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The Endangered Species Act of 1973 - Habitat Modification Is a Harm That Constitutes a Taking - *Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, 115 S. Ct. 2407 (1995)

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The Endangered Species Act of 1973 - Habitat Modification is a "Harm" that Constitutes a "Taking" - *Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, 115 S. Ct. 2407 (1995).

The Endangered Species Act of 1973[1] (hereinafter the "Act") contains provisions intended to prevent the extinction of species that are designated by the Secretary of the Interior as endangered or threatened. The Act makes it unlawful for any person to "take" an endangered or threatened species.[2] In addition, the Act defines the term "take" to mean "harass, harm, pursue, hunt, shoot, wound, kill."[3] While the Act does not further define these terms, the Secretary of the Interior has by regulation defined "harm" to include "significant habitat modification."[4] It is this definition of "harm" that has led to vigorous disagreement between landowners, property rights advocates, and environmental agencies.

The inclusion of habitat modification in the definition of "harm," and therefore "take," is significant because in many instances the Act will prohibit the development of private land which serves as a habitat for an endangered or threatened species. Although this prohibition will create tremendous expense for landowners and developers, case law has upheld the Secretary's definition of "harm" to include habitat modification.[5] Not

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[1] The Endangered Species Act of 1973, 16 U.S.C. § 1531 (1985).

[2] 16 U.S.C. § 1538(a)(1) (1985).

[3] 16 U.S.C. § 1532(19) (1985).

[4] 50 C.F.R. § 17.3 (1994) ("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] *See e.g.*, Palila v. Hawaii Dep't of Land and Natural Resources, 639 F.2d 495 (9th Cir. 1981) (upholding the Secretary's definition of "harm" under the Act's "take" provision by holding that the defendant's action in maintaining feral sheep and goats within the critical habitat of the endangered palila bird constituted a taking within the meaning of the Act); Palila v. Hawaii Dep't of Land and Natural Resources, 852 F.2d 1106 (9th Cir. 1988). The court affirmed the district court's holding that the conduct of state officials, in permitting mouflon sheep in the endangered palila bird species designated critical habitat, constituted a prohibited "take" under the 1981 redefinition of "harm." *Palila*, 852 F.2d at 1110. This conduct constituted a "harm" because the eating habits of the sheep destroyed the mamane woodland, thus causing habitat degradation that could result in the extinction of the palila bird. *Id.* at 1107. This case confirmed the existence of a cause of action under the Act based on the destruction of the habitat of an endangered species. *Id.* at 1106; *see also* Sierra Club v. Lyng, 694 F. Supp. 1260 (E.D. Tex. 1988) (holding that habitat destruction could constitute a violation of the "take" provision even when the habitat had not been designated as a critical habitat).

until *Babbitt v. Sweet Home Chapter of Communities for a Great Or.*,[6] however, has the Secretary's definition of "harm" been facially challenged as being unreasonable or inconsistent with the Act.

The Supreme Court held in *Sweet Home Chapter* that habitat modification is a "harm" that qualifies as a taking under the Act.[7] The factors considered by the Court included the ordinary understanding of the word "harm," the broad purpose of the Act, the incidental "take" permits, the legislative history, and the latitude that the Act gives the Secretary in enforcing the statute.[8] This casenote contends that the Court's holding in *Sweet Home Chapter* was correct.

The respondents in *Sweet Home Chapter* were small landowners, logging companies, and families who were dependent on the forest product industries of the Pacific Northwest and the Southeastern United States. This action and the request for a declaratory judgment was brought against the petitioners, the Secretary of the Interior and the Director of the Fish and Wildlife Service, to challenge the validity of the Secretary's regulation defining "harm," and more specifically the inclusion of habitat modification in that definition.[9]

The respondents claimed that they suffered economic injury because the "harm" regulation was applied to the red cockaded woodpecker, an endangered species, and the northern spotted owl, a threatened species.[10] Both species reside on land used by the respondents for logging activities. Although logging detrimentally altered the natural habitat and resulted in death or injury to members of both species, the respondents desired to continue their logging operations.[11]

The United States District Court for the District of Columbia granted summary judgment for the petitioners and dismissed the respondents' complaint.[12] The district court held that "Congress intended an expansive interpretation of the word 'take,' an interpretation that encompasses habitat modification."[13] The court of appeals ultimately reversed the decision,[14] concluding that "harm," like the other words used to define

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[6] Babbitt v. Sweet Home Chapter of Communities for a Great Or., 115 S. Ct. 2407. (1995).

[7] *Id.*

[8] *Id.*

[9] 50 C.F.R. § 17.3 (1994).

[10] *Sweet Home Chapter*, 115 S. Ct. at 2410.

[11] *Id.*

[12] Sweet Home Chapter of Communities for a Great Or. v. Lujan, 806 F. Supp. 279 (D.D.C. 1992) (Lujan was the Secretary of the Interior before Babbitt.).

[13] *Id.* at 285.

[14] Sweet Home Chapter of Communities for a Great Or. v. Babbitt, 17 F.3d 1463 (D.C. Cir. 1994) (A divided panel of the court of appeals initially affirmed the judgment of the district

"take," should be read as applying only to "the perpetrator's direct application of force against the animal taken."[15] The United States Supreme Court reversed in favor of the petitioners and held that "the Secretary reasonably construed the intent of Congress when he defined 'harm' to include 'significant habitat modification or degradation that actually kills or injures wildlife.'"[16]

The Supreme Court held that the ordinary understanding of the word "harm" supports the Secretary's interpretation.[17] In support of this conclusion, the Court relied upon the dictionary definition of "harm," meaning "to cause hurt or damage, [or] to injure."[18] As applied to the Act, this definition "naturally encompasses habitat modification that results in actual injury or death to members of an endangered or threatened species."[19]

The dissent favored the court of appeals' invocation of *noscitur a sociis* (i.e., "several items in a list shar[ing] an attribute counsels in favor of interpreting the other items as possessing that attribute as well").[20] Relying upon this canon of statutory interpretation, the dissent noted that "harm" is "merely one of [ten] prohibitory words in § 1532(19), and the other [nine] . . . are all affirmative acts . . . which are directed immediately and intentionally against a particular animal."[21] Thus, the dissent reasoned that the term "harm" must refer to a direct application of force because the other words in the definition of "take" imply such an affirmative act.[22]

The petitioners correctly noted that the "ordinary meaning of 'harm' encompasses killing or injury, whether by habitat modification or otherwise."[23] The dictionary definition of "harm" does not include the word "directly" or infer that only direct actions leading to injury constitute "harm." In addition, *noscitur a sociis* applies only where "the legislative intent or meaning of a statute is not clear."[24] "If the intent of Congress

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court. After granting a petition for rehearing, however, the panel reversed.).

[15] *Id.* at 1465.

[16] *Sweet Home Chapter*, 115 S. Ct. at 2418.

[17] *Id.* at 2412.

[18] *Id.* (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1034 (1996)).

[19] *Sweet Home Chapter*, 115 S. Ct. at 2412-13.

[20] *See id.* at 2424 (Scalia, J., dissenting) (qouting Beecham v. United States, 114 S. Ct. 1669, 1671 (1994)); *see also* Neal v. Clark, 95 U.S. 704, 708-09 (1877).

[21] *Sweet Home Chapter*, 115 S. Ct. at 2423 (Scalia, J., dissenting).

[22] *See id.*

[23] Brief for Petitioners at 16, Babbitt v. Sweet Home Chapter of Communities for a Great Or., 115 S. Ct. 2407 (1995) (No 94-859).

[24] NORMAN J. SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION at 47.16 (5th ed. 1992); *see also* Russel Motor Co. v. United States, 261 U.S. 514, 519-20 (1923).

is clear, that is the end of the matter; for the court . . . must give effect to the unambiguously expressed intent of Congress."[25] When there is a challenge to an agency's interpretation of a statutory provision that is "fairly conceptualized, [and] really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail."[26] As discussed below, the legislative history indicates that Congress intended the "take" provision to include habitat modification; therefore, the respondents' challenge must fail.

Even if *noscitur a sociis* were to be applied, the premise of the court of appeals and of the dissent was flawed. Many of the terms that accompany "harm" in the Act's definition of "take,"[27] particularly "harass," "pursue," "wound," and "kill," refer to activities or results that do not necessarily require direct force. Therefore, the Supreme Court was correct in not invoking the canon to invalidate the Secretary's interpretation of "harm" which is reasonable and compatible with the text of the Act as a whole.

The broad purpose of the Act supports the reasonableness of "the Secretary's decision to extend protection against activities that cause the precise harms Congress enacted the statute to avoid."[28] In *Tennessee Valley Authority v. Hill*,[29] the Supreme Court stated that the Act "represented the most comprehensive legislation for the preservation of endangered species ever enacted by any nation."[30] Given the clear expression of the Act's broad purpose to protect endangered and threatened wildlife, the Secretary's definition is reasonable.

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[25] Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984). The Court noted that "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. In addition, the Court stated that "[i]f Congress has explicity left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight . . . ." *Id.* at 843-44.

[26] *Id.* at 866.

[27] *See* 16 U.S.C. § 1532(19) (1985).

[28] *Sweet Home Chapter*, 115 S. Ct. at 2413.

[29] Tennessee Valley Auth. v. Hill, 437 U.S. 153 (1978).

[30] *Id.* at 180. The Court stated that the "plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost." *Id.* at 184. The Court also stated that "Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities . . . ." *Id.* at 194.

In addition, the 1982 congressional authorization for the Secretary to issue "take" permits "if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity,"[31] "strongly suggests that Congress understood [the Act] to prohibit indirect as well as deliberate takings,"[32] unless an incidental "take" permit is issued for indirect takings. The respondents claimed that there is "certainly nothing in the text of the 1982 amendments that endorses or adopts the agency's view of 'harm.'"[33] Several states, in their amicus curiae brief, argued that "[t]he 1982 amendments adding the . . . incidental take scheme do not indicate, let alone require that 'take' include habitat modifications that indirectly injure wildlife."[34] The legislative history of the incidental "take" permits shows, however, that Congress had incidental takes through habitat modification specifically in mind when it created the incidental "take" program.[35] The grant of an incidental "take" permit would be absurd if its purpose was to allow direct and deliberate actions to be taken against an endangered or threatened species. Therefore, it seems clear that Congress intended the Act to be applied to foreseeable and incidental effects on listed species.

Finally, the legislative history of the Act supports the reasonableness of the Secretary's definition. The Senate Report stressed that " '[t]ake' is defined . . . in the broadest possible manner to include every conceivable way in which a person can 'take' or attempt to 'take' any fish or wildlife."[36] The House Report stated that "the broadest possible terms"[37] were used to define takings.

The respondents asserted that Congress did not intend "take" to include habitat modification. They argued that the congressional "[c]ommittee's removal from the definition of a provision stating that 'take' includes 'the destruction, modification or curtailment of [the] habitat or range'"[38] is indicative of congressional intent that the "take" provision

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[31] 16 U.S.C. § 1539(a)(1)(B) (1985).

[32] *Sweet Home Chapter*, 115 S. Ct. at 2414.

[33] Brief for Respondents at 41, Babbitt v. Sweet Home Chapter of Communities for a Great Or., 115 S. Ct. 2407 (1995) (No. 94-859).

[34] Brief of the States of California, Kansas, Nebraska and Utah, as Amicus Curiae supporting Respondents at 9, Babbitt v. Sweet Home Chapter of Communities for a Great Or., 115 S. Ct. 2407 (1995) (No. 94-859).

[35] *See* S. REP. NO. 97-418, at 10 (1982). The permit process was described as being modeled after the response to a specific situation in San Mateo County, California, in which the "taking" of endangered butterflies was incidental to the development of some 3,000 dwelling units on a site inhabited by the species. *Id.*

[36] S. REP. NO. 93-307, at 7 (1973), *reprinted in* 1973 U.S.C.C.A.N. 2989, 2995.

[37] H.R. REP. NO. 93-412, at 15 (1973).

[38] *Sweet Home Chapter*, 115 S. Ct. at 2427 (Scalia, J. dissenting).

was not to encompass habitat modification.[39] This provision, however, would have made all destruction, modification or curtailment of a listed species habitat a "take," irrespective of the actual impact on the species, but the Secretary's definition of "harm" only applies if the habitat modification is significant and actually kills or injures listed species.[40] The deletion of habitat modification from the definition of "take," therefore, is not indicative of congressional intent.

In his dissent, Justice Scalia claimed that the Secretary's regulation dispenses with ordinary principles of proximate causation.[41] According to Justice Scalia, the statute "prohibit[s] habitat modification that is no more than the cause-in-fact of death or injury to wildlife."[42] There is, however, no indication that Congress intended to discard proximate causation.[43] Strict liability means "liability without regard to fault; it does not normally mean liability for every consequence, however remote, of one's conduct."[44] Consequently, the "harm" regulation only applies where significant habitat modification, by impairing essential behaviors,[45] is the proximate cause of actual death or injury to a protected species.

The dissent also claimed that any habitat modification where an endangered species is involved is a "harm."[46] A review of prior case history indicates otherwise. For example, in *Sierra Club v. Froehlke*,[47] the court refused to enjoin construction of the Meramec Park Lake Dam because the Sierra Club did not meet its burden of showing that the construction had jeopardized or would jeopardize the continued existence of the Indiana bat.

Although correct under current law, the decision in *Sweet Home Chapter* is likely to "increase demands by some in Congress who are intent on revising or perhaps eliminating altogether, provisions of the Act that prohibit land development that may destroy the habitat of endangered

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[39] *See id.* at 2427 (Scalia, J., dissenting).

[40] *See* 50 C.F.R. § 17.3 (1994).

[41] *See Sweet Home Chapter*, 115 S. Ct. at 2421 (Scalia, J., dissenting).

[42] *Id.* (claiming that any significant habitat modification that "'impair[s] essential behavioral patterns' is made unlawful, regardless of whether that result is intended or even foreseeable, and no matter how long the chain of causality between modification and injury").

[43] *See* 16 U.S.C. § 1531 (1985).

[44] *Sweet Home Chapter*, 115 S. Ct. at 2420 (O'Connor, J., concurring) (citing W. PAGE KEETON, PROSSER AND KEETON ON THE LAW OF TORTS § 79, at 559-60 (5th ed. 1984)).

[45] 50 C.F.R. § 17.3 (1994).

[46] *See Sweet Home Chapter*, 115 S. Ct. at 2421 (Scalia, J., dissenting).

[47] Sierra Club v. Froehlke, 534 F.2d 1289 (8th Cir. 1976).

species on private property."[48] The Act may also have the effect of deterring private development. There are, however, many valid reasons to preserve and protect endangered species.[49] As of 1994, "over eighty percent of all species were declining despite protection" from the Act.[50] This is reason to broadly enforce the Act, rather than to restrict its application.

It is self-evident that "without habitat a species can't survive."[51] The Secretary's definition of "harm" provides protection for endangered and threatened species and does not disregard land development. The Secretary "may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat . . . ."[52] In addition, the designation of critical habitat is authorized only "to the maximum extent prudent."[53] Several considerations, including the ordinary meaning of "harm," the broad purpose of the Act, the incidental "take" permits, the legislative history, and the latitude given to the Secretary, suggest that his interpretation that "harm" includes habitat modification is reasonable.

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[48] Frona M. Powell, *Defining Harm Under the Endangered Species Act: Implications of* Babbitt v. Sweet Home, 33 AM. BUS. L.J. 131, 133 (1995).

[49] *See id.* at 151.

> [S]pecies and biodiversity should be protected because they produce and may produce in the future many direct benefits. For example, a large portion of commerical pharmaceutical products are derived directly from wild plants and animals. Biodiversity may also advance other scientific, medical, and anthropological knowledge, . . . and may lead to future economic and commercial benefits.

Id. Species provide "recreational and aesthitic benefits for humans, and species extinction represents a potential loss for humans that is profound." *Id.* "[H]umans should view conservation of biodiversity as essential to protecting the viability of the larger ecosystem on which all species depend." *Id.*

[50] *Id.* at 149.

[51] Richard Stone, *Court Upholds Need to Protect Habitat. U.S. Supreme Court Rules Against Loggers*, SCIENCE, July 7, 1995, at 23 (quoting Thomas Eisner, Cornell University ecologist).

[52] 16 U.S.C. § 1533(b)(2) (1985).

[53] 16 U.S.C. § 1533(b)(6)(C)(ii) (1985); *see also* 49 Fed. Reg. 38, 903 (1984) (stating that the factors to be considered in individual cases include whether "designation of a critical habitat may generate public antagonism that could lead to vandalism" of habitat, and whether there would be a "net benefit to the conservation of the species and their habitats").