



November 20, 2020

VIA EMAIL

Dr. Walter Cruickshank
Acting Director
Bureau of Ocean Energy Management
1849 C Street, NW
Washington, D.C. 20240

Mr. Michael Celata
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U.S. Bureau of Ocean Energy Management
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New Orleans, LA 70123-2394

RE: Biological Opinion on Oil and Gas Program Activities in the Gulf of Mexico

Dear Dr. Cruickshank and Mr. Celata:

This letter follows our letter dated September 4, 2020, in which we expressed serious concerns with the premises for the Bryde’s whale “jeopardy” finding in the National Marine Fisheries Service’s (“NMFS”) Biological Opinion on the Federally Regulated Oil and Gas Program Activities in the Gulf of Mexico, FPR-2017-9234 (Mar. 13, 2020) (“Biological Opinion”). In this letter, we write separately to address our additional serious concerns with certain prescribed measures in the Biological Opinion that lack support and may improperly influence NMFS’s finalization of incidental take regulations under the Marine Mammal Protection Act (“MMPA”), for which the Bureau of Ocean Energy Management (“BOEM”) is the applicant. Our concerns are magnified by the fact that these measures—which are generally applicable to broad categories of activities throughout the Gulf of Mexico (“GOM”)—are already being imposed upon industry without undergoing a rulemaking process under the Administrative Procedure Act (“APA”). We appreciate your attention to the issues addressed below, as well as those addressed in our September 4, 2020 letter.

I. THE ASSOCIATIONS

Founded in 1971, the International Association of Geophysical Contractors (“IAGC”) is the global trade association for the geophysical and exploration industry, the cornerstone of the energy

industry. The IAGC optimizes the business and regulatory climate and enhances public understanding to support a strong, viable geophysical and exploration industry essential to discovering and delivering the world's energy resources. With more than 80 companies in nearly 50 countries, our membership includes onshore and offshore survey operators and acquisition companies, data and processing providers, exploration and production companies, equipment and software manufacturers, industry suppliers, and service providers.

The American Petroleum Institute ("API") is a national trade association representing nearly 600 member companies involved in all aspects of the oil and natural gas industry. API's members include producers, refiners, suppliers, pipeline operators, and marine transporters, as well as service and supply companies that support all segments of the industry. API and its members are dedicated to meeting environmental requirements, while economically developing and supplying energy resources for consumers.

The National Ocean Industries Association ("NOIA") represents and advances a dynamic and growing offshore energy industry, providing solutions that support communities and protect our workers, the public and our environment. NOIA has more than 100 member companies, representing offshore oil and natural gas, wind and mineral production, drilling contractors, service providers, geophysical explorers, manufacturers and suppliers, marine construction, marine and air transportation, and law, finance and professional services, among other offshore industry segments.

The Offshore Operators Committee ("OOC") is an organization of 47 producing companies and 61 service providers to the industry that conduct essentially all of the OCS oil and gas exploration and production activities in the GOM. Founded in 1948, the OOC is a technical advocate for the oil and gas industry regarding the regulation of offshore exploration, development, and producing operations in the GOM.¹

Founded in 1923, the Louisiana Mid-continent Oil and Gas Association ("LMOGA") is Louisiana's longest standing trade association, exclusively representing all aspects of the oil and gas industry onshore and offshore, including exploration, production, mid-stream activities, pipeline, refining and marketing. LMOGA and our member companies are committed to safety and environmental protection.

II. THE BIOLOGICAL OPINION INCLUDES MEASURES THAT HAVE NO FACTUAL, SCIENTIFIC, OR LEGAL SUPPORT

The Biological Opinion includes a number of measures that are assumed to be part of the proposed action because they are contained in the proposed incidental take regulations under the MMPA. NMFS states, in the Biological Opinion, that these measures are intended to "minimize adverse effects to marine mammals, including sperm whale and Gulf of Mexico Bryde's whale, from sound related to geophysical surveys."² However, some of these measures have no relation to sperm

¹ By submitting this letter, the Associations do not intend to limit the ability of their individual member companies to submit separate comments or present their own views on the issues discussed in this letter.

² Biological Opinion at 101.

whales or Bryde’s whales or are otherwise baseless or outdated. We are very concerned that the Biological Opinion’s reference to—and, in some cases, expansion of—these measures will improperly influence NMFS’s final MMPA rule. Our specific concerns are set forth below.

A. There is no factual or legal basis for the Biological Opinion’s inclusion and expansion of the “nearshore closure area.”

In the Biological Opinion, NMFS has proposed a “nearshore closure area” described as: “From January 1 through May 31, no use of airguns may occur shoreward of the 20-m isobath and between 90-84° W (buffered by 10 km).”³ This proposed measure lacks any factual, scientific, or legal bases.

First, neither Bryde’s whales nor sperm whales are found within the coastal area bounded by this closure. In fact, the nearshore closure was not intended to protect Bryde’s whales or sperm whales in the first place. Rather, it was implemented through a legal settlement under the pretext of providing additional “protection” for *coastal bottlenose dolphins* during the calving season, and was expanded to add a 5-km buffer via joint motion following an Unusual Mortality Event (“UME”) pertaining to coastal bottlenose dolphins in the northern GOM. The UME has long since closed and, as of the time of this writing, the only ongoing UME in the GOM pertains to southwest Florida bottlenose dolphins and is attributable to biotoxin.⁴ Moreover, none of the strandings or deaths in the UME have been attributed to deep penetration seismic surveys or any other oil and gas activities.

Second, notwithstanding the fact that the nearshore closure was never intended to apply to, and does not materially benefit Bryde’s whales or sperm whales, the Biological Opinion’s description of the nearshore closure area inexplicably *expands* the closure temporally and geographically. Specifically, the settlement agreement requires that:

the permittee shall not . . . *between January 1 and April 30*, operate any airguns or any airgun arrays within the portion of the area defined in Paragraph I.D(3) falling within the boundaries of the Unusual Mortality Event in the Northern Gulf of Mexico. . . .^[5]

³ *Id.* at 107.

⁴ See <https://www.fisheries.noaa.gov/national/marine-life-distress/active-and-closed-unusual-mortality-events> (last visited July 13, 2020).

⁵ See *NRDC et al. v. Jewell et al.*, No. 2:10-cv-01882 (E.D. La.), Dkt. 127-2, page 5 (emphasis added); see also *id.* at Dkt. 118-2, Section IX (“Intervenor-Defendants do not agree that all of the measures described in paragraph IX.A and IX.B are feasible or appropriate. Intervenor-Defendants shall be free to challenge any such measures should one or more of the Federal Defendants develop and implement them.”); *id.* at Dkt. 127-2, Section G (“The terms of this Stipulation have been agreed to for purposes of compromise. No party concedes by entering into this Stipulation that any of the permit requirements described above are warranted by scientific evidence or should be imposed after the Stay expires, or that these requirements are sufficient to achieve legal compliance or reduce biological risk over the long term.”).

The referenced area in Paragraph I.D(3) is defined as: “Coastal waters shoreward of the 20-meter isobath, and a 5 kilometer buffer extending seaward from the 20 meter isobath.”⁶ Thus, in the Biological Opinion, NMFS is proposing to *expand* the temporal closure, as currently stated in the settlement agreement, from four to five months (from January 1-April 30 to January 1-May 31) and *expand* the buffer area around the 20-m isobath from 5 km to 10 km.⁷ It goes without saying that NMFS has no authority to expand a measure applicable to non-ESA-listed species under the guise of an ESA Section 7 consultation.⁸

The proposed closure has no relation to Bryde’s whales or sperm whales and therefore is not an alternative or measure that will avoid the likelihood of jeopardy of, or minimize the impacts to, a *listed species*.⁹ Additionally, there are no data to suggest that seismic surveys negatively affect any bottlenose dolphin populations in any manner. In fact, because there are no negative effects, NMFS has (appropriately) waived the shutdown requirement for the *Tursiops* genus.¹⁰ We are gravely concerned that the Biological Opinion’s recitation—and unexplained (and unlawful) expansion—of a measure that has nothing to do with ESA-listed species will improperly influence the final MMPA rule or establish an unlawful regulatory measure under the ESA.

B. There is no scientific basis for the additional buffer around the Bryde’s whale area.

The Bryde’s whale area defined in the Biological Opinion includes an additional 10-km (6.2-mile) buffer.¹¹ However, the Biological Opinion provides no factual basis or analysis to support this additional buffer, nor does it identify the “ecological considerations” that apparently justify the buffer. And, in fact, there are no such justifications because there exists no evidence of any threats to the Bryde’s whale in the 10-km expanded area.

First, the Bryde’s whale area already includes all known sightings of Bryde’s whales in the eastern GOM. Specifically, the Bryde’s whale area defined in the Biological Opinion is the same as is defined in the Bryde’s Whale Status Review.¹² In turn, the area designated in the Status Review is an expansion of the Bryde’s Whale Biologically Important Area, as defined by LaBrecque et al.

⁶ *NRDC et al. v. Jewell et al.*, No. 2:10-cv-01882 (E.D. La.), Dkt. 127-2, page 3 (emphasis added).

⁷ The proposed MMPA incidental take regulation for the Gulf of Mexico proposes only a four-month closure. *See* 83 Fed. Reg. 29,212, 29,307 (Aug. 21, 2018).

⁸ *See* 16 U.S.C. § 1536(a)(2) (ESA Section 7 consultation applies only to “endangered species or threatened species”).

⁹ *See* 50 C.F.R. § 402.02.

¹⁰ *See* Biological Opinion at 106; *see also, e.g.*, 83 Fed. Reg. 63,268, 63,304-05 (Dec. 7, 2018) (waiving shutdown requirements for small dolphins in five incidental harassment authorizations applicable to proposed seismic surveys in the Atlantic Ocean).

¹¹ *See id.* at 292 (defining Bryde’s whale area as “the area from 100- to 400- meter isobaths from 87.5° W to 27.5° N as described in the status review (Rosel 2016) plus an additional 10 km around that area ... for added protection of this extremely small population and accounting for ecological considerations.”).

¹² Rosel et al. (2016). *Status Review of Bryde’s Whales (Balaenoptera edeni) in the Gulf of Mexico under the Endangered Species Act*. NOAA Technical Memorandum NMFS-SEFSC 692.

(2015).¹³ By including waters out to the 400-m depth contour to provide a buffer around the deeper water sightings, and west toward Mobile Bay, AL, the Status Review’s defined area includes *all* confirmed Bryde’s whale sightings in the Northeast GOM, rendering meaningless the 10-km buffer prescribed by the Biological Opinion. Even if there were reason for a buffer, it could only be rationally applied to deep water areas where the Bryde’s whale sightings have been clustered.

Second, there are no demonstrated threats from the oil and gas industry in and around the Bryde’s whale area.¹⁴ This is evidenced by the fact that this area does not include the general vessel traffic patterns by the industry. Nor is there significant oil and gas activity anywhere in the Eastern Planning Area that would provide a meaningful contribution to anthropogenic noise levels.¹⁵ As one peer reviewer on the Bryde’s whale status review noted, “the Bryde’s whale area is as quiet as it gets for the GOM, owing to a lack of nearby seismics and little shipping.”¹⁶ Relatedly, to our knowledge there have been no reported instances of oil and gas-associated vessels striking Bryde’s whales in the GOM over four decades of reporting.¹⁷ And even if there were an increased risk of oil and gas vessel strike in locations around the Bryde’s whale area of which we are not aware, then any buffer should be tailored only to those specific locations.

Third, any buffer around the Bryde’s whale area that is intended to reduce potential impacts caused by sound exposure from G&G surveys must be supported by application of the relevant acoustic criteria. Numerous analyses in the Biological Opinion, and in related MMPA and NEPA analyses, discuss modeled distances and durations of exposure to reach Level A and B harassment thresholds. Yet no discussion of those thresholds is included as the basis for the 10-km buffer. In fact, none of the relevant modeling results reported in existing documents indicate that either of those thresholds is met at or near a 10 km distance. Without a quantitative analysis using NMFS’s existing acoustic criteria, the 10-km buffer lacks a scientific basis.

In sum, specific information on the locations of Bryde’s whale sightings and vessel traffic attributable to oil and gas operations should be analyzed to determine whether a buffer is necessary

¹³ LeBrecque et al (2015). *Biologically Important Areas for Cetaceans Within U.S. Waters*. *Aquatic Mammals* 41(1):30-38.

¹⁴ The ESA listing rule for the Bryde’s whale identifies no such threats and NMFS has stated that it is presently unable to determine “critical habitat” in the areas that *are* inhabited by the species (much less determine that a 10-km buffer outside that range is necessary). 84 Fed. Reg. 15,446, 15,487 (May 15, 2019).

¹⁵ Even if such activity were to occur, it would likely require a new ESA Section 7 consultation because BOEM removed the area under the GOMESA moratorium from the action addressed in the Biological Opinion.

¹⁶ Robin S. Waples, et al., *Bryde’s Whale Status Review Report (ID 337): Peer Review Report*.

¹⁷ See https://tethys.pnnl.gov/sites/default/files/publications/Jensen_Silber_2003.pdf (last visited Aug. 31, 2020). Although other industries may not operate under similar reporting requirements, we are aware of only one documented vessel strike death of a Bryde’s whale in the Gulf of Mexico: a 2009 case where an animal was found in Tampa Bay across the bow of a freighter though it is unclear whether this was the vessel that struck and killed the animal. See <https://www.fisheries.noaa.gov/species/gulf-mexico-brydes-whale> (last visited Aug. 31, 2020); see also

<https://www.heraldtribune.com/article/LK/20091006/News/605228715/SH> (NOAA representative statement indicates the vessel was a freighter) (last visited Aug. 31, 2020).

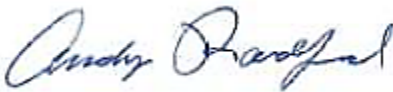
and, if so, where it is actually needed. In addition, this determination must be informed by a quantitative analysis that applies NMFS’s acoustic criteria to assess the scientific utility of any such buffer. The Biological Opinion provides *none* of this necessary information or analyses to support the 10-km buffer.

III. CONCLUSION

As described above, the Biological Opinion includes measures that have no factual, scientific, or legal support. These measures must be corrected to ensure that industry is not subjected to unlawful, unsupported, or unnecessary requirements under either the ESA or the MMPA. In addition, *all* of these measures—which are broadly applicable—must be implemented through an APA rulemaking process, which has not yet occurred. We request that BOEM engage directly with NMFS on these issues and we remain willing and available to further discuss these issues with BOEM and with NMFS.

Thank you for your attention to this matter. If you have questions, please do not hesitate to contact Dustin Van Liew (dustin.vanliew@iagc.org), Dr. Alex Loureiro (alex.loureiro@iagc.org), or Andy Radford (radforda@api.org).

Sincerely,



Andy Radford
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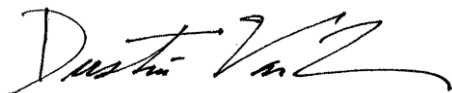
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