**Introduction**

Recent appellate court decisions regarding the federal Endangered Species Act (ESA) provide greater protection from liability for “takings” of endangered species but also more uncertainty about the deference owed to federal agencies during ESA consultations.

A US Fifth Circuit Court of Appeals (Fifth Circuit) decision in June should increase the comfort of water users, growers, and pesticide registrants with regard to ESA “takings” claims. *The Aransas Project v. Shaw*, 13-40317, 2014 WL 2932514 (5th Cir. June 30, 2014)(*Aransas*), provides the clearest statement to date that agencies that grant permits or licenses for water or pesticide use (and the private parties who receive them) are not responsible under the ESA for every subsequent harm to listed species. Such a clear boundary on the reach of the ESA should give government agencies a freer hand in issuing permits and licenses. In *Aransas*, a three-judge panel found that a Texas state agency’s issuance of a permit allowing private parties to withdraw upstream water was not a foreseeable cause of the downstream deaths of 23 endangered whooping cranes. In short, the Fifth Circuit found that the chain of causation from permit issuance to the death of the birds was too attenuated and too remote to support a “taking” claim against the permit issuer.

State agencies and the US Environmental Protection Agency (EPA) take a wide range of licensing actions — from routine permitting to issuance of pesticide registrations. These actions could potentially result in the “take” of an endangered or threatened species. The *Aransas* ruling provides some protection to state permitting entities and EPA, as well as involved water users, when defending against alleged “takings” of species listed as threatened or endangered under the ESA. Although the water users and farmers who benefited from the permits were not defendants in the *Aransas* case, the decision’s reasoning should apply equally to them, as long as they are drawing water consistent with state-issued permits or applying pesticides in accordance with EPA-administered labels.

However, the Fifth Circuit *Aransas* case is not the only ESA litigation to watch. Earlier this Spring, the Ninth Circuit created headlines (and a split among federal appellate courts) when it upheld a *biological opinion* (BiOp) of the US Fish & Wildlife Service in *San Luis & Delta-Mendota Water Authority v. Jewell*, 747 F.3d 581, 592-93 (9th Cir. 2014), petition for rehearing en banc denied, No. 11-15871 (9th Cir. July 23, 2014). The BiOp at issue essentially denied 20 million agricultural and domestic users access to water from the Central Valley Project in California, in order to protect a small number of ESA-listed delta smelt. In doing so, it granted considerable deference to the US Fish & Wildlife Service’s views.

Individually, both these federal circuit decisions promise immediate changes in the ESA context: one better protects government agencies and private parties from ESA civil and criminal penalties, and the other may lessen the duties of the consulting services when explaining the denial of a permit or license. Taken together, ESA litigation likely will result in a meaningful US Supreme Court opinion in the not-too-distant future — with far-reaching implications for water users, landowners, and pesticide users.

**Background of Aransas Litigation**

The central importance of *Aransas* is its conclusion that environmental challengers must show that permitting action is a foreseeable cause of the “take” of a threatened or endangered species. The road to *Aransas*, though, began with an earlier US Supreme Court decision that in large part introduced the requirement that plaintiffs must prove proximate cause in ESA Section 9 “takings” cases.

Under Section 9 of the ESA, a “take” means “to harass, harm,...wound, [or] kill” protected species. 16 U.S.C. § 1532(19). A subsequent regulation implementing the provisions of the ESA clarified that “harm” includes — beyond direct harm to a protected species — “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(c).

This regulation could be interpreted expansively: to make state and federal agencies liable for a “take” whenever harm resulted to a protected species, its behavioral patterns, or its habitat, with a continuing threat of liability during the entire term of a license or permit. Such a broad interpretation would constrain agencies’ ability to issue water permits and pesticide registrations. But the US Supreme Court chose
The Water Report

Figure 1

The application of proximate cause as the controlling standard places a limitation on liability for the “take” of a listed species. As a result, state and federal agencies (and the users who receive permits or licenses from these agencies) are not liable for harm that is far removed from the issuance of the permit. However, because it is a fact-dependent standard, guidance from subsequent cases is particularly important. *Aransas* is the most recent of these subsequent cases to better insulate government agencies and private parties from the risk of litigation for “takings” under the ESA. In *Aransas*, the Fifth Circuit found that the US District Court for the Southern District of Texas (District Court) had ignored the proximate cause requirement when it imposed liability on a Texas state agency for a too-remote harm to a listed species. The problem, according to the court, was the district court’s “untethered linking of governmental licensing” with every resultant harm to an endangered species. The appellate court held that “[f]inding proximate cause and imposing liability…in the face of multiple, natural, independent, unpredictable and interrelated forces affecting the cranes’ [habitat] goes too far….” *Aransas*, 2014 WL at *14.

The species at issue in *Aransas* was the whooping crane, which is listed as endangered under the ESA. According to the court record, the world’s only wild flock resides in Aransas National Wildlife Refuge (see Figure 1) during each winter before migrating to Wood Buffalo National Park in Canada in the summer. *Id.* at *1*. Between 2008 and 2009, an estimated 23 of the 300 wild cranes in the flock died. The Aransas Project (TAP) sued directors of the Texas Commission on Environmental Quality (TCEQ) under the ESA for committing an unauthorized “take” of the cranes. [See Robb, *TWR* #85]
TCEQ regulates surface water use in Texas through the issuance of permits. *Id.* In this case, TCEQ had issued permits to private parties to withdraw surface water from the San Antonio and Guadalupe Rivers. TAP argued that TCEQ committed an unauthorized take of the 23 cranes by issuing these permits to private water users for withdrawing water from the rivers, in turn leading to a significant reduction in:

- freshwater inflow into the San Antonio Bay ecosystem. That reduction in fresh-water inflow, coupled with a drought, led to increased salinity in the bay, which decreased the availability of drinkable water and caused a reduction in the abundance of blue crabs and wolfberries, two of the cranes’ staple foods. According to TAP, that caused the cranes to become emaciated and to engage in stress behavior, such as denying food to juveniles and flying farther afield in search of food, leading to further emaciation and increased predation. Ultimately, this chain of events led to the deaths of twenty-three cranes during the winter of 2008–2009.

*Id.* at *2.*

The District Court accepted TAP’s theory of causation (illustrated graphically in Figure 2) and held that TCEQ had violated the ESA through their water-management practices. *Id.* at *3.*

![Figure 2: Comparison of Permits to Withdraw Water and the Habitat of the Whooping Crane](http://thearansasproject.org/situation/basin-management/)


On appeal, the Fifth Circuit reversed the District Court’s decision. Relying on the US Supreme Court’s 1995 *Sweet Home* ruling, the Fifth Circuit held that “proximate cause and foreseeability are required to affix liability for ESA violations.” *Id.* at *12.* The court determined that the long chain of causation separating TCEQ’s issuance of a permit from the death of any individual crane — of which every link required “modeling and estimation” — made TCEQ’s actions too remote, attenuated, and unforeseeable to be considered the proximate cause of the cranes’ deaths. *Id.* at *15.* As a result, the court determined that as a matter of law, proximate cause and foreseeability were lacking. *Id.* at *17.*

### Aransas in Light of Decisions of Other Federal Circuit Courts

Appellate courts in other circuits generally agree with the *Aransas* decision that actions that are too attenuated (and thus not foreseeable) do not constitute a “take” under the ESA. But the unique contribution of *Aransas* is that, unlike prior cases from other circuit courts, it resulted in a conclusion that the agency was not liable. As a result, the *Aransas* decision gives the clearest statement yet of the outer limits of causation under the *Sweet Home* proximate cause doctrine.
Earlier cases from other circuits went the other way, finding actions that were sufficient to meet the proximate cause standard. For instance, in *Strahan v. Cox*, 127 F.3d 155, 158 (1st Cir. 1997), Massachusetts officials were found to have violated the ESA for issuing licenses that authorized gillnet and lobster pot fishing. The officials knew that “entanglement with commercial fishing gear…is a major source of human-caused injury or death to the Northern Right whale” and numerous whales were previously found with such injuries. Though Massachusetts argued that the mere licensing action could not satisfy proximate cause, the First Circuit disagreed. Rather, granting licenses to use gillnets and lobster pots foreseeably, and perhaps even expectedly, causes injury to endangered whales. A similar case is *Animal Prot. Inst., Ctr. for Biological Diversity v. Holsten*, 541 F. Supp. 2d 1073, 1077–78 (D. Minn. 2008), in which the federal district court found that the Minnesota Department of Natural Resources had, by authorizing and allowing third parties to engage in trapping and snaring activities, taken the endangered Canada Lynx.

One way to conceptualize this standard is to assess whether a gap (which may include a gap in time, space, or an event outside the control of the authorizing agency or the holder of a permit) exists between the action authorized by a permit or license and the harm to the endangered species. In both *Cox* and *Holsten*, trappers or fishers receiving licenses harmed the endangered species as part and parcel of that license or permit. No intervening gaps existed between their actions (trapping and fishing) and the harm to endangered species (injury caused by snares and nets).

In fact, in cases where a government licensing agency or person who received such a license was found to have proximately caused a “take,” the action authorized by a license or permit directly resulted or foreseeably could result in harm to the endangered species. See *Loggerhead Turtle v. Cnty. Council of Volusia Cnty., Fla.*, 148 F.3d 1231, 1258 (11th Cir. 1998) (failure to regulate beach front artificial lighting caused endangered turtles to crawl in the direction of the light and to get run over by traffic); *Sierra Club v. Yeutter*, 926 F.2d 429, 438–39 (5th Cir.1991) (timber company logging practices would result in illegal take of endangered red-cockaded woodpeckers); *Defenders of Wildlife v. EPA*, 882 F.2d 1294, 1301 (8th Cir.1989) (registration of pesticides containing the harmful chemical would result in illegal “take” when pesticides sprayed on crops); *Animal Welfare Inst. v. Martin*, 588 F. Supp. 2d 70, 99 (D. Me. 2008) (Maine’s issuance of trapping licenses likely to lead to prohibited takings); *Seattle Audubon v. Sutherland*, CV06-1608MJP, 2007 WL 1300964 (W.D. Wash. May 1, 2007) (logging in an area occupied by an endangered owl could result in harm); *Pacific Rivers Council v. Oregon Forest Indus. Council*, No. 02-243-BR, 2002 WL 32356431 at *11 (D.Or. Dec. 23, 2002) (state forester’s authorization of logging operations likely to result in a “take” sufficient for liability).

*Aransas*, however, followed a different pattern. The death of the cranes was not caused by the water users who received a government permit to withdraw water. Rather, several intervening events existed between the action authorized by the permit and the harm to the cranes. The plaintiffs argued that the deaths of the cranes were caused by a chain of events: the withdrawal of water increased the salinity of the water, which then flowed from the river into a bay and estuary, which in turn reduced the cranes’ food source, which then led to stress migration, and which finally led to emaciation and death of the cranes.

The new contribution from *Aransas* is thus to define the outer limits of proximate cause, at which point the authorizing agency is no longer liable for any harm. *Aransas*, in combination with the cases from the other circuits, shows that any intervening steps in the chain of causation that separate the action authorized by a permit to withdraw water or apply pesticides and the harm to species cast into doubt whether the government agency can be considered the proximate cause of the “take” of an endangered species.

Not every circuit has followed the proximate cause analysis first employed in *Sweet Home* and most recently applied in *Aransas*. In the Ninth Circuit (encompassing Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington) and Eleventh Circuit (Alabama, Florida, and Georgia), for example, proximate cause as defined in *Aransas* and *Sweet Home* may not be the standard for government licensing and permitting activities. See *Loggerhead Turtle v. County Council of Volusia County, Fla.*, 148 F.3d 1231, 1251 n.23 (11th Cir. 1998); *Pailla v. Hawaii Dep’t of Land & Natural Res.*, 852 F.2d 1106, 1107 (9th Cir. 1988). One district court has reached a similar result. See *Animal Prot. Inst., Ctr. for Biological Diversity v. Holsten*, 541 F. Supp. 2d 1073, 1078 (D. Minn. 2008), where the court found, “[F]irst, the Court notes that the footnote in the *Sweet Home* decision relied upon by Defendants is dicta…. ” (citing *Loggerhead*, 148 F.3d at 1251 n.23). [Editor’s Note: Since the *Sweet Home* footnote was found to be “dicta,” it would not have precedential value for the court to follow.] In *Loggerhead*, the Eleventh Circuit expressed some reluctance to adopt the proximate cause requirement in *Sweet Home*, and found that a county could be held liable for not regulating beachfront lighting, which in turn caused endangered turtles to crawl toward the lighting, where they were subsequently injured by vehicles. *Loggerhead Turtle*, 148 F.3d at 1251 n.23.
Both the Palila and Loggerhead Turtle decisions, however, are more than 15 years old and the Palila case predates Sweet Home and was disclaimed by Justice O’Connor’s Sweet Home concurrence — so Aransas may be persuasive even in the Ninth and Eleventh Circuits. Indeed, one federal district court in California, in the Ninth Circuit, recently found the approach in Aransas persuasive. See California River Watch v. Cnty. of Sonoma, C 14-00217 WHA, 2014 WL 3377855 (N.D. Cal. July 10, 2014), which relied on Aransas to find that “the plaintiff did not meet its burden of proving” causation because its claim that land development would endanger protected salamanders required the use of approximation and modeling.

**Other Developments in ESA Litigation**

The Fifth Circuit is not the only forum for retesting the limits of the ESA. Since the enactment of the ESA, courts have balanced the protections afforded to endangered species against the need for state and federal agencies to fulfill their statutory responsibilities to register pesticides, apportion water, and provide power. Great deference has been given to the US Supreme Court’s 1978 ruling that “[t]he plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost.” Tenn. Valley Auth. v. Hill, 437 U.S. 153, 184 (1978). In TVA v. Hill, this broad protection led the US Supreme Court to halt construction of a $100 million dam to ensure the “survival of a relatively small number of three-inch fish.” Id. at 172-73. Even in Sweet Home, other members of the majority were not prepared to join in Justice O’Connor’s concurrence.

A case testing the deference owed to action agencies and the consulting services under Section 7 may soon present an opportunity for the US Supreme Court to revisit this balance. In its March San Luis decision, the Ninth Circuit reinstated a 2008 Fish & Wildlife Service BiOp that urged restriction of the US Bureau of Reclamation’s delivery of water from the Sacramento Delta to over 20 million agricultural and domestic water users in central and southern California. The concern at issue was potential effects on the delta smelt, a 2-3 inch fish in danger of extinction, from Sacramento River diversions. San Luis, 747 F.3d at 592-93. Despite recognizing the legitimacy of concerns with several aspects of the modeling and analysis on which the BiOp’s “reasonable and prudent alternatives” (RPAs) were based, the Ninth Circuit held it was obliged to defer to the expertise of the Service, whatever the economic implications.

The San Luis decision expressly rejected the opposite conclusion that had been reached by the Fourth Circuit last year in Dow AgroSciences LLC v. National Marine Fisheries Service, 707 F.3d 462 (4th Cir. 2013). In that case, the court vacated a National Marine Fisheries Service BiOp that addressed the potential impact of the use of several pesticides on salmon. The difference in results between the two courts’ views, despite similar criticisms of the BiOps, is demonstrated in Box 1.

The difference between the San Luis and Dow AgroSciences holdings is not academic. The delta smelt decision has a far more immediate impact than Dow AgroSciences. In light of the ongoing California drought, the San Luis decision will mean that much of the enormously-fertile San Joaquin Valley and areas south will be denied the water. In addition, the decision creates a split between the two circuits that could result in US Supreme Court attention.

### Box 1: Comparison of Biological Opinions in San Luis and Dow AgroSciences

<table>
<thead>
<tr>
<th>San Luis, sustaining BiOp</th>
<th>Dow AgroSciences, vacating BiOp</th>
</tr>
</thead>
<tbody>
<tr>
<td>“First, the BiOp is a bit of a mess. And not just a little bit of a mess, but, at more than 400 pages, a big bit of a mess.” 747 F.3d at 604.</td>
<td>“[T]he BiOp was not the product of reasoned decision-making in that the Fisheries Service failed to explain or support several assumptions critical to its opinion.” 707 F.3d at 464.</td>
</tr>
<tr>
<td>“It is a ponderous, chaotic document, overwhelming in size, and without the kinds of signposts and roadmaps that even trained, intelligent readers need in order to follow the agency’s reasoning.” Id. at 606.</td>
<td>“The BiOp explained that the 96-hour exposure assumption was a laboratory standard” but “without explaining why the 96-hour exposure assumption accurately reflected real-world conditions,” relied upon that assumption. Id. at 470-71.</td>
</tr>
<tr>
<td>“The BiOp should have been more explicit in describing exactly which studies it used in its analysis.” Id. at 612 n. 25.</td>
<td>“[T]he BiOp never adequately explained why it relied on older data despite the existence of new data and the potential drawbacks of using the older data.” Id. at 472.</td>
</tr>
</tbody>
</table>
 ESA Takes
 Economic Analysis
 (3rd Party)

Technically, that split arises from the two courts’ different handling of several issues. The first is how the consulting services must consider the economic feasibility of reasonable and prudent alternatives to a planned action. Cf. 50 C.F.R. § 402.02. Whereas San Luis held that the BiOp is not required to address the economic feasibility of alternatives, Dow AgroSciences favored a robust economic analysis of alternatives, based on the regulations implementing the ESA. Second, the two cases also differ in their approach to assessing the feasibility of alternatives on third parties. Whereas San Luis held that the impact on third parties need not be addressed in a BiOp, Dow AgroSciences suggested that consequences of a particular action on third parties must be addressed.

Resolution of either of these issues could have far-reaching implications. If the case reaches the US Supreme Court, it could lead the US Supreme Court to revisit two conclusions of the seminal 1978 Tennessee Valley Authority v. Hill decision that have provided the underpinnings of a great deal of ESA precedent ever since. These contrasting decisions by panels in two separate appeals courts regarding ESA consultations provide a basis to elevate San Luis to review by the US Supreme Court.

Conclusion

The recent appellate court decisions addressed in this article show that the ESA is a still-active area of environmental litigation, rife with new developments and the potential for US Supreme Court development. With debates about the scope of proximate cause in ESA “take” cases, and how much deference is owed to environmental authorities (agencies) that have created circuit splits, it is foreseeable, and perhaps even likely that one or more of these issues is on the path to being granted a writ of certiorari by the US Supreme Court in order to sort out the differences in circuit decisions.

Until the US Supreme Court acts, however, Aransas promises the most immediate nationwide impact. It affects the day-to-day operations of pesticide registrants, farmers, or water users across the nation operating under government licenses or permits who may be concerned about the threat of continuing liability for harm that may be far separated in time or distance from the original issuance of a permit or license. Aransas places an outer limit on such liability, providing additional protection to private parties and the government agencies that issue licenses and permits.

The impact of the San Luis case also is real, as California struggles with a historic drought that may or may not be ameliorated by new legislation promoted by California Senate and House delegations. Moreover, if San Luis reaches the US Supreme Court, the case could change the landscape for how much deference should be given to a federal agency’s analysis and conclusions in an ESA action and what role economic and technical feasibility should play in such decisions. Any future ruling that changes the extent to which agencies must consider economic implications in their ESA-related actions could have extraordinary implications.

For Additional Information:
Steven Richardson, Wiley Rein LLP, 202/ 719-7489 or rsrichardson@wileyrein.com

Steven Richardson’s practice reflects 20 years’ experience in key staff roles on Capitol Hill and at the U.S. Department of Interior and over a decade in private law practice. He focuses on regulation, public policy, and litigation in complex, high-profile matters involving water, wetlands, hydroelectric, land, energy, and environmental law. Mr. Richardson has extraordinary experience in successfully resolving complex water quality and allocation disputes and is a leader in helping companies site electric generation facilities and transmission lines. He has unique expertise in promoting and defending projects in environmentally-sensitive locations and fast-growing urban areas. Mr. Richardson also represents clients in “green building” and related energy efficiency issues and in defending against challenges under the National Environmental Policy Act (NEPA). He regularly writes and speaks on the legal, environmental, and social barriers to obtaining authority for new generation and transmission facilities.

David Weinberg has more than 35 years of experience in administrative and environmental law, specializing in environmental, occupational health and safety, transportation, product safety, and pesticide matters. Regularly rated by Chambers USA as one of Washington, DC’s “Leading Lawyers” in his field, Mr. Weinberg is commended for maintaining his “position as a leader in occupational health and safety, transportation, product safety, electronics and battery issues, and pesticide regulation” (2011) and highly praised by clients, who say: “It is hard to imagine a lawyer who knows the issues better” (2013). Commended in Chambers for possessing “a phenomenal level of experience” and providing “excellent analysis and strategic advice” (2010) while remaining “highly accessible” (2013), clients tell Chambers that he “knows all the players and precedents and what they need to do to be successful” (2012). He also has been listed for over a dozen years in The Best Lawyers in America, rated by the Euromoney Legal Media Group as one of the world’s leading environmental lawyers and named one of “America’s top 20 environmental lawyers” by the Guide to the World’s Leading Environment Lawyers.

Craig Fansler represents clients in environmental, safety, natural resources, and energy law. He advises clients regarding administrative appeals and litigation and a broad range of regulatory compliance matters regarding federal and state environmental, water, and natural resource laws and regulations, including the National Environmental Policy Act (NEPA), the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), the Endangered Species Act (ESA), Administrative Procedure Act (APA), the Clean Water Act (CWA), the Clean Air Act (CAA), and various state chemical and product regulations.

Andy Wang is a summer associate at Wiley Rein’s Washington, DC office, having recently completed his second year at Harvard Law School, where he is Senior Articles Editor of the Harvard National Security Journal, President of the Harvard National Security Law Association, and a semifinalist in Harvard’s Ames Moot Court Competition. Andy has accepted a clerkship position with the Fifth Circuit Court of Appeals following law school.