

Via Email and First-Class Mail

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Re: Mexico's January 2021 Supplemental Vaquita Regulations, Enforcement Failures, and the MMPA Imports Provision

Dear Mr. Rauch, Ms. Cole, and Ms. Young,

On behalf of the Center for Biological Diversity, Animal Welfare Institute, and the Natural Resources Defense Council, we write to provide information regarding the Mexican government's most recent regulatory actions regarding the vaquita and its continued enforcement failures. Mexico's regulatory program for its Upper Gulf fisheries remains far short of U.S. standards and is not "comparable" under the Marine Mammal Protection Act (MMPA) Imports Rule.¹ Accordingly, the National Marine Fisheries Service (NMFS) should continue its embargo on seafood from Mexico's Upper Gulf of California.²

As you are aware, in September 2020 and in response to the NMFS's ban on seafood imports, Mexico published new regulations governing fishing and other actions within the vaquita's habitat.³ We submitted a letter in November 2020 describing why those regulations are inadequate and fail to demonstrate that Mexico's regulatory program meets U.S. standards. Among those reasons, we described how the September regulations contained numerous promises of future action and, given Mexico's long history of unfulfilled promises and failures to

¹ 16 U.S.C. § 1371(a)(2); 50 C.F.R. § 216.24(h).

² 85 Fed. Reg. 13,326 (Mar. 9, 2020).

³ Diario Oficial de la Federación. *Acuerdo por el que se regulan artes, sistemas, métodos, técnicas y horarios para la realización de actividades de pesca con embarcaciones menores y mayores en Zonas Marinas Mexicanas en el Norte del Golfo de California y se establecen sitios de desembarque, así como el uso de sistemas de monitoreo para tales embarcaciones* (Sept. 24, 2020), available at http://www.dof.gob.mx/nota_detalle.php?codigo=5601153&fecha=24/09/2020. See also Legal Fishing Guide for The Upper Gulf of California.

enforce, why NMFS could not rely on those promises in considering whether to modify the existing ban.

In January 2021, Mexico supplemented its September regulations, issuing one of its promised plans and convening an inter-agency group.⁴ However, key components of the regulations remain unimplemented, and illegal fishing in the vaquita's habitat continues. As shown in the maps below, Mexico continues to allow illegal gillnet fishing throughout the Zero Tolerance Area, the area intended to be the focus of intense enforcement. Yet according to the IUCN Cetacean Specialist Group, illegal fishing is currently “uncontrolled.” Accordingly, NMFS should maintain its existing ban on seafood from the Upper Gulf.

A. Mexico Has Failed to Fully Implement Its September 2020 Regulations

In issuing its September 2020 regulations,⁵ the Mexican government committed to take a series of further actions to conserve the vaquita. But for each of these promises, the government has either failed to meet its own regulatory deadlines or entirely failed to follow through on the commitment, as of the date of this submission.

1. Insufficient Application Plan

The Mexican government's 2020 regulations required an “Application Plan” to be issued in coordination with several Mexican agencies within 30 days of the regulation's publication, i.e., by October 24, 2020 (5th Transitory Article). The Application Plan is supposed to address inspection and surveillance; recovery and disposal of illegal and lost gear; and additional conservation measures.

The Mexican government has not yet issued a plan that meets these requirements. While it did issue a plan on January 15, 2021, nearly three months late, the plan is vague and primarily delineates which agencies are charged with particular functions related to the vaquita. While there has long been a need to clarify the various Mexican agencies' functions, the agencies' duties identified in the Plan overlap, and many of the duties are vague and lack timeframes (e.g., directing agencies to “hold . . . meetings” and “participate . . . in inspection and monitoring”).

⁴ Guidelines for the organization and functions of the Intra-Government Group on Sustainability in the Upper Gulf of California January 15th, 2020. Official Gazette of the Federation. Available at http://dof.gob.mx/nota_detalle.php?codigo=5609927&fecha=15/01/2021

⁵ Several fishermen cooperatives have filed a legal challenge to the new regulations. In one case, [Expediente 790/2020-2 Juzgado primero de distrito en el estado de Baja California] the plaintiffs asked the court to invalidate multiple provisions of the regulations. In a preliminary ruling, however, the court only suspended a single provision—the requirement to turn over gillnets to the authorities—but made clear that this decision only applies to plaintiffs and that it does not permit them to use said gillnets to fish. [Expediente 790/2020-2 Juzgado primero de distrito en el estado de Baja California]. This case and others remain pending and, depending on the outcome of each, the regulations could be weakened or entirely invalidated.

Moreover, the plan entirely fails to address “actions for the recovery, disposal and recycling . . . of illegal” or lost gear, as required by the 2020 regulations.⁶

2. Lack of triggers

Critically, to ensure compliance with the fishing closures and gillnet ban, the September regulations also require that relevant agencies “develop . . . triggering factors, defined as “those situations identified by means of quantitative measures . . . which if exceeded will result in predetermined actions by authorities, such as prohibitions on fishing, closures of areas or similar responses” (Art. 17). The regulations require the agencies to publish the triggering factors; their duration and scope; and a mechanism for implementing the triggers by October 24, 2020. The Mexican government has failed to meet this directive; no triggers have been published.⁷

3. Vague compliance working groups

The regulations further promise the creation of two compliance working groups. The “Intragovernmental Group on Sustainability” (GIS) is directed to analyze, coordinate, and evaluate the agreement and was to be established simultaneously with the September regulations (6th Transitory Article). A separate “Collaboration Group on Application” (GCAL) is directed to facilitate the exchange of information on illegal fishing, totoaba trafficking, and prosecutions and was to be established within 30 days (7th Transitory Article). It is unclear when the GIS was established but Mexican agencies published “Guidelines for the organization and function” of the GIS on January 20, 2021.⁸ It also is unclear whether the Collaboration Group has been established or is intended to meet with or within the GIS.

The first GIS meeting was initially planned to take place in January but was then postponed to February 26, 2021,⁹ five months after the regulation’s publication. In its press release regarding the first GIS meeting, SEMAR acknowledged that a much-anticipated reform of the Federal Penal Code to make environmental crimes a serious violation—thereby allowing preventative detention and increasing both prison time and penalties—has not yet passed and is under review by the Senate.¹⁰

⁶ Diario Oficial de la Federación. *Application Plan in the Zero Tolerance Zone and the Refuge Area for the Protection of the Vaquita* (Jan. 20, 2021), available at http://dof.gob.mx/nota_detalle.php?codigo=5610105&fecha=20/01/2021.

⁷ Freedom of Information Request number 0819800027220. Letter RJL/INAPESCA/DG/DJ/UT/046/2021, dated in Mexico City, January 20th, 2021.

⁸ Diario Oficial de la Federación. *LINEAMIENTOS para la organización y funciones del Grupo Intragubernamental sobre la sustentabilidad en el Alto Golfo de California*. (Jan. 15, 2021), available at http://dof.gob.mx/nota_detalle.php?codigo=5609927&fecha=15/01/2021.

⁹ Secretariat of the Navy. Press release. Actions of the Government of Mexico in the Upper Gulf of California. February 20th, 2021. <https://www.gob.mx/semar/prensa/acciones-del-gobierno-de-mexico-en-el-alto-golfo-de-california-264317>

¹⁰ *Id.*

4. Marine mammal interaction reporting

The regulations further direct the Comisión Nacional de Acuacultura y Pesca (“Conapesca”) to publish a form and mechanism so fishermen can report marine mammal interactions (Art. 5). Conapesca has failed to publish any form or mechanism. Without instructions on how or where to report entanglements and bycatch, it is unlikely fishermen are reporting these events—information that is critical to knowing how much vaquita bycatch continues.

5. Gillnet surrender

The regulations required all permit holders, captains, and fishermen to deliver any gillnets to the Conapesca office closest to where their vessel is registered by November 23, 2020 (Art. 10), as the regulations ban possession of such gillnets near vaquita habitat. As of February 3, 2021, and in response to a public information request for how many nets had been received, Conapesca stated that they had no responsive information,¹¹ suggesting no nets had been turned over.

6. Gear marking

The regulations direct Conapesca to develop and implement a gear marking scheme within 18 months of the regulation’s publication (2nd Transitory Article). Given the delay of all other actions required by the regulations, we are concerned the Mexican government will also not meet this commitment.

7. Mexico’s discussions on reducing the gillnet ban area

As we noted in our November 2020 comments, the designated marine area to which the September 2020 regulations apply does not cover the vaquita’s full range, which includes waters of the Upper Gulf north of a line connecting Puertecitos and Puerto Lobos, from Baja California to the Sonoran Coast. Instead of expanding the gillnet ban applies to cover the vaquita’s full range, the Mexican government is now discussing a proposal to *reduce* the size of the area in which gillnets are prohibited.¹²

In sum, while we welcomed Mexico’s publication of its September regulations and appreciate that the Mexican government now has taken some steps to meet the regulations’ requirements, these actions were quite delayed, and the government has failed to follow-through on essential commitments. We are very concerned that the current plans and promised future actions lack the detail necessary to ensure fisheries’ vaquita bycatch and illegal totoaba poaching will be halted, saving the vaquita and totoaba from extinction.¹³

¹¹ Freedom of Information Request number 0819700216820, letter No. DGIV/0099/2021, dated January 26, 2021.

¹² Grupo Intragubernamental sobre la Sustentabilidad en el Alto Golfo de California, Instalación de la mesa técnica de medio ambiente (March 12, 2021) (meeting agenda with “Reduction of the Prohibition Area for all gillnets including ‘gillnets’ as the first point of discussion).

¹³ IUCN SSC Letter re Vaquita Threats (Mar. 26, 2021).

B. Mexico's Enforcement Failures

While we welcomed Mexico's new regulations, as we noted in our November 2020 comments, Mexico has a long history of enforcement failures. Unfortunately, Mexico has already failed to enforce its September 2020 regulations, and we remain gravely concerned about the vaquita's fate, given the continued level of illegal gillnet fishing.

In December 2020, IUCN Cetacean Specialist Group ("IUCN CSG") published new data demonstrating that "illegal fishing remains at high levels and takes place day and night."¹⁴ The IUCN CSG provided three maps documenting illegal fishing activities in October 2020 (Figure 2), November 2020 (Figure 3), and December 2020 (Figure 4). The maps depict hundreds of pangas—most fishing for shrimp with gillnets—within the Zero Tolerance Area, where both gillnetting and transit of any vessels are supposed to be strictly prohibited to protect the vaquita.

According to the IUCN CSG, in November 2020 alone, a total of 1,185 pangas were counted with nearly all of these pangas gillnetting for shrimp. Based on these data, the IUCN CSG concluded that "[f]ishermen have no incentives to change their traditional fishing practices — very little alternative fishing gear, and few alternative livelihoods to feed their families" and that "*[i]llegal fishing remains uncontrolled.*"¹⁵

These data demonstrate that, despite Mexico's promises and regulatory improvements, the same fact remains: Mexico has failed to halt gillnet fishing in the vaquita's habitat.

¹⁴ IUCN Cetacean Specialist Group, Vaquita update October through December 2020, available at <https://iucn-csg.org/vaquita-update-october-through-december-2020/>.

¹⁵ *Id.*

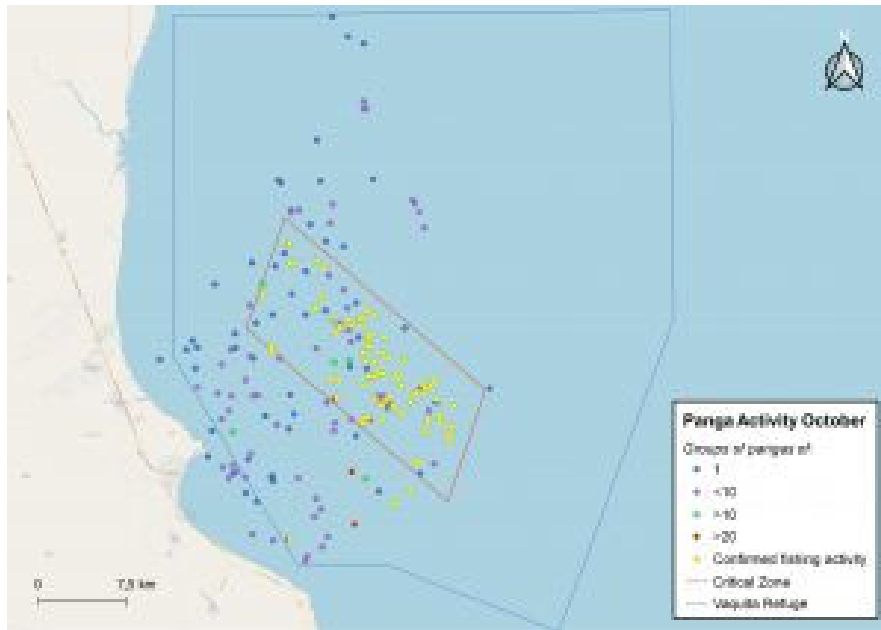


Figure 1. Panga positions in October 2020, with each color¹⁶ representing the approximate number of pangas observed from the survey vessel at a given time and location. Yellow dots indicate individual pangas that were confirmed to be fishing. The SSCS effort was concentrated in the ZTA (outlined in red but labeled as the ‘Critical Zone’ in the map legend). Source: Sea Shepherd Conservation Society Internal Reports, October 2020.

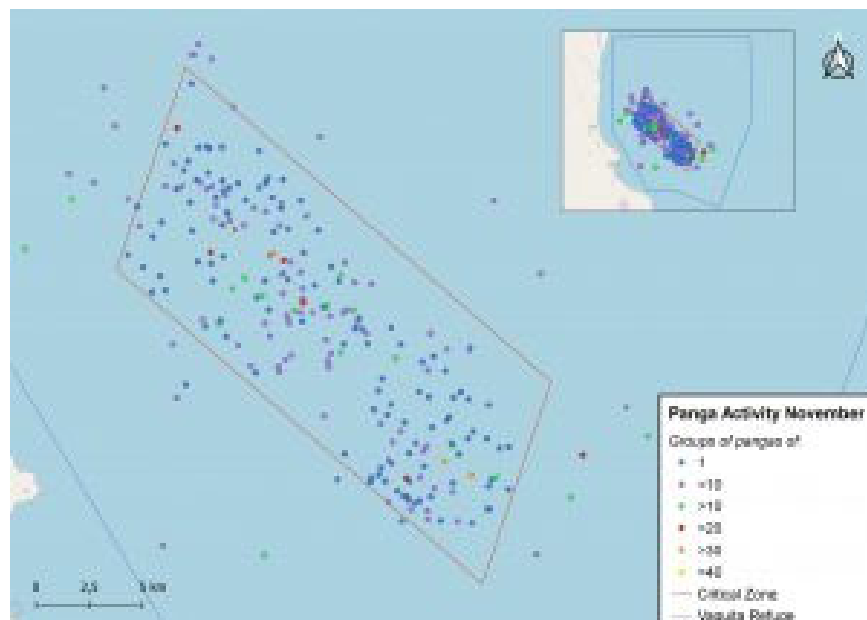


Figure 2. Panga positions in November 2020, with each color representing the approximate number of pangas observed at a given time. The Effort by net-removal vessels that reported panga positions was concentrated in the ZTA (outlined in red but labeled as the ‘Critical Zone’ in the map legend). Source: Sea Shepherd Conservation Society Internal Reports, November 2020.

¹⁶ In each of the figures, blue, purple, green, and red dots correspond to one, less than 10, more than 10, and more than 20 pangas, respectively.

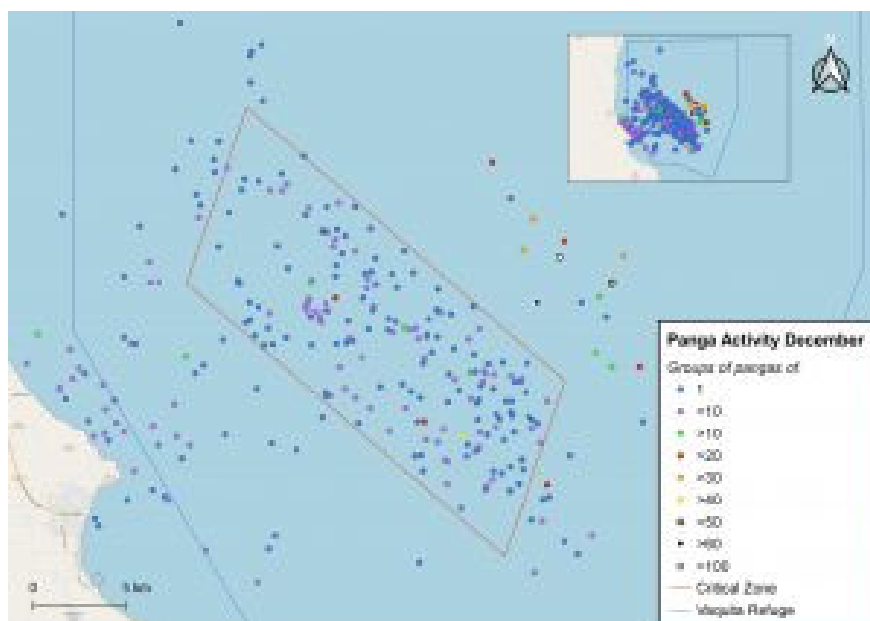


Figure 3. Panga positions in December 2020, with each color representing the approximate number of pangas observed at a given time. The effort was concentrated in the ZTA (outlined in red but labeled as the ‘Critical Zone’ in the map legend), but fishing was observed widely in the Vaquita Refuge (inset). Source: Sea Shepherd Conservation Society Internal reports, December 2020.

We note that, in November of 2020, Mr. Sunshine Antonio Rodriguez Peña, a well-known fishermen representative from San Felipe, Baja California, and seven others were taken into custody on charges of racketeering and organized crime related to totoaba trafficking.¹⁷ For years, Mr. Rodriguez Peña had posted regularly on Facebook documenting his and others’ illegal use of gillnets to catch shrimp, sierra, and curvina near San Felipe, which is prohibited under the new regulations.¹⁸ While one long-overdue enforcement action by the Mexican government is helpful, this action alone does not constitute sufficient enforcement.¹⁹ Fishers continue to fish illegally, doing so in broad daylight and also by attacking those engaged in patrolling the area and removing illegal fishing nets.²⁰

The failure to enforce the gillnet prohibition in the Upper Gulf is indicative of a systemic problem in Mexico to responsibly manage and enforce its fishing regulations, as highlighted in a September 2020 assessment by Vanda Felbab-Brown of the Brookings Institute:

¹⁷ *Van a proceso 6 pescadores detenidos en hábitat de vaquita marina*. Excélsior. Nov, 17, 2020. <https://www.excelsior.com.mx/nacional/van-a-proceso-6-pescadores-detenidos-en-habitat-de-vaquita-marina/1417384> Two suspects were subsequently released due to lack of evidence. To date, Mr. Rodriguez Peña remains in custody.

¹⁸ See Ex. C to our November 2020 comments.

¹⁹ Illegal totoaba trade also continues. In January 2021, authorities detected a 350-meter-long illegally set gillnet containing 13 totoaba, seven of which were dead. See <https://www.dossierpolitico.com/vernoticiasanteriores.php?artid=245273&relacion=&tipo=Noticias&categoria=1>. But again, isolated enforcement actions do not address the extent of illegal fishing.

²⁰ See <https://seashepherd.org/2021/01/01/collision-at-sea-as-sea-shepherd-vessels-attacked-in-mexicos-vaquita-refuge/>.

Fisheries management and enforcement in Mexico involves a complex and mostly ineffective tangle of institutions that tend to be under resourced, susceptible to corruption, and engage in buck-passing. . . . Well-meaning and dedicated officers get easily disheartened by the rock-bottom slashed budgets the López Obrador administration imposed, hollowing out already critically weak management, inspection, enforcement capacities—an institutional morass.²¹

This institutional morass has contributed to illegal fishing accounting for between 45 and 90 percent of official fish production in Mexico.²² Moreover, the problem is not limited to illegal fishing as enforcement failures are common throughout the seafood supply chain in Mexico. Yozell (2020), in a Stimson Center report analyzing the implementation of the U.S. Seafood Import Monitoring Program (SIMP), found as follows:

According to Stimson interviews with government, NGO, and industry stakeholders in Mexico, there are several steps along the seafood supply chain where information required for SIMP and verified by the Mexican government can be falsified, duplicated, or left unverified. Government capacity, reporting, and documentation have proven to be the main challenges for SIMP implementation in Mexico; and these challenges are clearest in the small-scale fishing sector.²³

Felbab-Brown cautions, however, that improvements to the enforcement of fishing regulations will not succeed unless there is “better resourcing of environmental management and protection agencies.”²⁴ She opines that “[a]s long as the López Obrador administration starves them of budgets, better environmental, fishery sustainability, and rule-of-law results won’t follow.”²⁵

A lack of resources is preventing coordinated, meaningful, and sustained efforts to prevent illegal fishing and protect the vaquita and totoaba. *Excelsior*, a respected media organization in Mexico City, recently reported, after a review of government reports about the recently-concluded shrimp season in the Upper Gulf, that a lack of resources, planning, logistics, and knowledge among senior officials of PROFEPA has led to “[l]os nulos resultados” or zero results in the protection of the vaquita and efforts to combat the illegal trafficking of totoaba.²⁶ Specifically, PROFEPA’s low budget is used inappropriately and for improvised actions that yielded no results. In November and December 2020, the 19 federal inspectors brought in to support local authorities in the Upper Gulf were unable to prevent unlawful conduct, as no small

²¹ See <https://www.brookings.edu/blog/order-from-chaos/2020/09/14/illegal-fishing-in-mexico-and-policy-responses/>.

²² *Id.*

²³ Yozell. 2020. A Qualitative Assessment of SIMP Implementation in Four Countries. Stimson Centre Report, available at <https://www.stimson.org/wp-content/uploads/2020/02/Stimson-Final-Traceability-Report.pdf>.

²⁴ *Id.*

²⁵ *Id.*

²⁶ See <https://www.excelsior.com.mx/nacional/sin-recursos-ni-estrategia-profepa-enfrenta-extincion-de-vaquita-marina/1434816> (English translation).

vessels were available “because there was not enough money for fuel.”²⁷ This prevented efforts to stop illegal fishing on, for example, November 11, 2020, when there were 60 pangas simultaneously engaged in illegal fishing inside the vaquita Zero Tolerance Area.

Furthermore, there are no four-wheeled drive vehicles available to conduct beach patrols or tow boats; no accommodations for PROFEPA officials to stay overnight in the area; and no office space for its officials to use, as the PROFEPA facilities in San Felipe and Santa Clara were attacked by fishers and set on fire in 2018 and 2019, respectively, and have not been rebuilt.²⁸ The former PROFEPA coordinator for San Felipe also sent personnel to assist with inspecting vehicles on the road to Mexicali despite the Ministry of National Defense having sufficient personnel to conduct the checks itself.²⁹

The lack of any coherent strategy to address monitor legal fisheries, curtail the extent of illegal fishing, and enforce fishing prohibitions in the Upper Gulf was highlighted in the February 26, 2021 GIS meeting between government officials, fishers, industry representatives, politicians, and others. Mr. Ramón Franco, a representative of the organized fishermen of San Felipe, noted how “everyone sees how in broad daylight illegals operate in total impunity.”³⁰ Carlos Tirado, the leader of the fishing cooperatives in Golfo de Santa Clara and Golfo de Sonora, asked, “[w]hen will there be a real strategy from the federal government and industry to find a solution, because as of today, February 26th, it does not exist?”³¹ Tirado also noted that, despite the prohibition on using gear that had been promulgated in September 2020, the government had failed to provide alternatives to the communities.³² No new meaningful or substantive strategies that were not already underway or that are common sense (e.g., information sharing) came out of the meeting.

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CONCLUSION

We recognize the importance of Mexico updating its regulations to align them with the critical status of the vaquita. The new regulations, if fully enforced, have the potential to reduce totoaba poaching and vaquita bycatch. However, because Mexico has neither fully implemented nor fully enforced the regulations, Mexico has not demonstrated that it is meeting or will meet U.S. standards, as the MMPA requires. NMFS should reject any comparability application from Mexico for its Upper Gulf fisheries.

We welcome the opportunity to discuss this issue with you and would be happy to answer any questions you may have. We also ask that you promptly inform us if Mexico submits a complete application for a comparability finding on its Upper Gulf fisheries that triggers the assessment timelines contemplated by the MMPA Imports Rule. Following submission of this letter via email, we will send a hard copy and a drive with all referenced cited for your records.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ See <https://www.excelsior.com.mx/nacional/gobierno-llego-a-reunion-sin-estrategia-para-habitat-de-vaquita-marina-pescadores/1435014> (English translation).

³¹ *Id.*

³² *Id.*

Sincerely,

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