

**UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF OCEAN ENERGY MANAGEMENT
GULF OF MEXICO REGIONAL OFFICE**

BOEM NTL No. 2023-G01

Date: August 17, 2023

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**

I. Introduction

This Notice to Lessees and Operators (NTL) was developed to provide recommendations and guidance for lessees and operators regarding suggested measures to expand protections for the Rice's whale,¹ during the period when the Bureau of Ocean Energy Management (BOEM) and the Bureau of Safety and Environmental Enforcement (BSEE) are engaged in reinitiated consultation with the National Marine Fisheries Service (NMFS) on the 2020 Biological Opinion, as amended (2020 BiOp). This guidance applies to the area comprising the entire northern Gulf of Mexico Outer Continental Shelf (OCS) between the 100- and 400-m isobaths (Expanded Rice's Whale Area; Figure 1). This delineation is based on one recent study² that Rice's whale occur in portions of this area. Therefore, the possibility of incidental take of Rice's whale in the Expanded Rice's Whale Area cannot be dismissed at this time.³ The Expanded Rice's Whale Area extends between those isobaths across the entire Gulf of Mexico OCS, extending eastward from the Mexican border with Texas and westward of the Rice's Whale Core Area identified in the 2020 BiOp. *See* Figure 1: Expanded Rice's Whale Area.

¹ At the time of the 2020 BiOp, the Rice's whale was formally known as the Gulf of Mexico Bryde's whale. However, on August 23, 2021, NMFS in a direct final rule revised the taxonomy and species name of the Bryde's Whale Gulf of Mexico subspecies. 86 Fed. Reg. 47022 (Aug. 23, 2021). NMFS therefore revised the common name to Rice's whale and the scientific name to *Balaenoptera ricei*. While the 2020 BiOp, as amended, refers to the Bryde's whale, BOEM is using Rice's whale in this NTL to reflect the current name and species designation. All references in the 2020 BiOp to the Bryde's whale should be considered to refer to the Rice's whale.

² Soldevilla, M. S., Debich, A. J., Garrison, L. P., Hildebrand, J. A., & Wiggins, S. M. (2022). Rice's whales in the northwestern Gulf of Mexico: call variation and occurrence beyond the known core habitat. *Endangered Species Research*, 48, 155-174.

³ This is not meant to be construed as a blanket determination as to whether BOEM, at present, has determined that there is a "reason to believe" that incidental take may occur, within the meaning of the ESA, the consultation regulations, or BOEM's regulations. Those decisions will be made on a case-by-case basis in accordance with BOEM regulations referenced below.

This guidance will remain in effect until revoked by BOEM. This guidance is intended to be used during BOEM's ongoing reinitiated consultation with NMFS (as described below) and will not supersede any conditions of approval (COAs), BiOp Protocols/Appendices, best management practices (BMPs), or other NTLs and guidance that may arise from a new or amended BiOp for oil and gas activities in the Gulf of Mexico OCS as a result of the reinitiated consultation.

II. Authority and Background

The Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. §§ 1331 *et seq.*, charges the Department of the Interior (DOI) with administering leasing and oil and gas exploration and development activities on the OCS. Under the delegated authority of the Secretary of the Interior, BOEM requires that entities engaging in oil and gas activities on the OCS avoid or minimize harm to threatened and endangered species listed under the Endangered Species Act (ESA), 16 U.S.C. §§ 1531 *et seq.*, if there is reason to believe that incidental take of such species may occur. As one of the agencies tasked with implementing and overseeing the ESA consultation requirements, NMFS consults with action agencies whose actions or decisions may affect ESA-listed species and, if the effects are adverse, may issue a biological opinion to ensure that the proposed project or action will not jeopardize the continued existence of the species or result in adverse modification of designated critical habitat.

On March 13, 2020, NMFS issued a programmatic biological opinion entitled, Biological Opinion for Federally Regulated Oil and Gas Program Activities in the Gulf of Mexico (2020 BiOp). The 2020 BiOp contained a Reasonable and Prudent Alternative (RPA) that would be applied in an area comprising the 100- to 400- meter isobaths from 87.5° W to 27.5° N (as described in the species' status review), plus an additional 10 km around that area, to avoid the likelihood of jeopardizing the continued existence of the Gulf of Mexico Rice's whale. On April 21, 2021, NMFS amended the BiOp to revise the Incidental Take Statement and to revise several Appendices to the BiOp, but did not modify the RPA or the area to which it applied.

On October 25, 2022, BOEM, along with BSEE, formally requested reinitiation of consultation on the 2020 BiOp, pursuant to Section 7 of the ESA. The reasons for the consultation included reevaluating the oil spill risk analysis in the BiOp and coordinating development of conditions of approval with NMFS that are related to OCS oil and gas impact pile driving and potential transit of OCS oil and gas activity vessels through the Rice's Whale Area identified in the 2020 BiOp RPA. As of the date of this NTL, the reinitiated consultation is ongoing.

Prior to and during the reinitiated consultation process, new information became available about the occurrence of Rice's whales in the Gulf of Mexico. In particular, a peer-reviewed study provided evidence that Rice's whales occur in the Expanded Rice's Whale Area. Given this information, the small number of Rice's whale present in the Gulf of Mexico, and the ongoing reinitiated consultation, BOEM is recommending that lessees and operators in the Gulf of Mexico implement certain avoidance and mitigation measures in the Expanded Rice's Whale Area, until such time as a new or amended BiOp is issued by NMFS and any measures identified by NMFS can be implemented.

This NTL explains the recommended procedures that OCS oil and gas lessees and operators should implement when transiting or performing operations in and near the Expanded Rice's Whale Area.

III. Recommended Measures to Protect the Rice's Whale

BOEM recommends to lessees and operators that all oil and gas activity within the Expanded Rice's Whale Area should be conducted in accordance with the following measures:

- a. Use trained visual observers to monitor the vessel strike avoidance zone (500 m). Such observers may be either third-party observers or crew members but crew members responsible for these duties should be provided with sufficient training to distinguish aquatic protected species to broad taxonomic groups.
- b. If transiting within the Expanded Rice's Whale Area (as described in this NTL), document and retain records for three years on details of transit, including what port is used for mobilization and demobilization.
- c. 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 (as described in this NTL and Figure 1). This recommendation would not apply when compliance would place the safety of the vessel or crew, or the safety of life at sea, in doubt. 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 to further reduce the risk of vessel strike of Rice's whales.
- d. Maintain on all vessels a minimum separation distance of 500 m from Rice's whales. If a whale is observed but cannot be confirmed as a species other than a Rice's whale, the vessel operator should assume that the whale is a Rice's whale and take appropriate action.
- e. Include a functioning Automatic Identification System (AIS) onboard all vessels 65 feet or greater associated with oil and gas activity (e.g., source vessels, chase vessels, supply vessels) that is operating at all times, as required by the U.S. Coast Guard. If the vessel does not require AIS, it is strongly encouraged that the operator document and retain records of the transit, including trackline (e.g., time and speed) data and visual marine mammal sightings.

As noted above, BOEM recommends that operators and lessees document their implementation of these measures during transit or activities across the Expanded Rice's Whale Area, including the impracticability of avoiding any activities or transit during nighttime hours or low visibility as provided in paragraph (c).

The above measures are distinct from the RPA, terms and conditions, and reasonable and prudent measures of the 2020 BiOp, as amended, that lessees and operators must comply with as stipulations in their leases or any COAs on plans, permits or other authorizations from BOEM or

BSEE. BOEM also recommends that lessees and operators, where appropriate, include the above mitigation measures in any Exploration Plans (EPs), Development and Production Plans (DPPs), and Development Operations Coordination Documents (DOCDs) that are submitted for approval while the reinitiated consultation is ongoing and until a new or amended BiOp is issued and implemented.

Lessees and operators are reminded that activities in their EPs, DPPs, or DOCDs must also be in compliance with 30 C.F.R. §§ 550.223(b) and 550.254(b) (regarding mitigations to be included in EPs, DPPs, and DOCDs where there is a reason to believe protected species may be incidentally taken by the proposed activities). For example, if there is a reason to believe that a Rice's whale may be incidentally taken in the Expanded Rice's Whale Area by the activities lessees and operators propose in a plan, BOEM will coordinate with NMFS regarding the sufficiency of the mitigations to be included in the EPs, DPPs, or DOCDs to reduce or eliminate the risk of take, including but not limited to the measures provided in this NTL. In the event such measures cannot eliminate the risk of incidental take of Rice's whales, lessees or operators may also need to apply for and receive an incidental take authorization under the Marine Mammal Protection Act, 16 U.S.C. §§ 1361 *et seq.*

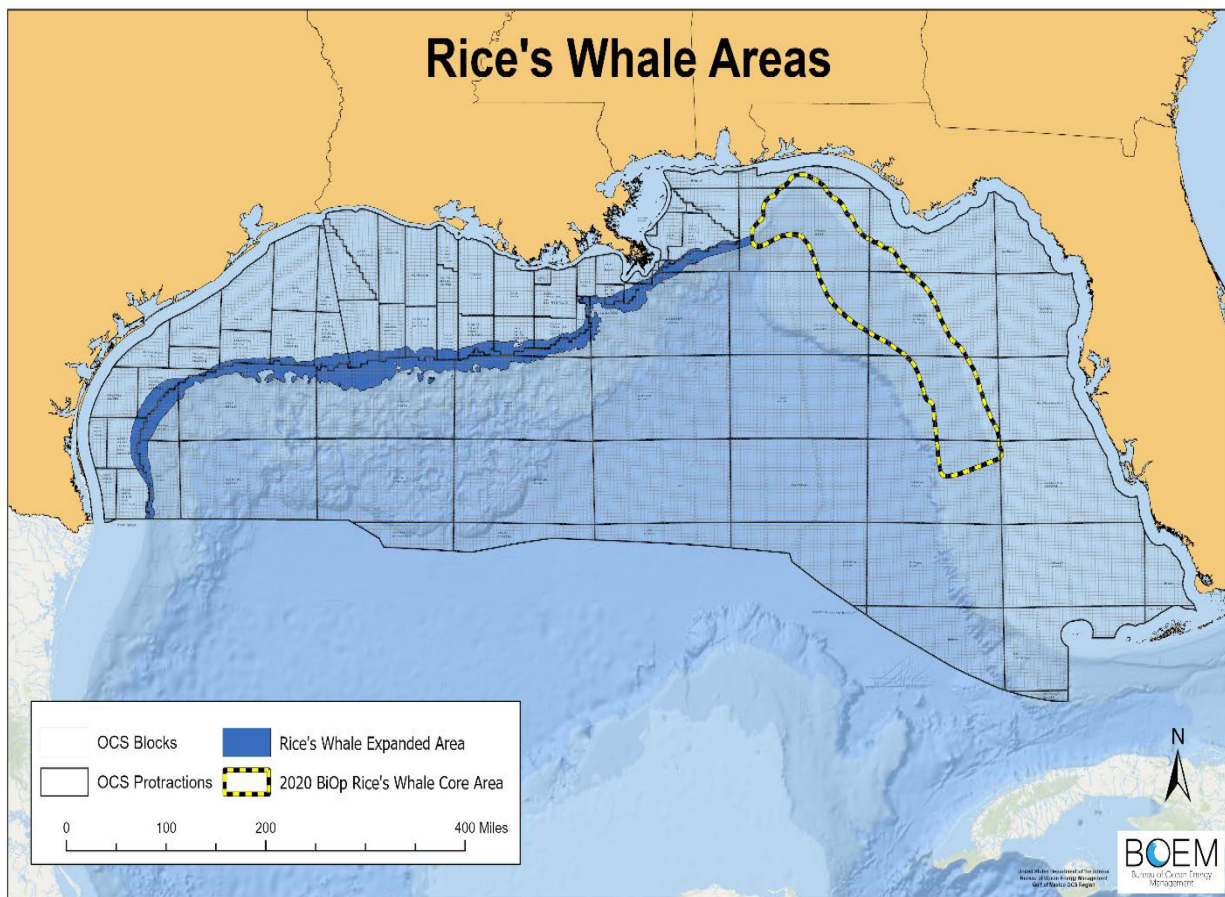


Figure 1: Expanded Rice's Whale Area.

IV. Guidance Document Statement

BOEM issues NTLs as guidance documents in accordance with 30 CFR 550.103 to clarify and provide more detail about certain BOEM regulatory requirements and to outline the recommended information to be provided in various submittals. Except to the extent that provisions of this NTL derive from requirements established by statute, regulation, or by a provision in the lease, they do not have the force and effect of law and are not meant to bind the public in any way. The provisions of this NTL may also be made mandatory in whole or part through terms, stipulations, or conditions of approval from BOEM in leases, plans, permits, or other authorizations.

This NTL is intended only to provide clarity regarding existing requirements under the law and to provide recommendations for ongoing OCS oil- and gas-related activities in the Gulf of Mexico while BOEM continues to engage in consultation with NMFS.

Paperwork Reduction Act of 1995 Statement

The collection of information referred to in this NTL provides BOEM with information necessary to implement the requirements contained primarily in 30 CFR Part 550 Subpart B, and to a lesser extent 30 CFR 550 Subpart A and 30 CFR Part 551. An agency may not conduct or sponsor a collection of information unless it displays a currently valid OMB Control Number. The Office of Management and Budget (OMB) has approved the information collection requirements in these regulations under OMB Control Numbers 010-0151, 1010-0048, and 1010-0114. This NTL does not impose additional information collection requirements subject to the Paperwork Reduction Act of 1995.

Contact

Submit questions concerning this NTL to ProtectedSpecies@BOEM.gov. Additionally, please use the phrase “Rice’s Whale NTL” in the subject line of your communication.

Dr. James J. Kendall
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Bureau of Ocean Energy Management

August 17, 2023

Date