October 6, 2023

Submitted via email and www.regulations.gov

Mr. David Bernhart
Assistant Regional Administrator
Protected Resources Division
NMFS Southeast Regional Office
263 13th Avenue South
St. Petersburg, FL 33701

RE: Offshore Operators Committee Comments
Notice of Proposed Rule: Endangered and Threatened Species; Designation of Critical Habitat for the Rice's Whale
Docket No. NOAA-NMFS-2023-0028

Dear Mr. Bernhart,

The Offshore Operators Committee (OOC) appreciates the opportunity to provide detailed comments on the above-referenced Proposed Rule for the Designation of Critical Habitat for Rice's Whale. Comments are submitted without prejudice to any member's right to have or express different or opposing views. It is from this perspective that these comments have been developed.

OOC member companies represent more than 90% of the oil and gas production in the Gulf of Mexico (GOMx) Outer Continental Shelf (OCS) with oil and natural gas operators, drilling contractors, and service providers. OOC also represents operators and future operators of offshore wind and companies who plan to participate in offshore Carbon Capture and Storage (CCS) projects. Our members are committed to conducting offshore operations safely and in a manner that protects the environment. The offshore industry has a long history of safe operations that has advanced the energy security of our nation and provided energy resources which are crucial to our nation's economy. OOC members support the protection of the Rice's whale, the environment, and the workers in the Gulf of Mexico.

OOC respectfully requests National Marine Fisheries Service (NMFS) to withdraw their currently proposed designation of critical habitat for the Rice's whale and reissue a new proposal that complies with the Endangered Species Act. After reviewing the proposal, it is apparent that there is not adequate published scientific data to support the critical habitat designation. The supporting documentation submitted by NMFS fails to properly identify occupied habitat as required by the Endangered Species Act (ESA) as defined in 16 USC §1532 5(A)(i). Additional details supporting our request are outlined below.

OOC is providing comments on the issues below related to the proposed Critical Habitat Designation and

resulting current and future impacts:

1. Limited Availability of Scientific Data
2. Data Does Not Support Designation
3. NMFS's Identification of Critical Habitat is Flawed
4. Physical or Biological Features Essential for Conservation
5. Due Process, Administrative Sequence Concerns
6. Stakeholder Impacts from Critical Habitat Designation Have Not Been Fully Analyzed
   - 6.1. Additional Economic Impacts
   - 6.2. Supply Chain Issues
   - 6.3. Other Relevant Impacts
7. Energy Supply, Distribution, and Use (Executive Order 13211) Not Fully Analyzed
8. Regulatory Flexibility Act/Initial Regulatory Flexibility Analysis is Incomplete

1. Limited Availability of Scientific Data

We agree with National Oceanic and Atmospheric Administration (NOAA)/NMFS' assertions that the scientific understanding of Rice's whale life history (88 FR 47455), behavior (88 FR 47456), call features (88 FR 47456, 47457), and diet (88 FR 47458, 47461) is currently very limited and requires further study, particularly to justify the expansive critical habitat designation proposed here. (Endangered and Threatened Species, 2023) We would like to express our concerns with the existing studies that have been utilized in the drafting of this proposed rule. These studies are not comprehensive enough to support the expansion of the Rice's whale critical habitat designation as proposed. As discussed above, OOC is requesting NMFS to withdraw their proposed designation of critical habitat for the Rice's whale and reissue a new proposal that complies with the law.

Currently available scientific information is insufficient to support a critical habitat designation over the full area proposed by NMFS. In 2021, NOAA published a report titled "A new species of baleen whale (*Balaenoptera*) from the Gulf of Mexico, with a review of its geographic distribution" in which it states "Compiling the sighting, acoustic, genetic, and stranding data, it is clear that these whales are restricted in their distribution to the GOMx, and that the northeastern GOMx, particularly the De Soto Canyon area and water depths of 150 – 410m, are currently the primary habitat of these whales." (Rosel et al., 2021) This same report raises several questions as to why there were possible Bryde's/Sei whale sightings in the western GOMx in the early 1990s. These questions indicate that additional information on the areas that the whales occupy and how they are utilized for different critical life stages is needed and better identification of these sightings is necessary to confirm if they were indeed Rice's whale sightings or "another, as yet unidentified population in the southern GOMx." (Rosel et al., 2021) This reports states that "further research in the western and southern GOMx will greatly aid our understanding of whether these whales utilize these habitats and if so, how often, and how they are related to the whales that are found in the northeastern GOMx." (Rosel et al., 2021) Although the proposal includes additional acoustic data, it leaves the questions from Rosel et al. (2021) unanswered. In the conclusion section of the Soldevilla et al. "Rice's Whales in the northwestern Gulf of Mexico: Call variation and occurrence beyond the known core habitat" paper (2022) it states, "It will be important to determine the number and overall spatial density of whales in this area, as well as the potential distribution in deeper waters and southern waters of the GOM. Additionally, given the differences in call

type production described here, it will be important to understand the relationship between the whales found in the western and eastern GOM, including movement patterns of individuals throughout the GOM. The northwestern GOM has high levels of anthropogenic activity that may present a risk to these whales, and it will also be important to assess the risk of these activities to these whales, particularly if whales are moving between the heavily trafficked waters of the central GOM." These outstanding data gaps have not yet been answered, and therefore critical habitat should not be designated along the entire 100-400m isobath without that data. Without resolution to the questions of what kind of whales (if any) routinely use areas outside of the Biologically Important Area previously identified for this species, designation of those areas as critical habitat for the Rice's whale is unsupported because it does not meet the requirements of Section 4 of the ESA. The May 2023 "Rice's whale (*Balaenoptera ricei*): Northern Gulf of Mexico Stock" report says "Limited information exists on how regularly they [Rice's whales] currently use U.S. waters of the western Gulf of Mexico…. Additional work to evaluate the presence and abundance of this species in the western and southern Gulf of Mexico will further understanding of their distribution and the plausibility of additional demographically independent populations." ("Rice's whale", 2023b) Further, the May 2023 stock assessment report states "All verified Rice's whale sightings, with one exception, have occurred in a very restricted area of the northeastern Gulf ... during surveys that uniformly sampled the entire oceanic northern Gulf" and the report concedes "there has been only one genetically confirmed sighting of a Rice's whale in this region [the western Gulf of Mexico], a whale observed during a 2017 NMFS vessel survey off Texas (Garrison et al., 2020; Rosel et al., 2021), despite substantial NMFS survey effort in the north central and western Gulf dating back to the early 1990s . . . ." ("Rice's whale", 2023b) Thus, by NMFS own admission as recently as May 2023, there is not enough evidence to support expansion of the habitat across the entire 100-400m isobath in northern GOM.

The largest estimated mortality event to the species was from the 2010 Deepwater Horizon (DWH) oil spill. Large oil spills continue to be cited as a chief risk to endangered species such as Rice's whales, without considering the extremely low likelihood of ever experiencing an event such as this again due to large advancements in process safety technology and practices as well as oil spill response methodology in the last 13 years. The 2015 report "Models and Analyses for the Quantification of Injury to Gulf of Mexico Cetaceans from the Deepwater Horizon Oil Spill" (DWH MMQIT, 2015), as cited in 88 FR 47455, did not have any data of oil-spill exposure or injury to Rice's whales (known as Gulf of Mexico Bryde's whales at the time), so it used injury metrics for bottlenose dolphins in Barataria Bay in Southeast Louisiana to extrapolate estimates for potential injuries that occurred to other marine mammals such as Rice's whales. (Endangered and Threatened Species, 2023) However, the report does not have adjustments on these estimated figures that account for differences in anatomy and physiology and other scientific differences between species, due to not having enough scientific knowledge of those species, including Rice's whales. Despite these large assumptions from lack of information, the report gives an estimated figure of 48 percent of Rice's whales exposed to oil (95 percent Confidence Interval: 23-100) and a mortality estimate of 17 percent (95 percent Confidence Interval: 7-24) of an estimated population of 54. (Endangered and Threatened Species, 2023) There were zero Rice's whale carcasses recovered during the DWH oil spill, yet these estimations are treated as facts by many organizations, including NOAA who cite them in their analyses. NMFS used this inaccurate data to provide context "for the determination of physical or biological features that are essential for the conservation of the species". (Endangered and Threatened Species, 2023)

The proposal attempts to shore up the limited data with reference to a study that has not been made available to the public, the Garrison et al. (2022) study entitled "The habitat of the critically endangered Rice's whale, *Balaenoptera ricei*, in the Gulf of Mexico". On August 24, 2023, during the public hearing, NMFS informed the public that this study has not yet been published and is, in fact, still under peer review. There is an expectation that this study will be published later in 2023; however, the Rice's whale critical habitat proposed rule was written and issued prior to the Garrison et al. (2022) study, all the while referencing it and making determinations based on this unpublished paper. To comply with its obligation to ensure adequate opportunity for public notice and comment, NMFS should make this draft report "available for public review so that its accuracy [can] be verified before [NMFS makes] a decision relying, to a large extent, on information contained in the report."[1]

NMFS provided OOC with an online link to the raw observation data and the model outputs from that data; however, there is no discussion on how the data was used to generate the density model including assumptions and uncertainties. For example, of the few baleen whale sightings in the data, the data does not specify the exact species and therefore cannot be 100% certain that it was a Rice's whale instead of similar species such as sei, fin, or Bryde's whales. Part of the integrity of rulemaking is to ensure that the public can review the reasoning behind the proposed rulemaking and provide informed commentary. This is greatly hindered when a key report (Garrison et al., 2022) relied upon to determine the proposed critical habitat area is not publicly available. This undermines not only the ESA, but also 5 USC §552(a)(1) of the Administrative Procedures Act.

In NAO 202-735D-2: Scientific Integrity, Section 6: Integrity of Scientific Activities (2), it states that "NOAA preserves the integrity of the scientific activities it conducts and activities that are conducted on its behalf. It will not tolerate loss of integrity in the performance of scientific activities or in the application of science in decision-making. To that end, NOAA will: "… (d) Ensure that data and research used to support policy decisions undergo independent peer review by qualified experts, where feasible, appropriate, and consistent with the law and NOAA's Information Quality and Peer Review Guidelines." (Scientific Integrity, 2023) NOAA/NMFS reliance on an unpublished, non-peer-reviewed study, conducted by agency personnel, to justify a critical habitat designation proposal is contrary to the agencies' own guidelines and policies.

2. Data Does Not Support Designation

One of the key components of ESA when designating critical habitat is identifying the occupied habitat at the time of listing. For this proposal, NMFS determined that the Rice's whale occupies the entire GOMx (88 FR 47460). This is clearly not supported by NMFS statement that the Rice's whale's range is primarily restricted to the De Soto Canyon area of the northeastern GOMx and the proposed rule which states "... Rice's whales rely entirely on the GOMx continental shelf and slope waters between the 100 and 400 m isobaths to support all of their life history stages, we have identified physical and biological features that support all of the Rice's whale life-history stages within its restricted range." (88 FR 47461)

Under 50 CFR §424.12(b), NMFS must first define the geographical area occupied at the time of listing and then identify areas within that area that contain physical or biological features essential to the conservation of the species that may require special management considerations or protections. These requirements were not met by NMFS' proposed critical habitat designation.

[1] *Idaho Farm Bureau Fed'n v. Babbitt,* 58 F.3d 1392, 1403 (9th Cir. 1995).

The proposal refers to a 2017 sighting of a Rice's whale off the central Texas coast in 225 m depth and acoustic results in that general area that were not verified by sightings. This information merely demonstrates that the species can physically travel to that location. It does not provide evidence that the species relies on that area or similar locations along the proposed critical habitat area along the 100-400 m isobath with sufficient regularity for that extended region to be deemed "occupied" 50 CFR 424.12(b)(1) nor "essential for the conservation of the species" per 50 CFR 424.12(b)(2)'s requirements for critical habitat designations outside occupied areas. (Criteria for designating critical habitat, 2023) To the contrary, the data in the proposal provides evidence that the only area the species "uses with sufficient regularity that it is likely to be present during any reasonable span of time"[2] is the relatively small region in the northeastern GOMx off the coast of Florida, in the Biologically Important Area. Therefore, the "expanded" region outside of that area does not meet the definition of occupied critical habitat under the ESA, and NMFS has not attempted to demonstrate that the extended region qualifies for designation as unoccupied habitat. Moreover, NMFS has not demonstrated that the "buffer" area around the Biologically Important area that makes up the 2019 "Core Habitat" area meets the criteria for critical habitat.

None of the studies cited in the proposal provides sufficient evidence that areas outside the Biologically Important Area were occupied by the Rice's whale at the time of listing. The proposal references the Roberts et al. (2016) study on habitat-based cetacean density models and incorrectly states that the predictive model from that study "highlights the importance of the 200 m isobath as an area Rice's whales may occupy along the northwestern GOMx shelf break." However, Roberts et al. (2016) does NOT state that the 200 m isobath in the northwestern GOMx is important; rather, it downplays the importance of that area. That study says, "Bryde's whales [Rice's whales are part of the Bryde's complex] were sighted very infrequently; we modeled them with stratified models" and "we fitted a limited [density surface model] designed to reflect their distribution along the northeast Gulf slope." Roberts et al. (2015), the supplementary report that accompanies Roberts et al. (2016) and is specific to the Bryde's whale, further states:

> "The habitat predicted by our model might be too expansive–for example, Bryde's whales may not occur near the Florida Keys or west of the Mississippi River Delta, even though the model predicts them in these locations. We note that Bryde's whales may have historically occupied the northwestern Gulf (Reeves et al., 2011; Rosel and Wilcox, 2014) and the two sightings from 1992-1993 reported west of the Delta but not used in our model occurred within the narrow, westward-diminishing band of density predicted by our model. In any case, in the northwestern area where all the sightings occurred in the 1994-2009 period, our model predicts density to be an order of magnitude or higher than these more questionable areas. The maps presented in this report utilize an exponential scale that unintentionally obscures this difference."

Thus, the Roberts et al. (2016) study does not in fact support designation of the habitat across the entire

[2] *Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 64 F.4th 1027, 1038 (9th Cir. 2023).

Gulf of Mexico along the 100-400 m isobath.

The proposed rule also relies on Reeves et al. (2011), which analyzed historic whaling records. As a preliminary matter, NMFS should not use this information for critical habitat determination because the ESA requires NMFS to establish that the area was occupied at the time the species was listed, not at any time during the historical record. Historic whaling records are per se irrelevant to a determination of occupancy for a species that was listed in the 21st century.

In the Reeves et al. (2011) study, any time a logbook referred to a sighting of a "finback" whale, it was assumed to be a Rice's whale. However, this study also states that it is possible that many of those sightings were minke whales. Due to the limited visual characteristics identifiable above the water line, Rice's whales are also very similar to other baleen whales such sei, fin, and Bryde's whales. These whales were not typically targeted by historical whaling vessels due to their limited market value, so their mere mention in logbooks, regardless of misidentification, is incidental, non-scientific, and unrepresentative of population numbers nor density. In either case, the assumption that "finback" whales sighted were Rice's whale is based on current-day data that show that fin whales occurring in the GOMx today are extralimital or migratory. That assumption is faulty for several reasons. First, population density data in the GOMx show that many present-day non-Rice's baleen whale species are known to appear in the GOMx. It is likely that these historical whalers could have misidentified any number of species as "finback" whales, which this 2011 study then assumed were Rice's whales. Second, all whale species worldwide were significantly higher before the historical whaling industry reduced their numbers, and we do not know what the population densities were; it is very likely that many non-Rice's baleen whales were much more prevalent back then, which whalers may have misidentified as "finbacks." Third, since populations used to be much higher, many of those "finback" whales were very likely fin whales or other similar-looking baleen whale species.

For the purposes of designating critical habitat, NMFS is required to use the best scientific and commercial information available. Therefore, the use of the whaling vessel records that were once used to notate any sighting of fin-backed whales throughout the GOM should be dismissed as inconsistent with accepted scientific practice. The proposed rule is utilizing this data and assuming that any of the fin-backed whale sightings were of a Rice's whale; however, current guidance, as summarized on the NOAA Fisheries website, now states that if you are unable to positively identify the animal, the sighting is marked as "unidentified". This source of data lacks scientific merit and should be dismissed from consideration when determining the proposed critical habitat. Utilizing speculative studies such as this 2011 study as "best scientific information available" is inappropriate. Rather, speculative information should only be used to justify the prioritization of new scientific studies, which can be used to make regulatory decisions.

The proposal references a 2022 acoustic study (Soldevilla et al., 2022), which showed that the Biologically Important Area had a far higher acoustic detection rate than any other part of the proposed critical habitat area. Further, the referenced study was incapable of determining quantities, population density, or bearing and range from the detectors. The proposal admits that Rice's whale long-moan calls were commonly detected on scales of 20-75 km (12-47 miles). All these factors obfuscate the ability to determine how much area outside the Biologically Important Area may be used by the Rice's whales, if at all. In contrast, the proposal and scientific literature provide substantial evidence of Rice's whales

using and occupying the Biologically Important Area. This study also states that the calls detected along the northern and western 100-400m isobath were different than the distinctive calls in the Biologically Important Area off the coast of Florida and give doubts whether those calls are from the same population, or even species, of baleen whales.

3. NMFS's Identification of Critical Habitat is Flawed

Due to the lack of current available data, there is no scientific justification for designation of the expansive area NMFS has proposed. NMFS acknowledges in the proposal that it does not know why Rice's whales prefer the Biologically Important Area. It also does not know to what extent any other areas outside of that area are utilized by the whales and why. Available scientific studies all show that the Biologically Important Area is the species' presently preferred range and is utilized during every life stage including foraging for their preferred diet of *Ariomma bondi.* (Kiszka et al., (2023)) Without better understanding the whales' utilization of areas beyond the Biologically Important Areas, defined by NMFS as areas and times in which cetaceans are known to concentrate for activities related to reproduction, feeding, and migration, as well as the known ranges of small and resident populations, critical habitat designation of any such "extralimital" areas is not appropriate. If future scientific information becomes available that shows areas outside the Biologically Important Area meet the definition of critical habitat, then NMFS should at that time utilize the Critical Habitat Revision Process.

The data NMFS is using to support its proposed designation demonstrates the notable gap between the Biologically Important Area and all other areas. In the Biologically Important Area, the data referenced are primarily based on visual sightings, which has a higher confidence level. The other areas of the proposed designation are supported only by acoustic data, one confirmed visual sighting in 2017, (Rosel et al., 2021) and the potential range of the food source, all of which have lower confidence levels in determining the range and habitat of Rice's whale. Any designation of critical habitat for the Rice's whale should be based on high confidence data that accurately depicts a Biologically Important Area.

Further, NMFS's treatment of extralimital sightings of Rice's whales is inconsistent because it treats similar observations differently for purposes of determining critical habitat. Rosel et al. (2021) "compiled and scrutinized stranding reports from the U.S. Atlantic coast dating back to 1954 and confirmed six records of whales from the Bryde's whale complex." The May 2023, "Rice's whale (*Balaenoptera ricei*): Northern Gulf of Mexico Stock" report for Rice's whales states that the strandings are "unclear" whether they are extralimital or not. Two of these were genetically confirmed as Rice's whales. It is hypothesized that these marine mammals had traveled from the GOMx to the Atlantic coast before stranding. Despite this data that shows that Rice's whales have been known to travel to the Atlantic coast, NMFS asserts that the Atlantic Ocean is not occupied by the Rice's whale. In contrast, NMFS relies on a single genetically confirmed extralimital sighting off the coast of Texas to support its conclusion that the entire Gulf of Mexico is "occupied" by the Rice's whale. This inconsistency in application of the extralimital sightings weakens the argument of utilizing these sightings as reasoning for designating such an expansive critical habitat area.

Finally, additional inconsistencies lie in utilizing the feeding source areas as a reason to designate an overly broad critical habitat area. The feeding source is believed to be between the 100m and 400m isobath areas not only in the Gulf of Mexico but also along the Atlantic seaboard and the Caribbean islands. These other areas are appropriately not designated as, nor are under consideration to be part

of, Rice's whale critical habitat area; neither should the area in the northern GOMx outside the Biologically Important Area.

4. Physical or Biological Features Essential for Conservation

NMFS has identified only a single essential feature, "GOMx continental shelf and slope associated waters between the 100 and 400 m isobaths that support individual growth, reproduction, and development, social behavior, and overall population growth" (88 FR 47461), and then identifies three "attributes" of the "feature" that "support Rice's whale's ability to forage, develop, communicate, reproduce, rear calves, and migrate throughout GOMx continental shelf and slope waters and influence the value of the feature to the conservation of the species" (88 FR 47461). The term "attributes" is a new concept, and NMFS has failed to demonstrate how this new concept is related to the essential feature under the framework of ESA. Notice-and-comment rulemaking is required to inform the public of how NMFS plans to apply this new concept in relation to critical habitat designation. The "attributes" of the "feature" described in the preamble and proposed regulatory text are discussed below.

The proposed language for 50 CFR 226.230(b)(1)[3] describes the first "attribute" as "Sufficient density, quality, abundance, and accessibility of small demersal and vertically migrating prey species, including scombriformes, stomiiformes, myctophiformes, and myopsida". However, the proposal references Kiszka et al., (in press), which suggests that most of the Rice's whales diet consists only of *Ariomma bondi* (66.8%, a scombriform) and *Diaphus dumerilii* (17.8%, a myctophiform), *Doryteuthis pealeii* (6.4%, a myopsid), and *Maurolicus weitzmani* (9.1%, a stomiiform). It is inappropriate to state that their essential prey are these entire orders of fish and squid rather than the specific genus and species documented in the study, especially since it is stated that Rice's whales are highly selective of more energy-dense prey species, and not entire orders. NMFS' use of much broader taxonomy classifications in their "essential features" description admits the limitations of the Kiszka et al study, further underlying the fact that there is insufficient scientific understanding of the species. By using these broader classifications, NMFS is creating a flawed argument that the entire GOMx is "occupied" by the species, which it is not.

The second "attribute" is described in proposed 50 CFR §226.230(b)(2)[4] as "marine water with elevated productivity, bottom temperatures of 10-19 degrees Celsius." However, there are no referenced studies to show that the proposed range for the critical habitat has those essential features, nor that other parts of the ocean that were not selected for the critical habitat may also have those essential features. Therefore, NMFS has not demonstrated that the ESA requirements for determining Critical Habitat have been met, based on an invalid argument of essential features.

Finally, the third "attribute" is described at 50 CFR 226.230(b)(3)[5] as "Sufficiently quiet conditions for normal use and occupancy, including intraspecific communication, navigation, and detection of prey, predators, and other threats." NMFS's identification of "sufficiently quiet conditions" as a valuable "attribute" of Rice's whale habitat is arbitrary and capricious because in-water sound is not an element

[3] 50 CFR 226.230 is currently listed for coral species and cannot be used for Rice's whale Critical Habitat Designation.
[4] 50 CFR 226.230 is currently listed for coral species and cannot be used for Rice's whale Critical Habitat Designation.
[5] 50 CFR 226.230 is currently listed for coral species and cannot be used for Rice's whale Critical Habitat Designation.

of habitat but rather the result of noise introduced to the marine environment. "Sufficiently quiet conditions" is not a "feature" that can be "found" on a "specific area" as required by the ESA. Furthermore, NMFS admits that much of the area proposed for designation is subject to significant anthropogenic noise, which means that NMFS may not identify "quiet conditions" as an essential element of those areas (88 FR 47461).

5. Due Process and Administrative Sequence Concerns

OOC is concerned that NMFS and action agencies have not followed the proper sequence to apply mitigation measures related to critical habitat for the Rice's whale. Although critical habitat has not been properly identified or designated, the Bureau of Ocean Energy Management (BOEM) and the Bureau of Safety and Environmental Enforcement (BSEE) reinitiated consultation with NMFS before the proper administrative sequence. The mitigations are evidence of pre-decisional consultation between NMFS, BOEM, and BSEE. That settlement previewed BOEM's intent (which was subsequently carried out with the issuance of BOEM NTL No. 2023-G01) to impose costly mitigation measures over an area that directly corresponds to the proposed critical habitat area. Neither BOEM nor NMFS has provided any explanation as to why the mitigation measures are now appropriate. In BOEM's Supplemental Environmental Impact Statement (EIS), issued in January 2023 (Bureau of Ocean Energy Management, 2023), BOEM concluded on review of the Soldevilla study (2022) that "not enough information is available at this time to confirm [the whales'] distribution or any seasonal movements outside of the core area that is already considered in this Supplemental EIS." Accordingly, BOEM determined that "the potential for vessel strikes to sperm and Rice's whale is extremely unlikely to occur due to the generally slow vessel transiting and surveying speeds, limited vessel routes originating from the eastern GOM, and the additional mitigations on vessels within the Rice's whale core area" and "the conclusions found in the 2017-2022 GOM Multi-sale EIS and 2018 GOM Supplemental EIS still remain valid." OOC questions if NMFS's critical habitat proposal is driven by the mandatory statutory factors and reasoned agency decision-making based upon available evidence. This is particularly important to note as these regional agencies will be responsible for enforcement of the mitigations that will be later developed as part of due process if this critical habitat is finalized.

6. Stakeholder Impacts from Critical Habitat Designation Have Not Been Fully Analyzed

NMFS did not consider the impacts of mitigations that may be imposed once critical habitat is established. As noted in the preamble of the proposed rule, once critical habitat is designated section 7(a)(2) of the ESA requires Federal agencies to ensure that actions they fund, authorize, or carry out are not likely to destroy or adversely modify that habitat.[6] BOEM has published both Lease Stipulations and a Notice-to-Lessees regarding Oil & Gas Exploration and Production restrictions in the entire proposed critical habitat area, and has already attempted to remove the proposed critical habit area, millions of potentially productive acres, from future federal oil & gas lease sales[7]. On 9/21/2023, the US District Court, Western District of Louisiana, Lake Charles division provided a preliminary injunction against the Lease Sale restrictions due to it being "arbitrary and capricious" and "the process followed here looks more like a weaponization of the Endangered Species Act than the collaborative, reasoned approach prescribed by the applicable laws and regulations." The judge further described the agencies' decision to "pivot from a prior policy …. leads to 'surprise switcheroo' by an agency against regulated entities."

[6] 88 Federal Register at 47454

[7] US District Court Wester District of Louisiana – Case No. 2:23-CV-01157

The BOEM NTL No. 2023-G01 (Bureau of Ocean Energy Management, 2023b) proposes the mitigation to "observe on all vessels, regardless of size, at all times a 10-knot or less, year-round speed restriction in the Expanded Rice's Whale Area" and "to the maximum extent practicable, lessees and operators should avoid transit through the Expanded Rice's whale Area after dusk and before dawn, and during other times of low visibility." This reduces the number of available transit hours for ships to come in from or out to the Gulf of Mexico from the ports from Alabama through Texas at minimum by 50%, some of which are amongst the largest and busiest ports in the US and the world.

For 75 years, OOC has advocated for the safety of the workforce and protection of the environment in the Gulf of Mexico and other areas on the OCS. Based on discussions with our industry partners as well as information provided by Subject Matter Experts, we have the following major safety concerns with the implementation of the proposed critical habitat area for Rice's whale:

- The reduction in available vessel transit time will affect the anchorage areas and lead to increased congestion in the shipping lanes and with that, increased safety issues in the shipping fairways with additional vessels. This includes increased congestion along oil and gas shipping lanes and support routes and greater increased risk within the transit areas which see the greatest amount of vessel traffic.

- There are much larger environmental as well as operational risks with facilities not being able to get replacement parts and not being able to perform repairs in a timely manner. These proposed mitigations have unknown additional safety impacts on systems designed without these mitigations and limitations, including on vessels, maintenance, and supply logistics. The proposed mitigations have not considered any of these operational challenges and subsequent associated safety risks.

- Port safety will also be potentially impacted by these proposed mitigations. The ports will be forced to do most of their loading and unloading during the dark hours to allow for vessel traffic to move during the daylight hours. This also greatly increases safety risks to port workers who are forced to perform all their vessel loading and unloading during dark hours, when lighting and visibility is limited as compared to during daylight hours. There are port and vessel worker fatigue concerns when doing this work during dark hours.

- There will be increased congestion and safety issues from this daytime increase in vessel traffic movement within the ports themselves, which will lead to increased collision risk, port access delays, and increased use of anchorages.

6.1 Additional Economic Impacts

There are additional negative economic impacts that have not been addressed or reviewed. In particular, there may be lost rental and royalty income for the federal government and lost royalty income for the impacted GOMx region states as a result of the exclusion of the proposed critical habitat areas from future lease sales.

With a reduction in future production in the GOMx, the American Petroleum Institute reports that "offshore oil and gas development is a valuable strategic energy asset", supplying 15% of crude and 2%

of natural gas production to the U.S. (Eversole, 2023) "Production in the Gulf is critical for global energy security" (Eversole, 2023) because by reducing U.S. output, we increase our dependence on foreign energy.

Mitigations that may be spurred by this proposed rule do not fully consider the economic impacts of the oil and gas industry on the OCS, including impacts to both currently leased blocks as well as potential future lease blocks impacted by the proposed critical habitat designation. The proposal states that economic impacts have been considered but there is no detail provided on that analysis. Critical stakeholders such as the oil & gas industry and offshore renewables industry were not consulted on their socio-economic impacts for that analysis.

There are currently 70 active oil and gas production platforms in the 100 – 400 m isobath area. These shelf properties are complicated structures comprised of hub platforms surrounded by numerous satellite platforms. For safety and operational reasons, operators must have access via vessels to these satellite platforms 24 hours a day, 7 days a week, 365 days a year. However, the proposed mitigations would not allow for vessel activity during dark and low visibility hours, thus reducing the safety measures that have been put into place to protect the offshore workers and the environment.

6.2 Supply Chain Issues

As mentioned previously, reduction in vessel movement also impacts the ports and creates port congestion issues and major logistical issues across the GOMx. Loading and unloading will be forced to be completed during the dark hours so that the vessels may move during the daylight hours. This major change in logistics will impact and slow down the supply chain of not only the oil and gas industry but any other industry which relies on port access to load and unload goods. The induced port congestion will also likely induce region-wide logistical delays.

6.3 Other Relevant Impacts

There are additional concerns of the many industries in the GOMx region which will also experience significant economic impacts with the potential mitigations. Limitations on speed and night / low visibility vessel transportation hours will significantly impact international trade in the GOMx. It will take these large vessels longer to enter and exit the ports, thus affecting their timelines. These impacts will affect some of the highest value ports to U.S. trade. 12 of the top 25 U.S. ports by total tonnage will be negatively affected by the proposed critical habitat. (Bureau of Transportation Statistics, 2023). The tourism industry will also be greatly affected, including cruise ships and charter fishing vessels.

7. Energy Supply, Distribution, and Use (Executive Order 13211) Not Fully Analyzed

As stated in the preamble of the proposed rule, Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking an action expected to lead to the promulgation of a final rule or regulation that is a significant regulatory action under Executive Order 12866 and is likely to have a significant adverse effect on the supply, distribution, or use of energy. (88 FR 47469) NMFS contends that "this rule, if finalized, will not have a significant adverse effect on the supply, distribution, or use of energy. Therefore, we have not prepared a Statement of Energy Effects."

OOC disagrees with NMFS in that this rule, if finalized, will most assuredly have a significant effect on the supply, distribution, and use of energy. The GOMx supplies approximately 15% of the oil and gas

(energy) production for the United States. Greatly reducing the amount of GOMx acreage available for leasing will, in turn, greatly reduce the production of oil and gas in the GOMx over time. Though the proposal does not have specific mitigations within it, NMFS recently solicited public comments on a petition to establish a vessel speed rule (Threatened and Endangered Species, 2023) that would severely restrict vessel movements within the core distribution area. And most recently, BOEM issued BOEM NTL No. 2023-G01 (Bureau of Ocean Energy Management, 2023b), which included these mitigations. Limiting vessel traffic to daylight hours only, and during that time, reducing speed to 10 knots or less, will cause huge project delays and will skew the economics of these projects, causing many of them to be cancelled due to the greatly increased costs. This translates into fewer wells drilled in the GOMx, which again greatly reduces the production of energy in the GOMx.

A Statement of Energy Effects must be prepared to properly research the effect of this proposed rule on energy supply, distribution, and use.

8. Regulatory Flexibility Act/Initial Regulatory Flexibility Analysis is Incomplete

The preamble states "We prepared an initial regulatory flexibility analysis (IRFA) in accordance with section 603 of the Regulatory Flexibility Act. The IRFA uses the best available information to identify the potential impacts to small entities of designating critical habitat." (88 FR 47469)

NMFS states that the IRFA anticipated that the proposed critical habitat will result in negligible impacts to small entities, claiming that in-water construction is likely the only activity category for which a portion of the incremental costs of the proposed rule would be borne by small entities.

OOC disagrees with the findings of the IRFA. There are hundreds of small entities that support the oil & gas industry on a daily basis. These entities include caterers, construction companies, small vessel companies, contract production operators, contract mechanics, contract electricians, contract tank cleaning, contract crane specialists, and much more. Any reduction in available leasing or discontinued drilling or other projects due to the increased cost of vessel transportation, will have a major economic impact on small entities.

OOC requests that NMFS revisits the IRFA to include all the small entities that rely on the oil & gas industry in the GOMx.

Conclusion

In conclusion, OOC asserts that there is not enough scientific data to legally support this proposed designation of Critical Habitat for the Rice's whale. OOC requests that NMFS withdraw the Proposed Rule and reissue a proposed rule in the future that complies with the ESA and its implementing regulations.

OOC encourages NMFS to also review the American Petroleum Institute (API) and EnerGeo's joint trades comment letter including the "Scientific Review of the Rice's Whale Proposed Critical Habitat" report as well as the "Economic Impacts of Gulf of Mexico Oil and Natural Gas Vessel Transit Restrictions" report from Energy & Industrial Advisor Partners (EIAP) that they have submitted as Appendix A and Appendix B of their letter. OOC also supports the National Ocean Industry Association (NOIA) comment letter

detailing the projected substantial impacts on many of the industries in the GOMx area.

We appreciate your consideration of these comments. Please do not hesitate to contact the undersigned with any questions at staff@theooc.us.

Sincerely,

Evan Zimmerman
Executive Director
Offshore Operators Committee

cc (via email):
Grant Baysinger, NMFS Southeast Region
Lisa Manning, NMFS Office of Protected Resources
Liz Klein, BOEM Director
Kevin Sligh, BSEE Director
Rear Admiral David Barata, Commander, 8th Coast Guard District, New Orleans

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