



November 21, 2017

Elaine Duke, Acting Secretary  
Department of Homeland Security  
Washington, DC 20528

Steven Mnuchin, Secretary  
Department of the Treasury  
1500 Pennsylvania Ave., NW  
Washington, DC 20220

Wilbur Ross, Secretary  
Department of Commerce  
1401 Constitution Ave., NW  
Washington, DC 20230

Kevin McAleenan, Acting Commissioner  
Customs and Border Protection  
Department of Homeland Security  
1300 Pennsylvania Ave., NW  
Washington, DC 20229

Sam Rauch, Acting Assistant Administrator  
National Marine Fisheries Service  
National Oceanographic and Atmospheric  
Administration  
1315 East-West Highway  
Silver Spring, MD 20910

John Henderschedt, Director  
Office of International Affairs and  
Seafood Inspection  
National Marine Fisheries Service  
1315 East-West Highway  
Silver Spring, MD 20910

**Re: Notice of Legal Violations: Violations of the Administrative Procedure Act and the Marine Mammal Protection Act (“MMPA”) for Failing to Implement the MMPA’s Prohibition on Imports of Fish and Fish Products from Mexico that Harm Vaquita in Excess of United States Standards**

Dear Secretaries Ross and Mnuchin, Acting Secretary Duke, Acting Commissioner McAleenan, Acting Assistant Administrator Rauch, and Director Henderschedt:

I write on behalf of the Natural Resources Defense Council (“NRDC”), the Animal Welfare Institute (“AWI”), and the Center for Biological Diversity (“the Center”) to notify you that the National Marine Fisheries Service (“NMFS”) and other government agencies are violating the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 500 *et seq.*, and the Marine Mammal Protection Act (“MMPA”), 16 U.S.C. § 1371(a)(2), in connection with the United States government’s failure to ban imports of fish and fish products from Mexico that have not satisfied the MMPA requirements applicable to the incidental killing or serious injury of vaquita.

We provide this notice to give the federal government the opportunity to correct these violations of law. If any of the facts identified below are inaccurate, please inform us by November 29, 2017.

**NATURAL RESOURCES DEFENSE COUNCIL**

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## **I. Factual Background**

### **A. Vaquita**

The vaquita's status is beyond dire. With far fewer than 30 remaining and an annual decline rate of nearly 50 percent, it is the most endangered cetacean—and probably the most endangered animal—on the planet. If current trends continue, it is doubtful the vaquita will survive the next season of intensive totoaba poaching from January to March, 2018.

The sole cause of the vaquita's steep decline is bycatch in gillnets, leading the Comité Internacional para la Recuperación de la Vaquita (CIRVA)—the international scientific advisory group on vaquita status and recovery established by the Mexican government in 1996—to conclude that the presence and use of gillnets in and around the vaquita's habitat is incompatible with vaquita survival. Nonetheless, as detailed in numerous CIRVA reports, our May 18, 2017 petition to ban imports of fish and fish products from Mexico that harm vaquita in excess of U.S. standards (“Vaquita Petition”), our September 21, 2017, comment letter (“Comment Letter”) on NMFS's notice of receiving the Vaquita Petition, and recent eye-witness reports, the Mexican government has failed to halt the use of gillnets in and around the vaquita's habitat in both legal and illegal fisheries.

As a result, the vaquita population has declined by 97 percent over the last twenty years. In early 2017, CIRVA reported that “almost half of the remaining vaquita population was lost between 2015 and 2016 (a 49 percent annual decline).”<sup>1</sup> There is no evidence suggesting any disruption in this annual decline rate, leaving today's vaquita population at the brink of extinction. NMFS has been aware of the vaquita's plight for more than two decades, with staff scientists participating in CIRVA since its first meeting in January 1997.

### **B. The Vaquita Are Out of Time**

While a capture-and-convert plan held the promise of buying more time for the vaquita, that effort was not successful. The Consortium for Vaquita Conservation, Protection, and Recovery (“VaquitaCPR”) developed a conservation action plan to prevent the vaquita from going extinct.<sup>2</sup> The plan was adopted by the Mexican government's Ministry of Environment and Natural Resources on the recommendation of CIRVA. The plan outlined steps to locate, catch, and house vaquitas in a sea pen in the Northern Gulf of California, with the goal of returning the animals to a gillnet-free habitat as soon as possible. The hope of VaquitaCPR was that in removing vaquita from their deadly habitat—an environment where they have a 50 percent chance of dying every year—they would be protected from poachers and people would have more time to render their habitat gillnet free.

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<sup>1</sup> Report of the Eighth Meeting of CIRVA, November 2016, p. 3.

<sup>2</sup> Information on VaquitaCPR can be found at <https://www.vaquitacpr.org/>.

VaquitaCPR field operations began on October 12 and ended on November 11. During field operations, two vaquitas were captured: an immature female that was released after veterinarians determined she was not adapting to human care and a mature female that was also released after not adapting to human care and soon after died. Subsequent to the mature female's death, VaquitaCPR suspended the catch operation, ending any hope that the vaquita can be saved by removing them from their deadly environment. Now, the only hope of keeping the vaquita (one of only six porpoise species) from going extinct within the next six months—after spending millions of years on the planet—is to immediately render their habitat free of gillnets.

### **C. Mexico's Utter Failure to Prevent the Vaquita's Extinction**

Mexico's failure to halt the vaquita's decline is not the result of forces outside of its control. Mexico's failure is entirely attributable to its unwillingness to adopt and effectively enforce and implement laws and regulations governing fishing in the upper Gulf of California.

The Vaquita Petition and the Comment Letter outline a history of action and inaction by various Mexican government agencies and officials that amounts to failure by design.

Even at the most critical time for vaquita, when the world's attention has been turned to efforts in the upper Gulf of California, Mexico has refused to take the steps necessary to keep gillnets out of vaquita habitat. Fishing vessels continue to operate with impunity in the Upper Gulf of California, despite regulations implemented to protect the vaquita, and active nets are still being found in closed fishing areas. On September 21, 2017, Mexico's National Institute of Ecology and Climate Change (INECC) began the third phase of its program to retrieve derelict fishing gear from the Upper Gulf of California Biosphere Reserve. Within the first two weeks of the program, 50 pieces of fishing gear were removed, of which 78 percent were totoaba nets. Eight percent of these nets were actively fishing.<sup>3</sup>

On October 20, 2017, three fishers on board an unlicensed, unnamed vessel were caught in a restricted area with 1.4 km of shrimp nets.<sup>4</sup> According to PROFEPA, during the month of October 2017 alone, authorities confiscated 5,632 meters of fishing nets, 42 pieces of fishing gear, and detained four people.<sup>5</sup> On November 5, 2017, PROFEPA announced that one shrimp vessel and three small fishing vessels were detained, and five tons of shrimp and 6.4 km of nets "used for the fishing of shrimp, shark and totoaba" were confiscated.<sup>6</sup> On November 7, 2017, PROFEPA announced that it had detained two vessels, one of which carried a 700 meter long shrimp net with a 2 ¾ inch

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<sup>3</sup> See <https://www.gob.mx/profepa/prensa/realiza-gobierno-federal-100-operaciones-maritimas-y-40-aereas-en-alto-golfo-de-california-coi>.

<sup>4</sup> See <http://www.lacronica.com/EdicionEnLinea/Notas/Noticias/20102017/1266042-Aseguran-embarcacion-camaronera-en-refugio-de-Vaquita-Marina.html>.

<sup>5</sup> See <https://www.gob.mx/profepa/prensa/realiza-gobierno-federal-100-operaciones-maritimas-y-40-aereas-en-alto-golfo-de-california-coi>.

<sup>6</sup> See <https://www.gob.mx/profepa/videos/aseguramiento-de-6-4-km-de-redes-1-barco-camaronero-y-3-embarcaciones-menores-en-alto-golfo>.

mesh size and six kilos of brown shrimp (camaron café, *Fanfantepeanaeus californiensis*). The second vessel was identified as carrying 400 meters of net and fish products, and 600 meters of abandoned net were also found. Three people were arrested.<sup>7</sup>

During this same operation, the Mexican Navy, Environmental Gendarmerie, and officials from the Comisión Nacional de Acuacultura y Pesca (CONAPESCA) were said to have encountered “dozens” of other vessels, who fled in various directions upon sighting the authorities. Sea Shepherd noted the presence of ten vessels laying nets in full daylight within the restricted zone.<sup>8</sup> The fact that vessels were seen to have fled from the area would appear to confirm that the number of detained illegal vessels and gear, as noted in the Vaquita Petition and Comment Letter, represent only a fraction of the illegal fishing activities that threaten the survival of the vaquita.

On November 11, 2017 Secretary of the Environment and Natural Resources (SEMARNAT) Rafael Pacchiano Alamán spoke before the Joint Committees on Environment and Natural Resources and Climate Change of the Mexican Chamber of Deputies and stated that the two principal causes of the deaths that threaten the vaquita are *commercial shrimp fishing* and the illegal fishery for totoaba.<sup>9</sup> A press release regarding the Secretary’s appearance before the Committees noted that “gears used to catch *shrimp and other types of finfish* represent a threat to the vaquita.”<sup>10</sup>

Mexico’s enforcement regime does not work. It has never worked. And it will not work unless drastic action is taken. The United States can compel such action, as envisioned by the MMPA by banning imports of vaquita-harmful fish and fish products from Mexico.

## **II. NMFS Is Violating the Law by Failing to Act on the Vaquita Petition**

### **A. Legal Framework**

In passing the MMPA in 1972, Congress found that “certain species and population stocks of marine mammals are, or may be, in danger of extinction or depletion as a result of man’s activities.” 16 U.S.C. § 1361(1). To counter this danger, Congress designed the MMPA to protect and recover marine mammals both domestically *and abroad*. To counter the negative impacts from commercial fisheries, the MMPA contains

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<sup>7</sup> See <https://www.gob.mx/profepa/prensa/asegura-profepa-dos-embarcaciones-menores-y-1-7-km-de-redes-camaroneras-por-pesca-ilegal-en-el-alto-golfo-de-california>.

<sup>8</sup> See <http://www.excelsior.com.mx/nacional/2017/11/07/1199702>; <http://www.lacronica.com/EdicionEnLinea/Notas/Noticias/16112017/1276288-Arrestan-a-3-pescadores-en-refugio-de-la-Vaquita.html>; <https://www.facebook.com/captpaulwatson/posts/10155538202690932>.

<sup>9</sup> See <http://www5.diputados.gob.mx/index.php/esl/Comunicacion/Agencia-de-Noticias/2017/11-noviembre/08/8370-Afirma-Pacchiano-Alaman-que-se-preve-modificar-el-programa-de-conservacion-proteccion-y-recuperacion-de-la-vaquita-marina-tras-reciente-muerte-de-un-ejemplar> (emphasis added).

<sup>10</sup> See <https://www.gob.mx/semarnat/prensa/pacchiano-alaman-informa-a-diputados-los-avances-en-materia-ambiental> (emphasis added).

provisions related to domestic fisheries and regulates the import of fish products into the United States.

Specifically, Section 101(a)(2) of the MMPA provides:

The Secretary of the Treasury shall ban the importation of commercial fish or products from fish which have been caught with commercial fishing technology which results in the incidental kill or incidental serious injury of ocean mammals in excess of United States standards. For purposes of applying the preceding sentence, the Secretary [of Commerce] –

- (A) shall insist on reasonable proof from the government of any nation from which fish or fish products will be exported to the United States of the effects on ocean mammals of the commercial fishing technology in use for such fish or fish products exported from such nation to the United States.

*Id.* § 1371(a)(2). Section 102 of the MMPA further provides that it is “unlawful to import . . . [a]ny fish . . . caught in a manner which the Secretary has proscribed for persons subject to the jurisdiction of the United States, whether or not any marine mammals were in fact taken incident to the catching of the fish.” 16 U.S.C. § 1372(c)(3).

The APA requires that “each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.” 5 U.S.C. § 553(e). The APA further requires that “within a reasonable time, each agency shall proceed to conclude a matter presented to it.” *Id.* § 555(b). The APA also provides a cause of action to any “person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute.” *Id.* § 702. The APA requires the reviewing court to: “(1) compel agency action unlawfully withheld or unreasonably delayed; and (2) hold unlawful and set aside agency action, findings, and conclusions found to be: (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . .” *Id.* § 706.

## **B. NMFS’s Legal Violations**

Outlining the deplorable status of the vaquita and Mexico’s consistent failure to meet U.S. standards for vaquita protection, the Vaquita Petition sought an “immediate ban” on vaquita-harmful imports and “emergency rulemaking.” Similarly, the Comment Letter submitted by NRDC, AWI, and the Center again sought “immediate” action after outlining how the situation in Mexico had not improved since the filing of the Vaquita Petition and that the status of vaquita had worsened. In light of the vaquita’s status, Congress’s intent with the MMPA to prevent marine mammal extinction, and no reasonable proof that Mexico is meeting U.S. standards for vaquita protection, NMFS’s failure to act under the MMPA’s clear mandate and its failure to act and unreasonable delay in responding to the Vaquita Petition is a violation of the APA.

Similarly, the MMPA's import provision, Section 101(a)(2), includes no exception and provides for no delay. NMFS has no basis to refuse banning imports of fish and fish products from Mexico that are harming vaquita in excess of U.S. standards and, accordingly, is in direct violation of the MMPA.

Further, as noted in the Vaquita Petition, on March 1, 2017, the U.S. Marine Mammal Commission submitted a letter to NMFS, formally recommending "that NMFS consider emergency rulemaking to make a finding that" UGC gillnet fisheries "do not meet the standards applicable under section 101(a)(2) of the MMPA" due to vaquita bycatch. The MMPA specifically requires that NMFS "shall . . . respond[ ] to" "[a]ny recommendations made by the Commission" within 120 days of receiving such a recommendation. If MMC's recommendation is not adopted, NMFS must provide a "detailed explanation" why not. 16 U.S.C. 1402(d). Despite the passage of 120 days since the MMC's recommendation, NMFS has not issued an emergency rulemaking to ban UGC gillnet fisheries or, under information and belief, otherwise explained why it has chosen not to do so.

### **III. Conclusion**

NRDC, AWI, and the Center and our millions of members and supporters have patiently waited for NMFS to fulfill its legal obligations. We urge you to immediately come into compliance with the law by acting on our petition and banning vaquita-harmful fish and fish product imports from Mexico.

If you have any questions regarding this letter or believe that anything in the letter is inaccurate, please contact me immediately.

Sincerely,



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