

Stephanie Otts:

Good afternoon, everyone. I'm Stephanie Otts. I'm the director of the National Sea Grant Law Center. Thank you so much for joining us for the last installment of our 2023 webinar series. So today, I'm excited to share a little bit of information about the legal efforts to protect the Rice's whale in the Gulf of Mexico. So, welcome.

So before we begin, just a few quick housekeeping notes. Participants are muted right now to reduce background noise, but feel free to use the chat box at any time if you have questions and I'll try to answer them as we go along. If you have technical issues, I'm not sure we can help, but you are welcome to private chat with Lauren, the National Sea Grant Law Center's project coordinator and the webinar host for today. I also wanted to let everyone know that the webinar is being recorded and we will post it to the National Sea Grant Law Center's website as soon as we can after the webinar. Usually takes a couple of days to get the transcripts and captions finalized, but be on the lookout for an email about that and you are welcome to share that with any colleagues that might be interested. And we think might have a bit of a small group today, and there will be plenty of time for a Q&A at the end. And at that time, you'll also be able to take yourself off of mute to ask a question verbally.

So just in case you are new to our webinar series or don't know much about the National Sea Grant Law Center, we were founded in 2002. We're housed at the University of Mississippi School of Law, and our mission is to conduct legal research, education, and outreach for the wider Sea Grant network of 34 Sea Grant programs and their partners. So if you're interested in our work and what else we do and have going on, I encourage you to visit our website and to also follow us on social media. Before I jump in, just I wanted to give a roadmap of where we're going on this presentation. So I'm going to start with a little bit of background about the species, then discuss the listing process under the Federal Endangered Species Act. And then I'm going to talk about some of the legal protections that flow from that designation as well as a number of related lawsuits. And then wrap up with a brief mention of some other legal efforts that are proceeding.

The Bryde's whales are failing whales that as a species are found throughout the world in the Indian Pacific and Atlantic oceans. The broader scientific community currently recognizes two subspecies of Bryde's whale, although it's important to keep in the back of your mind that there's always been debate about these taxonomic classifications. So generally speaking, the Eden's whale is smaller and found primarily in the coastal waters of the Indian Ocean and the Western Pacific Ocean. And then the Bryde's whale is a larger pelagic form found worldwide. And I'm fascinated how we have the subspecies named the same as the species for Bryde's whale, but welcome to the taxonomic distinctions in whale classifications. So while Bryde's whales were not historically subject to heavy whaling pressures and the global stocks appear stable, they are a listed CITES Appendix I species, which means they are a species of concern and there is a global prohibition on trade. The presence of Bryde's whales in the Gulf of Mexico was first recognized in 1965. At that time, they were assumed to be a population of the wider species of Bryde's whales, but the connection had not been studied until recently.

So just a little bit of background on the Endangered Species Act before we jump in. The Endangered Species Act of 1973 was enacted to prevent harm and loss to endangered and threatened species and to protect the places where they live. And the act celebrated an oppressive milestone this year when it turned 50. So happy birthday to the Endangered Species Act. And this is a landmark piece of environmental legislation that is a powerful tool for species conservation. Responsibility for implementing the act and protecting listed species is shared by NOAA Fisheries, also known as the National Marine Fishery Service within the National Oceanic and Atmospheric Administration, and the US Fish and Wildlife Service within the Department of Interior. NOAA Fisheries has responsibility for most marine species and the Fish and Wildlife Service has responsibility for terrestrial and freshwater

species. There are some interesting exceptions to that split in responsibility. For instance, the Fish and Wildlife Service has responsibility for walrus and polar bears most likely because they come on land for some of their lifecycle and time. But overall, NOAA Fisheries has responsibility for 163 endangered and threatened marine species.

And through the next couple of slides, I'll highlight some of the stages of the listing process using the Gulf of Mexico Bryde's whale as an example. So in 2014, researchers published a paper finding that the Gulf of Mexico Bryde's whale population was actually phylogenetically distinct from other members of the Bryde's whale complex. At the time, the authors estimated that the population was around 33 individual animals living in a severely restricted geographic range. So this is a population of animals that is extremely small and doesn't have a very large geographic range. Following the release of these research findings, the Natural Resources Defense Council, an environmental advocacy organization, filed a petition with NOAA Fisheries to list the Gulf of Mexico population as endangered under the Federal Endangered Species Act. So to qualify for a listing, a group of organisms must constitute a species, but this includes both taxonomic species, so the big taxonomic classification of a species as well as subspecies. And those species or subspecies must be in danger of extinction throughout all or a significant portion of their range.

So when NOAA receives a petition for a species listing, then it often convenes a status review team to conduct an investigation into finding out what is the status of that species. That took a couple of years and the status review team released its findings in December of 2016 determining that the Gulf of Mexico Bryde's whale was at high risk of extinction due to its small population and limited geographic range. Based on all these findings that the status review team put together, NOAA Fisheries determined that the Gulf of Mexico Bryde's whale was endangered and officially listed the species on the Endangered Species Act list in [inaudible 00:09:11], which is actually only five years. So in federal government regulatory terms, that's not that long of a time period to go from the first concerns being raised about the population to being listed on the Endangered Species Act list.

So in order for a species to be listed as endangered, NOAA fisheries must determine that its survival is in jeopardy based on one of five factors. It's either a decline in habitat, over utilization, disease or predation, inadequacy of regulatory mechanisms to protect the species or other factors threatening the species' existence. So there's four primary categories, and then you've got this catchall for other factors. The Gulf of Mexico Bryde's whale faces a range of threats similar to other marine mammals in the Gulf of Mexico. And the agency stated in its final rule listing the species that the most serious threats to the Gulf of Mexico Bryde's whale are its small population size, energy exploration, development and production, oil spills and oil spill responses, vessel collisions, anthropogenic noise mainly from shipping, and oil and gas activities, and fishing gear entanglements.

And then NOAA also determined that the existing regulatory mechanisms, including protections under the Marine Mammal Protection Act, are not adequate to control the most serious threats. And thinking a little bit into that, you may be wondering how the Marine Mammal Protection Act does not protect a marine mammal. Right? So the Marine Mammal Protection Act does prohibit the take of marine mammals in US waters, including harassing, hunting, capturing or killing marine mammals. And on its face, that seems like it would be adequate, but one of the reasons why it isn't sufficient is that some takes or harm, harassment, killing of marine mammals are allowed under the Marine Mammal Protection Act pursuant to permits and authorizations issued by NOAA Fisheries. The US Air Force, for example, requested and received permission to incidentally take marine mammals including the Gulf of Mexico Bryde's whale during testing and training activities in the Eglin Gulf Test and Training Range. So they just have a testing and training range in the Gulf of Mexico that they say that they could end up taking most likely through harassment through noise, marine mammals.

And then there's also an effort in Congress to exempt the Air Force from these Marine Mammal Protection Act requirements, which would obviously, if they get those exemptions, it would further limit the protections. And so while some take can be authorized by NOAA Fisheries under the Endangered Species Act, the Endangered Species Act has different standards for those authorizations as well as additional habitat provisions that we'll talk about in a minute that are considered more protective towards those listed species. So that's the background of the threats facing the Gulf of Mexico Bryde's whale and why the agency justified their listing. So while the Gulf of Mexico Bryde's whale was listed as endangered in April of 2019, that was not the end of the story. And so regulatory activity related to the listing process continues to this day as there was a technical correction in August 2021 for a name change. And now, NOAA is finally taking action to designate critical habitat.

So you may have been wondering for a while why I've been referring to the species as the Gulf of Mexico Bryde's whale when the title of this webinar is Legal Protection for the Rice's Whale. And that's because that was the name of the species when it was listed in April of 2019. In 2019, it was referred to as the Gulf of Mexico Bryde's whale. But in August 2021, NOAA issued a technical correction to the Endangered Species Act listing to revise the common and scientific name of the Gulf of Mexico Bryde's whale to the Rice's whale. This change was spurred by the publication of an article in the journal of Marine Mammal Science in which researchers determined that the Gulf of Mexico Bryde's whale was in fact a distinct species which they named the Rice's whale. This level of genetic distinctiveness from other Bryde's whales in the complex was identified in the 2014 study I mentioned earlier, but a separate species description was not provided at that time. So this article added more detail and more research to underpin that separate species determination.

So the name page did not that's fact or alter any of the protections under the Endangered Species Act. It was just a technical correction. But from this point forward, I will now be referring to the species as the Rice's whale as that is now NOAA Fisheries' name for the species. As part of the listing process, the Endangered Species Act requires agencies to designate critical habitat concurrently with the listing determination, although federal agencies may take up to a year to do so in certain circumstances. So critical habitat refers to the area within the geographic range of an endangered species that is essential to its conservation and that may require special management measures. So NOAA Fisheries listed the Rice's whale as endangered in April of 2019, and technically should have designated critical habitat at that time, but they argued that they needed more time to do the research and figure out the critical habitat issues. So under the Endangered Species Act, they can take up to one year to do that.

When NOAA failed to designate critical habitat by April of 2020, which would've been within a year of the listing, the Natural Resources Defense Council filed a lawsuit in July 2020 to compel the agency to do so. The parties reached a settlement in August of 2021 wherein NOAA Fisheries agreed to submit the critical habitat determination no later than October 31st, 2022, with a final rule by October 2023. The agency failed to meet this deadline. They argued that they needed to do more research and the settlement agreement was modified to extend the deadline for a determination to July 15th, 2023. So NOAA Fisheries didn't quite make that deadline, but almost, then they were pretty close. On July 24th, NOAA Fisheries published a proposed rule to list critical habitat for the Rice's whale. And so the map on the slide shows the proposed extent of the critical habitat for the species which the agency is defining as waters from the 100-meter isobath to the 400-meter isobath in the Gulf of Mexico. This proposed critical habitat definition or designation is consistent with previously identified habitat ranges for the Rice's whale.

The public comment period for this proposal closed in early October, and the final rule is expected next year following NOAA Fisheries' review of the public comments received. So although it's not unusual for critical habitat designations to spark controversy, there has been a significant amount of high level

political attention and pushback on this proposed rule. A little bit surprising to see how much controversy this proposal has sparked. These are just some examples of some headlines of actions. Earlier in October, Senators Ted Cruz and Joe Manchin sent a letter to NOAA asking them to withdraw the rule. The governors of the Gulf States sent a similar letter and the oil and gas industry has also been actively lobbying against it. And then of course, we have the advocacy of the environmental groups on the other side arguing for the protections. NOAA Fisheries received over 40,000 comments on the proposed rule. The agency has to review and respond to all of those comments. And so it'll be interesting to see how NOAA navigates this political controversy in the coming months.

So after all that background, what does this all mean? What does it mean if you are listed on the Endangered Species Act? So the Endangered Species Act protects endangered species primarily through two legal mechanisms, a prohibition on the take of such species and a requirement that federal agencies ensure that their actions are not likely to jeopardize the continued existence of listed species or adversely modify their critical habitats. Under the Endangered Species Act, the term take is defined quite broadly, and to basically include anything that harms, harasses, hunt... You can't hunt, shoot, wound, kill, trap, capture or collect. Pretty much any act that would kill harm or significantly disrupt normal behaviors. So as you can imagine, the Gulf of Mexico is a busy place. Commercial and industrial activities in the Gulf of Mexico have the potential to kill, harm or harass the Rice's whale, and thereby result in illegal take under the Endangered Species Act. Animals could be hit by vessels, entangled in fishing gear driven from preferred feeding or breeding areas as a result of noise.

And so I'm not going to go into all of the details about how this section works, but NOAA Fisheries does have some authorization to issue permits that would allow take for certain activities, but industries and other activities in the Gulf of Mexico need to adapt their operations to minimize and avoid at all possible these type of activities that would activities result in take to the Rice's whale. Separate from that provision, federal agencies must take steps through a process known as Section 7 consultation to ensure that their actions are not likely to jeopardize a listed species continue in existence as I mentioned before, or result in the destruction or adverse modification of designated critical habitat. Currently, there's a lot more going on right now with respect to federal agency consultation than with respect to the prohibitions on take. And so that's why, for the rest of the presentation, I'm going to focus on what's been happening around federal agency consultation.

So the consultation process varies depending on the complexity of the project or the action following Section 7 consultation for marine species. NOAA Fisheries will issue a biological opinion that analyzes the effects of the proposed action on the listed species. If NOAA Fisheries determines in a biological opinion, or BiOp, that the federal action is likely to jeopardize a listed species or adversely modify critical habitat, NOAA Fisheries must develop a reasonable alternative that would mitigate these impacts and avoid a violation of Section 7 that was reasonable and prudent alternatives or recommendations that go to the action agency, so the federal agency actually taking the action, and then they review and determine how to implement those alternatives. So this happened back in March 2020 in a way that touches on the Rice's whale. So in March 2020, NOAA Fisheries released a biological opinion on the Outer Continental Shelf oil and gas program in the Gulf of Mexico. And that program is implemented by the Bureau of Ocean Energy Management.

With respect to the Rice's whale, NOAA concluded that the oil and gas program was likely to jeopardize the continued existence of the Rice's whale due to possible fatalities from vessel strikes and harassment due to noise. Because of that conclusion that it was likely to jeopardize the species, the March 2020 BiOp included a reasonable and prudent alternative for the Rice's whale, which focused on avoiding vessel strikes. So the proposed alternative was for BOEM to impose certain restrictions on oil and gas vessels operating in the Gulf of Mexico, including a nighttime closure and a daytime speed limit of 10

knots or less, as well as the use of visual observers. So environmental groups filed a lawsuit against NOAA Fisheries challenging this biological opinion for failing to go far enough. So the environmental groups were arguing that this BiOp did not take into full consideration the impacts of the Deepwater Horizon oil spill on species or habitat. So it was a broad legal challenge to the biological opinion, not specifically to this reasonable and prudent alternative.

The parties are currently in mediation towards a settlement and recently agreed to a stay of the proceedings because BOEM agreed to reinitiate consultation with NOAA Fisheries. So there's an active lawsuit, they're negotiating a settlement, and proceedings have been stayed because NOAA Fisheries and BOEM are going to go through the consultation process again. The big development during this period when they are reinitiating consultation is that BOEM has announced that it intends to expand protections beyond the 100 to 400-meter isobath into an expanded Rice's whale area. So the core area is shown there in the map, that was what was considered in the 2020 BiOp, and they're saying that during this period of extended consultation, they're going to put these restrictions in place to that blue area. So it's just expanding the geographic range of the protections throughout the Gulf of Mexico. I think if you can think back and remember to the slide a couple slides ago on critical habitats, this is identical to the critical habitat proposal. So it's aligning the BOEM protections during the period of consultation to the new proposed critical habitat designations.

And those protections are similar to what was set forth in the original BiOp, which is just visual observers, the 10-knot daytime speed limit and nighttime closures. So as if that lawsuit wasn't enough, there's another lawsuit. So there's another lawsuit proceeding. This one is by the other side. This is the state of Louisiana and the oil and gas industry against BOEM. So back in January 2021, President Biden issued an executive order pausing lease sales on federal lands and in federal waters. So in adherence with that order, BOEM canceled a oil and gas sale that would have auctioned off over 78 million acres in the Gulf of Mexico. Litigation ensued right away over that and Congress stepped in through the Inflation Reduction Act and directed BOEM to hold what became known as Lease Sale 261 by September 2023. In the notice of sale that BOEM issued in August 2023, the agency withdrew six million acres from the lease offering and inserted a lease stipulation to restrict vessel activity in the area, citing concerns for the Rice's whale.

So more litigation happened as a result of that decision to withdraw those acres, and the US District Court for the Western District of Louisiana in September ruled for the oil and gas industry. The court directed BOEM to include the six million acres that were previously excluded and to remove portions of the stipulation meant to address the potential impacts to the Rice's whale. The Fifth Circuit at the end of September issued an order simply giving the agency more time to hold the sale and a new date was set for November 8th. So, actually, that would be today. That sale did not happen today. On October 26th, the Fifth Circuit stayed their order pending a decision on an appeal of that order by the conservation groups. So oral arguments in that appeal are scheduled for next week on November 13th. In response to that most recent order from the Fifth Circuit, BOEM has delayed the sale indefinitely. And if you think about it, it would obviously be pretty messy to hold a sale right now with such uncertainty about whether the Rice's whale stipulations could be included.

So this is a bit of a wild card. We don't really know how it's going to develop until the Fifth Circuit rules on these appeals and as well as the merits of the lawsuit. So that's a lot already going on. But there's one other high-profile effort by environmental groups to gain additional protections for the Rice's whale. So in May of 2021, a number of environmental groups submitted a petition to NOAA Fisheries calling on the agency to impose a year-round vessel speed limits to protect the Rice's whale from collisions with vessels and to reduce noise pollution. These groups are seeking a 10-knot speed limit and other mitigating measures for all vessels operating within the geographic area considered the species

core habitat. These requested actions are very similar to what BOEM is currently imposing on oil and gas vessels.

It took almost two years, but in April 2023, NOAA Fisheries published notice of its receipt of the petition and requested public comments on the proposed action. The comment period closed in July, and it's a little stunning to see how many comments they received. So they received over 70,000 comments. That's almost double what the agency received on the critical habitat designation, which is fascinating to see the probable impact of some advocacy around participating in that comment process. And then most recently, on October 27th, NOAA denied the petition. The agency argued that its time would be better spent focusing on other conservation tasks, including finalizing the critical habitat designation, developing the species recovery plan, and conducting a vessel assessment before they would consider imposing speed restrictions.

So we'll see what happens with this. We'll see if environmental groups file a lawsuit, challenging the denial. But for right now, this is the end of the petition process. So that really brings us to... I think the Rice's whale situation highlights a really tough conservation challenge and for NOAA Fisheries and BOEM to find the right balance. They're really stuck between a rock and a hard place. So how can you balance the conservation needs of a critically-endangered whale with the economic and operational needs of key marine-based industries in the Gulf of Mexico? While imposing a speed limit might not sound like that big of a deal, slowing down cargo ships adds time to the delivery of goods. Slowing down oil and gas vessels might result in that taking longer to do surveys or slowing down the transport of personnel and supplies. And we all know that time is money.

But on the other side, we know that noise pollution has a significant impact on the health and behavior of marine mammals. And reducing noise pollution would benefit more than just the Rice's whale. And so some of the proposed conservation measures would just be better for all life in the ocean if it was a little quieter out there. And so I think the important thing for here is just all of these decisions involve important value judgements that we don't always talk about enough. And what are our conservation goals? So should the conservation goal be zero extinctions? And so it doesn't matter how small of a population the Rice's whale are, we should be working to minimize their risk of extinction. Or should we be prioritizing between species, ones that maybe we feel have a higher level of recovery success, and how far should we go to protect these very small populations of plants and animals?

With that, just to wrap up, should have plenty of time for questions. You're welcome to place your questions in the chat, if you have any. As people are thinking, to see if they have any questions, wanted to note that this is the last webinar of our 2023 webinar series. We're currently planning what our 2024 webinar series will entail. So we encourage everyone to continue to follow us on social media and stay tuned for emails about what our 2024 series will look like next year. Well, with that, I don't see any questions in the chat box, so I want to thank everyone again for joining us. We will be sending an email to everyone who registered with a link to the recording when it becomes available. And I thank you again for your time.