On June 29, 1995, the Supreme Court announced its long-awaited decision in Sweet Home v. Babbitt, 11 S.Ct. 714 (1995), and the US government won. A group of landowners, loggers, and families who are dependent on the forest products industry had sued the government in federal court asking it to declare that the Department of the Interior's Fish and Wildlife Service (FWS) exceeded its authority in regulating private land under the Endangered Species Act (ESA). With the ruling the FWS retained the right to continue its regulation.

The ESA provides penalties for persons who “take” an endangered species. The law then defines “take” to include “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture...” (16 USC Sec. 1532 [19]). The Interior Department has written interpretive regulations further defining “harm” (and therefore “take”) to include “significant habitat modification or degradation that actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering” (50 CFR Sec. 17.3 [1994]).

That regulatory definition of harm is the fulcrum against which the FWS levers land-use restrictions on private land. In upholding the regulation, the Supreme Court said the FWS reasonably construed the intent of Congress when it defined “harm” to include habitat modification on private land. The ruling is therefore important, perhaps not so much as law but as forest policy.

Facial Challenges

The Sweet Home case became a “facial” rather than an “as applied” challenge to the government's regulation when both sides moved the trial court for summary judgment, each side, of course, asking for a ruling in its favor. In doing so, both parties claimed there were no important pending factual disputes, only disputes about the meaning of the law. Had the case arisen in a specific factual setting, the plaintiffs would contest the regulation “as applied” in that setting. The Court's ruling would be then understood in the context of those facts, making its generality uncertain. The Supreme Court and other appellate courts often wait to see how lower courts apply their rulings in other cases. If clarifications become necessary, or if lower courts misapply the law, the Supreme Court may accept another case on the same topic and modify, refine, limit, or strengthen the legal principle. When deciding an “as applied” case, the Court is sometimes
more inclined to boldness. If *Sweet Home* arose “as applied,” the Court could have ruled against the FWS without nullifying its written regulations. The regulation might still have been valid in different situations.

Without a factual context, however, the ruling becomes applicable regardless of situation. To rule against the FWS in such a dispute is to say the agency’s regulation is invalid on its face, independent of application.

The plaintiffs lost their motion for summary judgment in the trial court and appealed to the DC Circuit Court of Appeals. They lost their first appeal, asked for a rehearing, and won. On rehearing, one judge changed his mind and voted for the plaintiffs. Given the importance of the ruling to the FWS, and the then-existing conflict with an earlier case (*Palila v. Hawaii Dept. of Land and Natural Resources*, 852 F.2d 1106 [1988]), the government appealed. In *Palila*, the Ninth Circuit had upheld a federal district court ruling that the FWS “harm” regulation, as applied to sheep grazing on the principal food source for the endangered palila bird (found only on the slopes of Mauna Kea on the Island of Hawaii), was within the intent of the ESA.

The Standard of Review

Underlying the specific issue of *Sweet Home* is the question of the scope of review. To what extent should a reviewing court inquire into an agency’s decision? If the scope of review is too broad, courts could destroy an agency’s ability to administer complex, specialized programs (Schwartz 1991). But if the scope is too narrow or lenient, courts give rein to an agency’s natural tendency toward self-empowerment and expansion. Judicial review may become a “mere feint” (*SEC v. Chenery Corp.*, 332 US 194 [1947], J. Jackson dissenting).

The Supreme Court generally resolves the issue in favor of judicial deference to agency decisions. The early cases—*Gray v. Powell*, 314 US 402 (1941), and *NLRB v. Hearst*, 322 US 111 (1944)—indicated that courts should defer to agency interpretations of statutes, especially in cases where the appealed issue involves facts. The issue in *Sweet Home* is considered one of law, not fact, because it involves the definition of the statutory term “harm.”

In a more recent case, *Chevron u. Natural Resources Defense Council Inc.*, 467 US 837 (1984), the Court extended the principle of deference to issues of law, and it applied the *Chevron* principle in *Sweet Home*. The Court prescribed a two-step analysis when reviewing an agency’s interpretation of a statute. A court first looks to see if, in the statute, “Congress has directly spoken to the precise question at issue.” If so, that settles the matter. If not, then a court asks “if the administrator’s reading fills a gap or defines a term in a way that is reasonable in light of the legislature’s revealed design.” If the administrator’s interpretation is “reasonable,” courts are to defer to the agency’s judgment.

Nonetheless, questions remain about the meaning of “reasonable.” Is an agency regulation reasonable:

- if some argument supports it, even though the judges believe there are better arguments against it?
- if, based on the arguments, a range of interpretations is permissible and the government’s interpretation is within the range?
- only if, on review, the court agrees the agency selected the best alternative?

The standards implicit in the above questions are probably arranged in increasing order of difficulty. That is, if the first question implies the proper standard (some argument in its support), then almost any regulation—and surely the regulation at issue in *Sweet Home*—would pass muster. At the other extreme, if the last question implies the proper standard (best interpretation of congressional intent), then many regulations, and perhaps the regulation in this case, would be invalidated by the judges.

In *Chevron*, the Supreme Court directed courts to use a standard near the beginning of the list, granting deference or considerable weight to the interpretation of the governmental agency—especially when the issue involves conflicting policies about complex, technical areas of knowledge within the agency’s expertise. Judges generally lack the technical expertise of agency personnel, so they should not impose their policy judgments on an agency.

Given the inherent difficulties of a successful facial chal-
The Ruling

Six justices voted for the government and three voted for Sweet Home. Justice Stevens wrote the majority opinion and Justice Scalia wrote the dissent. Justice Stevens said the text of the ESA supports the regulation as a reasonable interpretation of congressional intent. First, the ordinary meaning of the word “harm” includes injure, and in the context of the ESA naturally includes habitat modification. He also noted that unless “harm” encompasses indirect injury, it would have no meaning independent of the other words in the statute. Courts frequently interpret statutes based on the principle that Congress does not include surplus words; therefore it is more likely that Congress intended the word to have an independent meaning.

Second, the regulation supports the purposes of the ESA. The ESA is comprehensive and aims to protect ecosystems on which endangered species depend. In TVA v. Hill, 437 US 153 (1978), the Court recognized that Congress intended to halt and reverse the trend toward extinction “whatever the cost.” To invalidate the regulation would invalidate the Secretary of the Interior’s definition in every circumstance, even when habitat modification was undertaken by landowners who knew their activities will result in the extinction of a species, such as knowingly draining a pond that harbors the last members of a species.

Third, the 1982 amendments to the ESA, which authorized the Secretary to issue incidental take permits, “strongly suggests” that Congress understands taking to include indirect as well as direct actions. Construing the term “harm” narrowly, as the plaintiffs advocate, would make incidental take permits nearly superfluous—there would be little need for landowners to apply for permits if the Secretary’s regulatory authority did not reach habitat modification on private land.

Those three reasons are sufficient to make the Secretary’s definition of harm a reasonable construction of the statute, and under Chevron, reasonableness is all that is required.

In Dissent

Justice Scalia wrote a long, thorough dissent arguing that:

- other dictionaries indicate the preferred interpretation of harm is limited to more direct, affirmative conduct against animals;
- the FWS regulation has very relaxed causation requirements, which will make it easy to prove violations;
- the regulation, as written and interpreted by the FWS, will allow landowners to be charged and convicted for omissions to act—criminal statutes usually require an overt act;
- the operative term in the statute, “take,” has an independent meaning in the common law of wildlife that implies direct, affirmative conduct intentionally directed against particular animals; and
- the civil penalties imposed under one section of the ESA, 26 USC Sec. 1540(a)(1), are strict liability, which means landowners may be in violation of the act for accidental, innocent activities that through remote chains of causation, harm wildlife indirectly.

Scalia argues that, in combination, these points imply truly sweeping liability. Persons can become liable for violating the ESA for a large number of routine activities (farming, building logging roads, harvesting timber) that modify habitat but are not directed at animals, and the regulation is therefore unreasonable.

Because Sweet Home is so similar in structure to Chevron, it is not new law in the sense of earlier decisions interpreting the Fifth Amendment (Flick et al. 1995). But the decision carries important forest policy implications.

As Forest Policy

The ESA is based on congressional findings that economic growth and development cause extinction; that many species are in danger of extinction; and that these species have aesthetic, ecological, educational, historical, recreational, and scientific value—16 USC Sec. 1531(a)(1)–(3). One of the act’s purposes is to conserve the ecosystems on which such species depend; see 16 USC Sec. 1531(b). The act surely then contemplates limiting economic growth in favor of species protection.

The field of economics recognizes that property rights are important institutional determinants of the success of free economies (North 1987, 1990, Barzel 1989) and that these rights influence the growth of productivity in the economy generally and in forestry (Baumol, Blackman, and Wolff 1989, Flick 1994). Well-defined, secure property rights reduce the costs of transacting business (North 1990, Pejovich 1995). Countries that define, protect, and enhance private property rights generally outperform those that destroy or curtail them (North 1987, Pejovich 1995).

Sweet Home affirms a substantial public property right in otherwise private property. On public and private land with endangered species, Congress intends that protection of those species be paramount. The production of other goods and services on those lands will be subordinated to the public interest in endangered species. Regulatory authority to pursue that policy vests in the FWS—which, as its name implies, is not a multiple-use (timber, range, recreation) agency and does not have broad experience in forest policy.

The ESA offers landowners one option to the blanket prohibition against “taking” endangered species. Landowners may apply for an incidental take permit under Sec. 10. To obtain a permit, they must write (at their own expense) an acceptable Habitat Conservation Plan, terms of which are negotiated with FWS officials and subject to public hearings. This is an expensive, time-consuming process, and therefore unsuitable for most nonindustrial private landowners. Further, there is no assurance the final terms of the permit will be less costly than its alternative—simply obeying the prohib-
bution against a “take.”

In *Sweet Home*, the Court referred to *TVA v. Hill* and the purposes of the ESA, describing it as the most comprehensive legislation for species protection ever enacted and demonstrating the plain intent of Congress to “halt and reverse the trend toward species extinction, whatever the cost. This is reflected...in literally every section of the statute.” This is bold, controversial forest policy.

As more species are listed and more habitat is designated, more forestland will be subject to the ESA—where protection of threatened and endangered species will be the primary purpose. Other owner objectives will be subordinated to an extent determined by FWS biologists who write and apply forest management guidelines to ensure species protection “whatever the cost.”

In the South, a major species of interest to forest owners is the red-cockaded woodpecker (RCW). In 1992, the FWS circulated a portion of its anticipated guidelines for managing private forests with RCWs (US Fish and Wildlife Service 1992). They contain complex, open-ended provisions. In cluster areas, for example, where the birds reside, the guides contain the following specifications:

- No cutting of cavity trees, and no damaging of cavity trees that results in death. Damage may include “exposure to herbicides, and fire scorch to the crown due to negligence...during prescribed burning.” But how will a landowner know what the FWS considers negligence?

- No “removing or damaging any pine trees greater than 10 inches dbh without assessing the cluster’s existing stocking rate and potential cavity tree situation.” What rules should a landowner follow in assessing stocking rates and cavity tree situations?

- No use of pesticides (insecticides) to control insect infestations if such control “will either result in significant losses of trees...or in removal of any cavity trees,” unless the FWS is contacted.

- No new roads through a cluster unless there is no reasonable alternative. In this case the FWS must approve construction or clearing activities.

Guides are also listed for foraging areas:

- A minimum of 60 acres of foraging habitat, and a minimum of 3,000 square feet of pine basal area in trees 10 inches dbh or larger. Additional stocking requirements cover more than three pages.

- “Open” stands are required, but the conditions for openness are not defined. The guides do specify, “If such a stand has not been prescribed burned and has not been thinned to a basal area of 80 square feet or less, it may not satisfy the ‘open’ condition criteria..... Stand quality (‘open’ characteristics), which ultimately determines foraging suitability and thus use, has to be considered in identifying acceptable foraging habitat.”

- No spraying of pesticides on standing trees unless necessary, in which case the FWS must be contacted prior to application.

There are also complex monitoring provisions for determining if a cluster is inactive or abandoned. “The monitoring program should be ‘individualized,’ to the degree necessary, to determine ‘beyond a reasonable doubt’ what, if any, RCW activity is taking place at the site....As general guidance, when it is not obvious that the cluster has been abandoned a long time (several to many years), monitoring...will be necessary to determine the cluster’s status.” Monitoring programs “will have to be developed on a case-by-case basis and discussed with the local [FWS personnel] for adequacy and acceptability.”

Under the *Sweet Home* decision, these rules are not now presumptively invalid, although they are certainly controversial. These provisions may even be unconstitutional. Their application on private timberland may violate the Fifth Amendment, or they may exceed their grant of authority under the Commerce Clause. The FWS may press for criminal prosecution in circumstances where

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the governing law and regulations are unconstitutionally vague.

Each of these arguments against RCW guides would require a landowner subjected to the guides to mount an "as applied" challenge. Application of the guides may be constitutional in many circumstances, while in others it may not. That depends on the facts, which means that it is not possible to determine in advance what circumstances separate legal from illegal application.

Assertive, wealthy landowners may litigate. Others will acquiesce.

It is clear from the RCW guides that private landowners must maintain regular contact with the FWS, coordinating and adapting forest management with the guidance of FWS officers. The cost of transacting private business will necessarily increase, and long-term income potential from the land will decline (Zhang 1996; Zhang and Pearse, in press). The effect is to reduce the economic efficiency of land management—including management for crops, timber, pasture, recreation, and wildlife that is not endangered or threatened. Consumers will pay more for products from these areas as increasing amounts of land are allocated to endangered species.

Timber-growing and other uses will intensify on the remaining lands and may shift overseas, as may new growth and investment in wood products manufacturing. These changes will naturally be marginal, especially in the near term.

Social costs will increase in other ways. State agencies will likely help apply and enforce the ESA, and demand will rise for federal personnel to authorize or modify private management plans. Without additional funding for ESA administration, waiting costs will increase as landowners queue up for government advice and authorization.

Conclusions

*Sweet Home* is a judicial interpretation of congressional policy as embodied in the ESA. It is not a constitutionally based ruling, yet it is at

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**Literature Cited**


ZHANG, D., and P. PEARSE. Differences in silvicultural investment under various types of forest tenures in British Columbia. *Forest Science* In press.

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