

United States Senate
WASHINGTON, DC 20510

October 6, 2023

Dr. Richard Spinrad
Administrator
National Oceanic and Atmospheric Administration
1401 Constitution Avenue NW, Room 5128
Washington, DC 20230

Mr. David Bernhart
Assistant Regional Administrator
National Marine Fisheries Service
263 13th Avenue South
St. Petersburg, FL 33701

RE: Notice of Proposed Rule: “Endangered and Threatened Species; Designation of Critical Habitat for the Rice’s Whale”; Docket No. NOAA-NMFS-2023-0028

Dear Dr. Spinrad and Mr. Bernhart:

We write to provide comments and request the National Marine Fisheries Service (NMFS) withdraw the proposed rule¹ for designation of critical habitat for the Rice’s whale. The proposed rule as written fails to comply with important elements of the Endangered Species Act (ESA) and would jeopardize domestic energy production, national security, and other important interests.

The ESA’s purpose is to provide adequate protections for the nation’s iconic wildlife while balancing the many uses of federal lands and waters. The ESA allows NMFS to designate an area as a “critical habitat”—a specific geographic area that is essential to conservation of an endangered or threatened species.² Designation of a critical habitat may lead to severe restrictions of area activities, including those conducted by federal agencies, requiring a federal permit or license, or that are federally funded. In designating any particular area as a critical habitat, NMFS is required to use the best available science to consider the economic impact, the impact on national security, and any other relevant impact.³ Unfortunately, NMFS failed to do so in this case, vastly underestimating the proposed rule’s economic and national security impacts. Moreover, the proposed rule denies the public the opportunity to comment on the studies used in the proposed rule’s analysis.

¹ Endangered and Threatened Species; Designation of Critical Habitat for the Rice’s Whale, 88 Fed. Reg. 47453 (proposed July 24, 2023) (to be codified at 50 C.F.R. pts. 224 and 226).

² 16 U.S.C. § 1533(a)(3)(A)(i)

³ 16 U.S.C. § 1533(b)(2)

For one, the proposed rule claims, without adequate evidence, “that at the time of listing Rice’s whales occupied the Gulf of Mexico.”⁴ NMFS claims this based on only a single sighting of a Rice’s whale off the central Texas coast in 2017 and de minimis possible acoustic detections in the western and northern Gulf of Mexico.⁵ The reality is decades of surveys of the Gulf have made very few observations of Rice’s whales and only in limited geographic areas.⁶ This is both legally and scientifically insufficient to demonstrate the Rice’s whales occupied the habitat. The proposed designation also fails to meet the ESA’s requirement that a critical habitat be “*specific areas within*”⁷ the broader geographical area occupied by the species. Instead, the rule would designate more than 28,270 square miles of the Gulf of Mexico as a critical habitat, an area larger than West Virginia.

The proposed rule also cites unreliable and incomplete sources for its conclusions. NMFS inappropriately cites an unpublished, still in peer-review study for the modeling that serves as the basis for including vast suitable areas of habitat of the Rice’s whale outside of the smaller core distribution area.⁸ Recently, NMFS was obligated to engage in a corrective rulemaking on a separate issue due to miscalculations in the supporting analysis—something that would have been made clear to NMFS earlier had it allowed public comment on the supporting analysis.⁹ That same risk is present with this proposed rule. NMFS cannot be sure of the accuracy and integrity of the data it used to define this vast critical habitat area before the study and its peer review are complete. If NMFS chooses to rely on this study, it should wait until the study is complete and has been peer reviewed then allow public comment on a proposed rule that is based upon completed work, so the public can verify its use and accuracy.

NMFS’s economic analysis in the proposed rule similarly falls short. It vastly underestimates costs for consultations under the ESA and fails to account for potentially significant project delays, modifications, and other economic costs resulting from the critical habitat designation. Further, the economic impact analysis completely dismisses the potential for modifications to federally permitted activities and their associated economic costs. The proposed critical habitat area stretches across many important oil and gas leases, shipping channels for major U.S. ports, and commercial and recreational fishing grounds—all activities that are likely to be dramatically curtailed if this rule is finalized. Yet the proposed rule completely disregards the potential impact on these industries. NMFS estimates designating the Gulf of Mexico’s entire 28,270.65

⁴ 88 Fed. Reg. at 47460.

⁵ Id.

⁶ Soldevilla, M. (2022) Rice’s Whales in the Northwestern Gulf of Mexico: Call Variation and Occurrence Beyond the Known Core Habitat. *Endangered Species Research*. Vol. 48: 155–174. <https://www.int-res.com/articles/esr2022/48/n048p155.pdf>

⁷ 16 U.S.C. § 1532(5)(A)(i) (emphasis added).

⁸ Garrison, L. (2023) Gulf of Mexico Marine Assessment Program for Protected Species (Gommapps): Marine Mammals, Volume 2, Appendix C: Gulf of Mexico Marine Mammal Spatial Density Models. <https://www.govinfo.gov/app/details/GOVPUB-I-0224db7668cf91ca1725a05f82a22661>

⁹ National Marine Fisheries Service, National Oceanic and Atmospheric Administration. (2022, February 15). *Update 2.15.22*. https://media.fisheries.noaa.gov/2022-02/GOM_RevisedRuleStatement_OPR1_0.pdf

square miles as a critical habitat will have “incremental administrative costs” of \$240,000 over ten years—an absurdly low assessment.¹⁰

The Central and Western Gulf of Mexico serves as an energy hub for the nation. Federal offshore oil production accounts for 15 percent of total U.S. crude oil production.¹¹ Together, there are over 345,000¹² workers servicing the offshore energy industry at any single moment in time. These businesses operate on a continuous 24 hour, 7 days a week rotation. To illustrate the potential costs of a critical habitat designation, on April 7, 2023, NMFS published a “Petition to Establish a Vessel Speed Restriction and Other Vessel-Related Measures to Protect Rice’s Whales.”¹³ On July 21, 2023, in litigation between NMFS and the Sierra Club and others, attorneys representing NMFS filed a stipulated agreement for Rice’s whale protections through the not-yet determined Rice’s whale critical habitat area. These stipulations included removing significant acreage from offshore oil and gas Lease Sale 261, placing a mandatory 10-knot speed limit for oil and gas related vessels, and forbidding travel through the area at night or in other low visibility conditions. Yet the proposed rule for designation of critical habitat estimates consultations under the ESA will only cost the oil and gas industry \$8,100 per year.¹⁴

The proposed rule may also jeopardize the nation’s military readiness and national security by imposing additional restrictions on training activities at the Eglin Gulf Test and Training Range (“Eglin Gulf Range”). The U.S. Air Force uses the Eglin Gulf Range to train fighter pilots, maintain operational readiness, and test other military capabilities. NMFS’s proposed critical habitat area significantly overlaps with the test range of the Eglin Gulf Range, potentially placing restrictions on the Air Force’s use of the area for that purpose and hurting military readiness. Again, NMFS largely disregards this potential impact, estimating a cost to the military of \$5,500 per year.¹⁵

Furthermore, the Gulf of Mexico lands one-third of the nation’s seafood, contributing over \$9 billion in commercial fishing activity.¹⁶ The waters of the Gulf of Mexico also attract millions of recreational anglers who contribute over \$3 billion directly to the economy every year.¹⁷ For decades, these mariners have been safely and efficiently balancing their role in domestic food production with protecting a diverse array of marine life. If the area is designated, potential limitations such as vessel speed and time of day restrictions would be unnecessary and possibly even dangerous, jeopardizing not only the economic vitality of this region, but also the safety of

¹⁰ 88 Fed. Reg. 47465.

¹¹ U.S. Energy Information Administration. *Gulf of Mexico Fact Sheet*. Retrieved September 28, 2023, from https://www.eia.gov/special/gulf_of_mexico

¹² National Ocean Industries Association. *The Economic Impacts of the Gulf of Mexico Oil and Natural Gas Industry*. Retrieved September 28, 2023, from <https://www.noia.org/gulfimpact2020>

¹³ Endangered and Threatened Species; Petition To Establish a Vessel Speed Restriction and Other Vessel-Related Measures To Protect Rice’s Whales, 88 Fed. Reg. at 20846 (proposed Apr. 7, 2023) (to be codified at 50 C.F.R. pt. 224).

¹⁴ 88 Fed. Reg. 47465.

¹⁵ *Id.*

¹⁶ National Marine Fisheries Service, National Oceanic and Atmospheric Administration. (2020). *Fisheries Economics of the United States*. <https://media.fisheries.noaa.gov/2023-09/FEUS-2020-final2-web-0.pdf>

¹⁷ *Id.*

mariners and anglers. Given the recent lawsuits and petitions against fishing activities filed by environmental groups on every coast, it is reasonable to be concerned that additional restrictions would also follow this critical habitat designation.

For these reasons, we request NMFS withdraw its proposed rule. If the service insists on moving forward with a critical habitat designation, then that proposed rule must comply with the ESA, be based on the best available science, designate a reduced critical habitat area within the total occupied area, and contain proper analysis of the economic costs and national security implications.

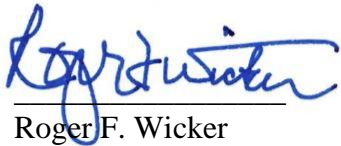
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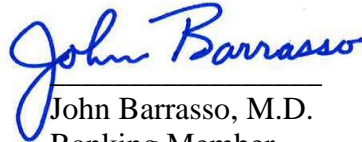
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Joe Manchin III
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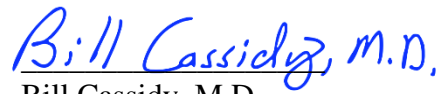
Roger F. Wicker
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Committee on Armed Services



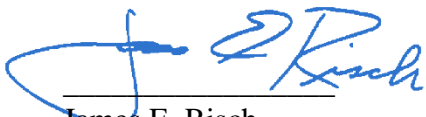
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Committee on Environment
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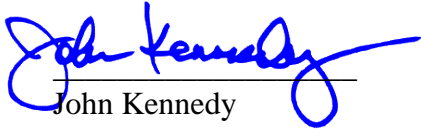
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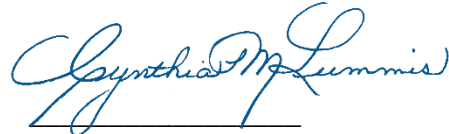
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Cindy Hyde-Smith
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