

**Congress of the United States**  
**U.S. House of Representatives**  
**Committee on Small Business**  
2561 Rayburn House Office Building  
Washington, DC 20515-6515

October 12, 2023

Ms. Liz Klein  
Director  
Bureau of Ocean Energy Management  
1849 C Street NW  
Washington, D.C. 20240

Dear Director Klein:

The House Committee on Small Business (the Committee) writes to inquire about the Bureau Ocean Energy Management's (BOEM) decision to exclude nearly six million acres from Lease Sale 261 and to create additional requirements for operators and vessels in the Gulf of Mexico.<sup>1</sup> As a part of the settlement the National Oceanic and Atmospheric Administration (NOAA) agreed to with the Sierra Club, BOEM issued a notice to lessees that substantially changed all future lease sales and established additional requirements intended to protect Rice's Whale.<sup>2</sup> Though the Fifth Circuit Court of Appeals has enjoined BOEM's decision due to it likely being unlawful, resulting in BOEM announcing updated terms for the sale, the Committee seeks to understand BOEM's rationale for settling with the Sierra Club and to what extent BOEM considered small business interests in agreeing to this settlement.<sup>3</sup>

In the notice, BOEM added an additional term to the Gulf of Mexico Oil and Gas Lease Sale No. 261, and all future sales, which reduced the land available for purchase and what that land is permitted to be used for, requires operators and vessels adhere to a 10-knot speed limit during the day, and a prohibits nighttime travel in the Rice's Whale's protective area.<sup>4</sup> This removes opportunities for small oil and gas producers to lease land to run and grow their businesses. The 10-knot speed limit restrictions on shipping will increase inefficiencies in the supply chain, which will in turn increase costs for consumers and create logjams at ports.<sup>5</sup> This cost will be felt disproportionately by small oil and gas operators in the Gulf, who are less able to take advantage of economies of scale. Together, these provisions appear to have a substantial impact on a significant number of small businesses.

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<sup>1</sup> Bureau of Ocean Energy Mgmt, BOEM NTL No. 2023-G01, Notice to Lessees and Operators of Federal Oil and Gas, and Sulphur Leases in the Gulf of Mexico Outer Continental Shelf, 1 (Aug. 17, 2023).

<sup>2</sup> *Id.*

<sup>3</sup> Louisiana v. Haaland, No. 2:23-CV-01157, 2023 U.S. Dist. LEXIS 175998, 14 (5th Cir. Sep. 21, 2023)

<sup>4</sup> Bureau of Ocean Energy Mgmt, BOEM NTL No. 2023-G01, Notice to Lessees and Operators of Federal Oil and Gas, and Sulphur Leases in the Gulf of Mexico Outer Continental Shelf, 1 (Aug. 17, 2023).

<sup>5</sup> Samuel Stettheimer, *Alabama Port Authority Rejects Possible Whale-Saving Rule*, THE ALA. POL. REPORTER (Jul. 17, 2023); Nathan Cobb, *Council Says Proposed Rule on Rice's Whales could Cripple Ports, Including Panama City*, PANAMA CITY NEW HERALD (Jul. 6, 2023).

This agreement is also alleged to have been made through a practice called “sue and settle,” which is a when agencies work with litigants to create policies through a court settlement.<sup>6</sup> This practice was not permitted until March 2022, due to its ability to be misused, and the lack of transparency in its use.<sup>7</sup> The Committee is concerned that such practices allow agencies to act with the force of law without engaging in the traditional rulemaking process, which is subject to the Regulatory Flexibility Act (RFA). The RFA requires agencies to consider how its rule affects small businesses when its rulemaking would create a significant impact on a substantial number of small businesses.<sup>8</sup> The Committee is concerned that repeated use of sue and settle tactics will move small business interests to the margins, and disadvantage small businesses in a time where they are already fighting inflation and interest rates.

It is important for agencies to examine small businesses interests—which make up 99.9 percent of all businesses in the United States—when passing any new rule. America’s small businesses deserve to have their voices heard and considered. We therefore request the following information as soon as possible but no later than October 26, 2023:

1. Studies into the Rice’s Whale’s extended habitat have repeatedly proved difficult.<sup>9</sup> If scientists in the field are generally unable to locate Rice’s Whales in these areas when they are intentionally looking for them, for what reason does the BOEM believe regular ships conducting business on regular trade routes will encounter Rice’s Whales?
2. In its 2022 Supplemental Environmental Impact Study, the BOEM concluded that a vessel striking a Rice’s Whale was “extremely unlikely.”<sup>10</sup> Given this conclusion, why did the BOEM include speed limits and nighttime travel bans within the Rice’s Whales protective zone?
3. What would be the impact on small entities if the terms of the settlement agreement were implemented through the rulemaking process—a process which allowed for small businesses to have input—instead of a notice document?
4. The RFA requires the consideration of not just small businesses, but also local governments and other small entities.<sup>11</sup> This rule would likely have a tremendous impact on ports along the Gulf of Mexico, increasing port traffic in the daytime, and reducing nighttime traffic; additionally, local governments have expressed concerns that this rule will drive down demand for their ports along the Gulf.<sup>12</sup> What does the BOEM expect the

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<sup>6</sup> Benjamin Zycher, *Biden Administration Continues its Anti-Democratic Sue and Settle Masquerade*, THE HILL (Sep. 14, 2023); *Sue and Settle: Regulating Behind Closed Doors*, U.S. CHAMBER OF COM. (Mar. 6, 2018).

<sup>7</sup> Kelsey Brugger, *EPA revokes Trump-era ‘sue and settle’ memo*, E&E NEWS (Mar. 24, 2022).

<sup>8</sup> The Regulatory Flexibility Act, 5 U.S.C. §§ 601-612 (2011).

<sup>9</sup> *Louisiana v. Haaland*, No. 2:23-CV-01157, 2023 U.S. Dist. LEXIS 175998, 14 (5th Cir. Sep. 21, 2023).

<sup>10</sup> *Id.*

<sup>11</sup> The Regulatory Flexibility Act, 5 U.S.C. §§ 601-612 (2011).

<sup>12</sup> Benjamin Zycher, *Biden Administration Continues its Anti-Democratic Sue and Settle Masquerade*, THE HILL (Sep. 14, 2023); *Sue and Settle: Regulating Behind Closed Doors*, U.S. CHAMBER OF COM. (Mar. 6, 2018).

<sup>12</sup> Kelsey Brugger, *EPA revokes Trump-era ‘sue and settle’ memo*, E&E NEWS (Mar. 24, 2022).

impact on small entities and local governments would be if this decision were made through proper formal or informal rulemaking?

5. Is it accurate to describe BOEM's agreement with the Sierra Club as a "sue and settle" arrangement?
  - a. If so, does BOEM intend to continue making decisions through "sue and settle" tactics?
  - b. How can the Committee attain confidence that the BOEM is considering the interest of small businesses in its decision-making when its decisions are made behind closed doors with special interest groups?
6. In *Louisiana v. Haaland*, BOEM argued that the compliance costs described by industry representatives were too speculative.<sup>13</sup> Given that BOEM did not describe the anticipated compliance costs in its updated terms sheet, what does BOEM believe is the compliance costs associated with the terms it added in Lease Sale 261?
  - a. What are the additional costs a small business may incur that other larger entities may not?

To schedule the delivery of your response or ask any related follow-up questions, please contact the Committee on Small Business Majority Staff at (202) 225-5821. The Committee on Small Business has broad authority to investigate "problems of all types of small business" under House Rule X. Thank you in advance for your cooperation with this inquiry.

In God we trust,



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Roger Williams  
Chairman  
Committee on Small Business



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Pete Stauber  
Member  
Committee on Small Business



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Aaron Bean  
Member  
Committee on Small Business

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<sup>13</sup> *Louisiana v. Haaland*, No. 2:23-CV-01157, 2023 U.S. Dist. LEXIS 175998, 14 (5th Cir. Sep. 21, 2023).