

PUBLIC COMMENT SUBMITTED BY
Florida Department of Transportation
October 6, 2023

**RE: Public Comment on NMFS NOAA Proposed Rule: Endangered and Threatened Species; Designation of
Critical Habitat for the Rice's Whale
NOAA-NMFS-2023-0028**

The Florida Department of Transportation (FDOT) serves the people of Florida by providing a transportation system that ensures the mobility of people and goods, enhances economic prosperity, and preserves the quality of Florida's natural resources. FDOT is responsible for assisting in the development of Florida's 16 deep-water seaports, whose safe and efficient operations support the livelihoods of our residents and millions of Americans.

FDOT is submitting this document in response to the request for public comments issued by the National Oceanic and Atmospheric Administration (NOAA) on the proposed designation of critical habitat for the Rice's Whale (NOAA-NMFS-2023-0028, Federal Register Docket No. 230711-0164, RIN 0648-BL86).

FDOT fully appreciates the importance of protecting endangered and threatened species and supports the implementation of thoughtfully considered activities that have a meaningful and measurable impact on the conservation and recovery of such species. FDOT urges NOAA to reconsider the evidence and assumptions contained in the proposed establishment of the Critical Habitat (CH) area, which proposes ALL Gulf of Mexico (GOMx) waters between 100 meters and 400 meters in depth be included. Instead, we believe that actual sightings, reasonable (if dated) acoustic evidence, and a rethink of the area that is essential to support the life-history needs of the species justifies two separate CH areas.

Designation of CH is the first step in the process of protecting listed species. Practical, right-sized, and evidence-based CH for listed species serves as a solid foundation for determining the location and purpose of subsequent conservation measures implemented to promote recovery while balancing human safety concerns and economic risk. In the case of the proposed Rice's whale CH, the State of Florida is concerned that it is far larger than evidence warrants, which, in turn, may lead the agency to consider the implementation of unnecessarily expansive and costly measures on maritime traffic industries that may provide very little conservation benefit beyond the limited geographic range of known occupied habitat. Specifically, measures such as strict vessel speed restrictions, night-time vessel area transit prohibitions, and others proposed in NOAA's GOMx Fishery Bulletin FB23-028 (published May 9, 2023) present significant safety concerns and economic risks that likely outweigh the negligible conservation benefits across unoccupied habitat (which population data suggests represents the vast majority of the proposed CH). For this reason, we urge NOAA-NMFS to establish the Rice's whale CH based on high-quality evidence.

We believe the proposed size and location of the CH represents a considerable overreach that is not supported by *actual Rice's whale sightings* and that there is insufficient evidence to reasonably conclude that water depth alone can define the area that is essential to support the life-history needs of the species.¹ Specifically, there has not been an evidence-based case made that; a) *prey species*, b) *marine*

¹ See "Specific Areas Within the Geographic Area Occupied by the Species Containing the Essential Feature in the Federal Register Notice.

water productivity, bottom temperatures, and pollutant levels, or c) sufficiently quiet conditions for normal use justify including ALL GOMx waters between 100 and 400 meters in depth in the CH. These considerations are addressed below:

Actual Rice's whale sightings: Certainly, the most definitive data points for determining CH are actual Rice's whale sightings. But sightings of this species, according to the proposal, are limited to just five geographic locations;

- a) *De Soto Canyon:* 181 sightings from NMFS and aerial survey sightings in the northeastern GOMx centered over the De Soto Canyon (while not defined in a documents search, we estimate the 100-400 meter portion of the Canyon to be roughly 3,000 square miles);
- b) *NE Gulf:* A "Bryde's-like" whale in the northeastern GOMx in 2019. Whether this is a Rice's whale has not been confirmed.
- c) *Tampa Bay:* A deceased female found in Tampa Bay in October 2009 (which is well outside the proposed CH). We question whether this proves this female resided in Tampa Bay or whether the regional currents pushed her remains to the Bay from where she lived when she perished;
- d) *Florida Bay:* An adult male Rice's whale stranded near Flamingo in Florida Bay, at least 140 miles from the closest point of the proposed CH. Again, we question whether this proves this male resided in Tampa Bay or whether the regional currents pushed his remains to the Bay from where he lived when he perished. and;
- e) *NW Gulf:* A Rice's whale was sighted in the western GOMx off the central Texas Coast in 2017.

We note that the proposal cites passive acoustic monitoring recordings from the early 1990's (roughly 30 years prior to the identification of Rice's whales) south of the Flower Garden Banks National Marine Sanctuary. Combined, there have been no sightings nor clear acoustical evidence of Rice's whales in waters between 100 and 400 meters deep between De Soto Canyon and Flower Garden Banks, roughly 300 nautical miles apart, and none southeast of De Soto Canyon.

Other claims about the possible presence of Rice's whale in the proposal appear to contain conclusions not supported by evidence. For example, the proposal cites a 2011 review of whaling logbooks from the GOMx that identified records of "finback" whales south of the Mississippi River delta and the southern GOMx on the Campeche Banks and concluded that because fin whales do not frequent the GOMx, they were likely Rice's whales. This led to the statement that "...Rice's whales historically *may* have had a broader distribution in the northern and southern GOMx." All that can be concluded from this is that some sightings were unlikely to be a fin whale, but it is conjecture as to what the species actually may have been.

In another instance, a model was developed in 2022 to predict Rice's whale distribution in the GOMx based on bathymetric (or submarine topography²) and oceanographic features. Using parameters such as water depth, chlorophyll-a concentrations, and bottom temperature/salinity, the model predicted suitable Rice's whale habitat outside the core distribution area in the northeastern GOMx, generally throughout the GOMx within 100- and 400-meters depth. This model only considers a small number of factors that supports only one of the three attributes cited as the Physical or Biological Features Essential for Conservation (prey, elevated productivity, and quiet conditions) and does not

² Source: NOAA oceanservice.noaa.gov/facts/bathymetry.html

appear to have been tested or validated by actual sightings or acoustical detection outside the De Soto Canyon or south of Flower Garden Banks.

The logbook analysis and the 2022 model constitute a hypothesis, which may serve as a starting point for further investigation but is unsuitable for drawing any conclusion. The inclusion of re-interpreted whalers' logbooks and a new, untested model do not appear warranted.

Prey species: The proposal acknowledges that stomach contents traditionally provide the most information on the diets and feeding of baleen whales and that there is no stomach content data available for the Rice's whale (which is a part of the baleen family). Without this reliable data, diet and foraging conclusions have been extrapolated from a brief (less than 72 hours) data set compiled from a single whale describing the depth and duration of dives the whale made near De Soto Canyon. Other conclusions were drawn based on the diets of similar - but different - whale species. The proposal also refers to trawls of "potential" prey near where Rice's whales were sighted, but there is no evidence that the potential prey is actually what the species feeds upon. Neither of these sources provides reliable information on the type and location of Rice's whale food sources, making so expansive a CH conclusion difficult to support.

Marine water productivity, bottom temperatures, and pollutant levels: The proposal simply states that waters between 100 and 400 meters in depth contain higher than normal production of organic matter by planktonic plants when compared to typical GOMx oceanic levels. This appears to indicate only that there is more planktonic food available there than elsewhere, but – as described above – little is known about the Rice's whale's actual diet. It is unclear how this offers reasonable evidence that this is a meaningful criterion in contemplating CH.

Sufficiently quiet conditions for normal use: Finally, with regard to the third attribute, which is related to sufficiently quiet conditions, the proposal states that Rice's whales need a low-noise environment to navigate, communicate and detect prey and predators. However, the proposal also identifies high-noise areas within or near the proposed CH, including the western GOMx. The proposal also states that the presence of Rice's whales near the Mississippi River delta is unknown and that this is another area of higher ambient noise but also falls within the proposed CH. This seems to argue for the exclusion of the 100 to 400-meter-deep waters between De Soto Canyon and Flower Garden Bank from the CH because it does not provide quiet conditions for normal use. This is also an area of dense shipping, energy production, and seismic surveys – activities that do not contribute to quiet conditions.

It is also important to note that the proposed 28,270 square mile CH area is 245 percent larger than the 11,500 square mile core habitat proposed by six prominent environmental groups (Natural Resources Defense Council, Healthy Gulf, Center for Biological Diversity, Defenders of Wildlife, Earthjustice, and New England Aquarium).³ We note that there is neither acknowledgment nor explanation of this proposed dramatic expansion in size nor an explanation of the difference between a "Critical Habitat" and a "Core Habitat" as described in their proposal.

³ 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 (Balaenoptera R8ICEI), May 11, 2021.

We do not believe that a case has been made to justify including the approximately 300 nautical miles of 100- to 400-meter-deep water between Flower Garden Bank and De Soto Canyon, nor the approximately 400 nautical miles of 100 to 400-meter depths south and east of De Soto Canyon, as contained in the current proposal. Subsequent vessel speed restrictions, night-time vessel area transit prohibitions, and other actions, such as those proposed in NOAA's GOMx Fishery Bulletin FB23-028, will likely have a far greater negative impact if the CH is unnecessarily large. An unnecessarily large CH designation will exacerbate the negative impacts on the U.S. economy and significantly degrade mariner safety, increasing the distance and duration of vessels transiting the entire GOMx.

In addition, the negative economic impacts of this CH would have significant effects on Florida's eight gulf seaports. These ports handle over 47 million tons of cargo (over 40% of all Florida waterborne tonnage) as well as over 600,000 cruise passengers. The total economic value of marine cargo and vessel activity at Florida seaports is estimated at nearly \$117.6 billion, or 13.3 percent of the State's Gross Domestic Product. The thousands of cargo vessels that transit our seaports annually are critical in delivering vital goods and services to Florida and the nation. Our three largest Gulf Coast ports represent 20% of this economic impact (Port Tampa Bay at over \$17B, SeaPort Manatee at over \$5B, and Port Panama City at \$1.6B). The Port of Key West, one of the nation's leading cruise ports of call, also borders the GOMx.

The proposed measures will impact nearly \$14 billion in import and export activity at these five seaports alone. Port Tampa Bay in particular is a critical state and national asset. As Florida's largest seaport by volume and the 21st largest in the United States, Port Tampa Bay has over 34 million tons of cargo passing through its docks in a given year. Industries served by these seaports will be put at a competitive disadvantage. In particular, this would impact the import and export of 96% of Florida's waterborne fertilizer industry concentrated at Port Tampa Bay, 86% of Florida's copper industry concentrated at Port Panama City, and 36% of Florida's prepared vegetables and fruits concentrated at Seaport Manatee.

Relating to the proposed measures such as strict vessel speed restrictions and night-time vessel area transit prohibitions, these increases in transit and delivery times will negatively impact the competitive position of Florida's Gulf Coast seaports. These ports serve not only as critical economic engines for their communities, but they also provide the goods and services consumed by local residents and visitors. Reduced use of these seaports will create an increased reliance on highway and rail modes.

FDOT urges NOAA to reconsider the evidence and assumptions contained in the proposed establishment of the CH area to address the evidence noted herein satisfactorily.