REGULATORY REPORT CARD | August 2014

MERCATUS CENTER
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AGENCY

National Oceanic and Atmospheric Administration

Rule title

Endangered Fish and Wildlife; Proposed Rule to Eliminate the Expiration Date Contained in the Final Rule to Reduce the Threat of Ship Collisions with North Atlantic Right Whales

RIN	0648-BB20
Publication Date	June 6, 2013
Comment Period Closing Date	August 5, 2013
Stage	Proposed rule

REGULATORY SCORING

	SCORE
1. Systemic Problem: How well does the analysis identify and demonstrate the existence of a market failure or other systemic problem the regulation is supposed to solve?	**3**/5
2. Alternatives: How well does the analysis assess the effectiveness of alternative approaches?	**1**/5
3. Benefits (or Other Outcomes): How well does the analysis identify the benefits or other desired outcomes and demonstrate that the regulation will achieve them?[1]	**3**/5
4. Costs: How well does the analysis assess costs?	**2**/5
5. Use of Analysis: Does the proposed rule or the RIA present evidence that the agency used the Regulatory Impact Analysis in any decisions?	**1**/5
6. Cognizance of Net Benefits: Did the agency maximize net benefits or explain why it chose another alternative?	**1**/5
Total Score	**11**/30

SUMMARY

This regulation eliminates the sunset clause contained in an existing rule requiring ships to reduce their speed with the goal of reducing collisions with North Atlantic right whales. The regulation restricts travel speeds of vessels 65 feet or longer to not more than 10 knots when traveling during certain seasons and in certain places along the US Eastern Seaboard where right whales are known to frequent.

The analysis ignores the management and enforcement costs to agencies, leading to an underestimate of the total costs of the regulation. These costs are likely significant, given the complexities involved in determining the location and size of Seasonal Management Areas and Dynamic Management Areas and the difficulties involved with enforcement in light of the abuse of the exceptions clause and the lack of adherence by foreign vessels.

The regulation aims to permanently eliminate the sunset clause despite admitting that the sampling period is insufficient to draw meaningful conclusions concerning the rule's benefits. The analysis lacks specificity regarding the estimated number of right whales saved because of the existing regulation and is unable to estimate the long-term impact on the right whale population.

There is little evidence that the agency used the analysis in its rule. No alternatives to the proposed elimination of the sunset clause are described or analyzed. With only a partial analysis of costs, no benefits estimation, and no consideration of alternatives, it is unclear how this regulation maximizes net benefits.

The Regulatory Studies Program at the Mercatus Center at George Mason University issues Regulatory Report Cards scored by a team of economists for economically significant proposed regulations. For more information about the program, scorers, other scores, and scoring conventions, see www.mercatus.org/reportcard.

1. Systemic Problem: How well does the analysis identify and demonstrate the existence of a market failure or other systemic problem the regulation is supposed to solve?	**3**		
Does the analysis identify a market failure or other systemic problem?	4	1A	While not explicitly stated as a "market failure," the agency essentially argues that ship captains lack the knowledge of the locations of right whale populations and lack the incentive to slow down to save the lives of right whales. Further, given the low reproductive rates, the death of a small number of right whales in any year can have significant impact on the population in the long run.
Does the analysis outline a coherent and testable theory that explains why the problem (associated with the outcome above) is systemic rather than anecdotal?	3	1B	NMFS does not mention market failure, but there is an implicit assumption that there is no clear mechanism in place for conserving these mammals. The main driver of the problem stems from ship speed. It appears as though the assumption is that the market lacks an incentive structure to reduce ship speed and therefore reduce lethal vessel collisions.
Does the analysis present credible empirical support for the theory?	2	1C	The analysis cites estimates of the decline in right whale populations over time and their inherently low rates of reproduction make their recovery rates problematic. Most empirical support is based on anecdotal information provided by various studies.
Does the analysis adequately address the baseline? That is, what the state of the world is likely to be in the absence of federal intervention not just now but in the future?	3	1D	The RIA does examine ship speeds in 2009 before and after the rule, showing that vessels travel nearly two knots faster without the rule than with it. The analysis also discusses how the paths vessels travel may change in response to the rule. There is no mention of what would happen in absence of the regulation other than presuming more lethal vessel strikes.
Does the analysis adequately assess uncertainty about the existence or size of the problem?	3	1E	NMFS acknowledges it is difficult to parse out the specific effect of current regulation on population trends since death rates are affected by other factors. The NMFS concludes, "It is difficult to make definitive conclusions at this time regarding the long-term biological effectiveness of the current vessel speed restriction rule." Substantive quantitative assessment is not performed. NOAA states that the true number of deaths due to vessel strikes may be much larger than the numbers known, as many are undetected. Kraus et al., (2005) suggest known deaths may be as little as 17 percent of the true number.
2. Alternatives: How well does the analysis assess alternative approaches?	**1**		
Does the analysis enumerate other alternatives to address the problem?	2	2A	The only alternative considered is the "no action" alternative. This alternative would allow the 2008 final rule to expire on December 9, 2013.The IRFA for the 2006 proposed rule reflected alternatives being considered at the time to achieve the purpose and need. That information, while still relevant, is curiously not repeated here.

Is the range of alternatives considered narrow (e.g., some exemptions to a regulation) or broad (e.g., performance-based regulation vs. command and control, market mechanisms, nonbinding guidance, information disclosure, addressing any government failures that caused the original problem)?	2	2B	The range of alternatives is the elimination of the sunset clause or the extension of the clause. Either way, the option is to continue the use of Seasonal Management Areas (SMAs) and Dynamic Management Areas (DMAs) in some regard. No incentive-based alternatives—such as fines per strike—were considered.
Does the analysis evaluate how alternative approaches would affect the amount of benefits or other outcome achieved?	2	2C	No analysis of benefits from unchosen alternatives is provided. Analysis shows ships slow by an average of two knots under the existing rule, which is expected to continue with an extension or elimination of the clause. There is no estimate of monetary values of whales saved through regulation. There is anecdotal information that there have been few to no known lethal vessel collisions since this regulation was introduced. The "no action" alternative was rejected because NMFS determined that vessel speed restrictions are needed to reduce the threat of ship collisions with right whales and to aid in the recovery of this highly endangered species.
Does the analysis identify and quantify incremental costs of all alternatives considered?	1	2D	There is no analysis of the cost of the alternatives not chosen. The chosen alternative (the only one offered) is shown to cause a $44.7 million cost on related industry (direct and indirect costs). The no-action alternative would be economically preferable for some small entities, including some passenger ferries, high-speed whale watching vessels, and charter fishing vessels. But there is no quantification of costs offered for these entities.
Does the analysis identify the alternative that maximizes net benefits?	0	2E	Given that alternatives other than the one chosen are not analyzed or discussed, there is no relevant information provided.
Does the analysis identify the cost-effectiveness of each alternative considered?	1	2F	"The sampling period was too short to make a meaningful determination about the rule's impact on the right whale population." The preliminary evidence suggests that around 1.2 –2 known fatal vessel strikes have been avoided as a result of the rule. Given the cost estimates and these figures, one could compute that each known fatality avoided costs between $22.4 and $37.3 million. However, these figures should be viewed as highly imprecise. Without the quantification of benefits, the lack of quantified cost-effectiveness is particularly problematic.
3. Benefits (or other Outcomes): How well does the analysis identify the benefits or other desired outcomes and demonstrate that the regulation will achieve them?	**3**		
Does the analysis clearly identify ultimate outcomes that affect citizens' quality of life?	2	3A	The analysis identifies the outcome of fewer lethal vessel collisions, but it makes no attempt to quantify or qualify what this really means to citizens' quality of life.
Does the analysis identify how these outcomes are to be measured?	3	3B	Given the goal of maintaining and possibly encouraging right whale population growth, they would track the number of right whales in the ocean. But no attempt is made to quantify or qualify what this really means to citizens' quality of life.

Does the analysis provide a coherent and testable theory showing how the regulation will produce the desired outcomes?	4	3C	Slowing vessel speed to 10 knots during certain periods and areas is hypothesized to reduce lethal vessel collisions. Average vessel operating speeds through SMAs in 2009 during the period when the rule was in effect declined to an overall average of 10.0 knots. Estimates of extra sailing time were calculated by subtracting time required to sail through each restricted area using average vessel operating speeds for that restricted area during periods when the rule was not in effect from the time required at a sailing speed of 10 knots.
Does the analysis present credible empirical support for the theory?	3	3D	Evidence is cited that indicates a "substantial" reduction in the probability of lethal strikes, although the impact is not quantified. Further, no lethal strikes have occurred in areas covered by the vessel speed reduction rule since its implementation. The sampling period is admitted to be "too short to make a meaningful determination of the rule's impact on the right whale population." (NPRM 34026)
Does the analysis adequately assess uncertainty about the outcomes?	2	3E	NMFS acknowledges that it is difficult to parse out specific effect of regulation on current population trends since death rates are affected by other factors as well (e.g., entanglement in fishing lines) and that more time is needed to obtain "statistically significant" effects. The insufficient sample period is also noted. However, there is no effort to estimate a range of values for the impact. It is simply asserted to be significant (despite the limited sampling period).
Does the analysis identify all parties who would receive benefits and assess the incidence of benefits?	1	3F	There is very little identification; perhaps all citizens are believed to gain equally, or perhaps benefits are believed to principally flow to whales themselves. No clear discussion is provided. No contingent valuation method (or alternative method) is applied.
4. Costs: How well does the analysis assess costs of the regulation?	**2**		
Does the analysis identify all expenditures likely to arise as a result of the regulation?	2	4A	The analysis, while doing a fair job of estimating the costs to industry, fails to acknowledge the costs to the agencies involved with managing the SMAs and DMAs and enforcing the regulation. There are no compliance requirements other than the management actions contained in proposed rule.
Does the analysis identify how the regulation would likely affect the prices of goods and services?	1	4B	The analysis Indirectly implies little effects on pricing. Estimates of direct economic impact on shipping industry represent less than two-tenths of one percent of ocean freight costs for US East Coast trade. The rule is estimated to lead to a $1 million cost per year on charter fishing, some of which could be passed onto consumers in the form of higher prices. However, no estimate of the impact on the price of chartered fishing is estimated. Likewise, there is no attempt to estimate the changes in the price of shipping or of the goods being shipped.

Does the analysis examine costs that stem from changes in human behavior as consumers and producers respond to the regulation?	2	4C	The analysis does account for potential changes in preferred shipping routes as a result of the rule. The analysis also discusses possible changes in transport preferences toward rail or truck but largely dismisses these as relevant options due to the limited gains of such action. One potential change in behavior the analysis ignores is that the existence of the SMAs may lead to an attempt to "make up for lost time" by increased speeds in waters not covered by the regulation and in the voluntary speed reduction zones. This could possibly explain why vessel speeds are, on average, higher in the DMAs after the implementation of the rule. Ultimately, this could lead to increased frequency of fatal vessel strikes with other marine life.
If costs are uncertain, does the analysis present a range of estimates and/or perform a sensitivity analysis?	2	4D	Where uncertain, it is claimed that the analysis errs on the side of a higher cost estimate. However, no range of cost estimates or sensitivity analysis is performed. Further, cost estimates are provided for only one year.
Does the analysis identify all parties who would bear costs and assess the incidence of costs?	3	4E	Economic costs vary by port and type of ship. Potential economic impact on four parties other than principle effects on large vessels, including commercial fishing, charter fishing, passenger ferries, and whale watching. However, the analysis ignores the costs borne by the agencies managing the SMAs and DMAs and enforcing the regulation.
5. Use of Analysis: Does the proposed rule or the RIA present evidence that the agency used the analysis in any decisions?	**1**	5	There is very little evidence to support a claim that the RIA was used to influence the decision to support this regulation. This is particularly the case since no alternatives were analyzed. The RIA appears to simply justify keeping current regulation in place rather than provide a wide-ranging analysis of what an optimal rule might look like.
6. Net Benefits: Did the agency maximize net benefits or explain why it chose another alternative?	**1**	6	Again, no other alternatives were considered beyond asking for comment as to whether the sunset clause should be extended instead of eliminated as the proposed rule suggests. No measures of benefits are provided, so net benefits are not estimated. There is little to no discussion for why benefits are not estimated, and thus little to no justification for not maximizing net benefits is made.