



## Decision

**Matter of:** U.S. Department of the Interior, Bureau of Ocean Energy Management—Applicability of the Congressional Review Act to Notice to Lessees and Operators of Federal Oil and Gas, and Sulphur Leases in the Gulf of Mexico Outer Continental Shelf

**File:** B-335629

**Date:** July 8, 2024

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### DIGEST

The U.S. Department of the Interior, Bureau of Ocean Energy Management (BOEM) published a document titled *Notice to Lessees and Operators of Federal Oil and Gas, and Sulphur Leases in the Gulf of Mexico Outer Continental Shelf* (NTL). In the NTL, BOEM announced recommended measures for oil and gas lessees and operators concerning their activities in an area of the Outer Continental Shelf where an endangered whale species (Rice’s whale) occurs.

The Congressional Review Act (CRA) requires that before a rule can take effect, an agency must submit the rule to both the House of Representatives and the Senate, as well as the Comptroller General. CRA incorporates the Administrative Procedure Act’s (APA) definition of a rule for this purpose with certain exceptions. We conclude that the NTL is a rule for purposes of CRA because it meets the APA’s definition, and no exception applies.

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### DECISION

On August 17, 2023, the U.S. Department of the Interior (Interior), Bureau of Ocean Energy Management (BOEM) published a document titled *Notice to Lessees and Operators of Federal Oil and Gas, and Sulphur Leases in the Gulf of Mexico Outer Continental Shelf* (NTL), available at <https://www.boem.gov/about-boem/regulations-guidance/guidance-portal> (last visited May 24, 2024). We received a request for a decision as to whether the NTL is a rule for purposes of the Congressional Review Act (CRA). Letter from Senator Bill Cassidy, M.D., to the Comptroller General (Sept. 25, 2023); see also Email from Policy Advisor to Senator Bill Cassidy, M.D., to Senior Attorney, GAO (Nov. 29, 2023). As discussed below, we conclude that the NTL is a rule subject to CRA’s submission requirement.

Our practice when rendering decisions is to contact the relevant agencies to obtain their legal views on the subject of the request. GAO, *GAO's Protocols for Legal Decisions and Opinions*, GAO-24-107329 (Washington, D.C.: Feb. 2024), available at <https://www.gao.gov/products/gao-24-107329>. Accordingly, we reached out to BOEM to obtain the agency's legal views. Letter from Assistant General Counsel for Appropriations Law, GAO, to Solicitor of the Interior, U.S. Department of the Interior (Dec. 6, 2023). We received a response from BOEM on January 26, 2024. Letter from Solicitor, Department of the Interior, to Assistant General Counsel for Appropriations Law, GAO (Jan. 26, 2024) (Response Letter).

## BACKGROUND

### BOEM and the NTL

The mission of BOEM is “to manage development of U.S. Outer Continental Shelf (OCS) energy, mineral, and geological resources in an environmentally and economically responsible way.”<sup>1</sup> BOEM, *About BOEM*, available at <https://www.boem.gov/about-boem> (last visited January 8, 2024); see NTL at 2 (referencing authority delegated by the Secretary of the Interior to BOEM). BOEM thus sells and administers leases for oil and gas exploration and development activities conducted on the OSC. NTL at 2; BOEM, *Leasing*, available at <https://www.boem.gov/oil-gas-energy/leasing> (last visited May 24, 2024). Additionally, BOEM promulgates regulations governing lessees' and other operators' activities on the OCS. See 30 C.F.R. Part 550. These regulations contemplate that covered entities “must submit, and BOEM must approve” certain documents before conducting certain activities on leased areas of the OCS. 30 C.F.R. § 550.201. For example, a lessee must submit an “Exploration Plan (EP)” before “conduct[ing] any exploration activities on a lease”; a “Development and Production Plan (DPP)” before “conduct[ing] any development and production activities on a lease [anywhere other than the Western Gulf of Mexico]”; and a “Development Operations Coordination Document (DOCD)” before “conduct[ing] any development and production activities on a lease [in the Western Gulf of Mexico]”. See *id.* More generally, BOEM's regulations contemplate that BOEM will periodically “issue Notices to Lessees and Operators (NTLs) that clarify, supplement, or provide more detail about certain [regulatory] requirements.” 30 C.F.R. § 550.103.

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<sup>1</sup> BOEM's website includes a current map of the OCS with accompanying description. See BOEM, *Outer Continental Shelf*, available at: <https://www.boem.gov/oil-gas-energy/leasing/outer-continental-shelf> (last visited May 24, 2024). The area that comprises the OCS is defined in the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. § 1331 *et seq.*, by reference to the Submerged Lands Act, 43 U.S.C. § 1301.

Pursuant to the Endangered Species Act (ESA), 16 U.S.C. § 1531 *et seq.*, BOEM requires that entities conducting oil and gas activities on the OCS must “avoid or minimize harm to threatened and endangered species . . . if there is reason to believe that incidental take of such species may occur.” NTL at 2.<sup>2</sup> Also pursuant to the ESA, BOEM, like all federal agencies, must consult with the National Marine Fisheries Service (NMFS) as necessary to “insure that any action authorized, funded, or carried out by [BOEM]” does not “jeopardize[] the continued existence of any endangered [] or threatened species.” 16 U.S.C. § 1536(a)(2); see also Response Letter at 1.

On March 13, 2020, following one such ESA-required consultation between BOEM and NMFS, NMFS published a March 13, 2020, “biological opinion” (2020 BiOp) concerning the effects of OCS oil and gas activities on several protected species, including the Rice’s whale.<sup>3</sup> Response Letter at 2; National Oceanic and Atmospheric Administration (NOAA) Fisheries, *Biological Opinion on the Federally Regulated Oil and Gas Program Activities in the Gulf of Mexico* (March 13, 2020), available at: <https://www.fisheries.noaa.gov/resource/document/biological-opinion-federally-regulated-oil-and-gas-program-activities-gulf-mexico> (last visited May 24, 2024). The 2020 BiOp discussed the extent of protected species’ habitats, the effects of oil and gas activities on such species, and “reasonable and prudent” alternative actions that oil and gas lessees and operators should take to protect those species, among other things. See 2020 BiOp. In October 2022, BOEM requested “reinitiation” of its consultation with NMFS based on a “peer-reviewed study” suggesting “that Rice’s whale may be found in more areas than those identified in the 2020 BiOp.” Response Letter at 2; see NTL at 2.<sup>4</sup>

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<sup>2</sup> Under the ESA, the term “take” means “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” 16 U.S.C. § 1532(19).

<sup>3</sup> Rice’s whale is as an endangered species listed under the ESA. See National Oceanic and Atmospheric Administration (NOAA), *Endangered and Threatened Wildlife and Plants; Endangered Status of the Gulf of Mexico Bryde’s Whale*, 84 Fed. Reg. 15446 (Apr. 15, 2019) (listing the Gulf of Mexico Bryde’s Whale as an endangered species under ESA); National Marine Fisheries Service (NMFS), *Endangered and Threatened Wildlife and Plants; Technical Corrections for the Bryde’s Whale (Gulf of Mexico Subspecies)*, 86 Fed. Reg. 47022 (Aug. 23, 2021) (revising the common name of a Bryde’s Whale subspecies to “Rice’s whale”).

<sup>4</sup> NTL, at note 1 (referencing Soldevilla, M.S., Debich, A.J., Garrison, L.P., Hildebrand, J.A. & Wiggins, S.M. (2022). *Rice’s whales in the northwestern Gulf of Mexico: call variation and occurrence beyond the known core habitat*. *Endangered Species Research*, 48, 155–174).

The NTL, issued on August 17, 2023, represented an effort by BOEM to provide additional guidance to OCS lessees and operators about Rice’s whale during the period while BOEM’s reinitiated consultation with NMFS remained “ongoing.” NTL at 2; Response Letter at 2. Specifically, BOEM explained that new information had become available about the occurrence of Rice’s whales, and it defined an “Expanded Rice’s Whale Area” within which “the possibility of incidental take of Rice’s whale” could not “be dismissed.” NTL at 1; Response Letter at 2–3.<sup>5</sup> BOEM also indicated that “all oil and gas activity [in] the Expanded Rice’s Whale Area should be conducted in accordance with” five recommended measures, which included: (1) using trained visual observers to monitor “vessel strike avoidance”; (2) documenting and retaining records regarding any transit within the Expanded Rice’s Whale Area; (3) observing a year-round speed restriction in the Expanded Rice’s Whale Area; (4) maintaining a defined minimum separation distance from Rice’s whales; and (5) including a functioning Automatic Identification System (AIS) onboard all vessels of 65 feet or greater that are “associated with oil and gas activity.” NTL at 3. BOEM further recommended that operators and lessees should “document their implementation” of these recommended measures, as well as “include [them] in any [EPs], [DPPs], and [DOCs].” NTL at 3–5.

In the NTL, BOEM also reminded lessees and operators that “activities in their EPs, DPPs, or DOCs” must comply with existing BOEM regulations regarding mitigation measures where protected species may be incidentally taken by proposed activities. NTL at 4. In this regard, BOEM elaborated that “if there is a reason to believe that a Rice’s whale may be incidentally taken” by a lessee or operator’s proposed activities, then BOEM would “coordinate with NMFS regarding the sufficiency of the mitigations [in] the EPs, DPPs, or DOCs . . . including but not limited to the measures provided in this NTL.” *Id.* “In the event such measures cannot eliminate the risk of incidental take of Rice’s whales,” BOEM indicated that lessees or operators “may also need to apply for and receive an incidental take authorization under the Marine Mammal Protection Act, 16 U.S.C. §§ 1361 *et seq.*” *Id.*

BOEM stated that the NTL was a “guidance document” that did not “have the force and effect of law” and was “not meant to bind the public in any way.” *Id.* at 5. Nevertheless, BOEM indicated that the NTL’s provisions aimed “to provide clarity regarding existing requirements,” and that the NTL’s recommendations could “be made mandatory . . . through terms, stipulations, or conditions of approval from BOEM in leases, plans, permits, or other authorizations.” *Id.*

BOEM indicated that the NTL would “remain in effect until revoked” and was intended to be used “during BOEM’s ongoing reinitiated consultation with NMFS.” *Id.* at 2. “As a result of th[at] reinitiated consultation,” BOEM signaled that “a new or

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<sup>5</sup> The NTL provides a map illustrating the difference between this “expanded” area and the area included in the 2020 BiOp. *Id.* at 2–4.

amended BiOP for oil and gas activities” may be forthcoming, along with “other NTLs and guidance.” *Id.*

### The Congressional Review Act

CRA, enacted in 1996 to strengthen congressional oversight of agency rulemaking, requires federal agencies to submit a report on each new rule to both houses of Congress and to the Comptroller General for review before a rule can take effect. 5 U.S.C. § 801(a)(1)(A).<sup>6</sup> The report must contain a copy of the rule, “a concise general statement relating to the rule,” and the rule’s proposed effective date. *Id.* CRA allows Congress to review and disapprove federal agency rules for a period of 60 days using special procedures. See 5 U.S.C. § 802. If a resolution of disapproval is enacted, then the new rule has no force or effect. 5 U.S.C. § 801(b)(1).

CRA adopts the definition of rule under the Administrative Procedure Act (APA), 5 U.S.C. § 551(4), which states that a rule is “the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency.” 5 U.S.C. § 804(3). However, CRA excludes three categories of rules from coverage: (1) rules of particular applicability; (2) rules relating to agency management or personnel; and (3) rules of agency organization, procedure, or practice that do not substantially affect the rights or obligations of non-agency parties. *Id.*

BOEM did not submit a CRA report to Congress or the Comptroller General on the NTL. In its Response Letter, BOEM stated that the NTL does not implement, interpret, or prescribe law or policy because it “is not based on a new—or any—interpretation of law or a policy choice.” Response Letter, 4. Instead, according to BOEM, the NTL merely “informs [] lessees of updated scientific information that indicates Rice’s whale may be found in [new] places” and indicates “that additional care is recommended based on that information.” *Id.* BOEM further stated that the NTL “does not alter how the agency will exercise its discretion nor change compliance expectations for regulated entities” considering that the NTL is “non-binding” and that NMFS, not BOEM, “enforce[s] the unauthorized take prohibitions of the ESA and Marine Mammal Protection Act.” *Id.* at 5. Alternatively, BOEM stated that the NTL falls within CRA’s third exception because it “provides advice to lessees without any accompanying change to their legal rights or obligations.” *Id.* at 6.

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<sup>6</sup> Alternatively, an agency can find for good cause that notice and public procedure are impracticable, unnecessary, or contrary to the public interest, and the rule will then take effect at a time the agency determines. 5 U.S.C. § 808(2).

## DISCUSSION

An agency action is subject to CRA if it meets the APA's definition of a rule and no CRA exception applies. For the reasons discussed below, we find that the NTL meets the APA's definition of a rule, and that no exception applies. Therefore, the NTL is subject to CRA's submission requirement.

First, the NTL meets the APA definition of a rule. Only the third element of that definition is at issue here because BOEM agrees that the NTL is "an agency statement with potential future effect."<sup>7</sup> Response Letter at 4. The NTL implements law or policy and thus meets the third element of the APA's definition because it announces new expectations of OCS lessees and operators whose activities BOEM manages through agency-administered leases and approvals. Specifically, the NTL instructs that "all oil and gas activity" in the Expanded Rice's Whale Area "should be conducted in accordance with" five recommended measures. NTL at 3. The NTL also states that operators and lessees should "document their implementation" of these five measures while indicating that they could "be made mandatory" through inclusion in "leases, plans, permits, or other authorizations," and signaling that BOEM will use these measures as a basis to scrutinize "the sufficiency of the mitigations [in] the EPs, DPPs, or DOCDs" submitted by lessees and operators to BOEM for approval. *Id.* at 3–5. This guidance, concerning new or updated means by which non-agency parties may avoid a penalty or gain a benefit from a federal agency (here, a lease, or BOEM's approval of oil and gas activities in the OCS) closely resembles other guidance that GAO has found to implement law or policy under CRA. See, e.g., B-334032, Dec. 15, 2022 (finding that Federal Highway Administration (FHWA) memo implemented law or policy by "announc[ing] a preference for certain types of [grant] projects" and "encourag[ing] [FHWA] funding recipients to select these types of projects"); B-238859, Oct. 23, 2017 (finding that amendments to the Forest Service's Tongass Land and Resource Management Plan implemented law or policy by establishing new criteria for the sale of timber to non-agency parties); B-329129, Dec. 5, 2017 (finding that a Consumer Financial Protection Bureau (CFPB) bulletin implemented law or policy by specifying actions for lenders to ensure compliance with CFPB-enforced laws).

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<sup>7</sup> Although the first and second elements are not directly at issue, we find them both met in this instance. The NTL is an agency statement because it is an official document issued by BOEM and posted on the agency's website. NTL; see *also* B-334146, June 5, 2023 (finding that a document issued by the U.S. Department of Agriculture (USDA) and posted on USDA website qualified as agency statement). The NTL has future effect because it announces prospective recommendations concerning the conduct of oil and gas operators on the OCS. NTL; see *also* B-333732, July 28, 2022 (finding that a USDA publication had future effect because it defined criteria for determining future financial assistance benefits).

BOEM states that the NTL does not implement law or policy because it merely “informs the lessees of updated scientific information” and “le[aves] the world as it found it.” Response Letter at 4–5. In this regard, BOEM relies upon B-334005, Jan. 18, 2023, which concerned a system of records notice (SORN) published by the District of Columbia Court Services and Offender Supervision Agency, Pretrial Services Agency (PSA). *Id.* PSA had published this SORN to provide notice that it needed to create a system of records to facilitate storage, dissemination, and disposal of new information covered by the Privacy Act of 1974, 5 U.S.C. § 552a—namely, information about federal employees’ requests for religious accommodation in response to Executive Order 14043, which required those employees’ vaccination against COVID-19. *Id.* Under these circumstances, GAO found the SORN did not implement law or policy. *Id.* As we explained, “the SORN was issued after the policy decision [to require vaccination] had been made by the President.” *Id.* It “addressed a necessary statutory step implicated by th[at] prior policy decision” but did not, itself, implement, interpret, or prescribe policy. *Id.*

However, a comparison to B-334005 reveals that the NTL is different from PSA’s SORN in important respects. Here, unlike in B-334005, BOEM is not taking necessary steps attendant to an already-final policy decision. The “updated” information in the NTL comes from a “peer-reviewed study,” not a prior policy decision by BOEM or another federal agency.<sup>8</sup> Response Letter at 2; NTL, at 2–3. Indeed, BOEM indicates that a main purpose of the NTL is to announce and act upon lessons from this study that are *not* fully incorporated into the 2020 BiOp or other existing guidance. NTL at 1–3. Moreover, while the NTL incorporates and reiterates several of NMFS’s recommendations from the 2020 BiOp, it also modifies and builds upon them in important respects.<sup>9</sup> Perhaps most notably, the NTL

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<sup>8</sup> The referenced study included one author affiliated with NOAA and two authors affiliated with academic institutions having partnerships with NOAA. See *Rice’s whales in the northwestern Gulf of Mexico: call variation and occurrence beyond the known core habitat*, available at: <https://www.int-res.com/abstracts/esr/v48/p155-174/> (last visited May 24, 2024). The journal in which the study appeared is not a U.S. federal agency publication, but an academic journal overseen by a professor at the University of Exeter, United Kingdom. See Endangered Species Research, About the Journal, available at: <https://www.int-res.com/journals/esr/about-the-journal/> (last visited May 24, 2024). NOAA, however, has included a link to the study on the “peer reviewed research” section of its website. See NOAA, Peer Reviewed Research, available at: <https://www.fisheries.noaa.gov/resource/peer-reviewed-research/rices-whales-northwestern-gulf-mexico-call-variation-and-occurrence> (last visited May 24, 2024).

<sup>9</sup> As one example, the 2020 BiOp suggested that there should be “no transit at nighttime [in Rice’s whale areas] . . . except for emergencies when the safety of the vessel or crew is in doubt,” see BiOp, at 598, whereas the NTL softens this language by recommending that “to the maximum extent practicable, lessees and operators  
(continued...)

defines an Expanded Rice's Whale Area—going beyond the area identified in the 2020 BiOp—in which the NTL states that lessee and operator precautions are warranted. NTL at 2–3. The NTL also indicates that BOEM's consultation with NMFS remains “ongoing,” and that “other NTLs and guidance” may “arise from a new or amended BiOp . . . as a result of [that] consultation.” *Id.* During the pendency of this consultation, as discussed above, the NTL suggests that its recommendations will provide the basis for follow-on actions by BOEM to bind lessees and operators through “mandatory” lease terms and to withhold agency approval of noncompliant EPs, DPPs, and DOCDs. *Id.* at 4–5. Ultimately, then, the NTL implements law or policy by presenting recommendations that are truly new—having not appeared in a prior policy document—and by signaling that those recommendations will shape BOEM's actions going forward. *Cf.* B-334005, Jan. 18, 2023 (explaining that an agency prescribes policy when it “alters how the agency will exercise its discretion, amongst other things”); B-238859; B-334032; B-329129.

BOEM also states that the NTL does not implement law or policy because it is “non-binding” and “does not indicate an expectation by BOEM . . . that lessees [will] change any actions to ensure legal compliance.” Response Letter at 5. However, GAO has previously instructed that a lack of legally binding effect does not, itself, take an agency's action outside of CRA's coverage. B-329272, Oct. 19, 2017 (“CRA's requirements are applicable to general statements of policy” that lack “legally binding” effects). For example, in B-335488, we found that a Department of Transportation (DOT) Notice of Funding Opportunity (NOFO) document implemented law or policy by “defin[ing] the procedures by which eligible entities may apply for three grant programs, describ[ing] the process by which DOT [would] evaluate [those] applications, and specify[ing] the level of funding that applicants [could] receive.” B-335488, October 18, 2023; *see also* B-334146, June 5, 2023, (notice of funding opportunity (NOFO) implemented policy by “establish[ing] a new grant program” with “eligibility requirements,” “criteria used to select proposals,” and “funding level[s]”).<sup>10</sup> For purposes of GAO's finding, it did not matter that no applicant was “obligated to apply for” or “entitled to receive” the funding advertised in the NOFO; rather, DOT's announcement of new criteria that “determine[d] whether and in what amount [a non-agency] entity may receive funding” was “sufficient” to implement law or policy and make the NOFO a rule. B-335488. As another

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should avoid transit [in the expanded Rice's whale areas] . . . after dusk and before dawn,” *see* NTL at 3. As another example, the NTL adds a recommendation for lessees and operators to retain transit records for “three years” that does not appear in the 2020 BiOp. *Compare* NTL at 3 *with* 2020 BiOp at 598.

<sup>10</sup> BOEM urges that lessees “would need to accept” any mandatory lease or other terms “prior to there being any expectation of legal compliance.” Response Letter at 6. However, this does not distinguish the NTL from the NOFO documents in B-335488 and B-334146, both of which involved “discretionary” grant programs that did not “obligat[e]” any entity to participate. B-335488; *see also* B-334146.



example, in B-334032.2, Apr. 5, 2023, we reaffirmed that a nonbinding Federal Highway Administration (FHWA) memo outlining preferred uses of federal funds implemented law or policy considering, among other things, that the memo signaled “additional planned actions” by FHWA to implement its preferences stated in the memo, including “new binding requirements ‘where permitted by law.’” B-334032.2; see also B-334032, Dec. 15, 2022.

Here, similar to the above cases, the NTL outlines agency preferences concerning the behavior of current or potential beneficiaries of federal actions. Whereas the agency guidance in B-335488 and B-334032.2 outlined agency-preferred grant proposals and agency-preferred uses of federal funds, respectively, the NTL outlines agency-preferred actions by OCS lessees and operators whose activities require BOEM authorization. See B-335488; B-334032.2; NTL. Like the memo in B-334032.2, moreover, the NTL signals “additional planned actions” by BOEM to implement its recommendations, including potentially through binding lease terms and other measures. NTL at 4; see also B-334032.2,<sup>11</sup> Considering these shared characteristics with rules discussed in prior GAO decisions, the NTL implements law or policy because it indicates to current and potential OCS lessees and operators that they should follow BOEM’s recommendations if they wish to receive or retain that agency’s authorizations. It indicates, in other words, that BOEM has “alter[ed] how [it] will exercise its discretion.” See B-334005.

In addition to meeting the APA’s definition of a rule, the NTL is not eligible for any of CRA’s exceptions. Two of those exceptions do not apply because the NTL has general, not particular, applicability, and because the NTL does not relate to internal agency management or personnel.<sup>12</sup> Additionally, the NTL is not eligible for CRA’s

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<sup>11</sup> Given these signaled follow-on actions, BOEM’s statement that the NTL does not evidence any “expectation” that “lessees [will] change any actions.” is unconvincing. Response Letter at 5. Indeed, BOEM’s Response Letter highlights at least one recent instance—involving Lease Sale 261—in which BOEM “would have made the [NTL’s] mitigations . . . binding,” but later “removed” that requirement “in accordance with a series of court decisions.” Response Letter at 3.

<sup>12</sup> Although CRA’s first and second exceptions are not directly at issue, we find them both inapplicable. The NTL is a rule of general, not particular, applicability because it applies generally to all lessees and operators conducting activities on the OCS. NTL; *cf.* B-334995, July 6, 2023 (“Rules of particular applicability are those rules that are addressed to an identified entity and also address actions that entity may or may not take, taking into account facts and circumstances specific to that entity.”). Moreover, because the NTL concerns non-agency lessees and operators, it is not a rule relating to agency management or personnel. NTL; *cf.* B-334411, June 5, 2023 (“A rule falls within the CRA exception for rules relating to agency management or personnel if it relates to purely internal agency matters, with no effect on non-agency parties.”).

third exception because that exception is for “rule[s] of agency organization, procedure, or practice,” whereas NTL is a rule concerned with the activities of non-agency OCS lessees and operators. See 5 U.S.C. § 804(3).

As we have explained previously, the third CRA exception was modeled on the APA, which excludes “rules of agency organization, procedure, or practice” from notice-and-comment rulemaking requirements. See B-329926, Sept. 10, 2018 (collecting cases). The purpose of that APA exception is to ensure “that agencies retain latitude in organizing their internal operations,” provided that such rules do not have a “substantial impact” on non-agency parties. *Id.* (quoting *Batterton v. Marshall*, 648 F.2d 694, 707 (D.C. Cir. 1980) and *Brown Express, Inc. v. United States*, 607 F.2d 695, 702 (5th Cir. 1979)). In keeping with that purpose, we have only applied the third CRA exception to rules focused primarily on the internal operations of an agency. For example, in B-329916, May 17, 2018, we found that an Internal Revenue Service (IRS) statement qualified for the third CRA exception because it merely shifted the timing of a step in the agency’s internal compliance procedures for handling certain taxpayers’ electronically filed income tax returns. Similarly, in B-329926, we found that updates to a Social Security Administration (SSA) manual governing SSA adjudicators’ use of information from the Internet qualified for the third CRA exception considering, among other things, that they were “binding only on SSA officials” and did not impose new burdens on non-agency parties.

By contrast, we have consistently found rules not focused on agency internal operations to be ineligible for the third CRA exception. Thus, in B-333732, July 28, 2022, we declined to apply the third CRA exception to the U.S. Department of Agriculture’s (USDA) annual Thrifty Food Plan updates, which increased the maximum benefit allotments for qualifying families under the Supplemental Nutrition Assistance Program (SNAP). And in B-238859, we declined to apply the third CRA exception to the Forest Service’s amended Tongass Land and Resource Management Plan, which established new criteria for the sale of timber to non-agency parties. See also, *e.g.*, B-334032 (FHWA memo specifying preferred uses of federal funds by non-agency parties ineligible for third CRA exception), B-334146 (NOFO that implemented a grant program and established its eligibility requirements, selection criteria, and funding ranges, was ineligible for third CRA exception).

Here, the NTL is not focused on internal agency operations. Rather, its purpose is to provide new recommendations to lessees and operators concerning the means to receive new or continued leases and authorizations from BOEM. See NTL; Response Letter at 6 (explaining that the NTL “provides advice to lessees”). Like the rules at issue in B-333732 and B-238859, the NTL is directed at, and concerns itself primarily with the behavior of, non-agency parties. Therefore, the NTL cannot qualify for the third CRA exception.

BOEM states that the NTL is eligible for the third CRA exception because it does not have a substantial impact on the rights and obligations of non-agency parties.

Response Letter at 6. In this respect, BOEM relies upon B-335516, Jan. 24, 2024, which concerned a Department of Education (Education) Fact Sheet announcing that Education would change its enforcement procedures for assessing compliance with the duty to make student loan payments. *Id.*

However, we need not apply the rubric of the third CRA exception to assess the substantiality of the NTL's effects on lessees and operators because, as discussed above, the third CRA exception is only for rules that primarily concern internal agency operations. The NTL does not meet this threshold.

## CONCLUSION

The NTL is a rule for CRA purposes because it meets the APA's definition of a rule and no CRA exception applies. Therefore, the NTL is subject to CRA's requirement that it be submitted to Congress before it can take effect.

A handwritten signature in black ink, reading "Edda Emmanuelli Perez". The signature is written in a cursive, flowing style.

Edda Emmanuelli Perez  
General Counsel