



HOUSE COMMITTEE ON
NATURAL RESOURCES
CHAIRMAN BRUCE WESTERMAN

To: Subcommittee on Water, Wildlife and Fisheries Republican Members
From: Subcommittee on Water, Wildlife and Fisheries staff,
Annick Miller (annick.miller@mail.house.gov) and Doug Levine
(doug.levine@mail.house.gov); x5-8331
Date: Wednesday, October 25th, 2023
Subject: Legislative Hearing on **H.R. 520, H.R. 2990, H.R. 5103, H.R. 5504, H.R. 5509, H.R. 5874, and H.R. __ by Rep. Graves of LA**

The Subcommittee on Water, Wildlife and Fisheries will hold a legislative hearing on: H.R. 520 (Rep. McClintock), to amend the Endangered Species Act of 1973 to provide that artificially propagated animals shall be treated the same under that Act as naturally propagated animals, and for other purposes; H.R. 2990 (Rep. Bonamici), “*National Oceanic and Atmospheric Administration Sexual Harassment and Assault Prevention Improvements Act of 2023*”; H.R. 5103 (Rep. Donalds), “*Fishery Improvement to Streamline untimely regulatory Hurdles post Emergency Situation Act*”; H.R. 5504 (Rep. Newhouse), To require the Director of the United States Fish and Wildlife Service and the Assistant Administrator for Fisheries of the National Oceanic and Atmospheric Administration to withdraw proposed rules relating to the Endangered Species Act of 1973, and for other purposes; H.R. 5509 (Rep. Porter), “*Electronic Permitting Modernization Act*”; H.R. 5874 (Rep. Ciscomani), “*Transboundary Aquifer Assessment Program Act*”; and H.R. __ (Rep. Graves of LA), To prohibit the implementation of certain documents until the Assistant Administrator for Fisheries of the National Marine Fisheries Service issues documents relating to the Rice’s whale, **on Wednesday, October 25, 2023, at 2:15 p.m. EDT in 1334 Longworth House Office Building.**

Member offices are requested to notify Thomas Shipman (thomas.shipman@mail.house.gov) by 4:30 p.m. on Tuesday, October 24, 2023, if their Member intends to participate in the hearing.

I. KEY MESSAGES

- H.R. 5504 requires the withdrawal of the three proposed Endangered Species Act (ESA) rules relating to interagency cooperation, critical habitat designation and the so called “blanket 4(d) rule” issued by the Biden Administration consolidate power in the hands of the administration and remove vital regulatory certainty for stakeholders.¹

¹ Endangered and Threatened Wildlife and Plants; Revision of Regulations for Interagency Cooperation (88 Fed. Reg. 40753 (June 22, 2023)); Endangered and Threatened Wildlife and Plants; Listing Endangered and Threatened Species and Designating Critical Habitat (88 Fed. Reg. 40764 (June 22, 2023)); Endangered and Threatened Wildlife and Plants; Regulations Pertaining to Endangered and Threatened Wildlife and Plants (88 Fed. Reg. 40742 (June 22, 2023)).

- The rulemakings addressed in H.R. 5504 roll back necessary reforms that were made by the Trump Administration, which modernized the ESA. These Biden rulemakings will do nothing to incentivize further species conservation, which may harm species.
- Instead of proposing counterproductive rulemakings, the Biden Administration should be working with Congress to modernize and reform the ESA.
- H.R. 5874 reauthorizes a program that provides state, federal and local officials with information to address pressing water resource challenges in the U.S.-Mexico border region.
- H.R. 5103 addresses the delays at the Office of Management and Budget when reviewing and approving fishery disaster declarations.

II. WITNESSES

Panel I

- *Members of Congress TBD*

Panel II

- *Mr. Gary Frazer*, Assistant Director for Ecological Services, U.S. Fish & Wildlife Service, Department of the Interior, Washington, D.C.
- *Dr. Richard Spinrad*, Under Secretary of Commerce for Oceans and Atmosphere & NOAA Administrator, Department of Commerce, Washington, D.C. [invited]
- *Ms. Shalanda Young*, Director, Office of Management and Budget, Washington, D.C. [invited]
- *Mr. Jonathan Wood*, Vice President of Law and Policy, Property and Environment Research Center, Bozeman, MT
- *Dr. Alex Loureiro*, Scientific Director, EnerGeo Alliance, Houston, TX
- *Dr. Sharon B. Megdal*, Director, Water Resources Research Center, The University of Arizona, Tucson, AZ
- *Mr. Robert E. Beal*, Executive Director, Atlantic States Marine Fisheries Commission, Arlington, VA
- *Mr. Tom Birmingham*, Water Policy Expert, Sacramento CA
- *Dr. Barbara Taylor*, Red List Coordinator for the Cetacean Specialist Group, International Union for the Conservation of Nature, San Diego, CA [*Minority Witness*]
- *Mr. Stephen Roady*, Senior Lecturing Fellow, Duke University School of Law, Professor of the Practice, Duke School of the Environment, Washington, D.C. [*Minority Witness*]

III. BACKGROUND

H.R. 520 (Rep. Tom McClintock, R-CA), To amend the Endangered Species Act of 1973 to provide that artificially propagated animals shall be treated the same under that Act as naturally propagated animals, and for other purposes.

H.R. 520 would amend the Endangered Species Act (ESA or Act) by requiring the Secretaries of the Interior and Commerce to not distinguish between naturally propagated (born in the wild)

and artificially propagated (born through artificial means) species in making any determination under the Act. The bill also requires the Secretaries to use artificially propagated animals to assist in mitigation measures required by the Act. The ESA was enacted in 1973:

to provide a means whereby the ecosystems upon which endangered and threatened species depend may be conserved, to provide a program from the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth [in this Act].²

This mandate impacts federal agencies, state and local entities, private organizations, and individuals by covering federal “actions” such as funding, permitting, licensing, and the granting of easements and rights-of-ways. Under the current framework, the ESA charges the U.S. Fish and Wildlife Service (USFWS) and the National Oceanic and Atmospheric Administration’s National Marine Fisheries Service (the Services) to field petitions to list species as threatened or endangered, and to designate critical habitat.³

In many cases, the Services will set a recovery goal for a listed species that acts as a benchmark for the recovery of that species. In addition, the Services may assign a population threshold that justifies certain conservation or mitigation actions to address any threats or to recognize conservation advancements for a species. As written, the ESA does not explicitly treat artificially propagated animals the same as wild born animals, therefore in practice, it is up to the Services’ discretion whether to consider artificially propagated animals when making determinations under the act.⁴ For example, in 2005 the National Marine Fisheries Service (NMFS), who has jurisdiction over salmon and steelhead, finalized agency policy that states that hatchery fish (artificially propagated) can only be taken into account in ESA listing decisions if they exhibit a “level of genetic divergence relative to the local natural population(s) that is not more than what would be expected between the closely related the natural populations”.⁵

H.R. 2990 (Rep. Suzanne Bonamici, D-OR), “National Oceanic and Atmospheric Administration Sexual Harassment and Assault Prevention Improvements Act of 2023”

The National Oceanic and Atmospheric Administration Commissioned Officer Corps (NOAA Corps) is one of the eight uniformed services of the United States.⁶ There are approximately 330 NOAA Corps officers who are charged with nautical charting and operating NOAA research vessels and hurricane aircraft.⁷

The Fiscal Year (FY) 2017 National Defense Authorization Act included provisions to address sexual harassment and assault issues at NOAA by requiring the agency to develop a policy for

² Endangered Species Act of 1973, 16 U.S.C. § 1531 et seq.

³ *The Endangered Species Act: How Litigation is Costing Jobs and Impeding True Recovery Efforts: Oversight Hearing Before the H. Comm. On Natural Resources*, 112th Cong. (2011) ([testimony of Karen Budd-Falen, Budd-Falen Law Offices, LLC., at 10](#)).

⁴ Endangered Species Act of 1973, 16 U.S.C. § 1531 et seq.

⁵ [70 FR 37204](#).

⁶ NOAA Corps, <https://www.oma.noaa.gov/noaa-corps/about-noaa-corps>.

⁷ Id.

preventing and responding to sexual assault and sexual harassment of its workforce.⁸ In response, NOAA issued its Sexual Assault and Sexual Harassment Prevention and Response Policy in February 2018.⁹ In 2021, the Government Accountability Office released a report which found that NOAA has made substantial progress since 2017 in preventing and responding to cases of sexual harassment and assault, but the evaluation concluded that the agency still has shortcomings.¹⁰

H.R. 2990 expands coverage of NOAA’s sexual harassment prevention and response policy to include observers and voting members and staff of regional fishery management councils. It requires NOAA to report a synopsis of each case of sexual harassment and the disciplinary action taken in each case, and it also requires NOAA to develop a restricted reporting system in order for survivors of sexual assaults to receive services without triggering an investigative process.

H.R. 2990 has three cosponsors: Rep. Jared Huffman (D-CA), Rep. Maria Salazar (R-FL), and Resident Commissioner Jenniffer Gonzalez-Colon (R-PR).

H.R. 5103 (Rep. Byron Donalds, R-FL), “Fishery Improvement to Streamline untimely regulatory Hurdles post Emergency Situation Act or the “FISHES Act”

Fisheries are critical to the United States coastal economy. They are an essential part of coastal economies, providing jobs for fishermen, fish processors, and related maritime support industries. However, fisheries are subject to a number of factors that can cause sudden and unexpected losses, leading to serious economic impact for fishers and their communities. These factors include events such as: hurricanes and typhoons, oil spills, harmful algal blooms, and other types of disasters, both natural and man-made.¹¹

On December 29, 2022, Congress enacted the Fishery Disasters Improvement Act, as part of the Consolidated Appropriations Act of 2023, which amended the Magnuson-Stevens Act (MSA).¹² Changes included a 120-day timeline for the Secretary to evaluate a request.

H.R. 5103 expands on the updates from 2022 by setting timelines for the Office of Management and Budget (OMB) to review disaster requests in an effort to expedite the overall process. Specifically, it requires OMB to approve a spending plan for a fishery disaster declared under the MSA within 30 days of it being submitted. In addition, OMB must return a denied spend plan to the Secretary of Commerce within 15 days with a description of the changes needed for it to be approved.

H.R. 5103 has nineteen [cosponsors](#), including fourteen Republicans.

⁸ [P.L. 114-328](#).

⁹ Workplace Violence Prevention and Response Program, <https://www.noaa.gov/workplace-violence-prevention-response-program>.

¹⁰ Sexual Assault and Harassment: NOAA Has Made Substantial Progress in Prevention and Response but Could Further Improve Its Processes. GAO-21-560 Published: Aug 27, 2021. <https://www.gao.gov/products/gao-21-560>.

¹¹ Fishery Disaster Assistance, <https://www.fisheries.noaa.gov/national/funding-and-financial-services/fishery-disaster-assistance>.

¹² [P.L. 117-328](#).

H.R. 5504 (Rep. Dan Newhouse, R-WA), To require the Director of the United States Fish and Wildlife Service and the Assistant Administrator for Fisheries of the National Oceanic and Atmospheric Administration to withdraw proposed rules relating to the Endangered Species Act of 1973, and for other purposes.

H.R. 5504 would require the withdrawal of three Biden Administration rulemakings that were proposed on June 22, 2023, dealing with the implementation of the ESA. Two of the rulemakings were proposed jointly by the Services,¹³ and the third was solely proposed by the USFWS.¹⁴

The rulemaking entitled “Endangered and Threatened Wildlife and Plants; Revision of Regulations for Interagency Cooperation,” makes changes to how federal agencies must consult with the Services under Section 7 of the ESA. Section 7 requires all federal agencies to consult with the Services when an agency action may negatively impact a species listed under the ESA. The rule makes changes to the definition of “effects of the action” and “environmental baseline,” and revises provisions related to reasonable and prudent measures (RPMs) when it relates to the incidental take of a listed species.¹⁵ Of particular concern is the removal of the framework that determines whether a consequence of a proposed project is “reasonably certain to occur.”¹⁶ By removing this framework, USFWS and NMFS are removing important considerations from the consultation process, such as, past experiences with similar actions, and any remaining economic, administrative, and legal requirements necessary for the activity to go forward.

There is also concern that the proposal allows USFWS and NMFS to potentially require RPM’s outside the action areas of a project in order to offset any remaining impacts of the incidental take of listed species.¹⁷ This proposal would substantially increase the Services’ discretion and potentially cause heavy increases in project costs by requiring actions, in the name of mitigation, that have little to do with the proposed project or the species in question.

The rulemaking entitled “Endangered and Threatened Wildlife and Plants; Listing Endangered and Threatened Species and Designating Critical Habitat,” makes sweeping changes to how critical habitat can be designated and the process for listing and delisting species under Section 4 of the ESA.¹⁸ Under the proposed changes, the Services would remove the need, when designating unoccupied critical habitat, for the Secretary to be “reasonably certain” that an area will contribute to conservation of the species and that “it contains one or more of the physical or biological features essential to the conservation of the species.”¹⁹ The proposed rule also removes the two-step process for designating critical habitat that requires the Services to consider all areas occupied by the species before considering and designating unoccupied areas

¹³ Endangered and Threatened Wildlife and Plants; Revision of Regulations for Interagency Cooperation (88 Fed. Reg. 40753 (June 22, 2023)); Endangered and Threatened Wildlife and Plants; Listing Endangered and Threatened Species and Designating Critical Habitat (88 Fed. Reg. 40764 (June 22, 2023)).

¹⁴ Endangered and Threatened Wildlife and Plants; Regulations Pertaining to Endangered and Threatened Wildlife and Plants (88 Fed. Reg. 40742 (June 22, 2023)).

¹⁵ [88 FR 40753](#).

¹⁶ 50 C.F.R. § 402.17.

¹⁷ *Id.*, *supra* note 13.

¹⁸ [88 FR 40764](#).

¹⁹ *Id.*

as critical habitat.²⁰ By removing these requirements, nearly all certainty for stakeholders as to what may be considered critical habitat is lost.

When it comes to the process for listing and delisting species under the ESA, the proposed rule also makes substantial changes to existing regulations. The rule adds the phrase “without reference to possible economic or other impact of such determination,” which is unnecessary given that the ESA explicitly states the economic costs are not a factor in making listing decisions.²¹ However, removing any reference to the economic cost of a listing in regulation is a step in the wrong direction because it removes the ability of the public to know what the economic impacts of a particular listing decision are. In addition, the rule states that the Services are considering whether to rescind the framework created by the Trump administration for interpreting and implementing the “foreseeable future” for threatened species.²² The rule also removes the phrase “shall delist a species” and replaces it with “it is appropriate to delist a species.”²³ This change is intended to clarify that the Services may not take immediate action to delist a species following completion of a status review.

The rule entitled “Endangered and Threatened Wildlife and Plants; Regulations Pertaining to Endangered and Threatened Wildlife and Plants,” which was only proposed by USFWS, reinstates the so called “blanket 4(d) rule.” Section 4(d) of the ESA directs the Secretary of the Interior to issue regulations deemed “necessary and advisable to provide for the conservation of” threatened species,²⁴ however the “blanket 4(d) rule” allows for threatened species to be given most of the same protections as endangered species.²⁵ This goes against the intent of Congress in the ESA that threatened and endangered species should be treated differently.²⁶ As California Senator John Tunney (D) stated during Senate debate on the ESA in 1973, Congress intended regulations for threatened species to be “tailored to the needs of the animal” and give states wide latitude to aid in the recovery of threatened species.²⁷ In the rulemaking, the USFWS signals that they will no longer consider what is best for each species before applying the blanket rule.²⁸ The rule states:

If this proposal is finalized, for threatened species that use the blanket rules found at 50 CFR 17.31(a) and 17.71(a), we will not make necessary and advisable determinations for the use of those blanket rules in future proposed or final listing rules.²⁹

²⁰ *Id.*

²¹ [88 FR 40764](#).

²² *Id.*

²³ *Id.*

²⁴ “Section 4(d) Rules Under the Endangered Species Act.” U.S. Fish and Wildlife Service. October 2021. [Section 4\(d\) Rules Under the Endangered Species Act \(fws.gov\)](#).

²⁵ [88 FR 40742](#).

²⁶ [16 U.S. Code § 1532 - Definitions | U.S. Code | US Law | LII / Legal Information Institute \(cornell.edu\)](#).

²⁷ “Revisions of the Regulation for Prohibitions to Threatened Wildlife and Plants.” Megan E. Jenkins and Camille Wardle. The Center for Growth and Opportunity at Utah State University. 10/17/18. [Regulations for Prohibitions to Threatened Wildlife and Plants - The CGO](#).

²⁸ [88 FR 40742](#).

²⁹ *Id.*

The blanket rule was rescinded by the Trump administration in 2019 and has never been implemented by NMFS.³⁰

H.R. 5504 has four Republican cosponsors: Rep. Harriet Hageman (WY-AL), Rep. Lauren Boebert (CO-03), Rep. Jerry Carl (AL-01), and Rep. Tracey Mann (KS-01). A Senate companion of this bill has been introduced by Senator Cynthia Lummis (R-WY) and is cosponsored by 17 Republican Senators.

H.R. 5509 (Rep. Katie Porter, D-CA), “Electronic Permitting Modernization Act”

H.R. 5509 requires the Secretary of the Interior to “design and deliver a centralized, modernized electronic permitting system to accept and process applications for permits, forms, and other paperwork required for activities regulated by the department.” This language is similar to that of President Biden’s Executive Order (E.O.) 14058, which directs the Secretary of the Interior to redesign the U.S. Fish and Wildlife Service (USFWS) website to support a centralized, modernized electronic permitting system to accept and process applications for permits. However, the USFWS already has an electronic permitting system, which launched in 2020 as mandated by the 21st Century Integrated Digital Experience Act (Public Law 115-336).³¹

Many activities that take place within the Department of the Interior (Department or DOI) require a permit. There is not a single definition of “permit” across DOI agencies. For example, the term is sometimes used to authorize a particular land use, such as by the Bureau of Land Management (BLM) in issuing permits for livestock grazing.³² At other times the term is used more generally, as covering the authorizations for a variety of land uses. Other terms that could also be viewed as a “permit” include leases, special use authorizations, and rights-of-way.

The Subcommittee on Water, Wildlife and Fisheries held a hearing in May on H.R. 2689, a more expansive version of this bill, that called on agencies across the Executive Branch to develop electronic systems. The Department gave testimony on that bill, but did not take a position in support or opposition.³³ In questions for the record, the USFWS, which is just one of the agencies H.R. 5509 would impact, confirmed that they have spent \$20.3 million to “improve and expand ePermits,” since FY 2020. In addition, USFWS requested \$13.5 million for ePermits in their FY 2024 budget request.³⁴

³⁰ “Administration Continues Overhaul of Endangered Species Act Regulations.” Tyson Kade and Jordan Smith. Van Ness Feldman LLP. [Administration Continues Overhaul of Endangered Species Act Regulations | Van Ness Feldman LLP \(vnf.com\)](https://www.vnf.com).

³¹ U.S. Fish and Wildlife Service, Press Release: “Service Launches New Electronic Permitting System to Streamline and Improve Permitting Process.” October 21, 2020. <https://www.fws.gov/press-release/2020-10/service-launches-new-electronic-permitting-system-streamline-and-improve> .

³² U.S. Bureau of Land Management, Livestock Grazing on Public Lands. <https://www.blm.gov/programs/natural-resources/rangelands-and-grazing/livestock-grazing>

³³ “Testimony of Matthew J. Strickler.” House Committee on Natural Resources. Subcommittee on Water, Wildlife and Fisheries. 5/10/23. [testimony_strickler.pdf \(house.gov\)](https://www.house.gov/naturalresources/testimony_strickler.pdf).

³⁴ Questions for the Record. House Natural Resources Committee. Subcommittee on Water, Wildlife and Fisheries. 9/25/23. https://naturalresources.house.gov/uploadedfiles/doi_qfr_responses_to_bentz_and_carl.pdf.

In addressing questions about how many permits would be impacted and how much implementation of that bill would cost, DOI could not give an estimate or firm number. On the question of cost of implementation, the Department said, “we would anticipate that a new system would require significant funding and substantial agency staffing.”³⁵

H.R. 5509 is cosponsored by Rep. Doug LaMalfa (CA-01).

H.R. 5874 (Rep. Juan Ciscomani, R-AZ), “Transboundary Aquifer Assessment Program (TAAP) Act”

H.R. 5874 would reauthorize appropriations for the United States-Mexico Transboundary Aquifer Assessment Act³⁶ (the Act) through 2035. In addition, the bill would add Arizona to the list of states that the Secretary of the Interior may evaluate and designate additional priority transboundary aquifers under the Act.

The United States-Mexico Transboundary Aquifer Assessment Act was signed into law by President George W. Bush on December 22, 2006. The primary goal of the Act was to develop a program to assess priority aquifers along the U.S.-Mexico border. Since the passage of the bill, the U.S. Geological Survey (USGS) has created a program called the Transboundary Aquifer Assessment Program, which collects data on groundwater quality and quantity along the U.S.-Mexico border, designates priority aquifers in that region, and monitors the health of these aquifers over time.

According to USGS, the agency spends \$1 million annually on the program, while receiving no reimbursable funding from other agencies or partners. TAAP currently has several studies ongoing related to geological and hydrogeological activity in priority aquifers and water quality in these aquifers.³⁷ There are four priority aquifers currently designated by the program: the Santa Cruz and San Pedro aquifers in Southern Arizona, and the Mesilla and Hueco Bolson Aquifers located in the greater El Paso area in Texas and New Mexico.³⁸ As written, the bill would need to shorten the authorization period to seven years to meet floor protocols.

H.R. 5874 has one bipartisan cosponsor: Rep. Melanie Stansbury (D-NM).

H.R. Rep. Garret Graves, R-LA), To prohibit the implementation of certain documents until the Assistant Administrator for Fisheries of the National Marine Fisheries Service issues documents relating to the Rice’s whale.

Section 7 of the ESA requires federal agencies to ensure that their actions are not likely to jeopardize the continued existence of endangered or threatened species (ESA-listed) or adversely modify or destroy their designated critical habitat. Federal agencies must do so in consultation

³⁵ *Id.*

³⁶ [P.L. 109-448](#).

³⁷ “Transboundary Aquifer Assessment Program.” Studies. [TAAP \(usgs.gov\)](#)

³⁸ “Transboundary Aquifer Assessment Program.” Priority Aquifers. [TAAP \(usgs.gov\)](#)

with the NMFS for ESA-listed species or designated critical habitat that may be affected by the action that are under NMFS jurisdiction.³⁹

The Outer Continental Shelf (OCS) oil and gas program in the Gulf of Mexico (Oil and Gas Program) meets ESA requirements through a programmatic biological opinion (BiOp). A BiOp considers all permitted actions and plans approved by the Bureau of Ocean Energy Management (BOEM) and Bureau of Safety and Environmental Enforcement (BSEE) under the OCS Lands Act.⁴⁰ The Oil and Gas Program activities include pre-lease activities related to geological and geophysical (G&G) surveys conducted under permits, prior to leasing, and activities associated with end-of-lease-life structure and equipment removal (decommissioning).

The BiOp also considers the promulgation of federal regulations under the Marine Mammal Protection Act (MMPA) for the incidental take of marine mammals due to G&G surveys specific to the proposed Oil and Gas Program activities and subsequent issuance of letters of authorization by NMFS.

BOEM and BSEE have engaged in numerous consultations with NMFS over the years to ensure that authorizing the Oil and Gas Program is consistent with the ESA. In a BiOp issued in March 2020 (2020 BiOp), NMFS concluded that the Oil and Gas Program was not likely to jeopardize various threatened or endangered marine species.⁴¹ However, NMFS determined that the Oil and Gas Program did pose a risk to the Rice's (or Bryde's) whale in the whale's habitat located in a small portion of the eastern Gulf.⁴² This area, shown in Figure 1, is already excluded from lease sales by congressional moratorium.

In the 2020 BiOp, NMFS concluded that BOEM and BSSE could adequately mitigate risk associated by the Oil and Gas Program by adopting a "reasonable and prudent alternative" to protect the Rice's whale. This consisted of several restrictions in the purple

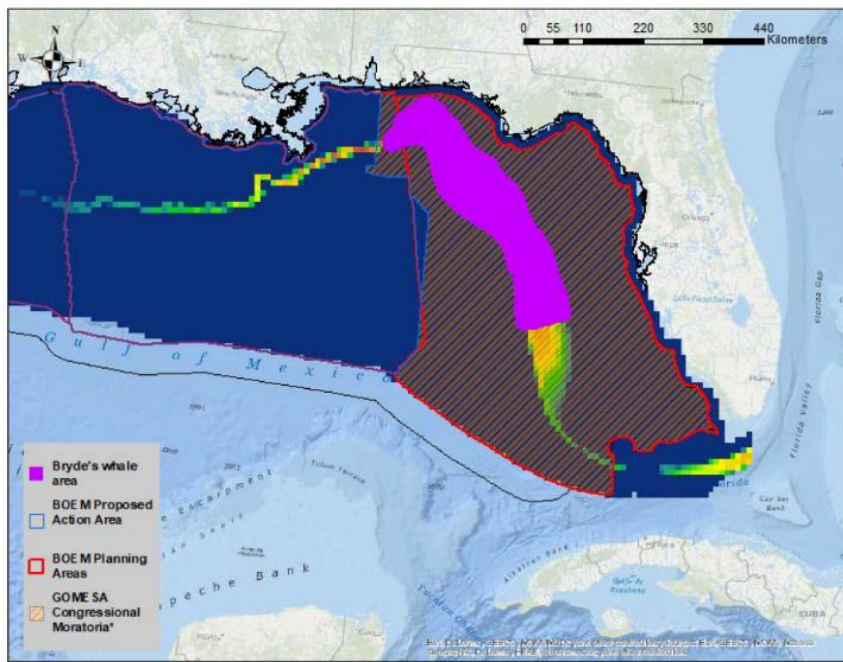


Figure 1: Rice's (Bryde's) whale area described in 2020 BiOp | Source: NOAA

³⁹ 50 CFR §402.14(a).

⁴⁰ 43 USC §1331 et seq. (2008); OCSLA.

⁴¹ United States. National Marine Fisheries Service (2020). Biological Opinion on the Federally Regulated Oil and Gas Program Activities in the Gulf of Mexico. <https://doi.org/10.25923/hyeh-mb74>

⁴² Id at 597.

highlighted whale area in Figure 1. These restrictions included prohibitions on nighttime transit or in low visibility conditions, a 10-knot, year-round speed restriction during daylight hours maintaining a distance from any whale that could be a Rice's whale, and requiring all vessels 65 feet or greater to have a functioning Automatic Identification System.⁴³

In October 2020, environmental groups sued NMFS (but not BOEM) in the District of Maryland, arguing that the 2020 BiOp understated the risk of the Oil and Gas Program to the Rice's whale and that the reasonable-and-prudent alternative was insufficiently protective.⁴⁴ In July 2023, the plaintiffs and NMFS agreed to stay the proceedings so that NMFS could update the 2020 BiOp.

The legislation would codify the 2020 BiOp for the Oil and Gas Program. The bill also sets certain requirements that NMFS must meet before it can reinstate consultation on a new BiOp. These requirements include: 1) the issuance of a final rule designating critical habitat for the Rice's whale that incorporates data from by a National Academies of Science, Engineering, and Medicine study to determine the occurrence and range of the Rice's whale in the Central, Eastern, and Western Gulf of Mexico Planning Areas; and 2) revising and finalizing the proposed rule "Taking and Importing Marine Mammals; Taking Marine Mammals Incidental to Geophysical Surveys in the Gulf of Mexico."⁴⁵

In addition, the bill directs how NMFS should consult and cooperate with stakeholders on actions related to the preparation of BiOps. These requirements mirror Section 4004 of the Water Infrastructure Improvement for the Nation Act⁴⁶, which requires the Secretaries of Commerce, and the Interior to ensure that any public water agency with contracts for water with Central Valley Project and State Water Project in California can be involved in the BiOp process.

IV. MAJOR PROVISIONS & ANALYSIS

H.R. 520 Rep. Tom McClintock, R-CA). To amend the Endangered Species Act of 1973 to provide that artificially propagated animals shall be treated the same under that Act as naturally propagated animals, and for other purposes.

- Amends Section 4 of the ESA to require the Secretaries of the Interior and Commerce to not distinguish between naturally propagated animals and artificially propagated animals in making determinations under the act.
- Authorizes the Secretaries to use artificial propagation of animals of a species for purposes of any mitigation required under the ESA.
- The provisions of the bill would apply to both threatened and endangered species.

H.R. 2990 (Rep. Suzanne Bonamici, D-OR), "National Oceanic and Atmospheric Administration Sexual Harassment and Assault Prevention Improvements Act of 2023"

⁴³ Id. at 597

⁴⁴ 142-70, Sierra Club v. NMFS, No. 8:20-Cv-3060 (D. Md. filed Oct. 21, 2020), Dkt.1

⁴⁵ 88 Fed. Reg. 916; January 5, 2023.

⁴⁶ [P.L. 114-322](#).

- Requires NOAA to report a synopsis of each case of sexual harassment and the disciplinary action taken in each case.
- Requires NOAA to develop a restricted reporting system for survivors of sexual assaults to receive services without triggering an investigative process.

H.R. 5103 (Rep. Byron Donalds, R-FL), “Fishery Improvement to Streamline untimely regulatory Hurdles post Emergency Situation (FISHES) Act”

- Requires the Office of Management and Budget (OMB) to approve a spend plan for a fishery disaster declared under section 312(a) of the Magnusen-Stevens Fisheries Conservation and Management Act within 30 days of it being submitted.
- Requires OMB to return a denied spend plan to the Secretary of Commerce within 15 days with a description of the changes needed for it to be approved.
- If the spend plan is resubmitted, OMB shall approve or deny the spend plan within 15 days of receipt.

H.R. 5504 (Rep. Dan Newhouse, R-WA), To require the Director of the United States Fish and Wildlife Service and the Assistant Administrator for Fisheries of the National Oceanic and Atmospheric Administration to withdraw proposed rules relating to the Endangered Species Act of 1973, and for other purposes.

- Requires the UUSFWS and the NMFS to withdraw two proposed rulemakings: “Endangered and Threatened Wildlife and Plants; Revision of Regulations for Interagency Cooperation” (88 Fed. Reg. 40753 (June 22, 2023)) and “Endangered and Threatened Wildlife and Plants; Listing Endangered and Threatened Species and Designating Critical Habitat” (88 Fed. Reg. 40764 (June 22, 2023)).
- Requires the UUSFWS to withdraw the proposed rulemaking: “Endangered and Threatened Wildlife and Plants; Regulations Pertaining to Endangered and Threatened Wildlife and Plants” (88 Fed. Reg. 40742 (June 22, 2023)).

H.R. 5509 (Rep. Katie Porter, D-CA), “Electronic Permitting Modernization Act”

- Requires the Department of the Interior, to the extent practicable, to design and deliver an electronic permitting system.
- Requires the Department of the Interior to provide a centralized electronic permitting system online repository.

H.R. 5874 (Rep. Juan Ciscomani, R-AZ), “Transboundary Aquifer Assessment Program (TAAP) Act”

- Adds Arizona to the list of states that the Secretary of the Interior may evaluate and designate additional priority transboundary aquifers.
- Extends appropriations for the United States-Mexico Transboundary Aquifer Assessment Act through 2035.

H.R. _____ (Rep. Garret Graves, R-LA), To prohibit the implementation of certain documents until the Assistant Administrator for Fisheries of the National Marine Fisheries Service issues documents relating to the Rice’s whale.

- Codifies the Biological Opinion (BiOp) for oil and gas operations in the Gulf of Mexico.
- In order to reinitiate consultation on the BiOp, the NMFS Assistant Administrator must first issue a final rule designating critical habitat for the Rice’s whale, and revises and finalizes the proposed rule “Taking and Importing Marine Mammals; Taking Marine Mammals Incidental to Geophysical Surveys in the Gulf of Mexico” (88 Fed. Reg. 916; January 5, 2023).
- Requires the NMFS Assistant Administrator to enter into an agreement with the National Academies of Science, Engineering, and Medicine to conduct a study to determine the occurrence and range of the Rice’s whale in the Gulf of Mexico.

V. COST

The Congressional Budget Office has not provided cost estimates for these bills.

VI. EFFECT ON CURRENT LAW

[H.R. 520](#)

[H.R. 5874](#)

[H.R. 2990](#)