

**\* CENTER FOR BIOLOGICAL DIVERSITY \* FRIENDS OF THE EARTH \***  
**\* TURTLE ISLAND RESTORATION NETWORK \* SIERRA CLUB \***

*Via Electronic and Certified Mail*

March 20, 2025

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**RE: Notice of Intent to Sue For Violations of the Endangered Species Act**

Dear Secretary Burgum and Deputy Director Cruickshank:

Pursuant to 16 U.S.C. § 1540(g), this letter serves as the Center for Biological Diversity's, Friends of the Earth's, Turtle Island Restoration Network's, and the Sierra Club's 60-day notice of intent to sue the U.S. Department of the Interior, the Secretary of the Interior, the Bureau of Ocean Energy Management, and the Director of the Bureau of Ocean Energy Management (collectively, "BOEM") over violations of the Endangered Species Act ("ESA").<sup>1</sup> Specifically, BOEM's recent rescission of Notice to Lessees and Operators 2023-G01, *Expanded Rice's Whale Protection Efforts During Reinitiated Consultation with NMFS*,<sup>2</sup> violates BOEM's ESA obligations and puts this critically endangered whale at greater risk of extinction.

Our organizations have been involved in efforts to conserve the Rice's whale (*Balaenoptera ricei*) for many years and are gravely concerned about the role that federally authorized oil and gas activity in the Gulf of Mexico is playing in the species' demise. Scientists estimate that there are likely only 51 individual Rice's whales left. Without immediate action to significantly reduce the risk of vessel strikes, noise pollution, oil spills, and other harms from offshore oil and gas activity, the Rice's whale faces a serious prospect of extinction.

Yet rather than taking such action, BOEM has done just the opposite—removing measures that would better protect Rice's whales from deadly collisions with vessels. BOEM's rescission of the Notice to Lessees ("NTL") violates the agency's affirmative ESA section 7(a)(1) duty to utilize its authority in furtherance of the ESA, as well as BOEM's obligation under section ESA 7(a)(2) to ensure that its actions do not jeopardize the continued existence of the Rice's whale.<sup>3</sup> Moreover, BOEM's rescission of the NTL—which provided some of the only specific means of

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<sup>1</sup> 16 U.S.C. §§ 1531–1544.

<sup>2</sup> BOEM, NOTICE TO LESSEES AND OPERATORS OF FEDERAL OIL AND GAS, AND SULPHUR LEASES IN THE GULF OF MEXICO OUTER CONTINENTAL SHELF: Expanded Rice's Whale Protection Efforts During Reinitiated Consultation with NMFS, BOEM NTL-2023-G01, Aug. 17, 2023, <https://www.boem.gov/sites/default/files/documents/about-boem/regulations-guidance/Wildlife-Expanded-Rices-Whale-Protection-Efforts.pdf> [hereinafter "BOEM NTL-2023-G01"].

<sup>3</sup> See 16 U.S.C. § 1536(a)(1), (a)(2).

reducing the risk of vessel strikes for Rice's whales from oil and gas activity in the western and central Gulf of Mexico—also increase the likelihood that Rice's whales will be injured or killed by vessel strikes, and thereby subject BOEM to liability under ESA section 9 for causing the unpermitted take of these whales.<sup>4</sup>

BOEM must immediately reissue the NTL. If BOEM does not take such action within 60 days, we will file litigation in federal court to resolve the matter.

## **I. LEGAL BACKGROUND: THE ENDANGERED SPECIES ACT**

In enacting the ESA, Congress recognized that certain species “have been so depleted in numbers that they are in danger of or threatened with extinction” and that these species are “of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people.”<sup>5</sup> Accordingly, the ESA seeks “to provide a means whereby the ecosystems upon which endangered and threatened species depend may be conserved, [and] to provide a program for the conservation of such ... species.”<sup>6</sup> The ESA is widely considered “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation,” and embodies the “plain intent” of Congress to “halt and reverse the trend toward species extinction, whatever the cost.”<sup>7</sup>

To accomplish its goals, the ESA contains several vital protections not provided for by any other law. Section 9 prohibits any person, including any federal agency, from “taking” an endangered species without proper authorization through a valid incidental take permit.<sup>8</sup> The term “take” is statutorily defined broadly as “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”<sup>9</sup> The definition of “harass,” in turn, includes “an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns, including breeding, feeding, or sheltering.”<sup>10</sup> In addition, “harm” is defined to “include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.”<sup>11</sup> “Take” includes both direct and indirect harm and it need not be purposeful.<sup>12</sup> Courts have repeatedly found federal agencies liable for take of listed species where agency-authorized activities resulted in the killing or harming of ESA-listed species.<sup>13</sup>

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<sup>4</sup> *Id.* § 1538(a)(2), (g).

<sup>5</sup> *Id.* § 1531(a)(2), (3).

<sup>6</sup> *Id.* § 1531(b).

<sup>7</sup> *Tenn. Valley Authority v. Hill*, 437 U.S. 153, 180, 184 (1978).

<sup>8</sup> 16 U.S.C. § 1538(a)(1)(B).

<sup>9</sup> *Id.* § 1532(19).

<sup>10</sup> 50 C.F.R. § 17.3; *see also* NMFS, Procedural Instruction 02-110-19: Interim Guidance on the Endangered Species Act Term “Harass” (Dec. 21, 2016) (adopting FWS’s regulatory definition of harass).

<sup>11</sup> 50 C.F.R. §§ 17.3, 222.012.

<sup>12</sup> *Sweet Home*, 515 U.S. at 704.

<sup>13</sup> *See e.g., Defenders of Wildlife v. Env’tl. Prot. Agency*, 882 F.2d 1294, 1300–01 (8th Cir. 1989); *Strahan v. Cox*, 127 F.3d 155, 163 (1st Cir. 1997).

Section 7 is considered “[t]he heart of the ESA.”<sup>14</sup> Under section 7(a)(1), all federal agencies have a non-discretionary duty to “utilize their authorities in furtherance of the purposes of [the Act] by carrying out programs for the conservation of endangered species....”<sup>15</sup> Thus, the ESA imposes on all federal agencies *an affirmative obligation* to conserve endangered species that their activities harm.<sup>16</sup> The ESA defines conservation as “the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to [the ESA] are no longer necessary.”<sup>17</sup>

Additionally, section 7(a)(2) contains the substantive requirement that all federal agencies ensure their actions are “not likely to jeopardize the continued existence of any endangered species....”<sup>18</sup> To comply with this substantive mandate, section 7 and its implementing regulations establish several procedural obligations. This process “offers valuable protections against the risk of a substantive violation [of the ESA] and ensures that environmental concerns will be properly factored into the decision-making process as intended by Congress.”<sup>19</sup>

In particular, section 7(a)(2) requires federal agencies to consult with the relevant expert agency—here, the National Marine Fisheries Service (“NMFS”)—whenever an agency action may affect a listed species.<sup>20</sup> The ESA requires that such consultations be based on the “best scientific and commercial data available.”<sup>21</sup>

The “may affect” standard for consultation is low, as “[a]ny possible effect, whether beneficial, benign, adverse or of an undetermined character, triggers the requirement.”<sup>22</sup> Agency action is defined to include “any action authorized, funded, or carried out by such agency”<sup>23</sup> where the agency “makes an affirmative, discretionary decision about whether, or under what conditions, to allow private activity to proceed.”<sup>24</sup> As courts have made clear, there is “little doubt that Congress intended agency action to have a broad definition in the ESA.”<sup>25</sup>

As relevant here, formal consultation results in the issuance of a biological opinion by the consulting branch of NMFS that determines whether the action is likely to jeopardize the

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<sup>14</sup> *W. Watersheds Proj. v. Kraayenbrink*, 620 F.3d 1187, 1209 (9th Cir. 2010).

<sup>15</sup> 16 U.S.C. § 1536(a)(1).

<sup>16</sup> *Pyramid Lake Paiute Tribe v. U.S. Dept of Navy*, 898 F.2d 1410, 1416-17 (9th Cir.1990); *Carson-Truckee Water Conservancy Dist. v. Clark*, 741 F.2d 257, 261-62 & n. 3 (9th Cir.1984).

<sup>17</sup> *Id.* § 1532(3).

<sup>18</sup> *Id.* § 1536(a)(2); *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1020 (9th Cir. 2012).

<sup>19</sup> *Nat. Res. Def. Council v. Houston*, 146 F.3d 1118, 1128-29 (9th Cir. 1998) (emphasis omitted); *see also Thomas v. Peterson*, 753 F.2d 754, 764 (9th Cir. 1985).

<sup>20</sup> 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a).

<sup>21</sup> 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a).

<sup>22</sup> *Karuk Tribe*, 681 at 1027.

<sup>23</sup> 16 U.S.C. § 1536(a)(2) (emphasis added); *see also* 50 C.F.R. § 402.03 (stating that Section 7 applies “to all actions in which there is discretionary Federal involvement or control.”); *Fla. Key Deer v. Paulison*, 522 F.3d 1133, 1141 (11th Cir. 2008) (holding that the Federal Emergency Management Agency’s administration of the National Flood Insurance Program is an agency action requiring ESA consultation); *Karuk Tribe of Cal.*, 681 F.3d at 1027 (holding that the Forest Service’s approval of Notices of Intent to conduct mining activities is an agency action requiring consultation).

<sup>24</sup> *Karuk Tribe of Cal.*, 681 F.3d at 1030.

<sup>25</sup> *Id.* at 1020 (citation omitted).

continued existence of the species.<sup>26</sup> If so, the opinion must specify reasonable and prudent alternatives (“RPA”) that would avoid the likelihood of jeopardy and allow the action to proceed.<sup>27</sup>

A likelihood of jeopardy is found when “an action [ ] reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.”<sup>28</sup> In determining whether an action is likely to jeopardize a species, NMFS must consider the aggregate effects of past and ongoing human activities that affect the current status of the species and its habitat (“environmental baseline”); the indirect and direct effects of the proposed action, including the effects of interrelated and interdependent activities (“effects of the action”); and the effects of future state and private activities that are reasonably certain to occur (“cumulative effects”).<sup>29</sup> NMFS must consider all of these factors in context of the current status of the species and its habitat.<sup>30</sup> Only where NMFS concludes that all of these elements added together do not threaten a species’ survival and recovery can the agency issue a no-jeopardy opinion.<sup>31</sup>

If NMFS concludes that the action “is reasonably certain” to result in the take of endangered species, NMFS will issue an incidental take statement (“ITS”) that specifies “the impact, i.e., the amount or extent, of ... incidental taking” that may occur.<sup>32</sup> An ITS must include “reasonable and prudent measures ... necessary ... to minimize such impact,”<sup>33</sup> and must specify the permissible level of taking, “thus ... serv[ing] as a check on the agency’s original decision that the incidental take of listed species resulting from the proposed action will not [jeopardize the continued existence of the species].”<sup>34</sup> In addition, when the endangered species to be taken are marine mammals, the take must first be authorized pursuant to the Marine Mammal Protection Act and the ITS must include any additional measures necessary to comply with the MMPA take authorization.<sup>35</sup> The take of a listed species in compliance with the terms of a valid ITS is not prohibited under section 9 of the ESA.<sup>36</sup>

Even after the procedural requirements of a consultation are complete, the ultimate duty to ensure that an activity is not likely to cause jeopardy to a listed species lies with the action agency. An action agency’s reliance on an inadequate, incomplete, or flawed biological opinion cannot satisfy its duty to avoid the likelihood of jeopardy to listed species.<sup>37</sup> Moreover, the

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<sup>26</sup> 50 C.F.R. §§ 402.02, 402.14(a).

<sup>27</sup> 16 U.S.C. § 1536(b)(3)(A).

<sup>28</sup> 50 C.F.R. § 402.02.

<sup>29</sup> *Id.* §§ 402.14(g), 402.02.

<sup>30</sup> *Id.*

<sup>31</sup> *See Pac. Coast Fed’n of Fishermen’s Ass’n v. U.S. Bureau of Rec.*, 426 F.3d 1082, 1093 (9th Cir. 2005) (the proper “analysis is not the proportional share of responsibility the federal agency bears for the decline in the species, but what jeopardy might result from the agency’s proposed actions in the present and future human and natural contexts”).

<sup>32</sup> 50 C.F.R. § 402.14(g)(7).

<sup>33</sup> 16 U.S.C. § 1536(b)(4).

<sup>34</sup> *Id.*; *Center for Biological Diversity v. Salazar*, 695 F.3d 893, 911 (9th Cir. 2012).

<sup>35</sup> 50 C.F.R. § 402.14(h)(3).

<sup>36</sup> 16 U.S.C. §§ 1536(b)(4), (o)(2); 50 C.F.R. § 402.14(i)(5).

<sup>37</sup> *See, e.g., Florida Key Deer v. Paulison*, 522 F.3d 1133, 1145 (11th Cir. 2008) (action agency must independently ensure that its actions are not likely to cause jeopardy); *Pyramid Lake Paiute Tribe*, 898 F.2d at 1415 (same).

ESA's implementing regulations further require an agency to reinitiate section 7 consultation when: (a) the amount of take specified in the incidental take statement is exceeded; (b) new information reveals that the action may have effects not previously considered; (c) the action is modified in a way that was not previously considered; or (d) a new species is listed or critical habitat designated that may be affected by the identified action.<sup>38</sup>

Additionally, until section 7 consultation is complete, federal agencies are prohibited from making "any irreversible or irretrievable commitment of resources" with respect to the agency action that may foreclose "the formulation or implementation of any reasonable and prudent alternative measures."<sup>39</sup> This prohibition exists to maintain the status quo pending the completion of consultation and remains in effect throughout the consultation period and until the action agency has satisfied its obligations under section 7(a)(2). Thus, the substantive duty to ensure against jeopardy to listed species remains in effect regardless of the status of the consultation.

## II. FACTUAL BACKGROUND: THE RICE'S WHALE

The Rice's whale lives solely in the Gulf of Mexico and is one of the most endangered marine mammals on the planet, with a best population estimate of only 51 individuals remaining.<sup>40</sup> The population is so imperiled that loss of even a single Rice's whale could have devastating impacts on the species. NMFS has determined, for example, that the species can withstand no more than one human-caused death every 33 years if the population is to recover.<sup>41</sup>



Rice's Whale, Permit No. 21938. Photo: NMFS SEFSC

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<sup>38</sup> 50 C.F.R. § 402.16.

<sup>39</sup> 16 U.S.C. § 1536(d).

<sup>40</sup> NMFS, Rice's Whale: In the Spotlight, <https://www.fisheries.noaa.gov/species/rices-whale/spotlight>; NMFS, RICE'S WHALE (*Balaenoptera ricei*): Northern Gulf of Mexico Stock, May 2023.

<sup>41</sup> See *id.* (determining the whale's potential biological removal level is 0.03 whales per year).

NMFS originally protected the species under the ESA in 2019 as a subspecies of the Bryde's whale but reclassified it in 2021 after scientists determined the whale is a unique species, now known as the Rice's whale.<sup>42</sup> NMFS considers the Rice's whale one of ten "species in the spotlight"—i.e., species "whose extinction is almost certain in the immediate future" absent action to reduce threats.<sup>43</sup>

In 2020, NMFS determined that existing and planned activities related to the exploration and development of oil and gas on the Gulf of Mexico outer continental shelf will likely jeopardize the continued existence of the Rice's whale.<sup>44</sup> NMFS reached this conclusion because of the "wide-ranging, combined multiple effects to the small and likely declining population" from five "combined stressors:" vessel strikes, vessel noise, marine debris, oil spills and dispersants, and sound from seismic surveys.<sup>45</sup> NMFS explained that these stressors can cause mortality; along with chronic stress, behavioral disruption, significant masking, and hearing loss, "all of which are expected to reduce the fitness of individuals."<sup>46</sup>

Despite finding these five different stressors from oil and gas activity likely jeopardizes the whale's continued existence, NMFS included an RPA to address only two of those threats: vessel strikes and vessel noise. Specifically, the RPA restricted vessel activity in Rice's whale habitat in the eastern Gulf, including a requirement that oil and gas vessels travel at no more than 10 knots through the area year-round and a prohibition on oil and gas vessels traveling through the area at night or at times of low visibility, except in emergencies for the safety of the vessel or crew.<sup>47</sup>

NMFS then conclusory declared that the RPA will somehow avoid jeopardy to the Rice's whale, despite finding that the few remaining whales will still suffer high levels of lethal and sublethal harm even with the RPA in place. Indeed, NMFS determined that the RPA will only reduce the number of lethal vessel strikes of Rice's whales from 17 whales to 12 and the number of sublethal vessel strikes from six whales to four.<sup>48</sup> Our groups challenged that biological opinion on several grounds, including for failing to ensure that the RPA is sufficient to avoid jeopardy to the Rice's whale as required by the ESA.<sup>49</sup>

While the litigation was pending, NMFS and BOEM reinitiated consultation and new science published indicating that the Rice's whale "persistently occur[s]" in the western and central Gulf, not just in the eastern Gulf as was previously believed.<sup>50</sup> The whale's habitat is now believed to

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<sup>42</sup> See, e.g., NMFS, Rice's Whale: About the Species, <https://www.fisheries.noaa.gov/species/rices-whale>; 86 Fed. Reg. 47,022 (Aug. 23, 2021); 84 Fed. Reg. 15,446 (Apr. 15, 2019).

<sup>43</sup> NMFS, Rice's Whale: In the Spotlight, <https://www.fisheries.noaa.gov/species/rices-whale/spotlight>; NMFS, Endangered Species Conservation: Species in the Spotlight, <https://www.fisheries.noaa.gov/topic/endangered-species-conservation/species-in-the-spotlight>.

<sup>44</sup> National Marine Fisheries Service, Biological Opinion on the Federally Regulated Oil and Gas Program Activities in the Gulf of Mexico, FPR-2017-9234 (Mar. 13, 2020) [hereinafter "NMFS BiOp"].

<sup>45</sup> *Id.* at 554.

<sup>46</sup> *Id.*

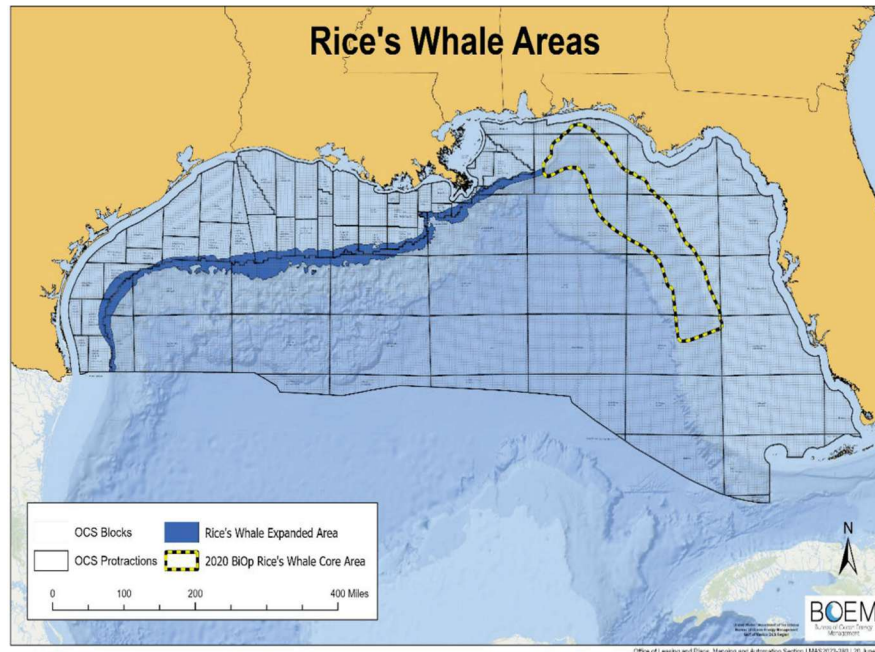
<sup>47</sup> *Id.* at 597.

<sup>48</sup> *Id.* at 359–62.

<sup>49</sup> See *Sierra Club v. NMFS*, No. DLB-20-3060, 2024 U.S. Dist. LEXIS 147292, at \*8 (D. Md. Aug. 19, 2024).

<sup>50</sup> See, e.g., Soldevilla, M. S., et al., Rice's whales in the northwestern Gulf of Mexico: call variation and occurrence beyond the known core habitat, 48 *Endangered Species Research* 155-174 (2022); 88 Fed. Reg. 47,453 (July 24,

include waters 100-meters to 400-meters deep along the entire Gulf continental shelf.<sup>51</sup>



In light of this new scientific information, and in response to NMFS’s conservation recommendations in the biological opinion,<sup>52</sup> in August 2023, BOEM issued NTL 2023-G01, titled “Expanded Rice’s Whale Protection Efforts During Reinitiated Consultation with NMFS.” BOEM determined that there is a potential for incidental take from vessels in parts of the habitat not covered by the RPA<sup>53</sup> and reminded lessees of their and the agency’s independent obligations to avoid incidental take where there is reason to believe an animal may be taken by their activities.<sup>54</sup> According to BOEM, it issued the NTL “to provide recommendations and guidance for lessees and operators regarding suggested measures to expand protections for the Rice’s whale” while NMFS is preparing a new biological opinion.<sup>55</sup>

Those measures largely mirrored the RPA in the biological opinion, but “applie[d] to the area comprising the entire northern Gulf of Mexico Outer Continental Shelf (OCS) between the 100- and 400-m isobaths.”<sup>56</sup> Specifically, the measures recommend that all oil and gas vessels travel at no more than 10-knots year-round when traveling through this area in the western and central Gulf and that “[t]o the maximum extent practicable” vessels should “avoid transit through [the area] after dusk and before dawn, and during other times of low visibility to further reduce the risk of vessel strikes of Rice’s whales.”<sup>57</sup> BOEM encouraged lessees to include these measures in

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2023); Soldevilla, M.S., et al., Rice’s whale occurrence in the western Gulf of Mexico from passive acoustic recordings, 40:3 Marine Mammal Science e13109 (2024).

<sup>51</sup> 88 Fed. Reg. at 47,461.

<sup>52</sup> NMFS BiOp at 617.

<sup>53</sup> *Id.* at 1.

<sup>54</sup> *Id.* at 4.

<sup>55</sup> BOEM NTL-2023-G01.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*



their applications where there was potential for incidental take and notified lessees that these measures could “be made mandatory . . . through terms, stipulations, or conditions of approval from BOEM in leases, plans, permits, or other authorizations.”<sup>58</sup>

In August 2024, a court held that NMFS’s biological opinion failed to comply with the ESA in various respects, including by failing to properly analyze the threat that Gulf oil and gas activity poses to ESA-listed species and by failing to contain an RPA that addresses all the stressors from oil and gas activity that threaten the whale’s continued existence. As summarized by the court:

First, the BiOp underestimated the risk and harms of oil spills to protected species. Second, the jeopardy analysis for two listed species, the Rice’s whale and the Gulf sturgeon, assumed these species’ populations remained as large as they were before the catastrophic Deepwater Horizon oil spill (“DWH”), even though the record evidence and NMFS’s own findings indicated that DWH significantly diminished their populations. Third, the RPA addressed only a couple of the stressors that were likely to jeopardize the Rice’s whale, without explaining why addressing only those two problems was good enough or even explaining how the measures it proposed would prevent the jeopardy those two stressors would cause. Fourth, the ITS failed to recognize oil spill take as incidental take and adopted an irrational surrogate for determining how many listed species would be taken by vessel strikes.<sup>59</sup>

The court vacated the biological opinion but stayed vacatur until May 21, 2025, to give NMFS time to prepare a new analysis that cures the deficiencies the court identified and thereby better analyzes and protects ESA-listed species as required by law.<sup>60</sup>

Then, in February 2025, BOEM revoked the NTL without explanation, stating only that BOEM was rescinding the NTL “in response to Secretary’s Order 3418, *Unleashing American Energy*.”<sup>61</sup>

### III. LEGAL VIOLATIONS: BOEM IS IN VIOLATION OF ESA SECTION 7

BOEM’s rescission of NTL 2023-G01 is unlawful. NMFS has determined that federally authorized oil and gas activities in the Gulf of Mexico are likely jeopardizing the Rice’s whale’s,

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<sup>58</sup> *Id.* This feature of the NTL – that it “will shape BOEM’s actions going forward” – led the Government Accountability Office to conclude that the guidance is a rule for purposes of the Administrative Procedure Act and Congressional Review Act. *See* U.S. Department of the Interior, Bureau of Ocean Energy Management—Applicability of the Congressional Review Act to Notice to Lessees and Operators of Federal Oil and Gas, and Sulphur Leases in the Gulf of Mexico Outer Continental Shelf, File B-335629 (Jul. 8, 2024) at 8-10 (reasoning that the NTL provides a “means by which non-agency parties may avoid a penalty or gain a benefit from a federal agency (here, a lease, or BOEM’s approval of oil and gas activities in the OCS)” and “implements law or policy because it indicates to current and potential OCS lessees and operators that they should follow BOEM’s recommendations if they wish to receive or retain that agency’s authorizations. It indicates, in other words, that BOEM has ‘alter[ed] how [it] will exercise its discretion.’”).

<sup>59</sup> *Sierra Club*, 2024 U.S. Dist. LEXIS 147292, at \*17–18.

<sup>60</sup> *See, e.g., id.* at \*132; *Sierra Club v. NMFS*, No. 20-cv-03060-DLB, Order Granting Motion to Alter/Amend Judgment, Dkt. No. 220 (Oct. 21, 2024).

<sup>61</sup> BOEM, BOEM Rescinds Expanded Rice’s Whale Protection Efforts, Feb. 20, 2025, <https://www.boem.gov/newsroom/notes-stakeholders/boem-rescinds-expanded-rices-whale-protection-efforts>.



and a federal court deemed the existing RPA insufficient to protect the whale.<sup>62</sup> BOEM issued NTL 2023-G01 specifically to increase protections for the Rice's whale from vessel strikes related to offshore oil and gas activity while NMFS prepares a new biological opinion.<sup>63</sup> And BOEM did so based on new science indicating that the species is regularly found in the western and central Gulf and in response to a conservation recommendation from NMFS. BOEM's decision to revoke the NTL is a gross dereliction of the agency's legal obligations and violates the ESA in numerous ways.

First, section 7(a)(1) requires BOEM to “utilize [its] authorities in furtherance of the purposes of [the ESA] by carrying out programs for the conservation of endangered species....”<sup>64</sup> BOEM's revocation of the NTL—which it enacted specifically to conserve the Rice's whale—violates BOEM's section 7(a)(1) obligation. While courts have disagreed about the level of discretion an agency has in how they go about implementing section 7(a)(1) conservation programs,<sup>65</sup> it is well settled that “total inaction is not allowed.”<sup>66</sup> The converse is also true—revoking measures intended to conserve one of the most endangered species on the planet from an activity likely jeopardizing its continued existence certainly violates BOEM's section 7(a)(1) obligations to use the agency's authorities to adopt conservation programs for endangered species.<sup>67</sup> This is especially true where (apart from the facially inadequate protections of the invalid RPA in NMFS's biological opinion) BOEM has no other actions—let alone a program—for the conservation of the Rice's whale.

Second, BOEM's revocation of the NTL constitutes an agency action within the meaning of the ESA. Section 7(a)(2) requires BOEM to “insure” that any of its actions or approvals are “not likely to jeopardize the continued existence of any endangered ... species ....”<sup>68</sup> The procedural requirements of the consultation process are designed to carry out this substantive mandate. BOEM's revocation of the NTL violates BOEM's substantive and procedural duties under ESA section 7(a)(2)<sup>69</sup> to ensure, through the consultation process, that its actions do not jeopardize the continued existence of the Rice's whale. BOEM's revocation removes vital protections for these highly imperiled whales—which were some of the only protections from oil and gas activity that the whales have in the central and western Gulf—without consulting with NMFS and without any other basis to conclude that it has satisfied the requirements of Section 7(a)(2).<sup>70</sup>

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<sup>62</sup> *Sierra Club*, 2024 U.S. Dist. LEXIS 147292, at \*104–05.

<sup>63</sup> BOEM NTL 2023-G01.

<sup>64</sup> 16 U.S.C. § 1536(a)(1).

<sup>65</sup> *Pyramid Lake Paiute Tribe*, 898 F.2d at 1418.

<sup>66</sup> *Fla. Key Deer v. Paulison*, 522 F.3d 1133, 1145, 1146 (11th Cir. 2008).

<sup>67</sup> *Ctr for Biological Diversity v. Vilsack*, 276 F. Supp. 3d 1015, 1031–32 (D. Ariz. 2017) (holding agency violated section 7(a)(1) of the ESA by terminating a program when the agency “did nothing to reverse or end the damage to [an ESA-protected species] habitat inflicted by the program.”).

<sup>68</sup> *Id.* § 1536(a)(2).

<sup>69</sup> *Id.*

<sup>70</sup> NMFS's existing biological opinion for Gulf oil and gas activities is unlawful for the reasons described above (among others). BOEM cannot rely only on that biological opinion to permit, manage, and authorize ongoing and new oil and gas activity that may affect Rice's whale.

Finally, as the entity that permits and manages otherwise prohibited offshore oil and gas activity in the Gulf, BOEM is the legal cause of any incidental take of Rice's whales that occurs from such activities. As there is no valid ITS for take of Rice's whales from vessel strikes, BOEM would be liable under section 9 of the ESA for causing any take of Rice's whales by vessel strike.<sup>71</sup> As detailed in the NTL, there is a potential from incidental take and the measures included in the NTL would help prevent that take. BOEM's revocation of the NTL increases the chances that such unlawful take will occur.

#### **IV. Conclusion**

For the foregoing reasons, BOEM is in violation of the ESA. If BOEM does not act to remedy these violations within 60 days, our organizations will initiate litigation in federal court to resolve the matter. We urge BOEM to contact us immediately to discuss options for avoiding litigation and putting the Rice's whale on the path to recovery.

Sincerely,

/s/ Kristen Monsell

Kristen Monsell  
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<sup>71</sup> *Id.* § 1538(a)(2), (g); *Strahan*, 127 F.3d at 163.