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Habitat Modification and the Endangered Species Act: The Sweet Home Decision

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Abstract. On June 29, 1995, the Supreme Court in a 6-3 decision in Babbitt v. Sweet Home Chapter of Communities for a Great Oregon upheld the regulation defining "harm" for purposes of the "take" prohibitions of the Endangered Species Act. The regulation includes significant habitat modification within the meaning of "harm."

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On June 29, 1995, the Supreme Court in a 6-3 decision in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon* upheld the regulation of the Fish and Wildlife Service defining "harm" for purposes of the "take" prohibitions of the Endangered Species Act.[1] The regulation includes significant habitat modification within the meaning of "harm." The *Sweet Home* decision resolves a difference between the 9th Circuit, which had upheld the regulation,[2] and the D.C. Circuit, which had struck it down.[3]

The Endangered Species Act (ESA) prohibits the "take" of endangered species and threatened species that are by regulation given similar protection. "Take" is defined in the Act as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."[4] There is no additional statutory elaboration on the meaning of take. Beginning in 1975, the Secretary of Interior, through the Director of the Fish and Wildlife Service, promulgated regulations that, among other things, defined "harm":

> *Harm* in the definition of `take' in the Act means an act which actually kills or injures wildlife. Such 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.[5]

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[1] U.S. No. 94-859; 1995 LEXIS 4463

[2] Palila v. Hawaii Department of Land and Natural Resources, 639 F. 2d 495 (9th Cir. 1981)(Palila I); 852 F. 2d 1106 (9th Cir. 1988)(Palila II).

[3] The D.C. Circuit initially upheld the regulation, but later reversed: Sweet Home Chapter of Communities for a Great Oregon v. Babbitt, 1 F. 3d 1 (D.C. Cir. 1993); 17 F. 3d 1463 (D.C. Cir. 1994).

[4] 16 U.S.C. §1532(19).

[5] 50 C.F.R. §17.3. This regulation has been in place since 1975, but was amended in 1981 to emphasize that actual death or injury of a protected animal is necessary for a violation.

Plaintiffs in the case were landowners, companies, families affected by listings, and organizations that represented them. The case was brought as a declaratory judgment action challenging the validity of the regulation *on its face, rather than as applied* in any particular instance, and focusing particularly on the inclusion of habitat modification in the regulatory definition.

The Court found that the text of the ESA supports the regulation in three ways. First, "harm" must have some meaning different from the other verbs in the series and hence must mean something beyond physical force directed at a listed creature. The common meaning of the term is broad and in the context of the ESA it would naturally encompass habitat modification that injures or kills members of an endangered species. Second, the purposes of the ESA are broad, including the conservation of ecosystems on which endangered and threatened species depend. Third, in 1982 Congress amended the ESA, presumably with an awareness of the then-current regulation and the first *Palila* case and not only did not correct the regulation, but added the §10 authorization for "incidental take permits" allowing the taking of listed species in certain circumstances as part of otherwise lawful activities the purpose of which was not taking listed species, but that could foreseeably result in take.

On these points, the majority disagreed with the analysis of the D.C. Circuit and with the dissenters, and further noted that neither the §5 authority to acquire habitat lands nor §7 provisions on federal compliance precluded the validity of the regulation. And, given the posture of the case, the regulation should be upheld in light of the fact that it was a reasonable interpretation of the statute by the Secretary, to whom Congress had delegated broad discretion and therefore was entitled to some degree of deference. The majority also felt the legislative history of the statute supported the interpretation stated in the regulation; the dissent disagreed on this point as well.

Justice O'Connor, writing in concurrence, emphasized that the challenge before the Court was a facial challenge to the regulation and that the limitation in the regulation to significant habitat modification that causes actual death or injury to identifiable protected animals (including preventing particular individuals from breeding) and the limitations resulting from the application of ordinary principles of proximate causation, which introduce notions of foreseeability, would result in reasonable applications. She also questioned the application of the regulation in the *Palila II* case because the actions of the state might not have proximately caused actual injury or death to living birds.

Justice Scalia, joined in dissent by Justices Rehnquist and Thomas, asserted that the effects of the regulation on private property were not supported by the statute. First, the regulation prohibits *any* habitat modification that kills or injures, regardless of whether that result is intended or foreseeable and no matter how long the chain of causality is between the modification and injury. Second, the regulation includes omission as well as commission of actions. Third, because the regulation includes impairment of breeding, the regulation encompasses injury inflicted not only on individual animals, but upon populations of species. Justice Scalia could find no basis for these elements either in the Act or in the traditional meaning of "take."