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Rusty Patched Bumble Bee/Endangered Species Act: Federal Court Addresses U.S. Fish and Wildlife Services Denial of Critical Habitat Designation

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The United States District Court for the District of Columbia (“Court”) in an August 11th Memorandum Opinion (“Opinion”) addressed an issue arising under the Endangered Species Act (“ESA”). See Natural Resources Defense Council, Inc., et al., v. U.S. Fish and Wildlife Service, et al., Civil Action No. 21-0770 (ABJ).

The question considered was whether the United States Fish and Wildlife Service (“Service”) should have designated critical habitat for the Rusty Patched Bumble Bee (“Bee”).

The ESA requires that when a species is placed on the “List of Endangered and Threatened Wildlife” that the Service designate any habitat of such species which is then considered to be critical habitat to the maximum extent prudent and determinable. See 16 U.S.C. § 1533(a)(3)(A).

The Service promulgated regulations outlining the criteria for designating critical habitat. See 50 C.F.R. § 424.12(a). The regulations also specify that a critical habitat designation would not be prudent when:

1. The species is threatened by taking or other human activity, and identification of critical habitat can be expected to increase the degree of such threat to the species; [or]
2. Such designation of critical habitat would not be beneficial to the species. In determining whether a designation would not be beneficial, the factors the Service[] may consider include but are not limited to: Whether the present or threatened destruction, modification, or curtailment of a species’ habitat or range is not a threat to the species, or whether any areas meet the definition of “critical habitat.”

See 50 C.F.R. § 424.12(a)(1).

The Service issued a final rule adding the Bee to the List of Endangered and Threatened Wildlife on January 11, 2017. It found that the Bee was presently in danger of extinction throughout its range. See 82 Fed. Reg. 3186.

The Service did not concurrently designate critical habitat for the Bee. Instead, it stated that the question of whether the designation was prudent was not “determinable at this time.” It also stated that:

. . . Because the designation of critical habitat will not likely increase the degree of threat to the species and may provide some measure of benefit, designation of critical habitat may be prudent for the rusty patched bumble bee.

Subsequently, on September 1, 2020, the Service concluded that designating critical habitat for the Bee would not be prudent. It stated that:

. . . “[b]ecause habitat for the rusty patched bumble bee is not limiting, and because the bee is considered to be flexible with regard to its habitat use for foraging, nesting, and overwintering, the availability of habitat does not limit the conservation of the rusty patched bumble bee now, nor will it in the future.” See 85 Fed. Reg. at 54284.

The Natural Resources Defense Council, Center for Biological Diversity, and Friends of Minnesota Scientific and Natural Areas (collectively, “NRDC”) challenged the decision not to designate critical habitat for the Bee. They argued that the ESA only authorizes the Service to withhold a critical habitat as “not prudent” in narrow circumstances when designation would not be beneficial to a species.

The Service was argued to have not established that the Bee would not benefit from the designation. The Service responded that even if NRDC has standing (which they were found to have), that the critical habitat decision was reasonable and supported by the record.

The Court held that the Service could forego designating critical habitat for the Bee only if the designation would not be beneficial for the species. This was found to not be supported by the record. The decision was determined by the Court to contradict the Service’s findings that habitat loss and degradation contributed to the species’ decline.

Findings by the Court included:

- Even if habitat loss and degradation is not the primary threat, nowhere does the Service suggest that habitat loss is not a threat and that negative impacts do not result from the loss.
- It does not matter whether critical habitat would confer “some” benefit, only whether the designation would not be beneficial to the species.
- The Service’s argument that the currently active Section 7 ESA consultation in the Bee’s occupied areas makes critical habitat designation unnecessary and not beneficial for the bee is unsupported.

The Court granted NRDC’s motion for summary judgment and vacated and remanded the critical habitat designation.

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