

VIA E-PORTAL

October 6, 2023

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

RE: American Association of Port Authorities' comments in response to Docket Number
NOAA–NMFS–2023–0028

Dear Ms. Manning:

On behalf of the U.S. member ports of the American Association of Port Authorities (“AAPA”), I am writing to express AAPA’s concern with the National Oceanic and Atmospheric Administration (“NOAA”) and National Marine Fisheries Service’s (“NMFS”) proposed rule to designate a critical habitat for the Rice’s whale from the 100 meter isobath to the 400 meter isobath in the Gulf of Mexico (“Gulf”), pursuant to section 4 of the Endangered Species Act (“ESA”). As detailed below, the proposed critical habitat would cover a large swath of the Gulf, interfering with a number of key shipping lanes for the United States. This proposed rule also comes at the same time that NOAA and NMFS are considering a pending Petition to Establish a Vessel Speed Restriction and Other Vessel-Related Measures to Protect Rice’s Whale (NOAA-NMFS-2023-0027) (“the petition”).¹ The restrictions included in the petition already present large workability, safety, and economic issues, all of which would be magnified by expanding the proposed critical habitat.

AAPA is the unified voice of the seaport industry in the United States. AAPA represents ports regarding issues facing the maritime industry, promotes the common interests of the port community, and provides industry leadership on federal issues related to port development and operations. While ports touching the Gulf are the most impacted by this proposed rule, the port community as a whole is concerned by these actions. Within the impacted area, AAPA represents dozens of ports, as the area stretches from Florida to Alabama, Mississippi, Louisiana, and Texas over to the U.S. / Mexico border. Overall, the newly proposed zone covers 28,000 square miles and intersects with key shipping lanes for Gulf Coast ports; shipping lanes that are crucial not only to these regions but to agricultural producers sending their products down the Mississippi to energy producers that are shipping energy cargoes across the entirety of the United States.

AAPA strongly opposes the proposed critical habitat as an unwarranted expansion and encourages NOAA/NMFS to reduce the area of the proposed critical habitat while also considering the extraordinary impacts to maritime safety and commerce.

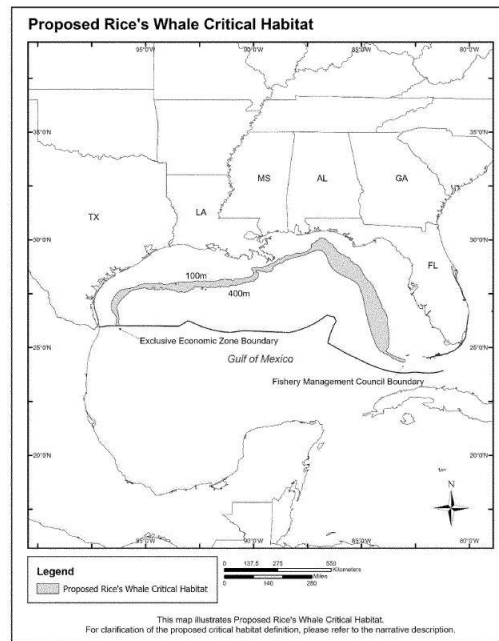
¹ National Marine Fisheries Service (NMFS) and National Oceanic and Atmospheric Administration (NOAA), Petition to Establish a Vessel Speed Restriction and Other Vessel-Related Measures to Protect Rice’s Whale, 88 FR 20846 (April 7, 2023).

Environmental protection efforts of AAPA member ports

AAPA Gulf port members are genuinely committed to taking steps to protect and preserve endangered and threatened species, including by working with local and federal officials on near real-time monitoring equipment to prevent whale strikes. AAPA member ports are not unfamiliar with whale issues; for example, member ports have actively participated in steps to protect and preserve the North Atlantic Right Whale (“NARW”). For the NARW, ports have undertaken voluntary measures to locate and avoid these animals, such as conducting NARW aerial surveys to provide wildlife managers with real-time data on calving distributions and installing acoustic monitoring buoys to increase detection efforts to help protect and support the recovery of NARWs. For example, the port of Jacksonville deployed an additional monitoring buoy to assist bar pilots with monitoring current conditions, in particular at the entrance to the St. Johns river. Additionally, ports frequently deploy buoys that collect water, and in a relatively short turnaround time, a chemical analysis can indicate the presence – but usually the lack thereof – of the whales. While the Rice’s whale is a new issue for AAPA port members to tackle, there is precedent for doing so while balancing conservation goals with the safe and efficient movement of commerce.

Concern about Rice’s Whale Critical Habitat Designation’s Expansion

The critical habitat proposed rule would establish a massive critical habitat for the Rice’s whale. The critical habitat covers 28,000 square-miles, or 17,920,000 acres, which cuts through the heart of the Gulf region.² This critical habitat essentially divides nearshore operations from the



open ocean as well as other maritime-related operations, such as offshore oil and gas as well as offshore wind.

² National Marine Fisheries Service (NMFS) and National Oceanic and Atmospheric Administration (NOAA), Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Rice's Whale, 88 FR 47453 (July 24, 2023).

This critical habitat is not limited in scope; it extends all the way up the west coast of Florida to the east coast of Texas, despite Rice's whales only being consistently located in the northeastern part of the Gulf.³ The critical habitat designation would also be a vast expansion of the area that NMFS only five months ago proposed to cover in their Rice's whale vessel speed restriction petition, which covered waters between 100-400 meters deep from approximately Pensacola, FL, to just south of Tampa, FL, plus an additional 10 kilometers around that area.⁴ The vessel rules that are currently under consideration would only be applicable to that area (known as the core habitat).

The Rice's whale was first identified by NMFS in 2019 under the ESA as an endangered subspecies of the Bryde's whale.⁵ The 2019 listing indicated that with approximately 100 whales in existence, small population size and restricted range were the most serious threats to the species, along with a range of lesser threats.⁶ The Rice's whale was not identified as a new species until 2021, well after environmental groups filed litigation against NMFS seeking to designate a critical habitat for the Rice's whale.⁷ As of August 2021, NMFS did not have sufficient information to determine a critical habitat because not enough was known about the geographical reach of the whale. The environmental group litigation against NMFS resulted in a stipulation that NMFS would propose a final rule by June 2024, a key part of which is this proposed rule.⁸

It is unclear to AAPA why NMFS would be in the process of establishing vessel speed restrictions and movements for ships through the Rice's whale habitat, extending from Pensacola to just south of Tampa, at the same time that NMFS is proposing a radically larger habitat for the Rice's whale through this rulemaking. At the same time, a recent stay agreement, filed as a result of additional litigation from environmental groups, outlines even more Rice's whale protections applicable to the Gulf of Mexico oil and gas activities. This litigation would remove the "Rice's Whale Expanded Area" from the upcoming Gulf of Mexico Lease Sale 261 and future lease sales during the reinitiated consultation period. BOEM has required a range of vessel restrictions in this lease area, including a 10-knot vessel speed restriction, limitation on night travel, and vessel strike avoidance protocols.⁹ This litigation is currently ongoing with a recent appellate decision removing those restrictions, but the potential vessel restrictions are alarming to AAPA members.

³ Id. at 47460.

⁴ Supra note 1.

⁵ See National Marine Fisheries Service and National Oceanic and Atmospheric Administration, Endangered and Threatened Wildlife and Plants; Endangered Status of the Gulf of Mexico Bryde's Whale, 84 FR 72 (April 15, 2019).

⁶ Id; see also Rosel, P.E.; Corkeron, P.; Engleby, L.; Epperson, D.; Mullin, K.D.; Soldevilla, M.S.; Taylor, B.L. (2016). Status Review of Bryde's Whales (*Balaenoptera edeni*) in the Gulf of Mexico under the Endangered Species Act (PDF) (Report). NOAA Technical Memorandum NMFS-SEFSC-692.

⁷ National Oceanic and Atmospheric Administration, Endangered and Threatened Wildlife and Plants; Technical Corrections for the Bryde's Whale (Gulf of Mexico Subspecies), 86 FR 47022 (August 23, 2021). The Natural Resources Defense Council and Healthy Gulf filed a complaint in July 2020 with the U.S. District Court for the District of Columbia seeking an order to compel NMFS to designate critical habitat for the Rice's whale.

⁸ Supra note 2.

⁹ See Bureau of Energy Management, Voluntary Precautionary Measures for Rice's Whale in the Gulf of Mexico, (Aug. 21, 2023) available at: [BOEM Issues Voluntary Precautionary Measures for Rice's Whale in Gulf of Mexico | Bureau of Ocean Energy Management](#). See also, e.g., WorkBoat, BOEM postpones Gulf of Mexico oil and gas lease sale (Sept. 28, 2023), available at: [BOEM postpones Gulf of Mexico oil and gas lease sale | WorkBoat](#).

AAPA remains concerned that this critical habitat expansion is not based on sufficient scientific analysis, and we align ourselves with the comments of the Florida Ports Council submitted to the June 2023 docket on vessel speeds restriction.¹⁰ In addition, we note that when the population of the endangered species is so small – approximately 52-100 individual whales – it is difficult to get data on where their habitat actually is; in some cases, only sounds of potential Rice’s whales were heard. NMFS’ acknowledges that “while contemporary sightings are primarily confined to the core distribution area in the northeastern GOMx, Rice’s whales historically may have had a broader distribution in the northern and southern GOMx.”¹¹ NMFS also states that “subsequent publications have confirmed that Rice’s whales continue to use the northwestern GOMx”, citing one sighting in 2017 and limited Rice’s whale calls that were detected acoustically between July 2017 to August 2017.¹² This is very limited data to be issuing a massive critical habitat designation that will very likely have significant economic impacts, as highlighted below. NMFS described the critical habitat as specific areas within the geographical area occupied by the species at the time of listing that contain physical or biological features essential to conservation of the species and that may require special management considerations or protection; and specific areas outside the geographical area occupied by the species if the agency determines that the area itself is essential for conservation. There appears to be insufficient data available for NMFS to determine that the entire area proposed to be designated as critical habitat is actually essential for conservation of Rice’s whales.

It is also worth noting that NMFS identified the most common threats to the Rice’s whale – small population size and restricted range – both of which have nothing to do with commercial vessel traffic. Other identified threats from NMFS were listed in the critical habitat proposed designation but included very little information as to the seriousness of these threats. These included energy exploration, development, and production; oil spills and oil spill responses; vessel collision; fishing gear entanglement; and anthropogenic noise.¹³ The discussion of vessel strikes came from NOAA’s 2019 endangered species determination, which categorized these whales as an endangered subspecies of the Byrde’s whale (not a new species). That determination found that vessel strikes of Byrde’s whales are likely underreported and undetected, based off of information from Byrde’s whales in other parts of the world.¹⁴ In fact, there has only been one confirmed vessel strike has been reported in the Gulf, and that strike was back in 2009.¹⁵ Similarly, the April petition to NOAA calling for the establishment of vessel restrictions in the core habitat included a cursory review of the scientific literature as justification for establishing a year-round mandatory speed zone for all vessels in the northeast Gulf, citing one study to justify vessel strikes as a potential

¹⁰ Letter re. Proposed Petition To Establish a Vessel Speed Restriction and Other Vessel-Related Measures to Protect Rice’s Whale, Florida Ports Council (June 5, 2023), available at https://flaports.org/wp-content/uploads/SUBMITTED-NOAA-Rices-Whale-Proposed-Rule-Letter_060523.pdf.

¹¹ National Marine Fisheries Service and National Oceanic and Atmospheric Administration, Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Rice’s Whale, 88 FR 47453 (July 24, 2023).

¹² Id.

¹³ See National Marine Fisheries Service and National Oceanic and Atmospheric Administration, Endangered and Threatened Wildlife and Plants; Endangered Status of the Gulf of Mexico Bryde’s Whale, 84 FR 72 (April 15, 2019).

¹⁴ Id.

¹⁵ See supra note 13; National Marine Fisheries Service and National Oceanic and Atmospheric Administration, [NOAA Lists Gulf of Mexico Bryde’s Whales as Endangered | NOAA Fisheries](#).

threat.¹⁶ Establishing a large critical habitat and identifying vessel strikes as a potential threat based on limited data is concerning enough for this critical habitat petition; it is even more concerning that NOAA/NMFS is actively considering vessel mitigation measures for the Rice’s whale “core habitat” at the same time that could be expanded to the full critical habitat area.

Overall, it appears that this expanded critical habitat designation is a direct result of litigation – some of which began even before the Rice’s whale was identified as a new species – and has been rushed to accommodate litigation deadlines without the input of all stakeholders that would be impacted.

Impact of Rice’s Whale Critical Habitat Designation on Economic Issues

AAPA member ports understand the importance of conserving Rice’s whale as a critical endangered species. AAPA Gulf port members are willing to engage in conservation efforts; however, it is important to ensure that the boundaries of any proposed critical habitat designation are not overly broad and properly balance species protection with economic impacts. Under section 4(b)(2) of the ESA, 16 U.S.C. § 1533(b)(2), NMFS must take into account economic impacts when revising critical habitat designations and may exclude areas where the benefits of exclusion outweigh the benefits of specifying an area as critical habitat, unless the failure to designate such area as critical habitat will result in extinction of the species concerned. AAPA is concerned that by extending the critical habitat so significantly beyond the core habitat identified just a few months ago, member ports and the crucial role they play in the supply chain will be greatly impacted.

Specifically, AAPA is concerned that, paired with the recent efforts related to Rice’s whale protections (vessel speed limitations etc.), an expanded critical habitat designation will lead to extreme economic impacts. NMFS is already currently in the process of considering a petition that calls for expanded protections for the Rice’s whale; while this petition was filed under a different section of the ESA, it is not difficult to imagine that these protections could easily be extended to this larger critical habitat in the future. Furthermore, in this proposed critical habitat designation, NOAA has identified in-water construction, energy development, commercial shipping, aquaculture, military activities, and fisheries as threats that “could independently or in combination result in the need for special management or protections of the essential feature.”¹⁷ Special management or protections lead AAPA members to assume that the critical habitat designation will not be the only thing that NOAA/NMFS imposes on the Gulf in order to preserve the Rice’s whale.

AAPA understands that one of the main purposes of seeking a critical habitat designation is to ensure that federal agencies take precautions to ensure that the activities they fund, authorize, or carry out do not destroy or adversely modify critical habitat through an ESA Section 7 consultation.

¹⁶ Petition to Establish a Mandatory 10-knot Speed Limit and Other Vessel-Related Mitigation Measures for Vessel Traffic within the Core Habitat of the Gulf of Mexico Whale, from National Resources Defense Council, Healthy Gulf, Center for Biological Diversity, Defenders of Wildlife, EarthJustice, and New England Aquarium (May 11, 2021).

¹⁷ National Marine Fisheries Service (NMFS) and National Oceanic and Atmospheric Administration (NOAA), Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Rice’s Whale, 88 FR 47453 (July 24, 2023).

However, the proposed critical habitat designation only focuses on the potential of future Section 7 consultation and does not appear to seriously consider economic concerns stemming from the designation of such a large critical habitat. The economic impact analysis in the proposed rule was based on the number of Section 7 consultations that had happened in the area from 2010 through 2021, with some leeway in the number for expected space vehicles launches, wind energy development, oil and gas exploration development, and military activities. Overall, NMFS assume minor consultations for each category would be required over the next ten years and assumed that those activities would not be located seaward of the 100 meter isobath and would not affect the habitat.¹⁸ This economic analysis does not consider that the vessel speed restrictions and other restrictions requested by the May 11, 2021 petition could easily be sought to apply in this larger area.

If the proposed vessel speed restrictions and moratoriums on nighttime travel proposed by NOAA for the Rice's whale core habitat were expanded to this larger proposed critical habitat, the results would be catastrophic. Just in the core critical habitat, these restrictions will have real-world effects on Florida seaports' ability to import and export critical goods. Seaports in the core habitat area are responsible for delivering over 40 percent of fuel to residents and visitors to the state of Florida and provide fuel to busy international airports including Orlando and Tampa. Being forced to reduce speed unreasonably and barred from transiting a portion of the Gulf Coast during nighttime hours would cause disastrous inefficiencies in the Gulf Coast maritime system, resulting in vessels drastically altering routes to avoid burdensome restrictions, causing backups and delays at other Gulf Coast ports. Imagine expanding that to every port in the Gulf. And there are also serious connective effects; for example, 12% of Florida's fuel comes from the Port of Lake Charles. Delays or interruptions between Gulf Coast ports due to vessel restrictions could be extremely impactful. This region is also home to significant vessel traffic. There are approximately 3,100 U.S.-flag vessel movements per year in and out of the Mississippi River. That vessel traffic is only U.S.-flag movements, which means that the total vessel movements in and out of the area are significantly larger. These vessel movements would all be impacted if proposed vessel restrictions were expanded to the entirety of the proposed critical habitat.

Finally, these restrictions will also have serious safety impacts. Vessel operators and pilots rely on the ability to move vessels at the speeds that are safest. Imposing a 10-knot vessel speed restriction greatly impacts the maneuverability and steering controls for larger vessels at slower speeds. Without speed as an effective tool to overcome navigational conditions, the risk of vessel groundings and collisions increases. This could lead to loss of life and/or disastrous environmental consequences from fuel or oil spills, which in itself is an identified threat to the Rice's whale.

These proposed restrictions are consequential enough in the core habitat area of the Rice's whale; if they were further expanded to apply to all of the critical habitat (or even a portion of it), the economic consequences are expected to be astronomical. Port and vessel traffic in the Gulf is crucial to the economic well-being of the entire United States. Core economic exports of the United States, including agricultural cargoes, are moved down the Mississippi River for export out of the Gulf. The Gulf of Mexico area, both onshore and offshore, is one of the most important regions for energy resources and infrastructure, producing 15% of total U.S. crude oil production, 47% of total U.S. petroleum refining capacity and 51% of total U.S. natural gas processing plant capacity.

¹⁸ Id.

All of this energy activity is reliant on ports to receive and export cargoes, and vessels to move those cargoes in. There are also huge economic centers that would be impacted by any expansion of the vessel speed or other restrictions. For example, the Port of Houston is the largest Gulf Coast container port, handling 73% of the Gulf Coast container traffic. This port alone handled 266 million short tons of containers in 2021 and provided nearly \$1 trillion of economic impact to the United States. And that is just one port that would be affected out of dozens. The following ports would be adversely affected by imposing a vessel speed restriction for the entire critical habitat as contemplated:

- Port of Tampa Bay
- Panama City Port Authority
- Port of Pensacola
- Alabama State Port Authority
- Port of Mobile
- Port of Pascagoula
- Mississippi State Port Authority
- Port of South Louisiana
- St. Bernard Port, Harbor & Terminal District
- Plaquemines Port, Harbor & Terminal District
- Port of New Orleans
- Port of Greater Baton Rouge
- Caddo-Bossier Port
- Port Fourchon
- Port of Morgan City
- Lake Charles Harbor and Terminal District
- Port Orange
- Port of Port Arthur Navigation District
- Port of Beaumont
- Port of Galveston
- Port of Houston Authority
- Port of Freeport
- Calhoun Port Authority
- Port of Corpus Christi
- Port of Harlingen Authority
- Port of Brownsville

Recommendations

AAPA members believe that there are ways to conserve Rice's whales in the Gulf without unnecessarily impeding commerce. AAPA supports the implementation of technologies on vessels and at ports to detect the presence of marine mammals. AAPA urges NOAA/NMFS to take a more targeted and technology-based approach to protecting Rice's whale than vessel speed limits; for example, AAPA members support the use of near real-time monitoring and mitigation programs (such as those described in Sec. 11303 of the 2022 Coast Guard Authorization Act) to detect the presence of marine mammals like Rice's Whales. It is critical that vessels be able to travel at speeds

above ten knots and at night to ensure safe conditions and efficient operations of critical seaport infrastructure. We understand that NMFS is investing in similar technologies already for the NARW – such as acoustic and satellite tracking monitoring, modeling, and whale detection and avoidance technologies – all of which could be used to mitigate risks to the Rice’s whale without impeding necessary commerce in the Gulf region.¹⁹

We hope NOAA/NMFS considers information from the affected ports and other maritime industry stakeholders in the development of this critical habitat designation. Any proposed expansion of the critical habitat and any additional measures taken by NMFS as a result of the new designation should carefully balance need for the designation compared to economic impacts to the region. As shown above, AAPA member ports are genuinely committed to taking steps to protect the Rice’s whale. However, it is crucial that steps are taken to balance conservation goals with the safe and efficient movement of cargo into and out of our nation’s ports. Thank you for your attention and consideration of these critical issues.

¹⁹ See, e.g., recent investments provided by the Inflation Reduction Act ([Funding to support right whale recovery | NOAA Fisheries](#)).