

United States Senate

September 7, 2023

Richard W. Spinrad, Ph.D.
Administrator
National Oceanic and Atmospheric
Administration
1401 Constitution Avenue N.W.
Washington, DC 20030

Liz Klein
Director
Bureau of Ocean Energy Management
1849 C Street N.W.
Washington, DC 20240

Dear Administrator Spinrad and Director Klein:

I write in opposition to the National Oceanic and Atmospheric Administration's (NOAA) proposed rule, "Endangered and Threatened Species; Designation of Critical Habitat for the Rice's Whale."¹ The Biden administration's overly aggressive efforts to protect the Rice's whale will cause severe and unnecessary burdens to supply chains, fishing and boating industries, and critical energy production within the Gulf of Mexico (Gulf). I request the immediate withdrawal of NOAA's proposed rule.

As you know, Rice's whales are already afforded protections under the Endangered Species Act (ESA) and the Marine Mammal Protection Act (MMPA). According to NOAA Fisheries, Rice's whales are found in the Gulf between 100 and 400 meters in depth. However, the exact number and their location have not been determined.² NOAA's most recent surveys, which claim there are approximately fifty Rice's whales in the Gulf, occurred in 2017 and 2018. Historically, however, only one of these whales has ever been identified off the coast of Texas.³ The survey data from NOAA is five years old and seemingly outdated, leading to questions on the current habitat and specific locations of Rice's whales along the Gulf. Considering the lack of scientific evidence regarding the presence of the whales, an expansion of their Critical Habitat area is unjustified.

NOAA's proposed rule, which was published in the Federal Register on July 24, 2023, aims to appease environmental and animal rights activists through the establishment of a Critical Habitat. This designation would establish a Critical Habitat between a 100- and 400-meter isobath in the Gulf stretching from Pensacola, FL, to the Texas/Mexico border. This broad range would cover approximately 28,000 square miles. Agencies tasked with regulating offshore development have repeatedly concluded that there is not enough available information to designate a Critical

¹ 88 FR 47453.

² NOAA Fisheries (2023). *Rice's Whale*. <https://www.fisheries.noaa.gov/species/rices-whale#:~:text=With%20likely%20fewer%20than%20100,protection%20of%20each%20remaining%20whale.>

³ *Id.*

Habitat for the Rice's whale outside of its Core Habitat area in the northeastern Gulf.⁴ In its January 2023 Final Environmental Impact Statement for Offshore Lease Sales 259 and 261, the Bureau of Ocean Energy Management (BOEM) did not find enough data on the general distributions and migrations of the Rice's whale to expand its habitat beyond this Core Habitat area.⁵ I urge you to conduct more scientific research and analysis on the whales' presence before establishing any rulemaking affecting commercial industries in waters off the Gulf, such as maritime carriers transporting critical freight and offshore oil and gas drilling.

Designating a Critical Habitat for the Rice's whale throughout this expansive area will result in extreme burdens and gratuitous restrictions on all vessel traffic, especially in and out of the Port of Mobile in Mobile, AL. The Port of Mobile covers over 4,000 acres, generates nearly 313,000 jobs, provides approximately \$2 billion in state and local tax impacts, and \$85 billion in economic value to Alabama as a whole.⁶ The seaport handles over 55 million tons⁷ of international and domestic cargo for exporters and importers, making it the 11th largest port in the nation based on total tonnage.⁸ It is my understanding that these proposed Critical Habitat restrictions will include imposing a year-round vessel speed restriction of 10-knots, preventing vessel transits at night and during periods of low visibility, and requiring detailed reports to the agency of any activity or plans to travel through the area for all vessels, regardless of size. This unwarranted federal action will greatly inhibit supply chains, freight transportation, and economic activity in my state and across the entire Gulf.

NOAA has failed to put forward any documentation deeming recreational vessels, or specific size vessels, especially those under 35 feet, to be of heightened concern to the whales' existence. There are no guarantees that the proposed restrictions will improve the whales' resilience or livelihood within the Gulf. In fact, a 2020 Biological Opinion developed by BOEM and National Marine Fisheries Service (NMFS) agreed that the potential for vessel strikes on Rice's whales is improbable, citing the already-slow transiting and surveying speeds imposed on large vessels, and additional mitigation measures imposed on vessels navigating the Gulf.⁹ I am greatly concerned that the reduced speeds and prevention of transiting Gulf waters at night will continue expanding to additional areas of the Gulf, parallel to regulations established to protect the Right whale. Continued expansion would substantially disrupt economic prosperity, tourism, transportation, and our national defense.

On July 21, 2023, the NMFS filed a Stipulated Stay Agreement with the Sierra Club and various environmental groups.¹⁰ On August 24, 2023, the court ruled to stay the Sierra Club v. NMFS

⁴ Bureau of Ocean Energy Management (2023). *Gulf of Mexico OCS Oil and Gas Lease Sales 259 and 261, Final Supplemental Environmental Impact Statement*. https://www.boem.gov/sites/default/files/documents/renewable-energy/state-activities/GOM_LS259-261_SEIS_FINAL.pdf.

⁵ *Id.*

⁶ Alabama State Port Authority (2023). *Port of Mobile*. <https://www.alports.com/economic-impact/>

⁷ *Id.*

⁸ Hu, P. S., et al. (2023). *2023 Port Performance Freight Statistics Program: Annual Report to Congress*. <https://doi.org/10.21949/1528357>

⁹ National Marine Fisheries Service (2020). *Biological Opinion on the Federally Regulated Oil and Gas Program Activities in the Gulf of Mexico*. <https://repository.library.noaa.gov/view/noaa/23738>.

¹⁰ *Sierra Club v. National Marine Fisheries Service*, Stipulated Agreement to Stay, July 2023.

https://cdn.baseplatform.io/files/base/ebm/ogj/document/2023/07/GoM_case_deal_july_21.64c024bd4b2b9.pdf

case and for all parties to comply with the Stipulated Stay Agreement.¹¹ The agreement significantly deters oil and gas drilling in the Gulf beginning with the Gulf Outer Continental Shelf (OCS) Oil and Gas Lease Sale 261 (GOM Lease Sale 261). Even though the Critical Habitat designation has not been finalized, the Notice to Lessees (NTL), Stipulated Stay Agreement, and BOEM Final Notice of Sale (FNOS)¹² exclude the entire established Expanded Rice's Whale Area, totaling over 6.3 million acres, from future oil and gas drilling in the Gulf. Of note, while NOAA and BOEM claim that the established Expanded Rice's Whale Area excludes over 6.3 million acres from leasing, industry believes that closer to 10 million acres will be restricted. If not by design, it is suspiciously coincidental that there is no direct path from Gulf Coast shore bases or ports to deep waters that avoids traversing the Expanded Rice's Whale Area. The uncertainty of the actual excluded acreage presents concerns that the expanded protection areas have been rushed through without proper feedback from industry and affected stakeholders.

Additionally, requiring all lessees and operators to comply with reduced speeds of 10-knots or less and preventing them from traveling after dusk and before dawn within the designated areas will detrimentally impact our nation's ability to domestically produce oil and gas in hopes of becoming energy independent. Along with energy security concerns, there are serious safety concerns with these restrictions, particularly restricting nighttime operators, for the offshore oil and gas workforce. Furthermore, requiring all vessels to designate a crew member to monitor for whales, maintain a minimum of 500 meters from Rice's whales, document every time they travel through the designated Expanded Rice's Whale Area, and maintain the records for a three-year period is not feasible for the average boat operator. Operators who are already facing issues with labor, supply chains, and inflation, would be further detrimentally impacted by these onerous requirements. The restrictions from this agreement will effectively increase reliance on foreign nations for energy production while simultaneously reducing investment in our oil and gas production along the Gulf.

On August 25, 2023, following the BOEM FNOS for GOM Lease Sale 261,¹³ several environmental groups filed a lawsuit against the Department of the Interior to challenge the sale.¹⁴ Lease Sale 261 makes over 67 million acres in the Gulf available for oil and gas leasing and is required under law through the Inflation Reduction Act. The environmental groups cite National Environmental Policy Act (NEPA) violations of health threats, polluting, and climate impacts as their reasoning for the lawsuit, and then include Rice's whale protections as an afterthought.¹⁵ Similar to what we have seen through the Expanded Rice's Whale Area, which unfairly targets the oil and gas industry, the motivation of the recent lawsuit stems from a desire

¹¹ *Sierra Club v. National Marine Fisheries Service*, Stipulated Agreement to Stay. August 2023.

https://earthjustice.org/wp-content/uploads/2023/08/154_order-granting-motion-to-stay-8.24.23.pdf

¹² Bureau of Ocean Energy Management (2023). *Gulf of Mexico Outer Continental Shelf Oil and Gas Lease Sale 261, Final Notice of Sale*. Docket No. BOEM-2023-0013. <https://www.boem.gov/sites/default/files/documents/oil-gas-energy/leasing/Sale-261-%20FNOS.pdf>

¹³ *Id.*

¹⁴ *Environmental Groups v. Department of Interior, Gulf of Mexico Oil and Gas Lease Sale 261*.

<https://earthjustice.org/wp-content/uploads/2023/08/complaint-8.25.23.pdf>

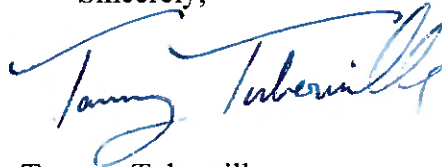
¹⁵ Earthjustice (2023). *Lawsuit Challenges Massive Offshore Lease Sale for Failing to Properly Consider Gulf Communities and Climate*. <https://earthjustice.org/press/2023/lawsuit-challenges-massive-offshore-lease-sale-for-failing-to-properly-consider-gulf-communities-and-climate>

to eliminate fossil fuel production and usage in the Gulf, not conserve and protect the Rice's whales' existence.

Strikes on Rice's whales are exceedingly unlikely given the restrictions already in place for Gulf vessel traffic. The addition of mandatory, burdensome "mitigation" efforts in the name of conservation will have detrimental impacts on Gulf and Mississippi River commerce that will far outweigh any benefit to the Rice's whale species. The Endangered Species Act requires an acting agency's Secretary to consider the economic impact of any Critical Habitat designation.¹⁶ Based on prior studies of Rice's whale habitat, I believe that NOAA has failed to abide by its duty to weigh the economic harms that will result if this habitat designation is finalized. The proposed rulemaking from NOAA and the FNOS from BOEM will have negligible impact on conservation efforts to save Rice's whales; however, it will disrupt supply chains, inhibit oil and gas production, and result in significant economic losses for Alabama and across the entire Gulf Coast. The lack of scientific evidence to support the Expanded Rice's Whale Areas, Critical Habitat designation, and speed and nighttime transit restrictions highlight that this unnecessary proposed rule is little more than an attack on the oil and gas industry and commercial development to appease environmental activists.

I request immediate withdrawal of the proposed rulemaking and revision of the Expanded Rice's Whale Area to include the withdrawn acreage in future lease sales. Thank you for your attention to this important matter.

Sincerely,

A handwritten signature in blue ink that reads "Tommy Tuberville". The signature is fluid and cursive, with the first name "Tommy" and last name "Tuberville" clearly legible.

Tommy Tuberville
United States Senator

¹⁶ 16 U.S.C. § 1533(b)(2).