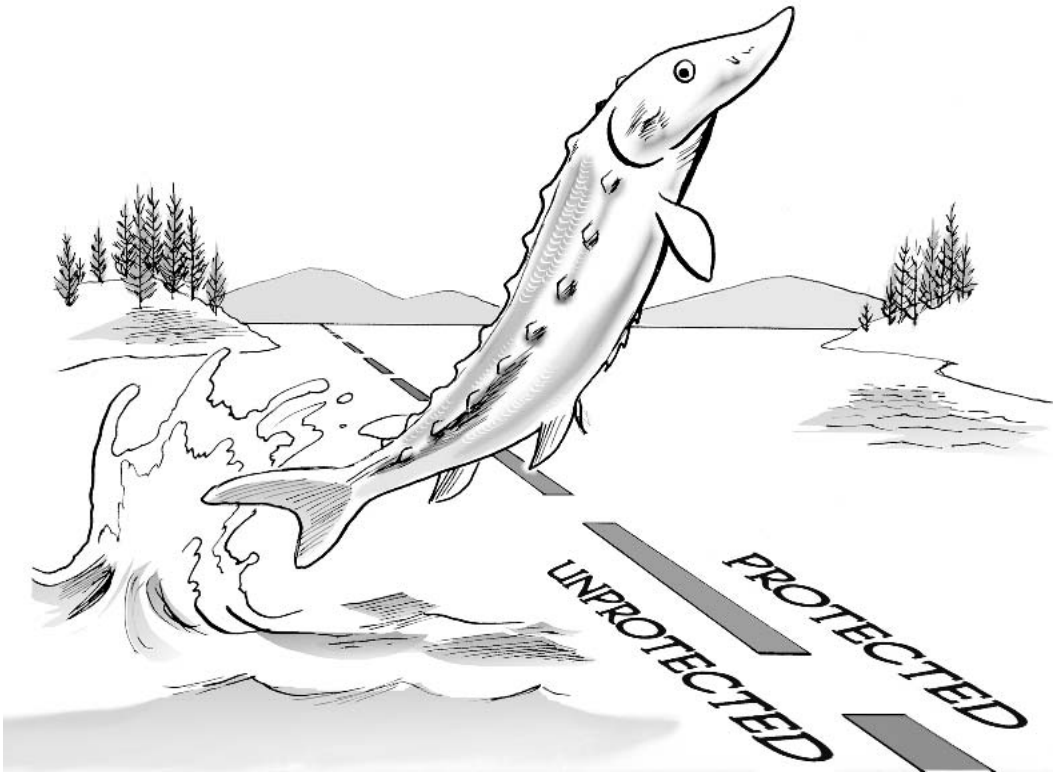
The **Mercatus Center** at George Mason University is an education, research, and outreach organization that works with scholars, policy experts, and government officials to bridge academic theory and real-world practice. The center's Regulatory Studies Program works within the university setting to improve the state of knowledge and debate about regulations and their impact on society. More information about the center can be found on the Web at www.mercatus.org. For the latest federal regulatory developments, visit www.regradar.org.

Green Sturgeon

STATUS: Comments are due July 5

The National Marine Fisheries Service (NMFS) and National Oceanic and Atmospheric Administration have proposed a new rule under the Endangered Species Act (ESA) in an effort to list and protect a particular geographical segment of the North American Green Sturgeon. Specifically, the agencies propose to list only the North American Green Sturgeon residing in the Sacramento River area as "threatened." Though genetically indistinguishable, the agencies do not consider North American Green Sturgeons who reside north of the Sacramento River area to be endangered or threatened.

This proposal is not the first time the federal government has tried to list a geographic subsection of a species as endangered or threatened even though the species, as a whole, appears sustainable. In 1997 for example, the Fish and Wildlife Service (FWS) determined that the Arizona portion of the cactus pygmy-owl was endangered but that the adjacent Texas portion was not. An owl that flew across the border from Texas to Arizona would suddenly gain all of the ESA's protections. On review, a court concluded that the FWS provided insufficient evidence to necessitate the listing of the owl and that the listing was arbitrary and capricious. However, the FWS has been more successful in defining and protecting certain portions of species such as the Gray Wolf, Copperbelly Water Snake, and the Bog Turtle.



KEVIN TUMA (2)

If legal battles follow the listing of the North American Green Sturgeon, the NMFS and NOAA may face another "arbitrary and capricious" ruling. The agencies have little data on historical population patterns of North American Green Sturgeon in the southern rivers, the very area where they are concerned about the viability of current populations.

In lieu of data, they hypothesize that a series of dams *may* have reduced areas that *may* have served historically as *possible* locations for the spawning of North American Green Sturgeon. In trying to establish whether the fish was present in one river near the Sacramento, the agencies write, "Indirect evidence from a variety of sources suggests that both adult and juvenile green sturgeon may have been present in this system in the past. If spawning did occur in the past, there may have been a reduction in spawning habitat." Even when speaking of the population in the Sacramento, the agencies concede that they "have not been able to quantify the reduction of habitat to date, and are uncertain how reduction in spawning habitat has affected the population's viability." Unable to prove that the North American Green Sturgeon resided in particular areas historically, the listing agencies attempt to justify the regulation on the lack of data to the contrary, asserting "lack of contemporary information cannot be considered evidence of historical green sturgeon absence."

The practice of dividing a species on a geographic basis for listing purposes dates back to 1978, when Congress amended the ESA to allow agencies to consider two or more distinct geographical segments of a species or subspecies as separate

species and assign them different statuses. According to Congress, while an animal in one part of the country may be plentiful, if it is determined that a different segment of the same animal's population in another part of the county is struggling to sustain itself, that segment may receive ESA protections. Following this amendment in which Congress invented the term "distinct population segments" (DPS), a term that was unknown to the scientific and policy community, lawmakers suggested that the agencies use DPS classifications "sparingly" and tasked the agencies with determining a method for classifying DPS and implementing the policy.

The sturgeon rule demonstrates the pitfalls of the congressional amendment, as agencies are still failing to design a coherent policy that complies with Congress's ill-conceived directive. Agencies continue to operate with a loosely articulated regulatory definition of "species" that supersedes any available scientific definition. It is not immediately clear whether this policy that allows agencies to define species based on constructed DPSs reduces or increases the effect of the act, but it certainly raises some questions, perhaps worthy of congressional attention, about the benefits of preserving a species in a particular area when it appears largely sustainable in another.

In the meantime, agencies should be more wary of making listings based on scant data and contorted hypotheticals. If the government is going to engage in species protection, given its scarce resources, one would hope that it would focus on those species that face the highest likelihood of extinction across their entire range. After all, regardless of whether supposedly discrete portions of a species' range are contracting, every species is struggling to survive at the margins of its range.

— John Shoaf

Intercarrier Compensation

STATUS: Reply comments are due June 22

For much of U.S. telecommunications history, regulation required consumers and businesses to overpay for long-distance telephone service to subsidize local monthly rates. Such cross-subsidies are just one example of the "intercarrier compensation" payments that carriers make when they hand off traffic to each other. Depending on the types of companies involved, such charges can range from almost nothing to as much as 10 cents per minute for interstate calls and 36 cents per minute for intrastate calls.

The current Federal Communications Commission proceeding is the latest round in the agency's quest to replace a hodgepodge of different payments with a single system that would apply to all carriers and treat all traffic the same—or as nearly the same as regulators can get away with, given the enormous political clout the U.S. Constitution provides rural states.

The biggest beneficiaries of current intercarrier compensation arrangements are carriers that serve customers in rural areas. In some cases, rural carriers receive more money from compensation and payments from the federal universal service fund than they receive from their own customers.

In a 2001 Notice of Proposed Rulemaking, the FCC seemed poised to reduce intercarrier payments to zero. Regulators sought comment on several "bill-and-keep" proposals that would have ended cross-subsidies. Instead, each telephone company would have to earn its keep by charging its own customers.

Last February, the FCC decided to seek comment on a raft of industry proposals developed in response to its original notice. The proposals range from mutations of bill-and-keep to various schemes that would keep the subsidies flowing by forcing additional players, such as broadband Internet services and VOIP providers, to make intercarrier payments.

Some of the plans ramp down the implicit subsidies, but replace them at least partially with increased explicit payments from the federal universal service fund. They would thus replace hidden subsidies (financed by charges on price-sensitive services like long-distance and wireless) with explicit subsidies (financed by charges on price-sensitive services like long-distance and wireless). Unless the FCC changes the funding mechanism, the change would be a victory for transparency but not economic efficiency.

One curious aspect of the FCC's February notice is its odd treatment of bill-and-keep—the option the commission appeared to favor in 2001. The February notice has an appended "staff analysis" that cogently responds to most of the objections that commenters raised to bill-and-keep. Oddly enough, the staff analysis is written in the commission's voice—it appears to have been cut-and-pasted right out of an earlier draft of the commission's decision. The reader cannot help but think that the staff wrote this section sincerely believing that this is what the commission wanted to say.

In separate comments, several commissioners disowned the staff's analysis. The surprising thing is that they nevertheless let it see the light of day. Whether this odd treatment constitutes a reversal or just a speed bump is anybody's guess.

— Jerry Ellig

Canadian "Smart Regulation"

STATUS: Report released March 2005

A new report from the Canadian government, entitled *Smart Regulation: Report on Actions and Plans,* signals a renewed focus by our northern neighbors on the effect of regulation on competitiveness. The report, billed as "the first in a series of regular updates on Smart Regulation initiatives currently underway or planned," recognizes the need for "regulatory renewal" to address challenges posed by "rapid scientific and technological advancements, global markets, and cross-boundary health and environmental risks."

When it was released, the report drew fire in the Canadian press for being "too American." But American regulators could learn much from the work. It stresses accountability and transparency, and one key element of

the implementation plan calls for the federal and provincial governments to "strengthen regulatory management." This includes not only improved analysis of developing regulations, but a review and rationalization of the existing stock of rules. The Canadian government may not conduct the detailed regulatory analyses required for major new rules in the United States, but we have made little effort to review existing U.S. regulations. The *U.S. Code of Federal Regulations* occupies over 20 feet of shelf space, so while a concerted governmental effort to review and rationalize the existing U.S. stock would be a daunting task, it would be one well worth undertaking.

Another key implementation strategy outlined in the Smart Regulation report is "measuring performance." If the Canadians really do undertake to measure the real outcomes of regulatory actions to determine whether they are achieving their desired objectives, they will be a step ahead of us. While the U.S. Office of Management and Budget reports to Congress on the costs and benefits of regulations each year, those figures are based on *ex ante* estimates provided by agencies during the rule development process and not on actual experience with regulatory outcomes. With the notable exception of the U.S. Department of Transportation, which occasionally performs retrospective analysis of the costs and effectiveness of its regulations, U.S. agencies tend never to look back at whether their regulations are achieving the desired outcomes, but rather always look to the next regulatory action.

The weakest objective of the Smart Regulation implementation plan may be one of "improving coordination and cooperation." Consistency and cooperation among regulators is important because conflicting or redundant policies can create uncertainty and hinder productivity and innovation among regulated entities. Yet competition among jurisdictions can also foster innovation and help identify "optimum" strategies. If the Canadians harmonize their regulations with their southern neighbor, for example, where would we go to get toilets that actually flush?

Like the United States, Canada is a federalist society. In many ways (health care aside), Canadians do a better job of following principles of federalism than we do. Most environmental and workplace regulations, for example, are left to provincial governments in accordance with the principle that local governments are better able to experiment with approaches that best meet the needs of their diverse citizenry. Coordination and cooperation efforts that blur those lines would be a mistake.

The Smart Regulation proponents in Canada should also consider the value of checks and balances in regulatory decision-making. While concurrent decision-making can help streamline regulatory decisions (such as permit applications), different perspectives interjected at different points in the regulatory development process have proven valuable in the United States.

Despite its strengths, the Smart Regulation movement in Canada shares the fundamental weakness of "smarter regulation" efforts in the United States. Missing from the Smart Regulation report is any recognition of the role of property rights or market mechanisms in addressing perceived problems. By substituting regulatory decisions, no matter how well analyzed, for private decisions made through open exchange in competitive markets, the government of Canada will always find itself trying to "renew" its regulatory system to keep pace with evolving realities.

— Susan Dudley