

USA

Habitat Protection Ruling

by Donald K. Anton*

A New York Appellate Court ruled in October that the habitat of endangered species as well as the species itself is protected under New York's Endangered Species Act. It thus ruled that a fence might be illegal if it curtailed the creatures' habitat.

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In a *per curiam* opinion, the Court unanimously affirmed a County Supreme Court justice who had refused to issue a preliminary injunction to stop the State Department of Environmental Conservation from requiring a landowner to tear down a 3,500 foot long, four foot high "snake-proof" fence that keeps timber rattlesnakes off his 213-acre property, where he intends to create a mine. The

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timber rattlesnake has been classified as a threatened species in New York State.

The decision is the first to interpret the state Endangered Species Act, which has been on the books for 28 years. Lawyers for the property owner said their client had not decided whether to appeal the preliminary injunction denial to the Court of Appeals. The landowner may also choose to go to trial on its request for a permanent injunction.

The statutory term “taking” applies to habitat as well as the animals, and a limitation of habitat that may harm the species provides enough justification for the State Department of Environmental Conservation to prohibit the fence, the court said.

The fence was erected when the landowner – Sour Mountain Realty Inc. – found a rattlesnake den 260 feet from its property line. But the Department of Environmental Conservation said that the fence would endanger the normal migratory patterns of the rattlesnakes, and cut them off from much of the area where they seek food. The normal territory radius of the snakes is two-and-a-half to three miles, and the fence would keep them from much of their habitat.

State officials ordered the property owner to dismantle the fence. The Department of Environmental Conservation issued the order under the Endangered Species Act, codified at §11-0535 of the Environmental Conservation Law. State environmental officials took the position that the act, which prohibits “the taking...of any endangered or threatened species,” empowers it to protect the habitat of protected animals and not just the animals themselves. The real estate company then went to court to obtain an injunction against the removal order. Justice Judith Hillery agreed in March 1999 with State environmental officials and refused to issue an order allowing Sour Mountain to maintain the fence.

The Second Department panel affirmed Justice Hillery’s decision, holding that the New York Legislature intended a broad construction of the term “taking” and sought to empower the Department of Environmental Conservation to use its authority to protect habitat.

“This is a huge victory for the State,” the Attorney General’s spokesman said. “It essentially says that the State has the right to regulate activity on private land in order to protect endangered and threatened species.” The spokesman added that the broad view of State environmental regulatory power was a “critical point” in the interpretation of the Endangered Species Act.

The lawyer representing the property owner said that the ruling sets up two criteria which the State must meet in order to justify its action. “At trial, the State of New York must prove two things: first, that the fence modifies the snakes’ habitat; and second, that [the habitat curtailment] can cause harm to the species,” he said. He would ask the trial judge to instruct a jury on such a test and said, “I think we can win with that clarity.”

The panel observed that federal courts have defined “taking” in the federal Endangered Species Act as including “harm” to the endangered animal, including habitat modification when it has a negative impact. New York’s Endangered Species Act was meant to complement the federal law, the panellists said, in adopting the federal courts reasoning in finding that “habitat interference may constitute a taking” under the New York law.

The appeals court rejected Sour Mountain’s argument that the state law prohibited only the intentional harming or killing of an endangered species. It said that the statute contains broad language including a prohibition against disturbing endangered species in New York. “We agree with the Supreme Court that the proscribed ‘lesser acts’ logically include habitat modification,” the justices said.

