Committee on Natural Resources
Subcommittee on Water, Wildlife and Fisheries
Legislative Hearing
1334 Longworth House Office Building
October 25, 2023

Responses of Stephen Roady, Senior Lecturing Fellow, Duke Law School
To Questions from Ranking Member Huffman and Representative Dingell

*Question from Subcommittee Ranking Member Huffman:

"Can you explain what opportunities for engagement and/or input impacted parties, like oil and gas companies, had throughout the stipulated agreement process for Lease Sale 261?"

*Response from Mr. Roady:

Thank you for your question. I am providing this response in my individual capacity; it is not being presented as the position of Duke University.

I appreciate the opportunity to address this issue, because there was an unsubstantiated suggestion during the October 25 hearing that the oil and gas industry was somehow not provided an opportunity to engage in the process that led to the Stipulated Agreement with respect to Lease Sale 261. That suggestion is not correct. In fact, it was the oil and gas industry itself that introduced the idea for that process, and the industry engaged in it closely from start to finish. And at the end of that process, the oil and gas industry was provided a final opportunity to comment. Although it expressed concerns, the industry ultimately did not ask the supervising court to withhold approval of the Agreement.

The Stipulated Agreement for Lease Sale 261 is the result of a mediation process that was triggered by litigation filed originally in 2020 by several conservation groups against the federal government. I was not involved in that litigation, but I have reviewed the publicly available filings that are available in the court docket for that case. Those court filings show that the oil and gas industry, including several individual companies, were intervening parties to the litigation and participated directly in the court-ordered mediation process that culminated in the Stipulated Agreement. In particular, those filings show that the American Petroleum Institute (API), on behalf of the oil and gas industry, invited the court to require the parties to the case "to participate in a mediated settlement discussion." These filing also show that the industry then participated closely in that mediated discussion, and that it was that discussion which eventually led to the Stipulated Agreement.

As is standard practice in mediation, this judicially-supervised mediation process was subject to a confidentiality agreement, in order to encourage full and frank discussions of positions. So, it is not possible to know what positions those parties took during the mediation

process, or to assess the full nature of the discussions. But the court record includes multiple filings demonstrating the industry's very close involvement in the mediation process itself.

By way of background, the docket entries for this case show that the Plaintiffs in the underlying litigation – Sierra Club, Center for Biological Diversity, Friends of the Earth, and Turtle Island Restoration Network – filed a case in the U.S. District Court for the District of Maryland challenging a 2020 Biological Opinion issued under the Endangered Species Act. *Sierra Club, et al., v. National Marine Fisheries* Service*., et al.,* No. 8:20-cv-03060 (filed Oct. 21, 2020) (Complaint for Declaratory and Injunctive Relief). In that 2020 Biological Opinion, the National Marine Fisheries Service (Service) endeavored to analyze whether the next 50 years of federally authorized oil and gas activities on the outer continental shelf in the Gulf of Mexico would jeopardize the continued existence of any threatened or endangered species.

The 2020 Biological Opinion concluded that, without mitigation, these oil and gas activities would jeopardize the survival and recovery of the critically endangered Rice's whale. As required by the Endangered Species Act, the Service therefore concluded the Biological Opinion with a "reasonable and prudent alternative" that according to the Service would, if adopted, prevent jeopardy to the whale by placing a 10-knot speed limit and other related restrictions on oil and gas-related vessel traffic in that particular part of the Gulf of Mexico the Service then considered to be the whale's habitat. In their complaint filed on October 21, 2020, the Plaintiffs challenged the analysis in the Biological Opinion on multiple grounds as arbitrary and capricious and challenged the Service's "reasonable and prudent alternative" as insufficient to avoid jeopardy to Rice's whale, in violation of the Endangered Species Act.

The American Petroleum Institute (API), EnerGeo, the National Ocean Industries Association, and Chevron U.S.A. (Chevron) then moved to intervene as defendant parties in the suit. The docket shows that the court granted their intervention on May 12, 2021. The process that led to the mediation and Stipulated Agreement began a bit later, as the court briefings unfolded in the case.

Specifically, as reflected in the court docket, on October 25, 2022, the Bureau of Ocean Energy Management (BOEM) sent a letter to the National Marine Fisheries Service requesting that the Service reinitiate Endangered Species Act formal consultation on the 2020 Biological Opinion – to essentially start the process anew based on new analyses of oil spill risks and other information. In response, the Service filed a motion asking the court to remand that Biological Opinion back to the Service, while leaving it in place, unchanged. The docket entries reveal that this request essentially asked the court to hand the matter back to the agency for a do-over, but to allow BOEM and the Service to continue relying on the admittedly outdated Biological Opinion to facilitate continuing oil and gas operations in the Gulf of Mexico while a new Biological Opinion was being prepared.

The entries in the court docket next show that Plaintiffs opposed the Service's request in large part because additional peer-reviewed scientific evidence had emerged demonstrating that Rice's whales "persistently occur" throughout the northern Gulf of Mexico in waters 100-400 meters deep and were therefore at far higher risk than the Service considered them to be in the 2020 Biological Opinion. The Plaintiffs argued that – should the Court be

inclined to grant a voluntary remand of that Opinion while allowing oil and gas operations to continue unchanged – the Court should at a minimum impose interim protective measures that were necessary to protect the Rice's whale from this far greater risk during the 2-year consultation process that the Service and BOEM proposed to follow.

In responding to this request from the Plaintiffs for interim protective measures for the Rice's whale, the American Petroleum Institute (API) filed a document with the court stating that it was:

> "willing to engage with Plaintiffs and Federal Defendants to discuss potential *voluntary* interim measures that may be protective during any remand. During prior related litigation, a negotiated process was successfully used to develop interim measures while the 2020 BiOp was being prepared, and could be used again here. *See Nat. Res. Def. Council v. Salazar*, No. 2:10-cv-1882 (E.D. La.), Dkt. 189 (discussing 10-year history of settlement discussions and implementation). To that end, the Associations would not be opposed to an order requiring the parties to participate in a mediated settlement discussion and report back to the Court."

The parties then presented oral argument to the court on the question of how best to proceed, and at that argument, the court and the parties agreed with API's suggestion for a mediated settlement discussion. Accordingly, the docket reflects that on January 6, 2023, the court entered an order referring the case to mediation with a magistrate judge. The order specifically stated that the mediation would "include the plaintiffs, the defendants, and the intervenor defendants." Thus, the oil and gas industry parties (the intervenor defendants), after having suggested mediation, were expressly included in the mediation process.

The docket entries show that the ensuing mediation process began in late January and lasted until approximately mid-July, 2023. During that time, the parties – including the oil and gas industry intervenors – met in multiple sessions with a federal magistrate judge appointed by the court. While the substance of those sessions is covered by a confidentiality order signed by all the parties at the outset of the mediation, the parties filed joint status reports generally updating the court on the number of meetings held, summarizing the overall progress of the discussions, and seeking to extend the time for the discussions when warranted. The oil and gas industry intervenors signed each of these joint status reports.

On July 21, 2023, the Plaintiffs and the Service filed the Stipulated Agreement and asked to court to grant a stay of the litigation based on their substantive agreements. The Stipulated Agreement specified that the industry intervenors (including API and Chevron) objected to the stay agreement and established a schedule for them to present those objections to the court. In an August 4, 2023 filing, those objecting parties filed a response noting their "concerns" with the Agreement, but they did not formally object to the entry of the agreement and the entry of a stay in that litigation, stating: "Intervenors do not object to the entry of an order that requires Plaintiffs and [the federal government] to comply with the terms of the agreement…"

In summary, the public record of the litigation that gave rise to the Stipulated Agreement regarding Lease Sale 261 shows that the oil and gas industry was intimately involved with the mediation process that led to that Agreement. The mediation was prompted by a suggestion from the industry itself, industry representatives engaged directly in that mediation process, and ultimately did not object to an order from the court that directed the government to comply with the terms of the Agreement. While API, Chevron, and the other oil and gas industry parties to that litigation did not agree to the results of the court-supervised mediation process, they were nonetheless directly involved in that process from the very beginning.

*Question from Subcommittee Member Dingell:

"The Endangered Species Act protects a number of marine species in the Gulf of Mexico, including the Gulf sturgeon, Florida manatee, and five species of marine turtles. How does the ESA manage to protect these and other species without causing a shutdown or collapse of commercial activity along the Gulf coast?"

*Response from Mr. Roady:

Thank you for your question. I am providing this response in my individual capacity; it is not being presented as the position of Duke University.

I appreciate the opportunity to address this issue, because there were suggestions during the October 25 hearing that the Endangered Species Act, (ESA) as applied to Lease Sale 261 in the Gulf of Mexico, might create significant adverse effects on the oil and gas industry, with the potential for highly negative economic impacts on the region. These suggestions are inaccurate. In fact, the Act is designed, and typically implemented, in a manner that carefully takes account of its potential effects on commercial activity. It has been in place since 1973, during which time hundreds, or even thousands, of oil and gas wells and associated exploration, development, and energy production activities have been initiated and operated in the Gulf region. The process that has been proposed by the government in an effort to comply with the ESA in connection with Lease Sale 261 continues the tradition of developing ways to protect endangered species without shutting down or collapsing commercial activity.

Congress enacted the ESA in 1973 to "provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species and threatened species." 16 U.S.C. § 1531(b). The ESA seeks to protect and recover imperiled species and populations by first listing them as threatened or endangered based on enumerated statutory factors. Id. § 1533(a)(1)(A)–(E); see id. § 1532(6), (20). The Act further provides for the designation of protected critical habitat for threatened and endangered species. Id. § 1533(a)(3)(A)(i).

Section 7(a)(2) of the ESA requires each federal agency to "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species." Id. § 1536(a)(2). The ESA and its implementing regulations establish an interagency consultation process to assist federal agencies

in complying with this duty. An agency must consult with the appropriate wildlife service—the U.S. Fish and Wildlife Service or, in the case of oil and gas activity in the Gulf of Mexico, the National Marine Fisheries Service (NMFS)—under Section 7 whenever it takes an action that "may affect" a threatened or endangered species or critical habitat. Id.; 50 C.F.R. § 402.14(a). In accordance with this statutory process, the Department of the Interior's Bureau of Ocean Energy Management (BOEM) consulted with NMFS to determine whether lease sales in the Gulf of Mexico could affect threatened or endangered species, such as Rice's whale.

In fulfilling the requirements of Section 7, agencies must "use the best scientific and commercial data available." 16 U.S.C. § 1536(a)(2). If the agency taking the action (the action agency) concludes the action may affect listed species or their critical habitats, it must initiate formal consultation with NMFS, unless the action agency determines and NMFS concurs in writing that the action is "not likely to adversely affect" any listed species or critical habitat. 50 C.F.R. §§ 402.13(c), 402.14(a), (b)(1). The result of the consultation between NMFS and BOEM regarding oil and gas activities in the Gulf was a decision that those activities could affect ESA-protected species; therefore, the two agencies entered into the formal consultation process.

Under the ESA, formal consultation requires NMFS to: (1) evaluate the current status and environmental baseline of affected species and critical habitats, (2) assess the effects of the action and cumulative effects on those species and habitats, and (3) analyze whether the effects of the action, when added to the environmental baseline together with any cumulative effects, is likely to jeopardize the continued existence of the species or adversely modify their critical habitats. Id. § 402.14(g). At the conclusion of formal consultation, NMFS issues a biological opinion assessing the effects of the action and making a formal determination regarding whether the action is likely to "jeopardize the continued existence of" the species or adversely modify their critical habitats. 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(e), (h).

ESA regulations define "jeopardize the continued existence of" as, "to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species." 50 C.F.R. § 402.02. These regulations also define "destruction or adverse modification of critical habitat" as "a direct or indirect alteration that appreciably diminishes the value of critical habitat as a whole for the conservation of a listed species." 50 C.F.R. § 402.02. 30.

Importantly, and highly pertinent to this question from Representative Dingell, a conclusion by NMFS that the proposed action is likely to jeopardize a listed species or result in adverse modification of its critical habitat does not automatically prevent that action from proceeding. Instead, the ESA and its implementing regulations provide a way for the action to proceed with certain modifications. Thus, in the case of oil and gas activity in the Gulf of Mexico that has the potential to jeopardize any ESA-protected species, NMFS can propose "reasonable and prudent alternatives" (RPAs) to the action that will allow the activity to go forward in some fashion, while avoiding jeopardy, and also avoiding adverse modification of critical habitat. 16 U.S.C. § 1536(b)(3); 50 C.F.R. §§ 402.02, 402.14(h)(2). In addition, the ESA

allows the government to consider the economic impact of designating critical habitat for any listed species. 16 U.S.C. §1533(b)(2).

Following a determination that a particular activity is likely to jeopardize a species listed as protected under the ESA, the action agency and the consulting agency develop these "reasonable and prudent alternatives" to proposed actions by negotiating among themselves. Through this process, the agencies often are able to identify measures that reduce or eliminate the harm to species, while allowing the activity to move ahead. Many times, these RPAs are the result of expert biologists working to come up with different solutions to modify activities and to develop mitigation that protects the species in question. As an example of the kinds of measures negotiated among government agencies (at both the state and federal level) as a way to protect endangered species, there are boating speed limits for ESA-manatees, which allow recreational boating and fishing to proceed in areas frequented by those manatees. Similarly, the government has established various nesting beach protection and low-lighting mandates in order to protect sea turtles that are listed as threatened or endangered under the ESA, while still allowing beachfront properties and hotels to operate.

In addition, with respect to designation of critical habitat, the ESA authorizes the government to consider potential economic effects. This provision allows the government to consider whether protecting certain areas could result in adverse economic consequences. As a result, both the U.S. Fish and Wildlife Service and the National Marine Fisheries Service typically scrutinize the economic impacts of potential critical habitat designations.

As relevant for Lease Sale 261, NMFS issued a Biological Opinion in 2020 that was designed to analyze whether the next 50 years of federally authorized oil and gas activities on the outer continental shelf in the Gulf of Mexico would jeopardize the continued existence of any threatened or endangered species. That Biological Opinion concluded that, without mitigation, these oil and gas activities would jeopardize the survival and recovery of the critically endangered Rice's whale. NMFS then established a "reasonable and prudent alternative" that in its view would prevent jeopardy to the whale by placing a 10-knot speed limit and other related restrictions on oil and gas-related vessel traffic in that particular part of the Gulf of Mexico the Service then considered to be the whale's habitat. Several conservation groups challenged this RPA approach as insufficient to avoid jeopardy to Rice's whale.

During the pendency of this litigation, peer-reviewed scientific evidence emerged demonstrating that Rice's whales "persistently occur" throughout the northern Gulf of Mexico in waters 100-400 meters deep and were therefore at far higher risk than the Service considered them to be in the 2020 Biological Opinion. As a result of this new evidence, the government sought to reinitiate Endangered Species Act formal consultation on the 2020 Biological Opinion. The parties to the litigation then entered into a mediated settlement discussion regarding how best to protect whales while this new consultation process went forward. During that same period, the Service also proposed new critical habitat for Rice's whales in an area along the continental shelf break in the Gulf. 88 Federal Register 47453-47472 (July 24, 2023). In determining this critical habitat, the Service considered the possible resulting economic effects and explained its reasoning for delineating the scope of the area covered. 88 Federal Register at 47463-47466.

As a result of this mediated settlement discussion over the 2020 Biological Opinion, the court has recently approved a Stipulated Agreement that would allow the government (BOEM and NMFS) to apply new science to the protection of the critically-endangered Rice's whale, while establishing certain restrictions on the scope of Lease Sale 261. These restrictions would include extending protections within the new critical habitat proposed by the government on July 24, 2023. When the government turned to applying these protections to Lease Sale 261, it allowed approximately 92% of the original area proposed for that sale to remain open for oil and gas exploration and development. This decision-making process is fully in keeping with the careful approach authorized under the ESA, which endeavors to protect listed species, while also allowing for significant commercial activities to proceed. If followed, it will be another example of the way in which the purposes of the ESA can be achieved, and endangered species can be protected, without either shutting down or collapsing affected commercial activity.

Thank you again for this opportunity to respond to the questions from Subcommittee Ranking Member Huffman and Representative Dingell.