# New Bush Administration Policy Limits Endangered Species Listings
## Many Species Would No Longer Qualify for ESA Protection

The Solicitor of the Department of the Interior—the Bush Administration's top lawyer on endangered species issues—released a legal opinion on March 16, 2007, that prescribes how the Administration will decide whether to list species as threatened or endangered under the Endangered Species Act in the future. The decision casts aside thirty years of precedent on how to interpret the phrase "in danger of extinction throughout all or significant portion of [a species'] range" in the ESA and does so in a way that—had it been in effect years ago—would have denied protections for many of the ESA's greatest recovery stories, including the gray wolf, grizzly bear, and bald eagle. The opinion is an attempt to insulate listing decisions from legal challenge—at the expense of saving and recovering America's imperiled wildlife.

**Q – What is at issue in the Solicitor's opinion?**

At issue is the very definition of an "endangered species" and thus the scope of protections available to imperiled wildlife under the Endangered Species Act. The ESA defines an endangered species as one that is "in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. § 1532(6). The statute does not define the phrase "significant portion of its range," thus it has been left to the Department of the Interior and the courts to interpret.

**Q – Why was this opinion prepared?**

The Bush Administration previously attempted to limit the scope of the ESA by reinterpreting the definition of an endangered species under the Act. Numerous federal courts have now rejected this interpretation. The Solicitor's opinion is a response to those court decisions and an attempt to refine the Administration's position in light of these losses.

Since 2000, the Bush Administration has argued that in order to list a species as endangered it must be in danger of extinction throughout ***all*** of its range. This interpretation conflates two standards into one. As noted above, an endangered species is defined as one that is "in danger of extinction throughout all ***or*** a significant portion of its range." (emphasis added). Elementary principles of statutory interpretation counsel that when two clauses are joined by the word "or" they are to be viewed as separate standards of distinct meaning. By contrast, the Bush Administration tried to argue in court that the second clause merely says that endangered status is warranted when threats in one area of the species' range are of such a magnitude as to cause a risk of extinction to the whole.

Defenders of Wildlife and other conservation groups have successfully argued in various courts that the definition of endangered species should be given its plain meaning to cover species that are either 1) in danger of extinction everywhere or 2) in danger of extinction in some smaller, but significant, part of its range. The Solicitor's opinion is the result of these repeated losses in federal court, most notably *Defenders of Wildlife v. Norton*, 258 F.3d 1136 (9th Cir. 2001) (flat-tailed horned lizard). The issue has also come up in cases

involving the gray wolf, Canada lynx, coastal cutthroat trout, green sturgeon, Queen Charlotte goshawk, and the Florida black bear.[1] In total, seven district courts have adopted or followed the Ninth Circuit's ruling.

**Q – What does the opinion do?**

The Solicitor's opinion acknowledges the plain language of the statute that a species must be considered endangered under the ESA if it is at risk of extinction generally or within a significant portion of its range. Unfortunately, the opinion then goes on to limit protection for endangered species by defining the word "range" to include only the range in which a species *currently exists*, not the historic range of the species where it once existed. This portion of the Solicitor's opinion flatly contradicts the Ninth Circuit's ruling and subsequent court decisions requiring the agency to consider historic range. *Defenders of Wildlife*, 258 F.3d at 1145; *see Northwest Ecosystem Alliance v. U.S. Fish & Wildlife Serv.*, 475 F.3d 1136, 2007 U.S. App. LEXIS 2296, at *35-36 (9th Cir. Feb. 2, 2007); *Tucson Herpetological Soc'y v. Norton*, No. CV-04-0075-PHX-NVW, sip op. At 9 (D. Ariz. Aug 30, 2005).

Additionally, the opinion grants the Secretary of the Interior considerable discretion in deciding what portion of the range is "significant." For example, the Secretary may consider factors other than just the size of the range portion in determining what is significant. The opinion explicitly rejects the Administration's prior position that a species is only endangered if the threats faced in a portion of the range could lead to the extinction of the species as a whole. Thus, the Secretary cannot interpret the phrase "significant portion" of the range to be coterminous with a global threat to the species.

**Q – How does the opinion harm species?**

The Solicitor's opinion undermines endangered species protection in two important respects:

First, by limiting ESA protection to a species' current range, the opinion rejects the Ninth Circuit's holding that a species can be considered endangered in a significant portion of its range "if there are major geographic areas in which it is no longer viable but once was." *Defenders of Wildlife v. Norton*, 258 F.3d at 1145. By contrast, the Solicitor argues that if a species can no longer be found in an area, then it is extinct in that area, not "in danger of extinction." Accordingly, the Solicitor maintains that since a species can only be "in danger" within its current range, the Secretary must only consider the current range of a species in determining whether it is endangered.

Such a position raises numerous questions about the Department of the Interior's obligation to recover a species throughout its historic range. It also calls into question whether the Department ever need restore or reintroduce a species to areas where it no longer exists.

Restoration of wolves in the Northern Rockies, for example, might not have occurred under this policy. When wolves were reintroduced to Yellowstone National Park and Idaho, they could be found only in Canada,

[1] *Nat'l Wildlife Fed'n v. Norton*, 386 F. Supp. 2d 553 (D. Vt. 2005) (gray wolf); *Defenders of Wildlife v. Secretary*, 354 F. Supp. 2d 1156 (D. Or. 2005) (gray wolf); *Defenders of Wildlife v. Norton*, 239 F. Supp. 2d 9 (D.D.C. 2002) (Canada lynx); *see also Ctr. For Biological Diversity v. U.S. Fish & Wildlife Serv.*, 402 F. Supp. 2d 1198 (D. Or 2005) (coastal cutthroat trout); *Envtl. Protection Info. Ctr. v. Nat'l Marine Fisheries Serv.*, No. C-02-5401 EDL (N.D. Cal. Mar. 1 2004 (green sturgeon); *Sw. Ctr. For Biological Diversity v. Norton*, CA No. 98-934 (RMU/JMF), 2002 U.S. Dist. LEXIS 13661 (D.D.C. July 29, 2002) (Queen Charlotte goshawk); *Defenders of Wildlife v. Norton*, CA 99-02072 (HHK) (D.D.C. Dec. 13, 2001) (Florida black bear).

Alaska, and Minnesota. The rest of the United States would not have been considered "current range" for the wolf; thus the species would not have qualified as endangered, despite its extirpation from most of the lower 48 states. Under this standard, grizzly bears, bald eagles, and many other species that are abundant in some areas but no longer found in large portions of their historic range might not warrant listing irrespective of the scientific basis for doing so. Looking forward, the policy could even require that the Secretary of the Interior delist species in the portions of their range that are no longer occupied—a move that could compromise the recovery of many more listed species.

Second, the opinion appears to permit the Secretary to list and delist species by state boundaries—a significant reversal of longstanding policy. In reviewing the ESA's legislative history, the opinion states that "[s]ome of the floor debate and hearing testimony strongly suggest the Secretary has the discretion to divide the range of a species along political boundaries and declare it endangered only in states where the state authorities are not providing adequate protection of species." (Op. at 11). It further states that "For example, the Secretary might examine the American alligator as a species, determine that Florida is a significant portion of the American alligator's range, and conclude that American alligators in Florida are in danger of extinction, even though alligators elsewhere are not." (Op. at 15).

Such an interpretation raises particularly grave concerns in the Northern Rockies where the states of Wyoming and Idaho are urging the Department of the Interior to delist gray wolves and permit greater state management of the species. Both states are hostile to wolves and have expressed intentions to dramatically cull wolf populations as soon as federal protections are lifted. Delisting wolves on a state-by-state basis could lead to patchwork protections that would undermine region-wide efforts to recover wolves in the Northern Rockies and restore them to appropriate habitats throughout the Northwest.

**Q – Can the opinion be challenged?**

Not directly. The opinion is intended as a legal guide for future actions. As the policy is implemented in listing decisions and any formal rulemaking, however, those decisions and the validity of the Solicitor's opinion on which they are based can and likely will be challenged in federal court.

For more information contact:

Jason Rylander
Staff Attorney
Defenders of Wildlife
1130 17th Street, NW
Washington, DC 20036
(202) 682-9400 x. 145
(202) 486-8650 (cell)
jrylander@defenders.org