

*This is the fifth post in a series. The first post is available [here](#). The second post is available [here](#). The third post is available [here](#). The fourth post is available [here](#).*

Overall, the biggest takeaways from the proposed regulations are that (a) they are intended to substantially increase the discretion the agencies have in implementing the ESA; and (b) in particular, they are intended to make it easier for the agencies to ignore or sidestep issues relating to climate change in implementing the ESA. The former is not surprising, and in fact has a bipartisan history in ESA implementation. And the latter isn't surprising coming from a Republican administration. Indeed, the last major effort by a Republican Administration to overhaul the ESA regulations, at the end of the second Bush Administration, also sought to weaken the consideration of climate change in ESA implementation, and again with a particular focus on Section 7 consultation.

The changes in this round are in some ways more substantial than those in the prior round – if nothing else because we are much more aware of how important climate change is as a threat to biodiversity. So if you're not going to fully address climate change in implementing the ESA, you're going to continue to leave a lot of species increasingly vulnerable. There are good arguments out there (for instance, see [this article](#) by JB Ruhl) that using the ESA as a primary tool to address climate change is at least politically counterproductive or infeasible, and perhaps administratively as well. On the other hand, if we do nothing, we are making it easier for species to go extinct, an irreversible harm. However, that kind of public debate is not reflected in the regulations – where the agencies, to my mind, are rather disingenuous in claiming that the revisions won't have any significant impact on how the ESA is being implemented.

Note that there is some tension between the two takeaways from these regulations. To the extent that they expand agency discretion, a future Administration can use that discretion to consider climate change, and indeed I don't think there's much in these regulations that would keep them from doing that. Of course, that could lead to a back-and-forth where some Administrations use the ESA to address climate change impacts on biodiversity, and other administrations do the opposite. And in the long run, that kind of inconsistent protection can be very harmful to species, since during periods when there is less protection, permanent damage to species and ecosystems can occur that can't be easily undone during periods of higher protection.