

Lessons of the Waterdog: ESA & CWA Protections

Alex N. Dominguez

Introduction

The state of Alabama is home to 73 different types of amphibians, from frogs to salamanders, and everything in between. Many of these amphibians benefit from two specific environmental protection statutes: (1) the Endangered Species Act (ESA); and (2) the Clean Water Act (CWA). Under the ESA, species are listed as either “threatened” or “endangered,” and governments, businesses, and individuals must avoid taking actions that may cause them harm. In addition, the ESA allows the Secretary of the Interior to designate “critical habitat” for areas essential to the conservation of the listed species. Further, under the CWA, aquatic species have been able to reap the benefits of improved water quality achieved through the listing of certain waterbodies these species call home. This two-prong approach to species protection can serve as a model for future protections of aquatic and amphibious threatened and endangered species. This article examines the case of the Black Warrior Waterdog to demonstrate the success of this approach.

Black Warrior Waterdog

Late at night in the Alabama Black Warrior River Basin, a nine-inch salamander snags small bugs resting on the river’s surface. However, this is not just any salamander, it is the Black Warrior Waterdog (Waterdog), a species listed as endangered under the ESA.

The nocturnal Waterdog is dependent upon a very specific environment. This species is found only within the Black Warrior River Basin in the state of Alabama (see map), thriving in medium and large streams dominated by clay and bedrock with plenty of crevices and slabs to hide and rest.¹ In total, the range of the Waterdog spans only four Alabama counties: Blount, Tuscaloosa, Walker, and Winston.

The Waterdog is currently facing many challenges, the most significant of which is water quality degradation: “Changes in water chemistry and flow patterns, resulting in a decrease in water quality and quantity, have detrimental



effects on salamander ecology because they can render aquatic habitat unsuitable.”² Sedimentation has also played a significant role in overall water quality degradation.³ Sedimentation is essentially the settling of solid particles, such as rocks and dirt, from the natural flow of the rivers and stream. While sedimentation is a natural process, it can be amplified to harmful levels by construction and development near waterways which disturb soils and increase runoff. As particles cloud the water, they cause physical alterations to the Waterdog’s habitat resulting in a

reduction in food sources, alteration to regular shelter, and the potential buildup of negative substances.

Listing the Waterdog

Recognizing these pressing threats to the species, on January 3, 2018, the U.S. Fish and Wildlife Service (FWS) listed the Waterdog as an endangered species under the ESA. By listing the Waterdog as endangered, FWS acknowledged that the Waterdog “is in danger of extinction throughout all or a significant portion of its range.” However, this listing did not happen overnight; instead, it took decades.

In 1982, the Waterdog was placed on a candidate waiting list, meaning “proposed listing was possibly appropriate” but “substantial data on biological vulnerability and threats were not available to support a proposed rule.”⁴ In 1996 the Waterdog was removed from the candidate waiting list, just to be added back to the list in 1999. In an effort to move the Waterdog off of the candidate waiting list for good, the Center for Biological Diversity (CBD) petitioned FWS in 2004 and again in 2010. After these failed attempts, momentum slowed, and the Waterdog remained on the candidate waiting list.

Tired of this lack of action, CBD took a more aggressive approach. After several conversations and the looming possibility of legal action, CBD and FWS reached a settlement in 2011 in which FWS agreed to decide by the end of the year whether or not to list the Waterdog and all other species listed on the 2010 candidate waiting list.⁵ While FWS action took longer than expected, on October 6, 2016, FWS initiated the listing process in order to move the Waterdog off the candidate waiting list and onto the official endangered species list. Two years later the Waterdog was officially listed as endangered under the ESA.

Upon listing under the ESA, the Waterdog received specific protections from “takings.” Under the ESA, to “take,” is defined to mean “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct.” In 1995, the Supreme Court held in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, that *significant* habitat modification was a reasonable interpretation of the term “harm” under the ESA definition of “take.”⁶

In addition to “taking” protections, under the ESA, when a species is listed as endangered, FWS must designate

critical habitat that is essential for conservation of the listed species. Therefore, upon listing, FWS designated 420 miles of the river in the Black Warrior River Basin, 127 of which were already designated as critical habitat for other listed species. This designated area includes four tributaries within the Black Warrior River Basin: Sipsey Fork, Locust Fork, Blackwater Creek, and Yellow Creek.



Efforts under the CWA

Ideally, the problems would end there, and the species would be on its path to recovery. Unfortunately, that is not the case with the Waterdog. In February 2019, the Black Warrior Riverkeeper (Riverkeeper), an environmental advocacy group, sued the U.S. Environmental Protection Agency (EPA) for failing to protect two Northern Alabama streams from pollution.⁷ Specifically, Riverkeeper alleged that the EPA violated the CWA through its “arbitrary approval” of Alabama’s request to delist impaired waters without supporting evidence that these waters meet applicable standards. And Riverkeeper stated that the EPA “failed to consider *all* [emphasis added] relevant information about Alabama’s waterbodies and pollutants as required.” (Complaint, pp. 1-2.)

Under the CWA, states are required to identify waters for which discharge permits alone are not enough to implement applicable water quality standards. (Clean Water Act § 303.) These state waters are then ranked based on the severity of the pollution and the uses to be made of the water. Each state submits to the EPA the list of so-called impaired waters along with their ranking and maximum discharges of pollutants allowed into those waters. Removing impaired waters from the state list should occur when the identified pollutants are no longer

occurring, but Riverkeeper’s complaint contends that the rivers were removed from the impaired list without improvements in the water quality.

So, what does this mean for the Waterdog? Several of waterbodies approved for delisting are known habitat for the species and one, Big Yellow Creek, is currently designated as critical habitat. Removing these waterbodies from the list of impaired waters means they will no longer be scheduled for pollutant discharge limits, and “will be excluded from the subsequent implementation of water-quality based ... pollution control measures...” (Complaint, p. 2.) Removing these waterbodies from the impaired list may put the Waterdog’s likelihood of recovery at risk. The Waterdog was benefiting from CWA protection by having the potential for reduced pollutants in its habitat. That potential ends when those waterways are no longer considered impaired under the act.

Conclusion

The protection history of the Waterdog under the ESA and CWA is useful to apply to other aquatic and amphibious species. It demonstrates the amount of pressure needed to push FWS to act in regard to ESA listings. In addition, the Waterdog’s dependence on water quality illustrates the link between species protection and CWA, and reveals the risk of removing impaired waters from Section 303 lists when

those waters are designated critical habitat. The Waterdog provides an example of how the ESA and the CWA must work hand in hand in order to protect endangered species. 🐾

Alex N. Dominguez is a University of Mississippi School of Law Juris Doctor 2020 Candidate and worked as a legal intern with the Mississippi-Alabama Sea Grant Legal Program.

Endnotes

1. U.S. Fish & Wildlife Service, *Black Warrior Waterdog*. Facts provided throughout this section describing the Waterdog and its environment are based on information from this webpage.
2. 83 Fed. Reg. 257 (Jan. 3, 2018). Facts provided throughout this article regarding the official listing of the Waterdog and the challenges it is facing are based on information from this *Federal Register* document.
3. U.S. Fish & Wildlife Service, *Black Warrior Waterdog*. Information in this paragraph regarding sedimentation and its effects on the Waterdog are based on this FWS webpage.
4. 81 Fed. Reg. 69501 (Oct. 6, 2016).
5. Center for Biological Diversity, *Alabama’s Black Warrior Waterdog Proposed for Long-awaited Endangered Species Act Protection With 669 River Miles of Protected Critical Habitat* (Oct. 5, 2016).
6. 515 U.S. 687 (1995).
7. *Black Warrior River-Keeper, Inc. v. U.S. Environmental Protection Agency*, No.2:19-cv-00344 (N.D. Ala. Feb. 27, 2019). The facts throughout this section are based upon this complaint.



IN SUM.

A Summation of the Facts and Figures of Interest in this Edition

★ <i>Estimated number of Bryde’s whales in the Gulf of Mexico:</i>	33
★ <i>Number of threatened or endangered species in Mississippi:</i>	50
★ <i>Number of threatened or endangered species in Alabama:</i>	132
★ <i>States that have more listed species than Alabama:</i>	3