

2002

Hawaii Longline Ass'n v. National Marine Fisheries Service: Are Regulatory Ambiguities Within The Endangered Species Act A Snake In The Grass?

Dale Dixon

University of Maine School of Law

Follow this and additional works at: <http://digitalcommons.maine.edu/oclj>

Recommended Citation

Dale Dixon, *Hawaii Longline Ass'n v. National Marine Fisheries Service: Are Regulatory Ambiguities Within The Endangered Species Act A Snake In The Grass?*, 8 *Ocean & Coastal L.J.* (2002).

Available at: <http://digitalcommons.maine.edu/oclj/vol8/iss2/4>

This Case Note is brought to you for free and open access by the Journals at University of Maine School of Law Digital Commons. It has been accepted for inclusion in Ocean and Coastal Law Journal by an authorized administrator of University of Maine School of Law Digital Commons. For more information, please contact mdecrow@maine.edu.

HAWAII LONGLINE ASS'N v.
NATIONAL MARINE FISHERIES SERVICE:
ARE REGULATORY AMBIGUITIES WITHIN
THE ENDANGERED SPECIES ACT
A SNAKE IN THE GRASS?

*Dale Dixon**

I. INTRODUCTION

In *Hawaii Longline Ass'n v. National Marine Fisheries Service*,¹ the Hawaii Longline Association (HLA), a fishery trade association,² filed suit seeking an injunction to prohibit the National Marine Fisheries Service (NMFS) from excluding it from participating in formal consultations pursuant to the Endangered Species Act (ESA) and to prevent NMFS from withholding a draft biological opinion.³ The U.S. District Court for the District of Columbia held that the NMFS' interpretation of the regulation it had authored, which defines HLA's applicant status, was a post-hoc rationalization⁴ and therefore undeserving of substantial deference by the court.⁵ On the parties cross-motions for partial summary judgment, the court granted in part and denied in part HLA's motion for partial summary judgment and denied NMFS' motion for partial summary judgment.⁶

* University of Maine School of Law, Class of 2004.

1. No. 01-765 U.S. Dist. LEXIS 7263 (D.D.C. Apr. 25, 2002).

2. HLA "represents the owners, crews, suppliers, dealers, and vessels that make up the Hawaii-based longline tuna and swordfish fishery . . ." *Id.* at *2.

3. A biological opinion, produced during the formal consultation process, sets forth the expert agency's conclusions as to whether or not any endangered species will be jeopardized or their habitat adversely modified by the actions of the acting agency. *Greenpeace v. National Marine Fisheries Serv.*, 55 F. Supp. 2d 1248, 1255-56 (W.D. Wash. 1999).

4. The court explained a post-hoc rationalization as a "litigation position that had never been articulated by the agency itself prior to the litigation." *Hawaii Longline Ass'n.*, No. 01-765 U.S. Dist. LEXIS 7263, at *18.

5. *Id.* at *67.

6. *Id.* at *45.

The principal issue was whether HLA should be considered an applicant under the ESA, entitling HLA to participate in consultation proceedings with NMFS.⁷ The NMFS, who was conducting a biological assessment, contended that HLA was not entitled to participate in the consultation process. By challenging NMFS' interpretation, HLA invited the court to determine whether NMFS' interpretation of its own consultation regulation, found at 50 C.F.R. § 402 and issued jointly by NMFS and the U.S. Fish and Wildlife Service (USFWS), was unreasonable.⁸ The issue of regulatory interpretation required the court to examine a host of deference standards in order to decide whether it should substitute its judgment for that of the Agency's. Unfortunately, resolution of the substantive issue in the case, which was whether the longline fishing practices of HLA's members were contributing to the "decline in populations of four species of threatened or endangered sea turtles,"⁹ was being delayed by litigation over regulatory ambiguities. The question now becomes, in situations dealing with species teetering on the edge of extinction, does litigation over ESA regulatory ambiguities do injustice to both the conservation interests and the economic interests involved? And secondly, if it does, what can be done to improve how the ESA is promulgated, administered and enforced?

This Note considers whether changes should be made to the ESA that would clarify ambiguities that are raised by this case and other vague regulations promulgated by NMFS and USFWS that may present similar interpretation problems in the future. This Note contends that it is common, appropriate and often efficient for Congress to leave to agencies the job of promulgating the detailed regulations used to implement a statute, but that such an approach may not be desirable with respect to the ESA. Regulatory ambiguities within the ESA can cause endless litigation, uncertainty for all the parties involved as well as overburden federal agencies who are working with finite resources. After reviewing the development of the ESA, the significance of the ESA, and the judicial review of administrative actions, this Note concludes that the regulatory ambiguities presented by this case need to be clarified in order to avoid diluting the effectiveness of such important preservation legislation as the ESA.

7. *Id.* at *12.

8. *Id.* at *14-15.

9. *Id.* at *5.

II. EVOLUTION OF THE ENDANGERED SPECIES ACT

The Endangered Species Act, enacted in 1973, is intended to protect threatened and endangered plant and animal species from extinction.¹⁰ Three major pieces of wildlife legislation preceded the ESA.¹¹ These preceding statutes were the Lacey Act of 1900, the Endangered Species Conservation Act of 1966 and the Endangered Species Preservation Act of 1969.¹² The Lacey Act prohibited "the importation of animals taken in violation of either state or foreign law."¹³ Although the Lacey Act was not designed to preserve endangered species, it was an important milestone in conservation because it was the first use of federal power to protect wildlife and biodiversity.¹⁴ The Endangered Species Conservation Act of 1966 and the Endangered Species Preservation Act of 1969 were both specifically designed to protect endangered species. The utility of these early acts, however, was limited by Congress' attempt to reach a compromise between economic interests and conservation interests.¹⁵ The ESA of 1973 replaced the acts of 1966 and 1969.

The ESA provides a structure for saving plant and animal species from extinction that is more comprehensive than any other conservation legislation ever enacted.¹⁶ The Supreme Court, in *Tennessee Valley Authority v. Hill*, viewed the ESA as holding environmental goals of preservation above economic considerations.¹⁷ Passage of the ESA in 1973 was largely the result of shifting social paradigms that allowed for the recognition of the value of healthy ecosystems and their value to humanity. It was also during this period, the 1970's, that we saw the development of numerous environmental lobby groups, the first "Earth Day"¹⁸ and the passage of congressional legislation designed to protect the quality of the human environment and preserve the natural environment. Such legislation includes the Clean Water Act, the Clean Air Act and the National Environmental Policy Act.¹⁹

10. 16 U.S.C. §1531 (2002).

11. Davina Kari Kaile, Note, *Evolution of Wildlife Legislation in the United States: Analysis of the Legal Efforts to Protect Endangered Species and the Prospects for the Future*, 5 GEO. INT'L ENVTL. L. REV. 441, 446-447 (1993) [hereinafter Kaile].

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 180 (1978).

17. *Id.*

18. Kaile, *supra* note 11, at 456-57.

19. *Id.* at 456.

The ESA's stated purpose is "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved," and "to provide a program for the conservation of such endangered species and threatened species . . ." ²⁰ The key provisions of the Act place certain requirements on the USFWS and the NMFS.

Section 4 of the Act requires the Secretary of the Interior and the Secretary of Commerce to create and maintain a list of endangered and threatened species. ²¹ Section 7 prohibits federal actions that "jeopardize" the continued existence of a listed species or result in the destruction of a listed species critical habitat. ²² Section 9 prohibits the "taking" of any listed species by a private individual or any federal agency. ²³ Of these sections, Section 7 is by far the most influential. The courts have played a significant role in making it such a powerful and far-reaching portion of the ESA by adopting a literal interpretation of the Section 7 language. ²⁴

The ESA is a powerful piece of conservation legislation that affects a vast range of economic and social enterprises. Like so many other federal statutes, Congress has conferred broad rulemaking powers on USFWS and NMFS and left them with the detailed implementation of the statute. This places a heavy burden on these agencies to ensure that the goals and standards of the ESA are satisfied.

III. JUDICIAL DEFERENCE GIVEN TO AGENCY'S LEGAL INTERPRETATIONS

Agencies frequently interpret the meaning of statutes and the rules and regulations that they have promulgated. Section 706 of the Administrative

20. 16 U.S.C.A. § 1531(b) (2000). An endangered species "means any species which is in danger of extinction throughout all or a significant portion of its range . . ." 16 U.S.C. § 1532(6) (2000). A threatened species "means any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." 16 U.S.C. § 1532(20) (2000).

21. 16 U.S.C.A. § 1533 (2000). The determination of whether a species is endangered should be made on "the best of the scientific and commercial data available." 16 U.S.C. § 1533(b)(1)(A) (2000). This is an important provision because it allows NMFS and USFWS to act before a species becomes endangered, something the 1969 Act was criticized for failing to do. Kaile, *supra* note 11, at 451.

22. 16 U.S.C.A. §§ 1536(a)(1), (2) (2000). Section 7 is the most controversial section of the Act, which is ironic because it received little attention during the Congressional debates that established the Act. Kaile, *supra* note 11, at 455.

23. 16 U.S.C.A. § 1532(19). A "taking" is defined as harassing, harming, pursuing, hunting, shooting, wounding, killing, trapping, capturing, or any attempt to do any of the above. *Id.*

24. Kaile, *supra* note 11, at 456-57. See also *Tennessee Valley Auth.*, 437 U.S. 153 (1978).

Procedure Act (APA) calls for a court to set aside an agency's action if the court determines that the action was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law or without observance of procedure required by law.²⁵ In cases challenging an agency's interpretation of a regulation, it seems that the APA provides little in the way of deference and permits a reviewing court to substitute its own judgment for the agency's legal interpretation. Contrary to the APA, judicial deference analysis in most cases tends to turn on Supreme Court precedent, which gives greater deference to agency action than does Section 706.

The general standard applied by courts when reviewing an agency's interpretation of a statute under its administration is that of substantial deference.²⁶ As discussed by the Supreme Court in *Chevron v. Natural Resources Defense Council*, the standard of substantial deference applies in instances where "Congress has not spoken to the precise question at issue."²⁷ The court must sustain the agency's interpretation so long as it is "based on a permissible construction of the statute."²⁸ This strong degree of deference requires the court to defer to an agency's interpretations of law in most instances and it reflects the Court's recognition of the fact that the agency's expertise may give it an advantage in construing the law. Nonetheless, the *Chevron* standard of substantial deference does not address the situation that arises when an agency's interpretation of a rule or regulation it has authored is being challenged. The Supreme Court addressed this issue in *Auer v. Robbins*.²⁹ In *Auer*, the Supreme Court held that an agency's interpretation of its own regulation is entitled to an even stronger degree of deference than the *Chevron* standard provided and should be considered controlling "unless plainly erroneous or inconsistent with the regulation."³⁰ In most cases dealing with an agency's interpreta-

25. 5 U.S.C.A. § 706(2) (1996).

26. *Hawaii Longline Ass'n*, No. 01-765 2002 U.S. Dist. LEXIS 7263, at *16 (citing *Chevron U.S. A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984)).

27. *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 842-45 (1984).

28. *Id.*

29. 519 U.S. 452 (1997).

30. *Auer v. Robbins*, 519 U.S. at 461 (1997) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989) and *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)). In *Auer v. Robbins*, St. Louis police sergeants and a lieutenant sued the police commissioners for overtime pay under the *Fair Labor Standards Act* of 1938. *Auer*, 519 U.S. at 455. The petitioners interpreted the regulation to mean that they were entitled to overtime pay, however, both the District Court and the Eighth Circuit disagreed with the petitioners interpretation. *Id.* at 456. The Supreme Court held that the Secretary of Labor's interpretation of his own regulatory test is not "plainly erroneous," and this is controlling. *Id.* at 461. "Auer deference is warranted only when the language of the regulation is ambiguous." *Christensen v. Harris County*, 529 U.S. 576, 588 (2000).

tion of its own regulation, the deference analysis is comprised of a review of *Chevron* and *Auer*. In our imperfect world, however, a second line of cases has developed that focuses on the appropriate degree of judicial deference when *Chevron* and *Auer* are inapplicable. In *Christensen v. Harris County*,³¹ the Court held that “*Chevron* deference is only due where an agency’s statutory construction is announced through formal adjudication or rulemaking.”³² The Court in *Christensen* was confronted with an agency interpretation contained in an opinion letter and not a formal adjudication.³³ Under these circumstances, the Court held that such interpretations are “entitled to respect” under the Court’s decision in *Skidmore v. Swift & Co.*,³⁴ “but only to the extent that those interpretations have the ‘power to persuade.’”³⁵ In *United States v. Mead Corporation*, the Court affirmed the assertion that *Skidmore* can be applied when *Chevron* is inapplicable.³⁶

In short, the deference standard applied by the reviewing court depends upon the sort of agency action that is being challenged. Circumstances may arise where the standards of *Chevron*, *Auer* and *Skidmore* cannot be applied. One particular situation where these highly deferential standards are not applied is when the court finds that an agency’s interpretation is a post-hoc rationalization. A post-hoc rationalization is a litigating position that is wholly unsupported by regulations, rulings, or administrative practice and which has not been asserted prior to the litigation.³⁷ In *Bowen v. Georgetown University Hospital*, the Court stated that “deference to what appears to be nothing more than an agency’s convenient litigating position would be entirely inappropriate.”³⁸

31. 529 U.S. 576 (2000).

32. *Hawaii Longline Ass’n.*, No. 01-765, 2002 U.S. Dist. LEXIS 7263, at *21 (citing *Christensen*, 529 U.S. 576 (2000)).

33. *Christensen v. Harris County*, 529 U.S. 576, 587 (2000).

34. 323 U.S. 134, 140 (1944).

35. *Christensen v. Harris County*, 529 U.S. at 587 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)).

36. *United States v. Mead Corp.*, 533 U.S. 218 (2001) (holding that a ruling letter by the United States Customs Service is not entitled to *Chevron* deference, but under *Skidmore*, it is eligible to claim respect according to its persuasiveness).

37. *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 212 (1988).

38. *Id.* at 213. See also *Investment Company Institute v. Camp*, 401 U.S. 617, 628 (1971) (where the Court states “Congress has delegated to the administrative official and not to appellate counsel the responsibility for elaborating and enforcing statutory commands.”) See also *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962) (the Court stated that “[t]he courts may not accept appellate counsel’s post-hoc rationalizations for agency actions. . .”).

The federal courts accept the notion that courts should defer to administrative determinations because congressional legislation granted the agency interpretative power, however, ambiguities allow for agency discretion and in many instances the agency has more expertise on the issue than does the court.³⁹ Still, it is a complex issue due to the great variety of actions performed by agencies.⁴⁰ The process of judicial review is further complicated by the Supreme Court's choice to tailor deference to the specific variety of agency action being challenged.⁴¹ In *Mead*, the Court stated that Congress has indicated that different statutes present different reasons for considering respect for the exercise of administrative authority or deference to it.⁴² As a result of the variation in statutes and agency action, the courts have to wade into a pool of deference standards and exercise what they believe is the appropriate standard, perhaps causing some inconsistency in the results of similarly situated cases.

IV. THE HAWAII LONGLINE DECISION

In *Hawaii Longline Ass'n v. National Marine Fisheries Service*,⁴³ HLA sought an injunction to prohibit NMFS from excluding HLA from participating in upcoming consultations and to prevent NMFS from withholding a draft biological opinion. The consultations that HLA wished to participate in were consultations required by the ESA whenever the Fisheries Management Plan⁴⁴ for the Hawaii region⁴⁵ is revised. The biological opinion,⁴⁶ which is at the heart of this case, was sought by HLA so that it could review the opinion, as well as give comments and convey the trade association's position to NMFS. NMFS was conducting the ESA consultations because in May of 2000 it had "determined that longline

39. *Mead Corp.*, 533 U.S. at 236.

40. *Id.*

41. *Id.* at 237.

42. *Id.* at 238.

43. No. 01-765, 2002 U.S. Dist. LEXIS 7263.

44. Fisheries under the United States' jurisdiction are regulated by the NMFS under the Magnuson-Stevens Act. 16 U.S.C.A. §§ 1801-1883 (1994). The Magnuson-Stevens Act established eight regional councils that are responsible for preparing fisheries management plans. *Hawaii Longline Ass'n*, No. 01-765, 2002 U.S. Dist. Lexis 7263, at *4.

45. The fisheries based in Hawaii, Samoa, Guam, and the Northern Mariana Islands fall under the Western Pacific Fishery Management Council. 16 U.S.C.A. § 1852(a)(1)(H) (2000).

46. The biological opinion sets forth the agency's conclusions regarding jeopardy to the subject species and adverse modification to the species critical habitat, as well as the reasoning supporting the opinion. *Greenpeace v. National Marine Fisheries Serv.*, 55 F. Supp. 2d 1248, 1256 (W.D. Wash., July 1999).

fishing had likely exceeded the predicted take levels for Olive Ridley⁴⁷ sea turtles as specified in the 1998 biological opinion.⁴⁸ Essentially, NMFS was examining whether longline fishing⁴⁹ in the Hawaii region was contributing to the decline in Loggerhead,⁵⁰ Leatherback,⁵¹ Green,⁵² and Olive Ridley sea turtle populations. "It is undisputed that turtles of each species are killed or injured when they become entangled in fishing lines or pierced by hooks" set out by the longlining ships.⁵³ The legal issue, under Sections 7 and 9 of the ESA, was whether the longlining was jeopardizing the turtles' existence over all or a portion of their ranges.⁵⁴

The court granted HLA's motion for partial summary judgment on HLA's claims that it was an applicant for the purposes of consultation under the ESA and that it was entitled to a copy of the draft biological opinion.⁵⁵ The court denied NMFS' motion for partial summary judgment.⁵⁶

On the first issue, whether HLA was an applicant under the ESA, HLA contended that it and its members qualify as applicants because its

47. The Olive Ridley sea turtle (*Lepidochelys kempî*) is listed as threatened in its American range in the Eastern Pacific. Marlo Pfister Cadeddu, *Turtles in the Soup? An Analysis of the GATT Challenge to the United States Endangered Species Act Section 609 Shrimp Harvesting Nation Certification Program for the Conservation of Sea Turtles*, 11 GEO. INT'L ENVTL. L. REV. 179, 181 (1998).

48. *Hawaii Longline Ass'n.*, No. 01-765, 2002 U.S. Dist. LEXIS 7263, at *7.

49. Pelagic longline fishing targets migratory species of fish, such as swordfish, tuna and various species of shark. Longline vessels employ a mainline that can be up to sixty miles long. Attached to the mainline are 400 to 2,000 branch lines (HLA) each with a hook baited with squid. *Hawaii Longline Ass'n.*, No. 01-765, 2002 U.S. Dist. LEXIS 7263, at *5. Swordfish longline gear is usually set in the evening and hauled the next morning. Longlining for swordfish occurs year-round, but activity is highest in the first and second quarters. Honolulu Laboratory, *Hawaii Swordfish Fisheries*, available at http://wpacfin.nmfs.hawaii.edu/hi/dar/hi_sword_text.htm.

50. The Loggerhead sea turtle (*Caretta caretta*) was listed as a threatened species on July 28, 1978. It is listed as threatened throughout its range. It is found in the Atlantic, Pacific, and Indian Oceans and it has major nesting concentrations in the southeastern United States. *Loggerhead Turtle v. County Council of Volusia County*, 120 F. Supp. 2d 1005, 1015 (M. D. Fla., May 2000).

51. The Leatherback sea turtle (*Demochelys coriacea*) was listed as endangered throughout its range on June 2, 1970. It is found circumglobally and its principal nesting grounds are on the Pacific coast of Mexico. *Id.* at 1016.

52. The Green sea turtle (*Chelonia mydas*) was placed on the endangered species list on July 28, 1978. It is listed as endangered in Florida and as threatened elsewhere. *Id.*

53. *Hawaii Longline Ass'n.*, No. 10-765 2002 U.S. Dist. LEXIS 7263, at *5.

54. *Id.* at *5.

55. *Id.* at *45.

56. *Id.*

members need NMFS approval to fish for tuna and swordfish.⁵⁷ NMFS, however, contended that neither HLA nor its members are an applicant under the ESA definition because they do not directly conduct the consulted-upon action, which NMFS argues is the approval of the Fisheries Management Plan.⁵⁸ Applicant, as defined by the regulation authored by NMFS, “refers to any person . . . who requires formal approval or authorization from a Federal agency as a prerequisite to conducting the action.”⁵⁹

On the second issue, whether HLA had a right to a copy of the draft biological opinion, HLA argued that “the regulations and previous agency interpretations thereof make clear that applicants are entitled to a copy of a draft” biological opinion.⁶⁰ In response, NMFS argued that the plain language of the regulation demonstrated that there was no express requirement that NMFS provide a copy of the draft biological opinion to the applicant.⁶¹ HLA contends that NMFS violated “the ESA’s implementing regulations by shutting HLA out of the consultation . . .” process and the biological opinion process by not considering it an applicant.⁶² HLA argues that NMFS’ interpretation of the regulation is undeserving of the high standard of deference as set forth in *Chevron*,⁶³ because the interpretation was not “asserted prior to the litigation and is therefore a post-hoc rationalization.”⁶⁴

The court began its analysis by deciding what standard of review to apply to the circumstances presented by this case. Because the court found NMFS interpretation of the regulation as to HLA’s status as an applicant a post-hoc rationalization, the court did not apply the highly deferential standard found in *Chevron*.⁶⁵ The court stated that NMFS interpretation was a post-hoc rationalization because “[a]t no time prior to this litigation has NMFS ever explicitly addressed the issue of HLA’s status as an applicant.”⁶⁶ In fact, there was evidence, letters written by NMFS counsel,

57. *Id.* at *15.

58. *Id.*

59. 50 C.F.R. § 402.02 (2002).

60. *Hawaii Longline Ass’n*, No. 10-765, 2002 U.S. Dist. LEXIS 7263, at *30–31.

61. *Id.* at *30.

62. *Id.* at *12.

63. See *supra* text accompanying note 30.

64. *Hawaii Longline Ass’n*, No. 10-765, 2002 LEXIS 7263, at *17–18 (citing *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204 (1988) for support of its position that NMFS interpretation is a post-hoc rationalization).

65. *Hawaii Longline Ass’n*, No. 10-765, 2002 U.S. Dist. LEXIS 7263, at *16.

66. *Id.* at *18–19.

from which it could be inferred that NMFS viewed HLA as an applicant.⁶⁷ On this evidence, the court rejected the “plainly erroneous” standard of *Auer*.⁶⁸ After a review of the cases dealing with post-hoc rationalizations, the court decided that it must replace *Auer* deference with the deference standard of *Skidmore*.⁶⁹ Under *Skidmore*, the court said it would be more than happy to accept NMFS’ position if it is a sound and convincing interpretation of its regulations.⁷⁰

The court, however, found NMFS’ argument unpersuasive based on the agency’s earlier interpretations of the regulations in an ESA Consultation Handbook that the agency had published.⁷¹ In the preamble to the regulations, it is explicitly stated that “applicant status is to be ‘broadly’ conferred.”⁷² To further undermine NMFS interpretation of “applicant,” the court discusses an example provided in the handbook that distinguishes between an applicant and a party who simply has a general interest in an agency’s operations.⁷³ From this handbook example, the court concludes that HLA is an applicant because the fishermen have obtained licenses from NMFS to fish under another provision, and the “licensees are required to adhere to all regulations under . . .” the Fisheries Management Plan.⁷⁴ The court determined that “NMFS’ attempt to limit applicant status to consultations over a specific permit or license contradicts the unambiguous and broad language of its own regulations.”⁷⁵

67. *Id.* at *19.

68. *Id.* at *20.

69. *Id.* at *21. See also *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 89 L. Ed. 124, 65 S. Ct. 161 (1944). Citing *Skidmore* in *Christensen v. Harris County*, 529 U.S. 576 (2000), the Court held that such interpretations are “entitled to respect” to the extent that they have the “power to persuade.” *Hawaii Longline Ass’n.*, No. 10-765, 2002 U.S. Dist. LEXIS 7263, at *21. The court went on to cite *United States v. Mead Corporation*, 553 U.S. 208 (2001), in support for its use of its position on the deference owed. In *Mead*, the Supreme Court held that “the deference analysis was more complicated than a simple examination of whether the agency’s interpretation was subject to a formal rulemaking, as *Christensen* had intimated.” *Id.* at *21–22. The court also relied on *Mead* because it affirms use of *Skidmore* deference as an alternative standard whenever *Chevron* does not apply. “*Christensen* and *Mead* were issued as an alternative standard whenever *Chevron* does not apply.” *Id.* Under *Skidmore*, the court said it “would be more than happy to accept NMFS’ position if it is a sound and convincing interpretation of its regulations.” *Id.*

70. *Hawaii Longline Ass’n.*, No. 10-765, 2002 U.S. Dist. Lexis 7263, at *22.

71. *Id.* at *22. The handbook discussed by the court was co-authored by United States Fish & Wildlife Service.

72. *Id.* at *22–23 (citing 51 Fed. Reg. 19926 (June 3, 1986)).

73. *Hawaii Longline Ass’n.*, No. 01-765, 2002 U.S. Dist. LEXIS 7263, at *22–23.

74. *Id.* at *23–24.

75. *Id.* at *24.

The court further determined that the ESA Handbook reflects the proper scope of the consulted-on "agency action."⁷⁶ NMFS defined the agency action as "fishery management."⁷⁷ The court concluded that NMFS' narrow articulation of the agency action directly contradicts the Handbook's declaration and that NMFS' language in prior biological opinions demonstrates that the agency "ordinarily views its consultations as focusing equally on both the management and *operation* of the fishery, rather than only on the former."⁷⁸ The court completes its analysis of this issue by stating "[t]he clear intent of the Section 7 regulations is to allow input from those who are directly affected by ESA consultations."⁷⁹

On the second issue, whether NMFS is obligated to share a draft biological opinion with an applicant, the court held that NMFS' interpretation of § 402.14 (g)(5) was "clearly inconsistent" with its earlier interpretations and therefore "cannot be accorded substantial deference."⁸⁰ Again, referring back to the Handbook, the court found an earlier interpretation, which confirms "the applicant is entitled to review draft biological opinions obtained through the action agency, and to provide comments through the action agency."⁸¹ The court stated that "[a]lthough the language in the regulations is ambiguous," it appears from the language that release of the draft [biological opinion] to applicants was intended to be automatic.⁸²

IV. DISCUSSION

The decision in *Hawaii Longline Ass'n* is probably the correct legal decision, but the case is not important for its disposition. The case is

76. *Id.* at *25.

77. *Id.* NMFS argued that under the Magnuson-Stevens Act it is responsible for approving the Fisheries Management Plan. 16 U.S.C.A. §§ 1852(h)(1), 1854(c)(1)(A) (2000).

78. *Hawaii Longline Ass'n.*, No. 01-765, 2002 U.S. Dist. LEXIS 7263, at *26-27.

79. *Id.* at *27. The court further stated that the intent of Section 7 would be undermined by denying a party such a voice based on a technical distinction over the scope of the agency action.

80. *Id.* at *31, (citing *Thomas Jefferson Univ. v. Shalala*, 512, U.S. 504 (1994) (quoting *Gardebring v. Jenkins*, 485 U.S. 415) (deferring to an agency's interpretation of its regulations unless an "alternative reading is compelled by the regulation's plain language or by other indications of the Secretary's intent at the time of the regulation's promulgation)).

81. *Hawaii Longline Ass'n.*, No. 10-765, 2002 U.S. Dist. LEXIS 7263, at *33.

82. *Id.* at *36. The court also stated that "the release of draft opinions to Federal agencies and any applicants facilitates a more meaningful exchange of information. Review of draft opinions may result in the development and submission of additional data, and the preparation of more thorough biological opinions. *Id.*

important because it demonstrates that there are some problems associated with the administration of the ESA. Some of the most basic definitions within the ESA's regulations are ambiguous and in need of clarification so that the Act is administered in an expeditious and uniform manner. The appropriate entity, whether that is Congress, NMFS, USFWS, the Secretary of Commerce or the Secretary of the Interior, should take the necessary steps to clarify these rules and regulations. There are pragmatic reasons why these ambiguities should be clarified by executive or legislative action and not judicial action.

It is undisputed that the courts have played a significant role in shaping the powers of the ESA and making it one of the most powerful pieces of legislation in this country. This is evidenced by the Supreme Court's position in *Tennessee Valley Authority*⁸³ where the Court enjoined the filling of an already completed dam and stated that, "although one hundred million dollars had been spent to complete the dam, Congress had characterized the value of an endangered species as 'incalculable.'"⁸⁴ Notwithstanding the value of the courts and the work they have done to make the ESA a potent statute, some of the imperfections of the ESA cannot be remedied by the courts.

One argument against allowing the courts to provide definitions for the ESA regulations is that the process simply takes too long. If the definitions are provided by the usual course of the law, which is a case-by-case approach, it could take a year or more to find out if a particular organization is entitled to participate in ESA consultations. This is an unacceptable time delay when considering, for example, whether shrimping trawlers are jeopardizing endangered sea turtles in the Gulf of Mexico.⁸⁵ The time delays resulting from litigation over issues dealing with semantics is unfavorable to both the turtles' interests and the fishermen's interests. Time may not be of the essence in the instant case, though it may be in the next case where an endangered species is driven to extinction while waiting for the Supreme Court of the United States to grant a writ of certiorari.

83. *Tennessee Valley Authority*, 437 U.S. at 153 (holding that it is clear from the Endangered Species Act's legislative history that Congress intended to "reverse the trend toward species extinction—whatever the cost). *Id.* at 184.

84. *Id.* at 187.

85. Matthew Brotmann, Comment, *The Clash Between the WTO and the ESA: Drowning a Turtle to Eat a Shrimp*, 16 PACE ENVTL. L. REV. 321 (1999). This comment provides a thorough discussion of the threats posed to sea turtles by the shrimp fishing industry. It also discusses the new regulations mandating the use of new technology (turtle excluder devices) to prevent the taking of endangered and threatened sea turtles by shrimp trawlers.

A second argument for not leaving the definitions of ESA regulations to the courts is that the courts operate using a host of deference standards. This forces a court reviewing agency action to go through the Herculean task of determining which deference standard to apply to the specific action, as the district court did in the *Hawaii Longline Ass'n* decision. Some suggest that the process may function better if the standard of judicial review is simplified. For instance, Justice Scalia, in his dissenting opinion in *Mead*, stated that the new deference standard established in *Mead* is inconsistent with the old standard in *Chevron*. The effects of the new rule, as Scalia sees them, are that it will result in "protracted confusion,"⁸⁶ causing the courts to struggle in an effort to follow the theoretical deference guidelines. The problem arises when a court tries to draw a line between, for example, substantial evidence, arbitrary and capricious and the hard look doctrine. This tangled mass of word formulations is counterproductive with regard to the ESA because it contributes to the endless litigation, uncertainty and unpredictability of the judicial process.

As the nation continues to grow and prosper economically, it is foreseeable that more species will be pushed to the verge of extinction, which will require swift and effective agency action to prevent their extinction and ensure the preservation of biodiversity. Accordingly, it is important that all reasonable efforts be taken to make enforcement of the ESA work in a more efficient and productive manner. Therefore, now is the appropriate time for executive or legislative action to clarify the ambiguities in the ESA regulations in order to avoid superfluous and expensive litigation from which no one benefits.

Finally, if humans continue to drive species to extinction at the current rates, what we stand to lose is not inconsiderable. Influential Harvard biologist, E.O. Wilson, has said that human destructiveness will cause humanity to "suffer an incomparable loss in aesthetic value, practical benefits from biological research, and worldwide biological stability."⁸⁷ As a naive law student, my opinion is worth next to nothing. Yet if what E.O. Wilson has to say is true, all efforts must be taken to ensure that the goals of the ESA are met.

86. *Mead Corp.*, 533 U.S. at 245-46.

87. E.O. WILSON, *BIOPHILIA* 122 (1984).

