Critical Habitat under the Federal Endangered Species Act of 1973: Future Directions

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Critical habitat began as an informal concept defining areas of "essential" or necessary habitat for a species prior to the inception of the Endangered Species Act of 1973 (Act). During subsequent amendments to the Act, critical habitat became formalized and regulatory (1978) and further clarified (1982). Since 1996, case law has further directed the implementation of critical habitat by calling into question or invalidating our regulatory definitions or interpretations of 1) "adverse modification" under section 7 of the Act; 2) the terms "primary constituent elements" and "special management considerations" per the definition of critical habitat under section 3 of the Act; and 3) economic impact analyses of critical habitat designations. Under the Clinton administration, unsuccessful efforts were put forth to make legislative changes to the Act to move the provisions for designating critical habitat from the listing arena to the recovery arena. To date, the current administration has not proposed legislative amendments to the critical habitat provisions of the Act, possibly due to the litigious and uncertain political climate. They assert that critical habitat provides little benefit to listed species and that the Act and implementing regulations should be changed. While the future direction of critical habitat is still uncertain, there are at least two conceptual options: 1) continue to follow current regulations and case law, but explore more flexible interpretations in implementation, or 2) make legislative changes to the Act and implementing regulations regarding critical habitat.