



When The Rubber Met The Road . . .  
Then The Water, Fish, And Whales:  
Using The Endangered Species Act To  
Overcome The Dilution Of The Clean  
Water Act

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ANIMAL LEGAL DEFENSE FUND **STUDENT CONVENTION 2023**

# Why I chose the Topic

- Southern Resident killer whales
- I am from the Northwest



# Intro

- Southern Resident killer whales
- Coho salmon
- 6PPD
- Clean water act
- Endangered Species act
- Citizen suits



# Overview

1. The tire **preservative** comes off the tires onto roads and 6PPD is released.
2. The chemical is then combined with rainwater where it turns into the **toxic chemical 6PPD-quinone** and then washes into streams.
3. The tire preservative **kills Coho salmon**.
4. There are not enough salmon for the endangered species to eat, so the **Southern Resident killer whales die** from starvation and don't repopulate due to high infant mortality rate.



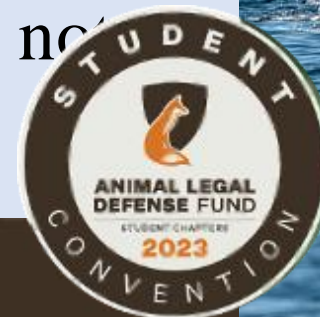
# Clean Water Act

- The EPA could have added 6PPD to the restricted list of chemicals and banned it from being put into products.
- There has been a series of cases that have diminished the Environmental Protection Agencies ability to regulate Waters of the United States
- *Sacket* the Supreme Court narrow the scope of what the CWA covers



# Endangered Species Act

- “**unlawful** for any person to **take an endangered species** of fish or wildlife.”
- The **harm** provision is defined as “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”
- The **harass** provision is defined as, “significant environmental modification that has had the effect of actually injuring or **killing wildlife**, including acts which annoy it to such an extent as to **significantly disrupt essential behavioral patterns**, which include, but are not limited to, breeding, **feeding** or shelter.”



# Southern Resident killer whale (Endangered)

- Distinct population
- They are critically endangered
- Salmon is their major food source
- Live in the Northwest



# Three Major Cases

- *Sweet Home* (1995)

Babbitt v. Sweet Home Chapter of Cmty. for a Great Or., 515 U.S. 687, 690 (1995).

- *Arkansas* (years)

The Arkansas Project v. Shaw, 576 U.S. 1035 (2015).

- *Beach Ridge* (2009)

Animal Welfare Inst. v. Beech Ridge Energy LLC, 675 F. Supp. 2d 540, 541 (D. Md. 2009).





# Sweet Home (Holdings)

- *Sweet Home* challenged Babbitt’s interpretation of take to include habitat modification
- *Sweet Home*: “Harm in the definition of **'take'** in the Act means an act which **actually kills** or injures wildlife.”
- “Congress intended **'take'** to apply **broadly** to cover **indirect as well as purposeful actions.**”
- Killing the whale’s food source is diminishing their populations and causing their extinction



# Southern Resident killer whale

- They are critically endangered from lack of food and
  - Other reasons are being addressed
    - They were stolen from theme parks (ended)
    - Persistent Organic Pollutants
    - High Noise levels
      - Boats are being slowed
      - There is a program to fight this



# Coho salmon

- They are being **killed before they can reproduce**
- Almost none of the original salmon make it back to reproduce
- October is Coho salmon, which represents **53.8% of the whales diet**
- Salmon **are sacred to local indigenous people**, including the Lummi Nation. Who are named after salmon.
- The fish enter the river when the water is at the highest which is also when the chemical gets swept into the river



# Who Drove here today



# Video Warning

Triggering Warning: the effect of 6PPD-quinone on fish





# Coho Salmon



# 6PPD

- It causes the fish to **turn on their sides and turn in circles**; it makes it look like they are desperately gasping for air.
- Local universities looked at **3,000 chemicals**
- Currently no workable alternative
- How does it get into the water
  - Comes off of tires
  - Mixes with water
  - Creating 6PPD-quinone
  - this chemical is just as toxic to aquatic life as the top twelve most toxic chemicals.





# Aransas (finding)

- Endangered Whooping Cranes were pushed to extinction because companies were taking water that was killing the crane's food source (the long version is on the next slide).
- *Aransas Project v. Shaw*: “requires the causal factors and the result to be reasonably foreseeable.”
- The court found that the chain of connection was too long for it to be reasonably foreseeable but that is where this case differs



# Comparison

1. “private parties withdrawing water from rivers, which led to
2. a significant reduction in freshwater inflow into the estuarine ecosystem, which, in combination with drought effects, led to
3. increased salinity in the bay, causing
4. a reduction in the abundance of blue crabs and wolfberries upon which the cranes rely, resulting in
5. emaciation of the cranes,
6. engagement in stress behavior, and ultimately
7. the death of 23 cranes in the 2008–2009 wintering season.”

1. The tire preservative comes off of the tires onto roads and 6PPD is released.
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3. The tire preservative kills Coho salmon.
4. There are not enough salmon for the endangered species to eat, so the Southern Resident killer whale dies from starvation.



# Beach Ridge

- The company failed to apply for an Incidental Take Permit (ITP), and their wind turbines were killing endangered bats
- *Animal Welfare Institute v. Beech Ridge Energy* “existing language could be construed as prohibiting the modification of habitat even where there was no injury.”
- In this case, it means that there must be fish actually dying and these fish are the food source of the endangered killer whales.
- There is actual harm to their feeding habits because there is such a high death rate of the Coho salmon from 6PPD-quinone



# Standing

- (1) actual or imminent injury that is concrete and particularized;
  - a) **Actual:** aesthetic, scientific, recreational, educational, and loss of profit
  - b) **Imminent:** Boats go out to watch them, people study them, and people see them all the time
- (2) a causal connection between the injury and the conduct complained of; and
  - depleted food source, so killing the remaining fish at a high rate will directly cause the decline of the species
- (3) likelihood that a favorable decision will redress the injury
  - In this case, the tire manufacturers stopping the use of 6PPD in tires will save the Coho salmon and the killer whales



# Civil Suit Tire Manufactures

Options:

1. Sue the Tire manufactures

A. 12 in the US countless abroad

B. The U.S. Tire Manufacturers Association openly agrees that 6PPD is likely causing death and harm to Coho salmon.



# Civil Suit Sue Agencies through Vicarious Liability

1. Sue the agencies for allowing this chemical to be in tires and to be imported (Department of Transportation /EPA)  
Though vicarious liability
  - A. The Department of Toxic Substance Control has deemed the chemical a priority product, which means it should be regulated.
  - B. Secretary responsible for an endangered species should be consulted to make sure they are not harmed



# Process

1. Challenges
2. Updates
3. Hopeful for regulatory change (CA)





**Thank you!**

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