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Is Habitat Modification that Kills or Injures Endangered Wildlife a Prohibited Taking under the Endagered Species Act

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RECENT DEVELOPMENT

Is Habitat Modification that Kills or Injures Endangered Wildlife a Prohibited Taking Under the Endangered Species Act?

In the spring of 1994, one judge met his conscience on a single issue: Does habitat modification rise to the level of an impermissible "taking" of an endangered species under the Endangered Species Act ("Act" or "ESA")?[1] When that judge altered his position, on a motion for rehearing and without additional oral argument, the United States Court of Appeals for the District of Columbia Circuit reversed its earlier opinion.[2] By a vote of two to one the Court held invalid a Fish and Wildlife Service ("FWS") regulation that defines "harm" in the definition of "to take" under the ESA as:

> 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.[3]

The court invalidated the regulation because it was neither clearly authorized by Congress nor a "reasonable interpretation" of the statute.[4] Not only did this decision reverse an earlier decision by the same court,[5] it also created a conflict with the Ninth Circuit on this issue.[6] In the *Palila* decisions the Ninth Circuit found that the regulation followed the plain language of the ESA and was consistent with the policy of Congress as evidenced by the legislative history.[7] The Supreme Court has granted

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1. Pub. L. No. 93-205, 87 Stat. 884 (1973) (current version at 16 U.S.C. §§ 1531-1544 (1988)).

2. Sweet Home Chapter of Communities for a Great Oregon v. Babbitt ("Sweet Home III"), 17 F.3d 1463 (D.C. Cir. 1994), *modifying per curiam* 1 F.3d 1 (D.C. Cir. 1993) (per curiam), *reh'g and reh'g en banc denied*, 30 F.3d 190 (D.C. Cir. 1994), *cert. granted*, 115 S. Ct. 714 (1995).

3. 50 C.F.R. § 17.3 (1991).

4. *See generally Sweet Home III*, 17 F.3d 1463.

5. *See* Sweet Home Chapter of Communities for a Great Oregon v. Babbitt ("Sweet Home II"), 1 F.3d 1 (D.C. Cir. 1993) (holding that 50 C.F.R. § 17.3 was valid).

6. Palila v. Hawaii Dep't of Land and Natural Resources ("Palila IV"), 852 F.2d 1106 (9th Cir. 1988) (holding that actions that modified the habitat of an endangered bird (the palila) in a way that could lead to extinction constituted "harm" under the ESA and therefore amounted to a prohibited taking).

7. *Id.* at 1108.

certiorari to the *Sweet Home* case[8] and will soon resolve the conflict between the circuits by ruling on the validity of the regulation.

This note examines the jurisprudence expressed on this issue in both the *Sweet Home* and *Palila* decisions. The conclusion is that the Supreme Court should reverse the *Sweet Home III* decision and affirm the Department of the Interior's regulation.

CONFLICT BETWEEN THE CIRCUITS

In the *Sweet Home* decisions, parties who were dependent on the forest products industry sued the Secretary of the Interior and the Director of the FWS claiming that their livelihoods had been damaged by timber harvest restrictions designed to protect the habitat of the northern spotted owl.[9] Three issues were raised by this line of cases. Only the third issue, the scope and validity of Interior's harm regulation, will be discussed here.

In *Sweet Home I*, the U.S. District Court for the District of Columbia held that the harm regulation promulgated by the Secretary of the Interior was valid and did not violate the ESA.[10] The court, in a carefully reasoned opinion by Judge Johnson, found that the language, structure, and legislative history of the ESA reveal that Congress intended an expansive definition of the word "take" which would encompass habitat modification. Judge Johnson analyzed the validity of the regulation under the standards of statutory review established by the Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[11] Under the *Chevron* test, if the "intent of Congress is clear, that is the end of the matter," and the federal agency's regulatory interpretation must fulfill this intent.[12] If the intent of Congress is ambiguous, however, the court must decide if the agency's regulation is "based on a permissible construction of the statute."[13] A court may not substitute its own interpretation if the agency's interpretation is "reasonable."[14]

Several congressional reports discuss the intent of Congress in using the word "take." The definition of "take" was to be interpreted "in the broadest possible manner to include every conceivable way in which

8. Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 115 S. Ct. 714 (1995).

9. Sweet Home Chapter of Communities for a Great Oregon v. Lujan ("Sweet Home I"), 806 F. Supp. 279, 281 (D.D.C. 1992).

10. *Id.* at 285.

11. 467 U.S. 837 (1984).

12. *Id.* at 842–43.

13. *Id.* at 843.

14. *Id.* at 844.

a person can 'take' or attempt to 'take' any fish or wildlife."[15] Judge Johnson found that the intent of Congress was clear and quoted a congressional report saying that "[o]ften habitat protection is the only means of protecting endangered animals which occur on non-public lands."[16] Under *Chevron*, because the intent of Congress was clear, that was the end of the matter and the regulation was valid.

In *Sweet Home II*, the U.S. Court of Appeals for the District of Columbia Circuit affirmed the holding that the regulation was valid in a two to one decision.[17] All three judges on the panel deciding the case wrote separate opinions that cover the issue of whether habitat modification may rise to the level of a prohibited taking. Chief Judge Mikva affirmed the deferential *Chevron* standard used by Judge Johnson of the District Court and concluded that Congress intended to include habitat modification as a prohibited action under the ESA. To support this position the Judge marshaled considerable evidence and precedent. For example, Judge Mikva quoted the Supreme Court's observation that:

> In shaping [the ESA], Congress started from the finding that "[t]he two major causes of extinction are hunting and destruction of natural habitat." S. Rep. No. 93–307, p. 2 (1973). Of these twin threats, Congress was informed that the greatest was destruction of natural habitats. . . ."[18]

He also pointed out that the first stated purpose of the ESA is "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved. . . ."[19] Judge Mikva argued that the regulation sets up permissible standards by which to judge when a habitat modification is so drastic that it constitutes a taking, and he pointed out that even if the definition of harm were to be found invalid, the unchallenged definition of "to harass" is probably broad enough to prohibit significant habitat modification.[20]

Judge Mikva's final major argument was that even if the language and history of the ESA were found to be ambiguous as to whether Congress intended to forbid habitat modification, a critical piece of evidence indicates their actual intent. In 1982, Congress amended the

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15. S. Rep. No. 307, 93d Cong., 1st Sess. 7 (1973). *See also* H.R. Rep. No. 412, 93d Cong., 1st Sess. 11, 15 (1973).

16. *Sweet Home I*, 806 F. Supp. at 284 (quoting S. Rep. No. 307, 93d Cong., 1st Sess. 4 (1973)).

17. *Sweet Home II*, 1 F.3d at 3.

18. *Id.* at 8 (Mikva, C.J., concurring) (quoting Tennessee Valley Authority v. Hill, 437 U.S. 153, 179 (1978)).

19. *Id.* (quoting 16 U.S.C. § 1531(b)).

20. *Id.* at 10 (citing 50 C.F.R. § 17.3).

ESA to include a provision that authorizes limited takings, pursuant to a permit, incident to "an otherwise lawful activity."[21] By modifying the law to allow the FWS to permit incidental takings, Congress confirmed that without such a permit incidental takings were unlawful. The legislative history clearly shows that habitat modification is a kind of activity that required a permit, because the House Report states that the incidental takings amendment is "modeled after a habitat conservation plan that has been developed by three Northern California cities. . . ."[22] In conclusion, Judge Mikva noted that, in upholding the regulation, the D.C. Circuit joined the Ninth Circuit in finding that inclusion of habitat destruction in the definition of harm is a reasonable and permissible regulation implementing the ESA.[23]

In a short concurring opinion, Judge Williams found the regulation valid solely because of the inference derived from the 1982 amendments to the ESA with respect to incidental takings permits.[24] Otherwise, Judge Williams found the dissent's analysis persuasive.

In dissent, Judge Sentelle voted to invalidate the regulation even though he ostensibly applied the same *Chevron* standard of deference that Judges Mikva and Johnson used to uphold the regulation. Judge Sentelle's principal problem with the regulation stemmed from the fact that he had "seen a great many farmers modifying habitat. . . [and] at no point when I have seen a farmer so engaged has it occurred to me that he is taking game."[25] On a profound level, Judge Sentelle voiced a legitimate concern. Apparently he was concerned that if the regulation was allowed to stand, the "habitat police" will swoop down on well meaning citizens and prohibit them from engaging in any livelihood which alters the landscape. The above quote is as close as Judge Sentelle gets to voicing his underlying policy concerns. The rest of the dissent is spent cloaking his real concerns in a veneer composed of the canons of statutory construction.

Judge Sentelle's principal structural argument was that a word is known by the company it keeps, *noscitur a sociis*. The company the word "harm" keeps in the law is bad company indeed. Most of the words that codify section 9 of the Act are very specific and suggest a direct injury to endangered wildlife: hunt, shoot, wound, kill, trap, capture, collect.[26]

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21. *Id.* (citing 16 U.S.C. § 1539(a)(1)(B)).

22. *Id.* at 11 (quoting H.R. Rep. No. 97-835, 97th Cong. 2d Sess. 30-31 (1982), U.S.C.C.A.N. 2807, 2871, 2872 (1982)).

23. *Id.* (citing Palila v. Hawaii Dep't of Land and Natural Resources ("Palila IV"), 852 F.2d 1106, 1108 (9th Cir. 1988)).

24. *Id.* (Williams, J., concurring).

25. *Id.* at 12 (Sentelle, J., dissenting).

26. 16 U.S.C. § 1532(19).

Only pursue and harass are somewhat milder and would not necessarily result in the death or injury of wildlife. Judge Sentelle reasoned that in such violent statutory company, surely Congress meant that harm is prohibited only if it harms to the same degree as these other resolutely active verbs. However, Judge Sentelle chose not to discuss the company of the less violent "pursue" or the word "harass" which seems as broad an activity as "harm." The *noscitur a sociis* argument fails because not all of the listed prohibited actions are forceful; harm keeps company with both violent and nonviolent actions.

The final canon of statutory construction that Judge Sentelle used to invalidate the regulation was the presumption against surplusage from *Mackey v. Lanier Collection Agency & Service, Inc.*[27] The judge's concern was that the agency's interpretation of the word harm, as an "act which actually kills or injures wildlife,"[28] encompasses all the other verbs in that section, such as hunt, shoot, and kill, rendering those verbs superfluous.[29] Congress would have wasted the ink on all these other verbs if they could legitimately all be subsumed under the definition of a single word, harm. However, the judge did not follow this argument to its logical conclusion. Congress did include both "harm" and the other forceful words which may be encompassed by "harm." Thus, the congressional authors of this language indicated that the meaning of harm was intended to include the less violent meanings of harm, such as impairment of feeding, sheltering, and breeding by habitat modification. Otherwise, Congress would have had no reason to include the word "harm," whose more violent meanings are listed individually.

Judge Sentelle could have written a more forthright dissent based on his underlying policy concerns, but he did not. In *Sweet Home III*, however, Judge Williams echoed and carried forward Judge Sentelle's concerns about the farmer tilling his field.[30] In *Sweet Home II*, Judge Williams stated that the regulation was valid because the inference of the 1982 Amendments was that Congress recognized "that the ESA otherwise forbids some such incidental takings, including some habitat modification."[31] In *Sweet Home III*, Judge Williams reversed that position, joined Judge Sentelle, and wrote for the new two to one majority to invalidate the regulation.

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27. 486 U.S. 825 (1988). The rule of construction, as expressed in this case, is that courts should be reluctant to affirm an agency interpretation of a law that would render superfluous another part of that law. Id. at 837.

28. 50 C.F.R. § 17.3 (1991).

29. *Sweet Home II*, 1 F.3d at 13 (Sentelle, J., dissenting).

30. *See generally Sweet Home III*, 17 F.3d at 1464–72.

31. *Sweet Home II*, 1 F.3d at 11 (Williams, J., concurring).

Like Judge Sentelle in *Sweet Home II*, Judge Williams appears to have made a decision based on policy grounds and then clothed it in the arguments of statutory construction. Judge Sentelle was worried that the farmer plowing his field might be guilty of a prohibited taking if he was found to have significantly modified endangered species habitat. Judge Williams may have been worried that every time that farmer wanted to plow he would have to get an incidental takings permit. That may be a legitimate policy concern, but again, like Judge Sentelle, Judge Williams did not argue the underlying policy issues. Instead, he too fell back upon canons of statutory construction.

He repeated the *noscitur a sociis* argument and noted that the other forceful words listed as constituting a taking argued against a broad reading of harm.[32] As discussed above, at least three of the words, harm, pursue and harass, do not necessarily involve the application of force. The *noscitur a sociis* line of reasoning is strongest when all the words in the list are similar except for one ambiguous word. That is not the case with the definition of "to take" in the Act: some words are "forceful," some are not. If any of the judges had employed the plain meaning test it would have reinforced this conclusion. A harm may be "an act or instance of injury,"[33] i.e., harm may be intentional or coincidental.

Judge Williams then outlined a detailed example of a situation in which a utility company sought to construct a nuclear power plant on the Connecticut River.[34] In supporting the 1982 amendments authorizing the FWS to issue incidental takings permits, an expert witness explained that endangered sturgeon eggs were inevitably entrained and crushed by the intake valves. Without the amendment the FWS could effectively prohibit the plant because the taking of the eggs was prohibited. Thus, said Judge Williams, the incidental takings permit system arose from two assumptions: "1) that the perpetrator need not have *intended* to take the creature in question, and 2) that even the slightest taking would violate the Act. . . ."[35] This anecdote seems to be the basis for Judge Williams' underlying concern that even minor modifications of habitat would require a bureaucratic incidental takings permit under the FWS regulation.

Judge Mikva, now writing in dissent in *Sweet Home III*, pointed out that the majority granted rehearing without oral argument or additional briefs tailored to the court's concerns. He stated, "What was rightly considered good law in the opinion in this case issued last year

32. *Sweet Home III*, 17 F.3d at 1464–66.
33. Webster's Third International Dictionary, Unabridged (1971).
34. *Sweet Home III*, 17 F.3d at 1467–68.
35. *Id.* at 1468 (emphasis in original).

. . . is now 'altered' on the basis of a confusing and misguided legal analysis that creates a needless conflict among the circuits."[36] He then examined the majority's arguments and concluded that they found nothing in the language, structure, or legislative history that unambiguously shows that "harm" may not encompass habitat modification.[37] Thus, under *Chevron*, the regulation must be upheld because, even if the intent of Congress was ambiguous, the agency's regulation was reasonable.

Judge Mikva pointed out that the Ninth Circuit held that the FWS definition of "harm" was a permissible interpretation of the statute and was, therefore, valid. That holding is in conflict with the holding in *Sweet Home III*. The Ninth Circuit opinion is found in a sequence of four decisions between 1979 and 1988 involving the Hawaii Department of Land and Natural Resources' maintenance of herds of feral sheep, feral goats, and imported mouflon sheep for sport hunting purposes in an area high on the slopes of Mauna Kea. The area had been designated critical habitat for the endangered bird known as the palila. The sheep and goats caused significant habitat modification and degradation of the mamane-naio forest on which the palila depends for its survival. In the *Palila* cases,[38] the courts found that the Department's practice of maintaining sheep and goats in the palila's critical habitat in an area owned by the state of Hawaii constituted an unlawful "taking" under the ESA and the Department was ordered to remove the sheep and goats from the area. The regulation itself was not challenged but its application, i.e., court-ordered removal of the animals to prevent impermissible habitat modification, was challenged. In no case did the actions of the Department directly affect the birds. They did not harass, pursue, hunt, shoot, wound, kill, trap, capture, or collect the birds. Rather, their maintenance of the sheep and goats destroyed the palila's critical habitat and in *Palila I*, the court granted the plaintiffs' motion for summary judgment, finding that the defendants were in violation of the prohibition against taking endangered species because they were harming the birds by a policy that led to the destruction of critical habitat.[39]

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36. *Id.* at 1473 (Mikva, C.J., dissenting).

37. *See id.* at 1473–78.

38. Palila v. Hawaii Dep't of Land and Natural Resources ("Palila I"), 471 F. Supp. 985 (D. Haw. 1979), *aff'd*, 639 F.2d 495 (9th Cir. 1981) ("Palila II"). Palila v. Hawaii Dep't of Land and Natural Resources ("Palila III"), 649 F. Supp. 1070 (D. Haw. 1986), *aff'd*, 852 F.2d 1106 (9th Cir. 1988) ("Palila IV").

39. *Palila I*, 471 F. Supp. at 995, 999.

The defendants appealed and the Ninth Circuit affirmed.[40] Even though the exact definition of harm was changed in 1981,[41] the *Palila II* court found that the definition then, as now, included activity that results in significant environmental modification or degradation of the endangered animals habitat.[42]

In *Palila III*, the plaintiffs sued in U.S. District Court to remove the mouflon sheep as well as the feral sheep and goats from palila's critical habitat. This issue had been held in abeyance because studies were in progress to determine whether the mouflon sheep destroyed the habitat in the same way as did the feral animals. The most significant part of this opinion is the judge's finding that:

> A finding of "harm" does not require death to individual members of the species; nor does it require a finding that habitat degradation is presently driving the species further toward extinction. Habitat destruction that prevents the recovery of the species by affecting essential behavioral patterns causes actual injury to the species and effects a taking under section 9 of the Act.[43]

As support for this position Judge King noted that, in 1981, the Secretary of the Interior redefined "harm" in the regulations because he was concerned that the original definition could lead to any habitat modification being a *per se* violation. Thus, he proposed that harm be simply defined as "an act which injures or kills wildlife."[44] After the comment period, however, the Secretary decided not to require actual death but redefined "harm:"

> to mean any action, including habitat modification, which actually kills or injures wildlife, rather than the present interpretation which might be read to include habitat modification or degradation alone without further proof of death or injury. Habitat modification as injury would only be covered by the new definition if it significantly impaired essential behavioral patterns of a listed species.[45]

The judge quoted from the same section of the final rule, noting that the redefinition of harm was *not* limited to:

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40. *Palila II*, 639 F.2d at 498.
41. *Palila III*, 649 F. Supp. at 1075.
42. *Palila II*, 639 F.2d at 497–98.
43. *Palila III*, 649 F. Supp. at 1075.
44. *Id.* at 1076 (quoting 46 Fed. Reg. 29,490, 29,490 (1981)).
45. *Id.* at 1077 (quoting 46 Fed. Reg. 54,748, 54,748 (1981)).

> direct physical injury to an individual member of the wildlife species. . . . The purpose of the redefinition was to preclude claims of a Section 9 taking for habitat modification alone without any attendant death or injury of the protected wildlife. Death or injury, however, may be caused by impairment of essential behavioral patterns which can have significant and permanent effects on a listed species.[46]

The key is the link between habitat modification and harm to the species as a whole, i.e., by preventing or inhibiting recovery of the population. Judge King found that the presence of the exotic sheep had a negative impact on the palila population that threatened the continued existence and recovery of the species. "Once this determination has been made, the [ESA] leaves no room for balancing policy considerations . . . ."[47] A taking had occurred and the sheep had to be removed. The Ninth Circuit affirmed *Palila III* because the district court's finding that habitat modification that could result in extinction constitutes "harm" was not clearly erroneous.[48]

CONCLUSION

There are several reasons why the Supreme Court should reverse the *Sweet Home III* decision. First, the *Sweet Home III* court's deepest policy concerns were misplaced and led to faulty jurisprudence. In both the *Palila* and *Sweet Home* lines of cases it was a concern that any habitat modification *per se* not be a taking in violation of section 9. In *Sweet Home III*, Judges Williams and Sentelle worried about the possibility that under the existing wording *any* modification of habitat would be a prohibited taking and a violation of the law. The Department of the Interior's clarification in the publication of the final rule, quoted by Judge King in *Palila III*,[49] should reassure the D.C. Circuit that such is not the case. A careful reading of the harm regulation supports this conclusion. It states that significant habitat modification is only a taking when it "actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering."[50] In other words, the burden of proof is on the person alleging harm to prove either actual death *or* injury by impairment of essential functions. Clearly, habitat modification *per se* would not be a violation. *Sweet Home III* was wrongly decided because the court ignored

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46. *Id.* (quoting 46 Fed. Reg. at 54,748)
47. *Palila III*, 649 F. Supp. at 1082.
48. *Palila IV*, 852 F.2d at 1110.
49. *Palila III*, 649 F. Supp. at 1077.
50. 50 C.F.R. 17.3 (1991).

the need for proof of injury by impairment and simply struck down the regulation *in toto* because they believed that habitat modification *per se* should not constitute a violation. *Sweet Home III* should be reversed because the regulation does not make modification a *per se* violation but requires sophisticated but ascertainable proof of impairment.

In addition, *Sweet Home III* should be reversed because if it is allowed to stand, habitat modification which impairs essential activities of endangered species will no longer require an incidental takings permit. There will no longer be a need to show that mitigation measures have been considered and adopted. This is clearly contrary to the intent of the original 1973 legislation and the 1982 Amendments. As Judge Mikva stated in his *Sweet Home III* dissent, "The purpose of the Endangered Species Act, lest we forget, is to protect endangered species."[51] The incidental takings permit provision is designed to allow developers and others the needed flexibility to modify habitat as long as it does not tip a species into extinction. That should not be too onerous a burden. If the burden is removed, then persons could modify or destroy habitat to their hearts' content as long as no actual dead or injured creatures were found.

Third, it is not logical to believe that the Congress intended a strict standard that prohibits habitat modification which leads to species impairment or death for federal actions (section 7) and a more lenient standard which allows similar modifications in non-federal actions (section 9 as reinterpreted by the *Sweet Home III* court).

Fourth, the *Sweet Home III* court jettisons the *Chevron* standard impermissibly. While the challenged regulation is a reasonable one it is not the only possible interpretation of the statute. The *Sweet Home III* court impermissibly substitutes their preferred interpretation of the statute for a reasonable agency interpretation which should have been accorded due deference.[52]

In summary, when Judge Williams shifted his support to Judge Sentelle's position, the U.S. Court of Appeals for the D.C. Circuit voted two to one to invalidate the Department of the Interior's regulation that defines a harm to include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing behavioral patterns. This decision is in conflict with Ninth Circuit decisions that hold

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51. *Sweet Home III*, 17 F.3d at 1478 (Mikva, C.J., dissenting).

52. The entire issue may be moot because even without validation of a definition of harm which includes significant habitat modification, the Interior may simply subsume habitat modification under its unchallenged definition of "harass." Harassment includes any activity, whether an intentional or negligent act or omission, which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to breeding, feeding, or sheltering. 50 C.F.R. § 17.3 (1991).

that habitat modification, which could lead to species extinction, constitutes an impermissible taking under the Endangered Species Act. The Supreme Court should reverse the Court of Appeals for the D.C. Circuit and reaffirm the principals articulated by the Ninth Circuit Court of Appeals.

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