> This is the second in a series of posts. For the first post, see here. The regulations I am analyzing in this post are available here.

The ESA has a system by which it determines what species warrant protection under the Act, and therefore should be listed as either endangered or threatened. In theory at least, endangered species face greater threats than threatened species. The Act also generally requires that "critical habitat" be designated for listed species – critical habitat is supposed to be habitat that is "essential" for the conservation of the species, and there are regulatory protections for critical habitat under the Act.

Threatened species are defined under the Act as species that is "likely to become an endangered species within the foreseeable future." (Thus threatened species are in theory in better shape than an endangered species, which is a species "which is in danger of extinction.") The revised regulations add a new definition of what it means to be a threatened species, something that had not been present in the regulations in the past (such that the statutory language was all that applied). Most importantly, the revisions define "foreseeable future" as "only so far into the future as the Services can reasonably determine that both the future threats and the species' responses to those threats are likely," a standard that will be applied on a "case-by-case" basis. The additional definition is likely most important for species who will be harmed by climate change – which is basically almost all species at this point in time. Climate change is a long-term process (although impacts are already being felt), and it can be challenging to precisely specify the exact extent or manner by which climate change will harm species. Setting a higher standard (as the regulatory language can be understood as doing) for demonstrating whether a species will be harmed in the future such that it should be listed under the Act may well mean that it will be harder to list species on the basis of climate change threats. Given the ubiquity of climate change impacts for biodiversity, that's a real concern – though an Administration that was proactive in thinking about protecting biodiversity from climate change (not this one!) probably could list species aggressively anyway, since the regulatory language is rather vague, allowing significant discretion to the agencies. One important qualification the agencies did make it in their explanation for their final rule is that they said that they "will not arbitrarily dismiss reliable aspects of climate change predictions or projects" even if there is uncertainty about other components of climate change predictions – though of course, given the fuzziness of the relevant language, that still gives the agencies broad discretion to decide when they consider climate change and when they do

not. Finally, the vagueness of the language, and the emphasis of the need for case-by-case, species specific analysis as to what is the “foreseeable future “ both increase the chances that courts will defer to determinations by the agencies that, for instance, climate change impacts are outside the foreseeable future and need not be considered.

The second major change here is removing language from the regulation that explicitly prohibited the agencies, when they are deciding whether to list a species under the ESA, from considering “possible economic or other impacts” of that listing decision. The statute requires the agencies to make listing decisions “solely on the basis of the best scientific and commercial data available,” language that is understood to exclude considerations of economic impacts of listing decisions. (The legislative history on this is quite clear.) The revised regulation simply repeats that statutory language. However, in proposing and finalizing the change, the agencies made clear that they are eliminating the explicit prohibition on conducting economic analyses in the regulation so that they can do economic analyses of listing decisions if they want to. The agencies acknowledged repeatedly that they still can’t consider those economic impacts in the listing decision itself, which raises questions about why they are opening the door to doing a futile economic analysis. The best guess is that the agencies hope that by doing economic analyses that show the impact of listing decisions, they can create political pressure to stop listing decisions (perhaps through Congressional action), even if they can’t legally refuse to list themselves.

The third major change is to critical habitat. Here the agencies have first made it more difficult to designate unoccupied areas as critical habitat. The ESA requires the agencies to designated occupied areas as critical habitat if they are essential for “the conservation of the species.” The Supreme Court recently held that this means that unoccupied areas must be “habitat” for the species. The proposed regulatory revisions would require “reasonable certainty” that the “area will contribute to the conservation of the species and that the area contains one or more of those physical or biological features essential to the conservation of the species.” The “reasonable certainty” standard is a new addition, and will make it harder to demonstrate that a currently unoccupied area is important for future conservation of the species – something that could be quite significant given that unoccupied areas may be important for species that move their ranges in response to climate change.

The agencies have also revised their regulations as to when they can refuse to

designate critical habitat on the grounds that it is not “prudent” to designate – the statute generally requires designation of critical habitat for all listed species unless designation is not prudent. The agencies have long used their regulations to provide clarity as to what it means for designation not to be prudent. In these revisions, the agencies have changed those provisions to include as not “prudent” situations where “threats to the species’ habitat stem solely from causes that cannot be addressed through management actions resulting from consultations under section 7(a)(2)” of the ESA – as I’ll discuss in the revisions to the Section 7 consultation regulations, the agencies have made pretty clear that they think that climate change is the kind of threat to species that is unlikely to be addressed through Section 7 consultation, and thus this is another way for the agencies to avoid consideration of climate change impacts in its regulatory system.

There is another reason the agencies changed their regulations around when designation of critical habitat is prudent – the prior regulations had stated that designation was not prudent when designation is not “beneficial” to the listed species – which some courts have held requires the agencies to do a species-by-species analysis of the benefits and costs of designation of critical habitat. This can be quite costly and time consuming, and also may make it harder for the agencies to avoid designation (at least without time consuming explanation). In its proposed rule, the agencies made clear that they were trying to avoid this kind of analysis by developing more blanket standards, based on “whether particular circumstances are present, rather than on whether a designation would be beneficial,” while still writing those standards in a vague enough way to give the agencies broad flexibility (and hopefully to also obtain judicial deference for its analysis).