of ESA's sweeping potential for liability.152 In upholding the USFWS regulation, the Court accomplished the following objectives: (1) increasing the strength of ESA; (2) promoting the primary goals of ESA by affording threatened and endangered species and their critical habitats the ultimate protection under the law; and (3) extending section 9 taking liability. Though actors may still obtain incidental taking permits under ESA, proponents of development may argue that the broad definition of "harm" upheld in *Sweet Home IV* will obstruct and discourage public and private land use programs.153


152. ESA's broad scope has significantly restricted private land use and development. Craig Anthony Arnold, *Conserving Habitats and Building Habitats: The Emerging Impact of the Endangered Species Act on Land Use Development*, 10 Stan. Envtl. L.J. 1 (1991). Developers must expend time and money to implement impact studies, devise alternative plans and apply for necessary permits to avoid § 9 liability. *Id.* at 4. ESA has particularly restricted the construction of low-income housing and minority businesses because the compliance requirements are cost-prohibitive to these groups. *Id.* at 34. A more realistic approach to the conservation problem would be to balance species preservation with social needs and the benefits of development. *Id.* at 5.

153. It has been suggested that the expansive scope and power of ESA have resulted in the preservation of endangered species at the expense of human jobs and property rights. Stuart Hardy, *The Endangered Species Act: On a Collision Course with Human Needs*, 13 Pub. Land L. Rev. 87 (1992). Some of the effects of ESA's § 9 taking prohibition include plummeting property values, the slowing of economic and land development, and suspension of agricultural undertakings. *Id.* at 92. It has also been argued that though preservation of threatened and endangered species and their habitats is necessary, it cannot be achieved at "any cost," because in the political arena, preservation will ultimately be weighed against economic interests. *Id.* at 88. Specific concerns of the business community include: (1) economic impacts must be sufficiently weighed in balancing economic interests and species protection; (2) compensation for prohibitions on private property; (3) preemption of other state and federal land use statutes by ESA; and (4) abuse
The controversy and significance of *Sweet Home IV* cannot be overstated. The holding is particularly significant because it gives courts clear guidance on the issue of section 9 takings. District courts will no longer have the discretion to choose between the two conflicting authorities in this area. The confusion over which land uses result in section 9 liability is also resolved by the decision. This holding ultimately, and most significantly, strengthens the ESA and increases its ability to protect and conserve our most precious resources.

*Shelli Lyn Iovino*

of taxonomic classification by animal rights activists to preclude economic growth. *Id.* at 90-91.

154. ESA offers the following alternatives to private landowners who are uncertain about taking liability: (1) do not undertake any activity that may result in a § 9 taking; (2) apply for an incidental taking permit; or (3) seek guidance from USFWS as to whether either the species or the activity involved will result in ESA liability. Steven P. Quarles et al., *The Unsettled Law of ESA Takings*, 8 NAT. RESOURCES & ENV'T. 10; 61 (1993).