

***POLICY POSITION
OF THE
SOUTHERN LEGISLATIVE CONFERENCE***

**REGARDING THE DESIGNATION OF A CRITICAL HABITAT FOR THREATENED OR
ENDANGERED SPECIES**

BACKGROUND

On September 9, 2011, a United States District Court Judge for the District of Columbia approved a settlement between the Center for Biological Diversity and the U.S. Department of Justice. As part of this settlement, the Department agreed that 374 species in the southern and southeastern United States likely deserved listing under the Endangered Species Act of 1973. The settlement, which also mandated the simultaneous consideration of critical habitat for all of the 374 species, was the result of confidential mediation between the parties; the states affected by the settlement received little information until the settlement was signed by the judge.

Under the Endangered Species Act of 1973 (the Act), a “critical habitat” for a threatened or endangered species is defined as “the specific areas within the geographical area occupied by the species at the time it is listed, on which are found those physical or biological features essential to the conservation of the species and which may require special management considerations or protections; and upon the determination by the Secretary [of Commerce or the Interior], specific areas outside the geographical area occupied by the species at the time it is listed that are essential for the conservation of the species.” The critical habitat designation only can be extended to include the entire geographical area which can be occupied by the threatened or endangered species under circumstances determined by the secretary. Prior to finalizing a critical habitat designation, consideration must be given to an analysis of the economic impact, the impact on national security, and any other relevant impact of making such a designation. Unless the failure to designate an area as critical habitat will result in the extinction of the concerned species, the secretary may exclude an area from the designation if, after conducting a cost-benefit analysis, it is determined that the benefit of the exclusion will outweigh the benefits of the designation.

The United States Fish and Wildlife Service (FWS) previously has used a cumulative or incremental calculation to measure the impact of a proposed critical impact designation. Between 2002 and 2007, the FWS used a cumulative, or broad, analysis to determine the impact of a designation. In 2013, the FWS codified the use of an incremental, or baseline, analysis to determine the probable impact of a designation. This method requires a general identification of the additional protections a critical designation would provide for the species, focusing on the impacts over and above those resulting from existing protections. Unlike a cumulative analysis, the incremental analysis is less likely to include what the true cost of the designation will be to those who live, work, and own property in the proposed critical habitat area.

In May 2014, the FWS and the National Oceanic and Atmospheric Administration issued three rule and policy proposals that would make additional changes to the process for designating a critical habitat, the definition of destructive or adverse modification, and to the Act’s process for excluding critical habitat. Under the proposed rules, a designation of critical habitat could be expanded beyond just those lands where the species might be found or exists as a historical habitat to also include those lands that might conceivably support the species’ recovery. This change will lower the legal threshold necessary to find adverse modification of a critical habitat zone, potentially opening up landowners to an increased risk of litigation.

RECOMMENDATION

The Southern Legislative Conference of The Council of State Governments urges Congress to pass legislation that will require the secretary of the U.S. Department of Commerce and the secretary of the U.S. Department of the Interior to consider the economic impact of a critical habitat designation. The SLC urges that such legislation require the economic impact analysis be calculated using a cumulative method, rather than an incremental method. Furthermore, the SLC requests that the designation of critical habitat not be expanded to include areas that are not a current or historic habitat of the listed species.

The Southern Legislative Conference of The Council of State Governments requests that a copy of this policy position be forwarded to the Southern Congressional delegation, secretary of the U.S. Department of the Interior, secretary of the U.S. Department of Commerce, and president of the United States.