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Eastern Hellbender/Endangered Species Act: Federal District Court Addresses Challenge to U.S. Fish and Wildlife Service Denial of Endangered/Threatened Listing

09/11/2023

The United States District Court (Southern District of New York) ("Court") addressed in a September 5th Opinion and Order ("Opinion") a Complaint filed by several environmental organizations challenging the United States Fish and Wildlife Service ("Service") decision to not list the eastern hellbender as endangered or threatened under the Endangered Species Act ("ESA"). See Center for Biological Diversity, et al., v. U.S. Fish and Wildlife Service, 21-cv-5706 (LJL).

The organizations filing the Complaint included:

- Center for Biological Diversity
- Waterkeeper Alliance, Inc.
- Waterkeepers Chesapeake, Inc.
- Lower Susquehanna Riverkeeper Association
- Middle Susquehanna Riverkeeper Association

(collectively, "Waterkeeper")

The ESA and its implementing regulations provide a process for which a species may be listed as either "endangered" or "threatened." The two listing categories are defined as:

- Endangered includes those species in danger of extinction throughout all or a significant portion of its range
- Threatened encompasses those species likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range

The ESA provides five factors for the Service to consider in determining whether a species is either endangered or threatened which include:

1. The present or threatened destruction, modification, or curtailment of its habitat or range
2. Over utilization for commercial, recreational, scientific, or educational purposes
3. Disease or predation
4. The inadequacy of existing regulatory mechanisms; or

5. Other natural or manmade factors affecting its continued existence

Waterkeeper had submitted a petition pursuant to the ESA regulations requesting that the eastern hellbender be listed as either threatened or endangered.

The Service subsequently issued a positive 90-day finding that the Waterkeeper petition presented substantial scientific information indicating that a listing of the eastern hellbender may be warranted. Nevertheless, the Service did not subsequently make a listing determination.

Waterkeeper then sued the Service to compel a determination.

The Service and Waterkeeper entered into a settlement requiring that the Service submit a listing determination by September 30, 2019. The Service concluded that the listing of the eastern hellbender was not warranted.

The eastern hellbender is described as an aquatic salamander with a population in streams across 15 states in the Northeast, Midwest, Mid-Atlantic, and Southern United States. It has a very restricted range in the State of Arkansas.

In its determination that the eastern hellbender was neither endangered nor threatened, the Service stated in the listing determination that:

Rangewide, the number of extant populations is predicted to decrease by 2 to 52 percent over the next 10 years, and then slightly decrease from year 10 to year 25 under both scenarios (see figure 1, below), with the “most likely” scenario skewed toward the reasonable worst plausible scenario. Despite these overall losses, multiple healthy populations over a broad geographic range are predicted to persist over the next 25 years (55 to 178 healthy populations, representing a 57-percent decrease to a 40-percent increase from current conditions).

Therefore, the Service concluded that the eastern hellbender was not endangered or threatened throughout all or a significant portion of its range and that listing was not warranted.

Waterkeeper’s Complaint challenged the Service’s finding arguing that it failed to rely on the best scientific and commercial data in several respects.

Motions for Summary Judgment were then filed by both the Service and Waterkeeper.

Waterkeeper advanced five arguments in support of its request that the Service’s listing decision be reversed. They included that the Service:

1. Failed to articulate a rational and legal basis for its not-warranted determination;
2. Relied on unproven or uncertain future conservation measures in reaching its not-warranted determination;
3. Failed to consider the adequacy of existing regulatory mechanisms;
4. Definition of “a significant portion of its range” is arbitrary; and
5. Arbitrarily truncated consideration of the “foreseeable future” by limiting its analysis to twenty-five years. Dkt. No. 56.

In addressing each of the five arguments the Court concluded:

1. The Service did not ignore evidence of the RWP nor did it reach a conclusion without explanation that ran counter to evidence before it (did not disregard expert opinions [including that of its own experts])
2. The Service’s consideration of conservation efforts was arbitrary and capricious and not in accordance with the law/relied on improper factors (Record before the Court is stated to

demonstrate that the Service considered conservation measures in reaching its not-warranted determination that had not yet been implemented and determined defective without concluding that those measures were sufficiently certain to be effective).

3. Rejects the argument that the Service failed to consider the adequacy of existing regulatory mechanisms (listing determination reflected the Service's understanding that regulatory mechanisms are to be considered after determining the threat to the species and their effects).
4. The Service did not abuse its discretion or act contrary to law in deciding, articulating, or applying its chosen definition of "significant portion of its range" (not error or arbitrary and capricious for the Service to determine that the eastern hellbender is not in danger of extinction or likely to become endangered in a significant portion of its range without considering whether genetically divergent variance of the species might be recognized as the species sometime in the future were in danger of extinction or becoming endangered).
5. Rejects the argument that Service's use of 25 years as outward bound of the "foreseeable future" was arbitrary, capricious, or otherwise not in accordance with the law. (The fact that the timeframe the Service used was not Waterkeeper's preferred timeframe does not mean that the agency violated either the ESA or the Administrative Procedures Act).

The Court discussed the options for relief which included:

- A limited remand to the Service directed it to provide further explanation of its conclusions is appropriate; or
- The listing determination should be vacated and a time limit imposed for the Service to issue a new listing within 180 days.

The Court grants Waterkeeper's Motion for Summary Judgment and holds that the Service's determination that a listing of the eastern hellbender as endangered or threatened is not warranted is vacated and remanded to the Service for further proceedings consistent with the Opinion. However, it denies the request by Waterkeeper that such a decision must be reached within 180 days pursuant to Waterkeeper's request.

A copy of the Opinion can be downloaded [here](#).