



MARINE MAMMAL COMMISSION

21 September 2017

Mr. John Henderschedt
Office of International Affairs and Seafood Inspection
Attn: MMPA Petition
NOAA Fisheries, F/IS
1315 East-West Hwy
Silver Spring, MD 20910

Dear Mr. Henderschedt,

The Marine Mammal Commission (the Commission), in consultation with its Committee of Scientific Advisors, has reviewed the “Notification of a Petition to Ban Imports of All Fish and Fish Products from Mexico That Do Not Satisfy the Marine Mammal Protection Act Provisions” published on 22 August 2017 (82 Fed. Reg. 39732). This petition was filed on 18 May 2017 by several environmental NGOs. The Commission offers the following comments and recommendations in response to the request for information pertinent to this petition.

In its 1 March 2017 [letter](#) providing information on foreign fisheries that export products to the United States, the Commission recommended that the National Marine Fisheries Service (NMFS) consider placing all Upper Gulf of California gillnet fisheries on the List of Foreign Fisheries, including the fisheries for shrimp and curvina. This recommendation stemmed from the continuing and rapid decline of the vaquita population due primarily to incidental mortality in gillnet fisheries, including the illegal totoaba fishery. The Commission underscored in its letter that sufficient information is available to warrant an import ban on products from those fisheries and noted that a five-year delay in establishing an import ban, as allowed under NMFS’s regulations implementing section 101(a)(2) of the Marine Mammal Protection Act (MMPA), would mean that the necessary protection for the vaquita would come far too late, given the immediately dire situation facing the species. The Commission therefore recommended that NMFS consider emergency rulemaking to make a finding that these fisheries do not meet the MMPA’s comparability standards for fish imports.

With the publication of this notice, NMFS specifically requests comments and information on four points, which are addressed as follows:

1) The adequacy of existing measures regulating commercial fishing throughout the range of the vaquita;

Mexico has imposed a number of measures to minimize vaquita mortality in fishing gear, including a vessel/gear buyback program, a two-year moratorium on gillnet fishing with compensation for fishermen, designation of a no-fishing sanctuary for vaquitas, and gear restrictions. However, fishery operators are intentionally continuing to fish illegally and gillnet fishing continues to kill vaquitas. Of five dead vaquitas examined in March and April 2017, three showed post mortem lesions consistent with bycatch while the cause of death of the other two (a

fetus and a young calf) could not be determined (CIRVA-9 2017). Enforcement has been inadequate. Few fishermen have been caught and charged, and fewer still have been successfully prosecuted. When penalties have been imposed, the fines assessed have been small relative to the value of the illegal product (totoaba swim bladders). Effective regulatory measures need to be accompanied with increased outreach, more on-the-ground enforcement, and traceability of seafood products. Given the precipitous and ongoing decline in the vaquita population and evidence that gillnets are the primary source of mortality, it is clear that measures regulating commercial fishing throughout the range of the vaquita and related enforcement efforts are not adequate to prevent extinction, much less to provide for conservation and recovery of the species.

Vaquitas are not the only marine mammals seriously injured or killed in gillnets in the Upper Gulf of California. A summary of active and ghost nets retrieved and dead animals removed from them was provided by Sea Shepherd Conservation Society to Mexican government officials and members of CIRVA on 2 June 2017. Between 15 December 2016 and 23 May 2017, the multi-partner program retrieved 5 dead dolphins (species not specified) and 25 dead sea lions from active or derelict fishing gear.

2) Whether such measures can be considered comparable in effectiveness to the U.S. regulatory program;

U.S. standards under the MMPA place limits on the numbers of marine mammals that can be killed or seriously injured incidental to commercial fishing operations. For a species such as the vaquita, it is likely that NMFS long ago would have (i) assigned highest priority to developing a take reduction plan to reduce mortality and (ii) invoked the emergency rulemaking provisions under MMPA section 118(g) given the “immediate and significant adverse effect” of fisheries on the vaquita. It is also likely that U.S. agencies would have established a robust enforcement program and imposed sufficient penalties to address violations. Mexico’s fisheries management efforts designed to conserve the vaquita, whether through poor design, ineffective enforcement, or for other reasons, have been unsuccessful in preventing the species’ decline to its present state of near-extinction. Those measures cannot be considered comparable in effectiveness to the U.S. regulatory program.

3) Whether the apparent decline in the vaquita population attributed to interaction with commercial fishing gear meets the standard of “immediate and significant adverse impact on a marine mammal stock” within the MMPA;

The precipitous decline in the vaquita population is more than apparent: it is observed and well-documented. Visual surveys conducted over the past 20 years and acoustic monitoring in place since 2011 provide irrefutable evidence of a real and significant decline. The estimated average annual rate of decline between 2011 and 2016 was 39 percent, corresponding to a population decline of more than 90 percent during that five-year period. There also is compelling evidence that the top source of vaquita mortality is (and long has been) entanglement in gillnets. Due primarily to fishing-related mortality, the vaquita is now the most endangered marine mammal species on the planet (assuming, as we do, that the baiji, or Yangtze River dolphin, became extinct approximately a decade ago, also due in large part to incidental mortality in fishing gear). For a species that is estimated to number fewer than 30 individuals (of all ages), and for which deaths attributed to entanglement in fishing

gear continue to occur despite Mexico’s regulatory program, there can be no question that these fisheries are having an immediate and significant adverse impact on the vaquita.

4) Which specific fisheries are, or may be directly associated with potential mortality of vaquita and therefore fall within the scope of the petition for emergency action.

The Commission recommends that NMFS act immediately to invoke the emergency rulemaking provisions of the MMPA import rule to ban the import into the United States of all fish and fish products from fisheries that kill or seriously injure, or that have the potential to kill or seriously injure vaquitas. Vaquitas are on the verge of extinction, and the use of this market access tool ought to be an important element of the overall effort to conserve the species.

Numerous fisheries in the upper Gulf of California that involve the use of gillnets, regardless of the target species, could contribute to mortality of vaquitas. The citations in the table below reference gear types used and the species targeted in fisheries in the upper Gulf. Whether all of these fisheries are still in operation is uncertain because the sources of information about them are, in some cases, over twenty years old. However, given the lack of data on current fishing operations in the region, the permitting of certain fisheries (e.g. for curvina and sierra) as exceptions under Mexico’s permanent gillnet ban, and the need for a precautionary approach, this information should provide the basis for preventative measures to protect vaquitas unless proven to be outdated.

Citation	Gear Type	Target Species
D'Agrosa, C., Lennert-Cody, C.E. and Vidal, O. 2000. Vaquita Bycatch in Mexico's Artisanal Gillnet Fisheries: Driving a Small Population to Extinction. Conservation Biology 14: 1110–1119.	Gillnet	Shrimp, chano, elasmobranchs, curvina, sierra
Rojas-Bracho, L., Reeves, R.R. and Jaramillo-Legorreta, A. 2006. Conservation of the vaquita <i>Phocoena sinus</i> . Mammal Review 36: 179–216.	Gillnet	Totoaba, chano, sharks, various others
Erisman, B., Mascarenas-Osorio, I., López-Sagástegui, C., Moreno-Báez, M., Jiménez-Esquível, V. and Aburto-Oropeza, O., 2015. A comparison of fishing activities between two coastal communities within a biosphere reserve in the Upper Gulf of California. Fisheries Research 164: 254-265.	Gillnet	blue shrimp, Gulf curvina, bigeye croaker, Spanish mackerel
Vidal, O., Van Waerebeek, K. and Findley, L.T. 1994. Cetaceans and gillnet fisheries in Mexico, Central America and the Wider Caribbean: a preliminary review. Report of the International Whaling Commission (Special Issue) 15: 221–233.	Artisanal gillnet	Totoaba, Striped mullet, Sharks - white, shortfin mako, lemon, pacific sharpnose, blacktip, dusky, alopiids, sphyrnids, triakids

Alberto Aragón-Noriega, E., Valenzuela-Quiñones, W., Esparza-Leal, H., Ortega-Rubio, A. and Rodríguez-Quiróz, G. 2009. Analysis of management options for artisanal fishing of the Bigeye Croaker *Micropogonias megalops* (Gilbert, 1890) in the Upper Gulf of California. *International Journal of Biodiversity Science & Management* 5.4: 208-214.

Gillnet /
trawl

Bigeye croaker

Rodríguez-Quiroz, G., Aragón-Noriega, E.A., Valenzuela-Quiñónez, W. and Esparza-Leal, H.M. 2010. Artisanal fisheries in the conservation zones of the Upper Gulf of California. *Revista de Biología Marina y Oceanografía* 45.1: 89-98.

Various

Curvina, sierra, bigeye
croaker, shrimp, rays,
sharks

Lluch-Cota, S.E., Aragon-Noriega, E.A., Arreguín-Sánchez, F., Auriolles-Gamboa, D., Bautista-Romero, J.J., Brusca, R.C., Cervantes-Duarte, R., Cortés-Altamirano, R., Del-Monte-Luna, P., Esquivel-Herrera, A. and Fernández, G. 2007. The Gulf of California: review of ecosystem status and sustainability challenges. *Progress in Oceanography* 73.1: 1-26.

Various

Various

We assume that NMFS and the U.S. Customs Service have more recent information concerning what fish species and fish products from this list are or may be exported to the United States and for which an import ban needs to be imposed.

We also note that the petition for emergency rulemaking that is the subject of the *Federal Register* notice was submitted four months ago. It is unclear how NMFS plans to proceed from here, but the agency may be contemplating following normal rulemaking procedures—review of comments received in response to this notice, publication of a proposed rule, with an opportunity for public comment, publication of a final rule, and perhaps a “cooling-off” period prior to implementation. The whole point of the emergency rulemaking provisions of section 118(g) of the MMPA, and presumably the counterpart provisions under the import rule, is to allow NMFS to respond to emergencies expeditiously. The vaquita situation is an emergency and if the importation of fish and fish products into the United States is contributing to the problem, then that too should be treated as an emergency. The Commission therefore recommends that NMFS use emergency rulemaking procedures to impose an immediate import ban on those fish or fish products. This could be accomplished by invoking the “good cause exception” of the Administrative Procedure Act (5 U.S.C. § 553(d)(3)), bypassing the publication of a proposed rule, and publishing an interim final rule to ban imports of such fish and fish products, with a post-publication comment period prior to publication of a “permanent” final rule. If NMFS follows its normal rulemaking timeline in taking action to protect the vaquita from additional fishing-related mortality, that action will likely be too late to contribute to saving the species from extinction.

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We hope these comments and recommendations will be useful. Please contact me if you have questions regarding the Commission's recommendations.

Sincerely,



Rebecca J. Lent, Ph.D.,
Executive Director

References

CIRVA. 2017. Report on the Ninth Meeting of the International Committee for the Recovery of the Vaquita (CIRVA). La Jolla, CA, April 2017. 32 pp.