This is the fourth post in a series. The first post is available here. The second post is available here. The third post is available here. The final regulations I am discussing in this post are available here.

These are by far the most significant, but also the most complicated changes to the regulations. Section 7 of the ESA prohibits federal agencies from taking actions that would jeopardize the existence of a listed species, or adversely modify a species' critical habitat. To implement this prohibition, federal agencies that are proposing to take an action have to go through a process in which they consult with FWS or NOAA about whether their actions might adversely affect a listed species, and if so, whether the action would cause jeopardy or adverse modification or whether there are "reasonable and prudent alternatives" that allow the action to avoid jeopardy or adverse modification. The document that does the analysis of whether jeopardy, adverse modification or reasonable and prudent alternatives exist is called a Biological Opinion.

I'll begin with a discussion of the changes to jeopardy analysis. The rules would in general make it harder to identify and rely upon downstream impacts of federal agency actions in a jeopardy (or adverse modification analysis). For instance, consultation has long considered the "indirect effects" of a proposed federal agency action – if a federal agency, for instance, will fund the construction of a new interchange on an interstate highway, the impacts are not just the direct effects of paving over some land to construct the interchange, but also the indirect effects of the development in the area that the new interchange will facilitate. The agencies in their revisions are requiring that there is "clear and substantial" evidence that those downstream effects will occur – note that this will in particular make it harder to show climate change impacts (and effects from those climate change impacts) are the result of a proposed agency action.

In addition, the agencies have imposed an arguably higher standard for showing a causal relationship between an agency action and downstream effects – in essence, there is a new provision of the regulations that imposes what lawyers call a "proximate cause" test for the connection between an agency action and follow-on actions or effects, such that long causal chains cannot be related to the agency action and included in consultation. Again, this will most likely have the effect of making it easier for the agencies to argue that some or all climate change impacts need not be considered in doing consultation. In addition, the regulations require that the downstream effects of an agency action must be "reasonably certain" to occur – and the agencies in their explanation of the final rules made clear that they are adopting proximate cause foreseeability requirements with that language.

Somewhat in tension with all of this, the agencies assert in their explanations that

"[n]othing in these regulations changes the manner in which the Services may consider climate change in our consultations." 84 Fed. Reg. 44995. I am skeptical that this will, in fact, be the case.

Another effort to limit the scope of consultation in the regulations is expanding the kinds of actions that are understood as "nondiscretionary" and therefore outside the scope of Section 7. The Supreme Court has held that where a federal agency is required to take an action, Section 7 does not apply – however, that raises questions about whether ongoing actions that are the result of previous nondiscretionary federal agency decisions are to be considered as part of consultation. The most prominent example here is the operation of dams, where the agency has no discretion about whether the keep the dam or (perhaps) operate the dam in certain ways – the new regulations put these effects in the "environmental baseline," which is not part of the action that is being consulted on. This could have a significant impact for consultation on impacts of dams on salmon runs in the Columbia and Snake River basins, for instance. Again, the agencies gave themselves broad case-by-case discretion to determine the scope of what is discretionary in a given instance and how to consider that in consultation

The second prohibition under Section 7 is the prohibition on adverse modification of critical habitat. Here the regulations build on prior changes to the definition by the Obama Administration, but pushing them even further. There is important historical background here: For years, the regulations defined adverse modification in a way that made it redundant of the prohibition on jeopardy (or at least it made it easy for the agencies to argue that it was redundant) – which had the benefits from the agencies' perspective of making it easy to justify not designating critical habitat in the first place (a time-consuming and politically fraught process) and also to avoid any adverse modification analysis in consultation as well. However, multiple federal appeals courts struck down that regulatory definition as contrary to the Act. The agencies in the Obama Administration issued a new definition of adverse modification to respond to those court decisions, a decision that emphasized that adverse modification of critical habitat exists not just when the agency action's impact on habitat might threaten the survival of a species, but also when the impact might threaten the ability of the species to recover such that it no longer requires protection under the Act. That was a big win for conservation – and importantly, the new revisions do not change that (and probably couldn't given the relevant caselaw). But the Obama Administration was still concerned that a broad definition of adverse modification might result in tying up lots of additional federal agency actions – so it limited that definition by requiring that the agency action in question "appreciably" impact habitat to count as adverse modification – in so doing, the agencies made pretty clear that they were putting in

a de minimis standard for adverse modification. The revision by this Administration builds on that language by also requiring that adverse modification means impact to critical habitat "as a whole" – such that even significant impacts to only a small portion of the habitat would not count as adverse modification. It thus can be understood as an expansion of the Obama Administration's carve out for de minimis actions (though the agencies' explanation for the change asserts that it simply clarifies the prior language and is consistent with it).