

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF LOUISIANA  
LAKE CHARLES DIVISION**

SHELL OFFSHORE INC.,

*Plaintiff,*

v.

U.S. DEPARTMENT OF THE INTERIOR;  
BUREAU OF OCEAN ENERGY  
MANAGEMENT; DEB HAALAND, in her  
official capacity as Secretary of the Interior;  
LAURA DANIEL-DAVIS, in her official  
capacity as Principal Deputy Assistant  
Secretary of the Interior for Land and  
Minerals Management; ELIZABETH KLEIN,  
in her official capacity as Director of the  
Bureau of Ocean Energy Management; and  
JAMES KENDALL, in his official capacity  
as Director of the Gulf of Mexico Regional  
Office of the Bureau of Ocean Energy  
Management,

*Defendants.*

Civil Action No. \_\_\_\_\_

**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

Plaintiff Shell Offshore Inc., by and through its attorneys, for its complaint against Defendants Department of the Interior, Bureau of Ocean Energy Management, Deb Haaland in her official capacity as Secretary of the Interior, Laura Daniel-Davis in her official capacity as Principal Deputy Assistant Secretary of the Interior for Land and Minerals Management, Elizabeth Klein in her official capacity as Director of the Bureau of Ocean Energy Management, and James Kendall in his official capacity as Director of the Gulf of Mexico Regional Office of the Bureau of Ocean Energy Management, states as follows:

## PRELIMINARY STATEMENT

1. This is a case of agency overreach. On August 23, 2023, Defendant Bureau of Ocean Energy Management (“BOEM”) adopted two eleventh hour changes (collectively, the “Challenged Provisions”) to Gulf of Mexico offshore oil and gas Lease Sale 261 ostensibly to protect the Rice’s whale resident in the eastern Gulf: (1) removing millions of acres from leasing—a so-called “Expanded Rice’s Whale Area” running across the northern Gulf the full length of the U.S. coast; and (2) imposing new lease stipulation provisions restricting vessel operations transiting this same expanded area. Taken together, these Challenged Provisions undermine years-long investments, and will both upset the competitive dynamics in Lease Sale 261’s bidding process and impose significant costs and delays to Shell Offshore Inc.’s (“Shell”) operations across its Gulf of Mexico leases. In the Inflation Reduction Act (“IRA”), Pub. L. No. 117-169, 136 Stat 1818 (Aug. 16, 2022), Congress explicitly directed the Department of the Interior (“Interior”) to conduct Lease Sale 261 by September 30, 2023, and required the sale to be held in accordance with a certain Record of Decision, thereby requiring the sale to be a Gulf region-wide sale and include unleased acreage not subject to moratorium or otherwise unavailable in the Western, Central, and Eastern Gulf of Mexico. IRA, § 50264(e). Therefore, BOEM must conduct Lease Sale 261 on September 27, 2023 as scheduled, but the Court should and can enjoin only the unlawfully inserted Challenged Provisions, which violate congressional intent and law governing agency decisionmaking.

2. In both the Outer Continental Shelf Lands Act (“OCSLA”), 43 U.S.C. §§ 1331, *et seq.* and the IRA, Congress eliminated obstacles to development of the oil and gas resources of the Nation’s outer continental shelf (“OCS”) and directed Interior to expedite oil and gas leasing, particularly in the Gulf of Mexico. The Gulf OCS is well-known for its energy resources, and its development powers the U.S. economy. As the leading oil and gas lease operator in the Gulf OCS,

Shell is at the forefront of that development. Over decades of groundbreaking development, Shell has invested billions of dollars in the Gulf and poured billions of dollars' worth of energy into the United States. To maintain that flow of energy, Shell has (and must) continually invest in developing its existing and acquiring new offshore leases, which requires significant long-term planning and expenditure of resources.

3. Acting through BOEM, however, Defendants erected new obstacles to Congress's development purpose and to Shell's offshore planning and operations. After setting out the scope and rules for Gulf Lease Sale 261—scheduled for September 27, 2023—through a Notice of Proposed Sale in March 2023, BOEM's August 23 Final Notice of Sale added the Challenged Provisions—which BOEM itself had previously and recently rejected—to Lease Sale 261. In taking this drastic last-minute action, BOEM failed its obligation to engage in “reasoned decisionmaking,” *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983), in violation of the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 551, *et seq.*

4. Because Shell will suffer irreparable harm from the Challenged Provisions' impact on its investments and operations that cannot be compensated through damages against an agency entitled to sovereign immunity, BOEM is able to impose legitimate mitigation to protect the Rice's whale at later stages of OCS development (after completing legally required steps), and BOEM has no legitimate interest in enforcing unlawful action, this Court should enjoin BOEM from applying the Challenged Provisions when it conducts Lease Sale 261 on September 27, 2023 as required by the IRA. To provide effective relief, Shell respectfully requests an injunctive order prior to September 27, 2023.

**THE PARTIES**

5. Plaintiff Shell is a subsidiary of Shell plc, and is headquartered in Houston, Texas. Shell is the leading oil and gas leaseholder and producer on the Gulf of Mexico OCS, and has successfully bid in the past on federal oil and gas leases during federal lease sales.

6. Defendant U.S. Department of the Interior is a cabinet-level department of the United States Government, and has statutory authority—through the Secretary of the Interior—to conduct oil and gas lease sales and issue leases.

7. Defendant Deb Haaland is sued in her official capacity as Secretary of the Interior (“Secretary”). Secretary Haaland is authorized by statute to hold oil and gas lease sales on the OCS, and has been directed by the IRA to hold Gulf Lease Sale 261 by September 30, 2023.

8. Defendant Laura Daniel-Davis is sued in her official capacity as Principal Deputy Assistant Secretary of the Interior for Land and Minerals Management. Principal Deputy Assistant Secretary Daniel-Davis has been delegated authority to sign records of decision to hold lease sales under OCSLA.

9. Defendant Bureau of Ocean Energy Management is a federal agency of the United States within the scope of 5 U.S.C. §701(b)(1), and has been delegated the responsibility for implementing the federal oil and gas leasing program on the Outer Continental Shelf, including the conduct of OCS oil and gas lease sales. 30 C.F.R §550.101.

10. Defendant Elizabeth Klein is sued in her official capacity as Director of BOEM.

11. Defendant James Kendall is sued in his official capacity as Regional Director of BOEM’s Gulf of Mexico Office. That Office is responsible for administering Gulf lease sales and certain operations on issued Gulf leases. Regional Director Kendall maintains an office in Louisiana.

## **JURISDICTION AND VENUE**

12. The Court has jurisdiction over this action under 28 U.S.C. §1346(a)(2) because agencies of the United States government are named defendants, 28 U.S.C. §1331 because this action arises under the Inflation Reduction Act, Outer Continental Shelf Lands Act, and Administrative Procedure Act, and 28 U.S.C. § 1361 because this action seeks to compel officers of the United States to perform their duty.

13. Venue is proper in this Court under 28 U.S.C. §1391(e)(1) because Defendants are federal agencies of the United States or officers sued in their official capacities or under color of legal authority; Defendants perform their official duties in this district; a substantial part of the events or omissions giving rise to the Complaint occurred within this judicial district; and Shell maintains facilities and operations within this judicial district in support of its Gulf of Mexico offshore leasing, exploration, and production program.

## **BACKGROUND**

### **A. Legal Background**

#### **1. The Outer Continental Shelf Lands Act**

14. The OCS is the area of submerged lands that lie seaward of a state's jurisdiction and that are subject to the "jurisdiction and control" of the United States. *See* 43 U.S.C. § 1331(a). "The principal purpose of [OCSLA] is to authorize the leasing by the Federal Government of...the Outer Continental Shelf,"<sup>1</sup> and encourage the "expedited exploration and development of the [OCS] in order to achieve national economic and energy policy goals, assure national security, reduce dependence on foreign sources, and maintain a favorable balance of payments in world

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<sup>1</sup> H.R. Rep. No. 83-413, at 2 (1953), *reprinted in* 1953 U.S.C.C.A.N 2177, 2177-78.

trade.” *Id.* § 1802(1). Indeed, Congress wished to “make [OCS] resources available to meet the Nation’s energy needs as rapidly as possible.” *Id.* § 1802(2)(A).

15. Congress cemented this mandate when it amended OCSLA in 1978 to “promote the swift, orderly and efficient exploitation of our almost untapped domestic oil and gas resources in the [OCS].”<sup>2</sup> Congress further explained that the amendments were enacted to eliminate “a variety of technological, economic, environmental, administrative, and legal problems which tend[ed] to retard the development of the oil and natural gas reserves.” 43 U.S.C. § 1801(8).

16. As the D.C. Circuit then observed, “the Act has an objective—the expeditious development of [OCS] resources.” *California v. Watt*, 668 F.2d 1290, 1316 (D.C. Cir. 1981). “The first stated purpose of the Act, then, is to establish procedures to expedite exploration and development[.]” *Id.* OCSLA’s “remaining purposes primarily concern measures to eliminate or minimize the risks attendant to that exploration and development,” and “in fact, candidly recognize that some degree of adverse impact is inevitable.” *Id.*

17. To facilitate OCSLA’s developmental purpose and “forestall premature litigation regarding adverse environmental effects that...will flow, if at all, only from the latter stages of...exploration and production,” *Sec’y of the Interior v. California*, 464 U.S. 312, 341 (1984), Congress created “four distinct statutory stages to developing an offshore...well,” *id.* at 337. Congress delegated principal responsibility over this complex program to the Secretary of the Interior (“Secretary”). *See* 43 U.S.C. § 1331(b).<sup>3</sup>

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<sup>2</sup> H.R. Rep. No. 95-590, at 8 (1977), *reprinted in* 1978 U.S.C.C.A.N 1450, 1460.

<sup>3</sup> The Secretary’s delegated authority is divided between BOEM and the Bureau of Safety and Environmental Enforcement (“BSEE”). *See* 76 Fed. Reg. 64,432 (Oct. 18, 2011). BOEM is responsible for, *inter alia*, lease sales, and BSEE is responsible for, *inter alia*, drilling and production operations safety and environmental protection.

18. First, at the five-year leasing program stage, Interior prepares “a schedule of proposed lease sales...which [the Secretary] determines will best meet national energy needs for the five-year period following its approval[.]” 43 U.S.C. § 1344(a).

19. Second, at the lease sale stage (at issue in this case), Interior conducts the lease sales provided for in the previously-adopted leasing program, 43 U.S.C. § 1337(a)(1), by “solicit[ing]...bids and...issu[ing]...leases,” *Sec’y of the Interior*, 464 U.S. at 338. “A lessee does not, however, acquire an immediate or absolute right to explore for, develop, or produce oil or gas...; those activities require separate, subsequent federal authorization” *Id.* at 317.

20. Third, at the exploration stage, “Interior reviews and determines whether to approve the lessees’...exploration plans.” *Ctr. for Biological Diversity v. U.S. Dep’t of Interior*, 563 F.3d 466, 473 (D.C. Cir. 2009). The Secretary “shall disapprove such plan if he determines that...any proposed activity under such plan would result in” serious harm to, *inter alia*, the environment, and “cannot be modified to avoid such condition.” 43 U.S.C. § 1340(c)(1) (citing *id.* § 1334(a)(2)(A)(i)).

21. Fourth, at the development and production stage, Interior reviews an additional and more detailed plan for (in typical cases) construction of a production platform, installation of processing equipment, and the laying of pipelines. *See id.* § 1351(c). “If Interior finds that the plan would ‘probably cause serious harm or damage...to the marine, coastal or human environments,’ then the plan...may be terminated.” *Ctr. for Biological Diversity*, 563 F.3d at 473 (quoting 43 U.S.C. § 1351(h)(1)(D)(i)).<sup>4</sup>

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<sup>4</sup> A lessee operating under an approved exploration or development plan must also obtain a permit prior to drilling a well pursuant to the plan. *See* 30 C.F.R. § 250.410.

## 2. The Inflation Reduction Act

22. Congress enacted the Inflation Reduction Act (“IRA”) in August 2022 to blunt inflation by reducing energy prices. Pub. L. No. 117-169, 136 Stat 1818 (Aug. 16, 2022). Among other things, the Act mandates that BOEM “shall conduct Lease Sale 261 in accordance with the Record of Decision approved by the Secretary on January 17, 2017” for the 2017-2022 Leasing Program “[n]ot later than September 30, 2023.” *Id.* § 50264(e).

### B. Factual Background

#### 1. The 2017-2022 Leasing Program

23. Consistent with OCSLA’s mandate to make offshore acreage available for oil and gas development, BOEM undertook a years-long process, including review of over two million comments, *see* 80 Fed. Reg. 4,941 (Jan. 29, 2015); 81 Fed. Reg. 14,881 (Mar. 18, 2016); public meetings; and development of a Programmatic Environmental Impact Statement (“EIS”), resulting in approval of the 2017-2022 Leasing Program. *See* BOEM, 2017-2022 Outer Continental Shelf Oil and Gas Leasing Program Proposed Final Program (Nov. 18, 2016) (“Proposed Final Program”), <https://www.boem.gov/oil-gas-energy/leasing/national-program/2017-2022-ocs-oil-and-gas-leasing-program>; BOEM, Outer Continental Shelf Oil and Gas Leasing Program: 2017-2022: Final Programmatic Environmental Impact Statement (Nov. 22, 2016) (“Nov. 2016 Final Programmatic EIS”), [https://www.boem.gov/sites/default/files/oil-and-gas-energy-program/Leasing/Five-Year-Program/2012-2017/BOEMOceanInfo/fpeis\\_volume1.pdf](https://www.boem.gov/sites/default/files/oil-and-gas-energy-program/Leasing/Five-Year-Program/2012-2017/BOEMOceanInfo/fpeis_volume1.pdf). The Secretary’s record of decision directed BOEM to proceed with ten scheduled lease sales in the Gulf of Mexico over the five program years. *See* BOEM, Record of Decision and Approval of the 2017-2022 Outer Continental Shelf Oil and Gas Leasing Program (Jan. 17, 2017) (“2017 Record of Decision”), <https://www.boem.gov/sites/default/files/oil-and-gas-energy-program/Leasing/Five->



Year-Program/2017-2022/2017-2022-Record-of-Decision.pdf. These sales were to be “region-wide and include unleased acreage not subject to moratorium or otherwise unavailable.” *Id.* at 3. This “region-wide sale approach ma[de] the entire leasable Gulf of Mexico OCS area available in each lease sale,” Proposed Final Program at S-2, with the goal of “provid[ing] greater flexibility to industry, including more frequent opportunities to bid on rejected, relinquished, or expired OCS lease blocks,” 2017 Record of Decision at 3.

24. By January 2021, seven of the planned Gulf-wide lease sales had proceeded as scheduled. Preparations were then underway to hold Gulf Lease Sale 257. *See* 86 Fed. Reg. 6,365 (Jan. 21, 2021).

25. On January 27, 2021, President Biden issued Executive Order 14008 to “pause new oil and natural gas leases...in offshore waters pending completion of a comprehensive review and reconsideration of Federal oil and gas permitting and leasing practices.” E.O. 14008, *Tackling the Climate Crisis at Home and Abroad*, 86 Fed. Reg. 7,619, 7,624 (Jan. 27, 2021). After Interior cancelled Lease Sale 257, *see* 86 Fed. Reg. 10,132, 10,123 (Feb. 18, 2021), and declined to schedule remaining Gulf Lease Sales 259 and 261, thirteen states obtained injunctive relief against the “pause” in leasing, which the district court found violated OCSLA’s procedural requirements and the APA’s requirements for reasoned decisionmaking, *see Louisiana v. Biden*, 622 F. Supp. 3d 267, 287–88, 299–300 (W.D. La. 2022); *see also Louisiana v. Biden*, 45 F.4th 841, 846 (5th Cir. 2022). BOEM accordingly scheduled and conducted Lease Sale 257 “as a [Gulf of Mexico] region-wide lease sale.” BOEM, Record of Decision for Gulf of Mexico Outer Continental Shelf Oil and Gas Lease Sale 257 2 (Aug. 31, 2021) (“2021 Record of Decision”), <https://www.boem.gov/sites/default/files/documents/oil-gas-energy/GOM-LS-257.pdf>.

26. Several environmental groups then sued to vacate Lease Sale 257 for alleged violations of the National Environmental Policy Act. *See Friends of the Earth v. Haaland*, 583 F. Supp. 3d 113, 128 (D.D.C. 2022), *vacated and remanded*, 2023 WL 3144203 (D.C. Cir. Apr. 28, 2023) (per curiam). Among other things, the plaintiffs argued BOEM’s decision to conduct Lease Sale 257 ignored alleged “new evidence demonstrating that biologically-important habitat for the [Rice’s] whale is larger than previously believed.” Pls.’ Summ. J. Br. at 41, *Friends of the Earth v. Haaland*, 583 F. Supp. 3d 113 (D.D.C. 2022) No. 21-2317 (RC); *see also* Pls.’ Reply Br. at 31 *Friends of the Earth v. Haaland*, 583 F. Supp. 3d 113 (D.D.C. 2022) No. 21-2317 (RC). Although Lease Sale 257 went forward as planned, the district court invalidated the results of the sale soon afterwards, preventing BOEM from issuing leases. *Friends of the Earth*, 583 F. Supp. 3d at 162. The 2017-2022 Leasing Program then expired in June 2022, precluding BOEM from conducting Lease Sales 259 or 261 under existing law.

27. In August 2022, Congress promptly intervened to remove these obstacles to Gulf oil and gas development by amending the default rules in OCSLA for the 2017-2022 Leasing Program’s remaining lease sales. Notwithstanding the plaintiffs’ arguments in *Friends of the Earth* and the alleged legal deficiencies identified by the district court, the IRA directed BOEM to “reinstate[.]” Lease Sale 257. IRA § 50264(b) (capitalization altered).

28. Moreover, as relevant here, Congress directed that “[n]ot later than September 30, 2023,” BOEM “shall conduct Lease Sale 261 in accordance with the Record of Decision approved by the Secretary on January 17, 2017” for the 2017-2022 Leasing Program, § 50264(e). As noted above, that Record of Decision, in turn, provides for Gulf lease sales that “would be region-wide and include unleased acreage not subject to moratorium or otherwise unavailable, in the Western, Central, and Eastern Gulf of Mexico.” January 2017 Record of Decision at 3. To further guarantee

that offshore oil and gas leasing would continue in the Gulf of Mexico, the IRA conditioned Interior’s ability to issue offshore leases for wind development on holding an oil and gas lease sale, and offering at least 60 million acres in offshore sales within the preceding year. § 50265(b)(2).

29. In a March 2020 Biological Opinion (“2020 BiOp”) under the Endangered Species Act, the National Marine Fisheries Service (“NMFS”) concluded that oil and gas activity in the Gulf was not likely to jeopardize the continued existence of a series of endangered species, including the sperm whale, blue whale, sei whale, loggerhead sea turtle, leatherback sea turtle, and hawksbill sea turtle. NMFS, Biological Opinion on the Federally Regulated Oil and Gas Program Activities in the Gulf of Mexico (Mar. 13, 2020), <https://repository.library.noaa.gov/view/noaa/23738>. By contrast, NMFS concluded that oil and gas activity in the Gulf poses a risk to the Rice’s whale due to potential vessel strikes in the whale’s habitat. But NMFS concluded that BOEM and BSEE could adequately mitigate the risk with “reasonable and prudent alternatives,” including by mandating “a nighttime closure and 10 knot or less speed restriction during the day year-round to all oil and gas program related vessels for the program duration in the [Rice’s] whale area.” 2020 BiOp at 597. According to NMFS, such restrictions were warranted only in the Rice’s whale’s core habitat—the purple area on the map below:

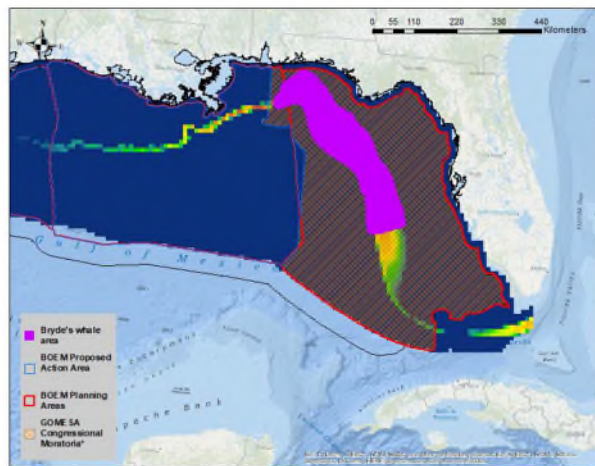


Figure 96. Image of the Bryde's whale area mitigation overlaying Roberts et al. (2016b) density model.

30. In advance of conducting Lease Sales 259 and 261, BOEM prepared, and in January 2023 issued, a Supplemental EIS to consider any new information that had arisen since the issuance of several prior impact statements. *See* BOEM, Gulf of Mexico OCS Oil and Gas Lease Sales 259 and 261: Final Supplemental Environmental Impact Statement (“Final Supplemental EIS”) (Jan. 9, 2023), [https://www.boem.gov/sites/default/files/documents/renewableenergy/state-activities/GOM\\_LS259-261\\_SEIS\\_FINAL.pdf](https://www.boem.gov/sites/default/files/documents/renewableenergy/state-activities/GOM_LS259-261_SEIS_FINAL.pdf). As relevant here, BOEM disagreed with NMFS’s analysis, finding that “activities and effects from a lease sale” on the Rice’s whale “are not reasonably foreseeable” since “vessels expected to service leases issued as a result of a lease sale are...unlikely to transit across” the Rice’s whale core habitat in the Eastern Gulf, which was closed to leasing. *Id.* at 5-5. Still, BOEM agreed to adopt the alternatives and began including nighttime closure and speed restrictions as stipulations in its lease sales. *See, e.g.*, BOEM, Lease Stipulations, Final Notice of Sale Gulf of Mexico Region-wide Oil and Gas Lease Sale 257 8–9 (Oct. 4, 2021) (“Lease 257 Stipulations”), <https://www.boem.gov/sites/default/files/documents/oil-gas-energy/leasing/Sale-257-Lease-Stipulations.pdf>; BOEM, Lease Stipulations, Proposed Notice of Sale Gulf of Mexico Region-wide Oil and Gas Lease Sale 261 8 (Mar. 15, 2023) (“Proposed Stipulations”), <https://www.boem.gov/sites/default/files/documents/renewable-energy/state-activities/proposed-nos-261-lease-stipulations.pdf>.

31. BOEM made clear, however, that “[b]ased on vessel and aerial survey sightings, the primary core habitat of Rice’s whale...is in the northeastern [Gulf]...in water depths between approximately 100 and 400 m”—the map area identified in purple by the 2020 BiOp. Final Supplemental EIS at 4-59. Indeed, BOEM indicated that it had “reviewed the recent July 2022 publication (Soldevilla et al. 2022) that evaluated passive acoustic data indicating that it is plausible that the Rice’s whale’s distribution is broader,” but determined that even taking that study

into account, “not enough information is available at this time to confirm [the Rice’s whale] distribution or any seasonal movements outside the core area that is already considered.” *Id.* BOEM concluded that it had “not identified justifiable reasons to restrict the lease sale area” by “exclud[ing] blocks from leasing in...the 100-400m isobath in the western and central Gulf,” and that its existing lease stipulations covering the core Rice’s whale habitat “provide adequate environmental protection.” *Id.* at C-34; *see id.* at C-123–24.<sup>5</sup>

## 2. Lease Sale 261

32. Consistent with the 2017-2022 Leasing Program, Congress’s directives in the IRA, and its most up-to-date environmental reviews, BOEM published a Proposed Notice of Sale for Lease Sale 261 in March 2023. *See* 88 Fed. Reg. 16,030 (Mar. 15, 2023). BOEM proposed “to offer for bid in this lease sale all of the available unleased acreage in the GOM OCS,” with specific exceptions relating to certain resources. BOEM, Proposed Notice of Sale, Gulf of Mexico Outer Continental Shelf Oil and Gas Lease Sale 261 3–7 (Mar. 15, 2023) (“Proposed Notice”), <https://www.boem.gov/sites/default/files/documents/renewable-energy/state-activities/proposed-nos-261.pdf>. The Proposed Notice included proposed lease stipulations, including the “Reasonable and Prudent Alternative[s]” to protect the Rice’s whale solely in the core habitat area previously identified by NMFS. *See id.* at 8; *supra* ¶¶ 29–31.

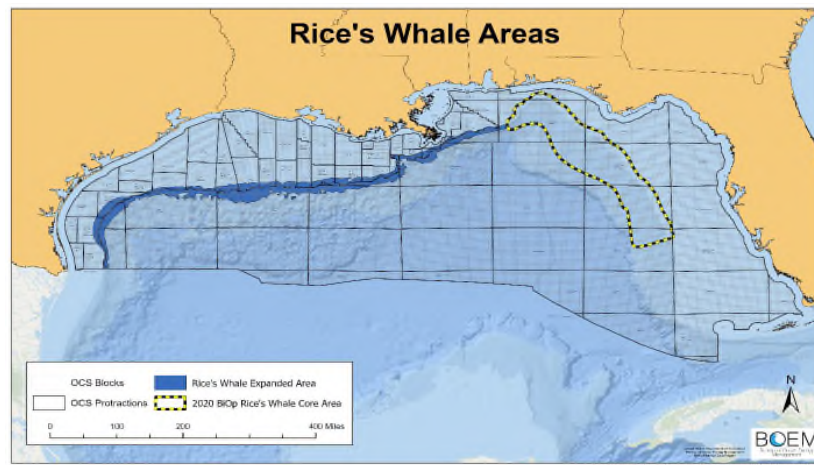
33. At the same time that Congress was removing obstacles to oil and gas leasing and development, a group of environmental plaintiffs were prosecuting a lawsuit to insert new roadblocks based on alleged harm to the Rice’s whale. In October 2020, those groups filed suit

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<sup>5</sup> BOEM stated that it would instead “consider[] the use of mitigation, including measures to reduce vessel strikes and overall avoidance, at all phases of energy development and planning,” including the “review of any planned transits through Rice’s whale core habitat” during “review of plans, permits, and/or authorizations at the post-lease stage.” *Id.* at C-123-24.

against NMFS alleging that the 2020 BiOp understated the risks of oil and gas leasing to the Rice’s whale. See Compl. ¶¶ 142–55, *Sierra Club v. Nat’l Marine Fisheries Service*, No. 8:20-cv-3060 (D. Md.). They also argued, *inter alia*, that the agency’s proposed “reasonable and prudent alternatives” were insufficient to protect the Rice’s whale. *Id.* ¶¶ 156–70. BOEM is not a party to this lawsuit.

34. On July 21, 2023, NMFS reached an agreement with the plaintiffs to stay the litigation while NMFS conducts a new Endangered Species Act consultation. See Stipulated Agreement to Stay Proceedings at 3, *Sierra Club v. NMFS*, No. 20-cv-03060, Dkt. No. 147 (D. Md.). During the pendency of the new consultation, the agreement between plaintiffs and NMFS represents that non-party BOEM will “exclude the area between the 100 meter and 400 meter isobaths in the northern Gulf of Mexico...from Gulf of Mexico Oil and gas lease sales...beginning with Lease Sale 261.” *Id.* at 4. This “Expanded Rice’s Whale Area” drastically expands the original Rice’s whale core habitat (below in black and yellow outline) to include a region running the full length of the U.S. Gulf coast across the northern Gulf of Mexico (below in blue):



*Id.*, Ex. 1, Fig. 1. The agreement also represents that BOEM will issue a Notice to Lessees “to provide recommendations and guidance for lessees and operators regarding suggested measures to expand protections for the Rice’s whale.” *Id.* Ex. 1 at 1.

35. The agreement further represents that BOEM will “add[]” “a lease stipulation....to the...offshore oil and gas leases offered in...Lease Sale 261...while the reinitiated consultation is ongoing.” *Id.* at 3. The stipulation directs lessees to “implement...measures for all oil and gas activities,” including for vessels: (1) a “10-knot or less, year-round speed restriction” in the Expanded Rice’s Whale Area; (2) “avoid[ing] transit through the Expanded Rice’s Whale Area after dusk and before dawn, and during other times of low visibility”; and (3) “maintain[ing] a minimum separation distance of 500 m from Rice’s whales” and all vessels “65 feet or greater associated with oil and gas activity...must have a functioning [Automatic Identification System] onboard and operating at all times.” *Id.*, Ex. 2 at 1.

36. In short, the agreement indicates that BOEM will impose the very operational restrictions it previously found unjustified. *See supra* ¶¶ 29–31. BOEM is not a signatory to this agreement.

37. On August 23, 2023, BOEM issued its Final Notice of Sale for Gulf Lease Sale 261. *See* BOEM, Final Notice of Sale, Gulf of Mexico Outer Continental Shelf Oil and Gas Lease 261 (Aug. 23, 2023) (“Final Notice”), <https://www.boem.gov/sites/default/files/documents/oil-gas-energy/leasing/Sale-261-%20FNOS.pdf>. Consistent with the litigation agreement between the plaintiffs and NMFS, the Final Notice includes the Challenged Provisions excluding the so-called “Expanded Rice’s Whale Area” from leasing, *see id.* at 10, and the new lease stipulation restricting the operation of vessels transiting the area, *see id.* at 17; BOEM, Final Notice of Sale Gulf of Mexico Oil and Gas Lease Sale 261 - Lease Stipulations (Aug. 23, 2023) (“Final Lease



Stipulations”), <https://www.boem.gov/sites/default/files/documents/oil-gas-energy/leasing/Sale-261-Lease-Stipulations.pdf>. The Final Notice provides no explanation for including the Challenged Provisions.

38. BOEM’s Record of Decision for Lease Sale 261 purports to justify the inclusion of the Challenged Provisions (independent of the agreement reached by NMFS in the 2020 BiOp litigation). With respect to exclusion of the “Expanded Rice’s Whale Area” from leasing, BOEM claims that “[r]ecent limited evidence shows that the Rice’s whale *may be present* in this area and removing the area reduces risks from new leasing.” BOEM, Record of Decision for Gulf of Mexico Outer Continental Shelf Oil and Gas Lease Sale 261 2 (Aug. 23, 2023) (“2023 Record of Decision”), <https://www.boem.gov/sites/default/files/documents/oil-gas-energy/leasing/GOM%20LS%20261%20ROD.pdf> (emphasis added). For the new lease stipulations directing lessees to *inter alia*, avoid vessel transits of the Area during nighttime and other times of “low visibility,” BOEM likewise points to “a recent study,” *i.e.* the Soldevilla study, “that the endangered Rice’s whale occurs in portions of the northern Gulf of Mexico between the 100-meter and 400-meter isobaths eastward from the Mexico border with Texas.” *Id.* at 12. The Record of Decision does not even acknowledge BOEM’s prior determinations, most recently in the Final Supplemental EIS, that—even considering the 2022 Soldevilla study to which the Record of Decision points—these exclusions and measures were unjustified. *See supra* ¶¶ 29–31.

### **3. Shell Faces Imminent Harm from BOEM’s Last-Minute Changes to Lease Sale 261**

39. Shell has participated in federal oil and gas lease sales on the Gulf OCS for decades. In fact, Shell has submitted thousands of sealed bids across dozens of Gulf lease sales over many years, and obtained leases for high bids in every sale in which it has submitted bids. Shell has invested billions of dollars to acquire, explore, develop, and produce from its Gulf of Mexico



leases. Based on its current investments and prospective business goals, Shell plans to continue producing from its Gulf of Mexico leases.

40. As part of its significant long-term investments in the Gulf OCS, Shell has already invested significant resources in its internal review process for Lease Sale 261. Shell's planning crystallized and intensified as BOEM released more detailed information regarding the sale, particularly with BOEM's release of the Notice of Proposed Sale on March 15, 2023.

41. By radically changing the terms of Lease Sale 261, BOEM has undermined Shell's long-term planning and investments, and drastically increased the costs and operational complexity to conduct operations on leases obtained in Lease Sale 261. *First*, the last-minute removal of a large area of potential lease tracts at such a late date necessarily alters the competitive dynamics of the sale. *Second*, the new restrictions on lease operations for an area of the northern Gulf running the full length of the Gulf coast divide Shell's offshore leases from the on-shore infrastructure that supports exploratory, development, production, and decommissioning operations. Imposing this barrier undermines long-term planning for and execution of these operations, and will increase the attendant costs for all leases issued from Lease Sale 261 and some leases issued from non-Lease Sale 261 sales.

42. For example, Shell's supply vessels transit through the "Expanded Rice's Whale Area" around-the-clock daily to provide Shell's offshore production facilities and contracted mobile offshore drilling units with any and all supplies needed for the continued safe and effective operation of the facilities. These vessels carry a variety of supplies, including thousands of tons of steel pipe, drilling fluid, cement, spare parts, groceries, and other necessities. By restricting the ability of vessels to supply Shell's offshore facilities—for instance, during nighttime and "low visibility" conditions—the new lease restrictions reduce the available hours for supply, and thereby

decrease the efficiency of supply shipping. This will increase the number of ships necessary to make supply runs during daylight hours and periods of normal visibility; increasing the attendant costs to Shell.

43. Moreover, operational restrictions on leases issued through Lease Sale 261 may impact a much broader swath of Shell's operations. For example, if Shell obtains a lease through Lease Sale 261 that includes the new limitation on nighttime operations in the so-called "Expanded Rice's Whale Area," it may severely restrict Shell's ability to obtain seismic survey data for leases in other areas obtained in other lease sales without the stipulation because a survey—which covers a broad area—cannot necessarily be designed to exclude individual blocks that are subject to the new stipulation. For drilling and other operations, logistical activities cannot reasonably be arranged so that a ship traversing the "Expanded Rice's Whale Area" for operations on a Lease Sale 261 lease follows one set of travel restrictions, while the same ship, traversing the same area, is subject to no such restrictions for non-Lease Sale 261 leases. In other words, Shell will lose the ability to consolidate operations across leases without incurring significant additional implementation costs.

44. Taken both as a whole and individually, BOEM's last-minute changes to Lease Sale 261 undermine the significant investments Shell made in preparation for Lease Sale 261—and further long-term planning—in reliance on BOEM's prior pronouncements.

### **CLAIMS FOR RELIEF**

#### **COUNT ONE (Inflation Reduction Act)**

45. Plaintiff re-alleges and incorporates by reference the preceding allegations as though fully set out herein.

46. The Administrative Procedure Act requires courts to “hold unlawful and set aside agency action” that is “not in accordance with law” or “in excess of statutory...limitations.” 5 U.S.C § 706(2)(A), (C).

47. Section 50264(e) of the Inflation Reduction Act provides that “not later than September 30, 2023, the Secretary shall conduct Lease Sale 261 in accordance with the Record of Decision approved by the Secretary on January 17, 2017.” IRA § 50264(e).

48. The January 2017 Record of Decision approved a plan for lease sales that would be “region-wide” across the “Western, Central, and Eastern Gulf of Mexico,” and would include “unleased acreage not subject to moratorium or otherwise unavailable...to provide greater flexibility to industry, including more frequent opportunities to bid on rejected, relinquished, or expired OCS lease blocks.” 2017 Record of Decision at 3.

49. The January 2017 Record of Decision contemplated neither the withdrawal of the entire 100- to 400-meter isobaths spanning the entire northern Gulf of Mexico from those lease sales nor imposing burdensome additional lease stipulations across that same area to provide additional protection to the Rice’s whale. On the contrary, the agency’s Final Programmatic Environmental Impact Statement specifically recognized that the “Biologically Important Area” for Rice’s whale had no “overlap[] with the [Gulf of Mexico] Program Area,” and so its “exclusion would not constitute a meaningful alternative.” Nov. 2016 Final Programmatic EIS at 2-26.

50. By contrast, the January 2017 Record of Decision did consider other “landscape-scale mitigation measures,” and specifically adopted two such “programmatic mitigation measures” as part of the agency’s five-year plan, including a measure protecting biologically sensitive underwater features in the Gulf that likewise span large areas. Jan. 2017 Record of Decision at 2; *see* Nov. 2016 Final Programmatic EIS at 2-18 to -19.

51. While the January 2017 Record of Decision preserved the possibility that “site- or resource-specific mitigation measures” might potentially be warranted “at the lease sale stage,” it already considered—and rejected—incorporating at a programmatic level the same Challenged Provisions the Bureau now seeks to implement. Jan. 2017 Record of Decision at 2; *see* Nov. 2016 Final Programmatic EIS at 1-10 (finding that proposed Environmentally Important Area for Rice’s whale “lacked adequate scientific support” or was “not appropriate for programmatic mitigation,” but “could warrant further analysis at the lease sale stage”).

52. The Challenged Provisions in the Final Notice are therefore not “in accordance with” the January 2017 Record of Decision, and, by extension, the IRA § 50264(e).

53. If the Challenged Provisions are allowed to remain in force, they will necessarily alter the competitive dynamics of the sale and drastically increase the costs of operating issued leases. Shell will suffer irreparable harm because its lost investments and increased costs cannot be recouped in litigation against the Defendants.

## **COUNT TWO (OCSLA)**

54. Plaintiff re-alleges and incorporates by reference the preceding allegations as though fully set out herein.

55. The Administrative Procedure Act requires courts to “hold unlawful and set aside agency action” if it is taken “without observance of procedure required by law.” 5 U.S.C. § 706(2)(D).

56. OCSLA provides for comments from state and local governments following the Bureau’s issuance of a Proposed Notice of Sale. *See* 43 U.S.C. § 1345(a)–(b) (“[W]ithin sixty days after notice of [a] proposed lease sale,” state and local governments may “submit recommendations to the Secretary regarding the size, timing, or location of a proposed lease

sale.”). BOEM’s implementing regulations confirm that the only post-notice comments and recommendations it must consider come from State and local governments—and, only through them, any final comments of their constituents—and the agency “will accept the recommendations of a State and/or local government(s)” if they “provide a reasonable balance between the national interest and the well-being of the citizens of the State.” 30 C.F.R. § 556.307(a)–(b).

57. Each proposed notice of sale must contain “a description of the area proposed for leasing, the proposed lease terms and conditions of sale, and proposed stipulations to mitigate adverse impacts on the environment.” 30 C.F.R. § 556.304(c); *see id.* § 556.304(a) (“lease stipulations and conditions, to mitigate adverse impacts on the environment...will be contained, or referenced, in the proposed notice of sale”). Under its own regulations, BOEM is directed to “send [the] proposed notice of sale to the governors of affected States and publish the notice of its availability in the Federal Register.” *Id.* §556.304(c).

58. Although a proposed notice of sale must include “a description of the area proposed for leasing, the proposed lease terms and conditions of sale, and proposed stipulations to mitigate potential adverse impacts on the environment,” 30 C.F.R. § 556.304(c), the Proposed Notice of Lease Sale 261 said nothing about BOEM’s newly imposed lease stipulations or other measures allegedly designed to mitigate impacts on the Rice’s whale. *See Proposed Notice.*

59. Nor does the Final Notice indicate that BOEM’s last-minute changes to the lease scope and stipulations based on the “Expanded Rice’s Whale Area” were made in response to any comments from State and local governments. *See Final Notice; 2023 Record of Decision.*

60. Instead, the Challenged Provisions resulted from a deal struck between a set of environmental groups and NMFS relating to a different agency action—the 2020 BiOp—that OCSLA and BOEM’s implementing procedures neither contemplate nor validate. Such a deal is

not a valid basis for agency action. *See, e.g., Portland Audubon Soc’y v. Endangered Species Comm.*, 984 F.2d 1534, 1539 (9th Cir. 1993) (explaining that the APA’s “ex parte communications prohibition” exists to ensure that “agency decisions required to be made on a public record are not influenced by private, off-the-record communications”) (internal quotation marks and citation omitted).

61. The Bureau failed to provide adequate notice in the Proposed Notice that it was considering adopting the Challenged Provisions and altered the terms of Lease Sale 261 for the first time in the Final Notice, after all opportunities for comment have passed. As such, the Challenged Provisions are procedurally invalid under OCSLA and its implementing regulations and must be set aside.

62. If the Challenged Provisions are allowed to remain in force, they will necessarily alter the competitive dynamics of the sale and drastically increase the costs of operating issued leases. Shell will suffer irreparable harm because its lost investments and increased costs cannot be recouped in litigation against the Defendants.

**COUNT THREE**  
**(Administrative Procedure Act)**

63. Plaintiff re-alleges and incorporates by reference the preceding allegations as though fully set out herein.

64. The Administrative Procedure Act requires courts to “hold unlawful and set aside agency action” that is “arbitrary, capricious, [or] an abuse of discretion.” 5 U.S.C. §706(2)(A).

65. In evaluating a claim that an agency’s action was arbitrary and capricious, a court “must consider whether the decision was based on a consideration of the relevant factors” and whether the agency “examine[d] the relevant data and articulate[d] a satisfactory explanation for

its action including a rational connection between the facts found and the choice made.” *State Farm*, 463 U.S. at 43 (internal quotation marks and citation omitted).

66. BOEM’s final Record of Decision seeks to justify the “Expanded Rice’s Whale Area” lease exclusion and stipulations based on “[r]ecent limited evidence show[ing] that the Rice’s whale *may be present* in this area and removing the area reduces risks from new leasing.” 2023 Record of Decision at 2 (emphasis added). *See also id.* at 12. Even accepting BOEM’s assertions at face value, its decisionmaking is arbitrary and capricious because “the facts and policy concerns on which it relied” have no adequate “basis in the record.” *Nat’l Treasury Emps. Union v. Horner*, 854 F.2d 490, 498 (D.C. Cir. 1988).

67. BOEM had repeatedly determined that such leasing provisions were *unsupported*. Indeed, having “reviewed the recent July 2022 publication (Soldevilla et al. 2022) that evaluated passive acoustic data indicating that it is plausible that the Rice’s whale’s distribution is broader,” BOEM found that even taking that study into account, “not enough information is available at this time to confirm [the Rice’s whale] distribution or any seasonal movements outside the core area that is already considered.” Final Supplemental EIS at 4-59. BOEM did not address, let alone explain, *see State Farm*, 463 U.S. at 43, how provisions that lacked “justifiable reasons” for inclusion in January 2023, Final Supplemental EIS at C-34, were nevertheless justifiable (on the same evidence) in August 2023.

68. Nor does BOEM even acknowledge that it has changed its position. To rationally change course, an agency must “‘display awareness that it is changing position’ and ‘show that there are good reasons for the new policy.’” *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221 (2016) (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)). BOEM’s “unexplained inconsistency” is therefore arbitrary and capricious. *Id.* (quotation marks omitted).

69. Moreover, having changed course by adopting the Challenged Provisions on a non-existent record and after the final opportunity for public comment, BOEM has acted without any “consideration of...relevant factors.” *State Farm*, 463 U.S. at 43. OCSLA makes clear Congress’s intent to “promote the swift, orderly and efficient exploitation of our almost untapped domestic oil and gas resources in the [OCS].”<sup>6</sup> BOEM does not address the impact of the Challenged Provisions on its statutory mandate. Nor does it address alternative options or the costs to leaseholders and operators of the Challenged Provisions—for instance, the new lease exclusion will alter the competitive bidding over offered leases, undermining the time and resources invested by lease operators in planning for offshore sales. Such costs impact development of OCS oil and gas resources and are “relevant factors” to BOEM’s exercise of its statutory duties. BOEM’s failure to address the costs of its action is arbitrary and capricious.

70. If the Challenged Provisions are allowed to remain in force, they will necessarily alter the competitive dynamics of the sale and drastically increase the costs of operating issued leases. Shell will suffer irreparable harm because its lost investments and increased costs cannot be recouped in litigation against the Defendants.

#### **PRAYER FOR RELIEF**

Plaintiff Shell Offshore Inc., prays for the following relief from the Court:

1. A declaration, pursuant to 28 U.S.C § 2202, that the Challenged Provisions of the Final Notice of Sale for Lease Sale 261 imposing new lease Stipulation No. 4, Part B(4) and withdrawing all acreage between the 100 meter to 400-meter isobaths violate the Inflation Reduction Act, the Outer Continental Shelf Lands Act, and the Administrative Procedure Act and are therefore unlawful.

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<sup>6</sup> H.R. Rep. No. 95-590, at 8 (1977), *reprinted in* 1978 U.S.C.C.A.N 1450, 1460.



2. A preliminary and permanent injunction setting aside the Challenged Provisions of the Final Notice of Sale for Lease Sale 261, and enjoining Defendants from implementing or otherwise enforcing the Challenged Provisions when and after they conduct Lease Sale 261, as they are statutorily obligated to do, by September 30, 2023.

3. An order vacating and striking the specific Challenged Provisions from the Final Notice of Sale and Record of Decision for Lease Sale 261.

4. Any further relief the Court deems just and proper.

August 28, 2023

Respectfully submitted,

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