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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648-XG619

Implementation of Fish and Fish Product Import Provisions of the Marine Mammal

Protection Act--Notification of Comparability Findings

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice; comparability findings for Mexico.

SUMMARY: Under the authority of the Marine Mammal Protection Act (MMPA), the NMFS Assistant Administrator for Fisheries (Assistant Administrator) has issued comparability findings for the Government of Mexico's following fisheries: Upper Gulf of California shrimp trawl fishery for both small and large vessels; Upper Gulf of California shrimp suripera fishery; Upper Gulf of California sierra purse seine fishery; Upper Gulf of California sierra hook and line fishery; Upper Gulf of California chano trawl fishery, for small vessels; Upper Gulf of California curvina purse seine fishery; and Upper Gulf of California sardine/curvina purse seine fishery for both small and large vessels. The Assistant Administrator is denying a comparability finding for the El Golfo de Santa Clara curvina rodeo-style gillnet fishery. NMFS bases the comparability findings on documentary evidence submitted by the Government of Mexico and other relevant, readily-available information including scientific literature and the reports of the "Comité Internacional para la Recuperación de la Vaquita" (CIRVA) (the international recovery team for vaquita).

DATES: These comparability findings are valid for the period of November 30, 2018, through January 1, 2022, unless revoked by the Assistant Administrator in a subsequent action.

FOR FURTHER INFORMATION CONTACT: Nina Young, at email:

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SUPPLEMENTARY INFORMATION: The MMPA, 16 U.S.C. 1371 *et seq.*, states that 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 this import restriction, the Secretary of Commerce 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.

On August 15, 2016, NMFS published a final rule (81 FR 54389) amending the fish and fish product import provisions of Section 101(a)(2) of the MMPA (see implementing regulations at 50 CFR 216.24(h)). This final rule established conditions for evaluating a harvesting nation's regulatory programs to address incidental and intentional mortality and serious injury of marine mammals in its commercial fisheries producing fish and fish products exported to the United States.

Under the final rule, fish or fish products cannot be imported into the United States from commercial fishing operations that result in the incidental mortality or serious injury of marine mammals in excess of U.S. standards (16 U.S.C. 1371(a)(2)). NMFS published a List of Foreign Fisheries (LOFF) on March 16, 2018 (83 FR 11703) to classify fisheries subject to the import

requirements. Effective January 1, 2022, fish and fish products from fisheries identified by the Assistant Administrator in the LOFF can only be imported into the United States if the harvesting nation has applied for and received a comparability finding from NMFS for those fisheries on the LOFF. The rule established the procedures that a harvesting nation must follow, and the conditions it must meet, to receive a comparability finding for a fishery on the LOFF. The final rule established a five-year exemption period, ending January 1, 2022, before imports would be subject to any trade restrictions (see 50 CFR 216.24(h)(2)(ii)).

Vaquita are listed as an endangered species under the U.S. Endangered Species Act, 16 U.S.C. 1531 *et seq.*, and are endemic to northern Gulf of California waters in Mexico. In 2017, the International Committee for the Recovery of the Vaquita (CIRVA) – a group of international scientists supported by Mexico and led by Mexican scientists – estimated that fewer than 30 individuals remain. Gillnets used to illegally fish for totoaba are the direct primary source of current vaquita mortality and continue to be deployed to supply China’s black market demand for totoaba swim bladders.

On May 18, 2017, Natural Resources Defense Council (NRDC), Center for Biological Diversity (CBD), and the Animal Welfare Institute (AWI) petitioned the Secretaries of Homeland Security, the Treasury, and Commerce to “ban the importation of commercial fish or products from fish” sourced using fishing activities that “result in the incidental mortality or incidental serious injury” of vaquita “in excess of United States standards.” The petitioners requested that the Secretaries immediately ban imports of all fish and fish products from Mexico that do not satisfy the MMPA import provision requirements, claiming that emergency action banning such imports is necessary to avoid immediate, ongoing, and “unacceptable risks” to

vaquita. NMFS published a notice of the petition's receipt on August 22, 2017, in the **Federal Register** for a 60-day comment period.

On December 21, 2017, the petitioners filed suit in the United States District Court for the District of Columbia, which among other things challenges the failure of NMFS, the U.S. Department of Commerce, the U.S. Department of the Treasury, and the U.S. Department of Homeland Security ("Defendants") to respond to the petition pursuant to the Administrative Procedure Act ("APA"). 5 U.S.C. 551-559; 701-706. On March 21, 2018, the petitioners filed suit before the Court of International Trade seeking an injunction requiring the U.S. Government to ban the import of fish or fish products from any Mexican commercial fishery that uses gillnets within the vaquita's range. On April 16, 2018, Petitioners filed a motion for a preliminary injunction on which oral argument was held on July 10, 2018. The Court of International Trade found in favor of the petitioners and granted the preliminary injunction.

On July 26, 2018, and August 14, 2018, the Court of International Trade (CIT) (Slip-Op 18-92) required the U.S. Government to ban all fish and fish products from Mexican commercial fisheries that use gillnets within the vaquita's range, pending final adjudication of the merits. This ban includes the importation from Mexico of all shrimp, curvina, sierra, and chano fish and their products caught with gillnets inside the vaquita's range. To effect this court order, NMFS published a **Federal Register** document on August 28, 2018 (83 FR 43792) giving notice of import restrictions on fish and fish products from Mexico caught with gillnets deployed in the range of the vaquita. In that notice, NMFS also required that all other fish and fish products not within the scope of the import restrictions but imported under the Harmonized Tariff Schedule (HTS) codes associated with the prohibited fish and fish products be accompanied by a

Certification of Admissibility in accordance with the provisions of 50 CFR 216.24(h)(9).

On November 9, 2018, the Government of Mexico requested that the Assistant Administrator make comparability findings based upon documentary evidence provided by the Government of Mexico for the Upper Gulf of California shrimp trawl fishery for both small and large vessels; Upper Gulf of California shrimp *suripera*¹ fishery; Upper Gulf of California sierra purse seine fishery; Upper Gulf of California sierra hook and line fishery; Upper Gulf of California chano trawl fishery, for small vessels; Upper Gulf of California *curvina* purse seine fishery; Upper Gulf of California sardine/*curvina* purse seine fishery for both small and large vessel; and El Golfo de Santa Clara *curvina* rodeo-style gillnet fishery. As stated in the final rule (81 FR 54397, Aug. 15, 2016) in response to comments on the proposed rule, nothing within the procedures set forth in 50 CFR 216.24(h) prevents a nation from implementing a bycatch reduction regulatory program and seeking a comparability finding during the five-year exemption period (see 50 CFR 216.24(h)(2)(ii)).

¹ *Suripera* nets rely on utilizing the movement of the wind and water currents to draw shrimp into a small-mesh modified cast net.

NMFS used the comparability finding process set forth at 50 CFR 216.24(h)(6), which is the process that will be used for all nations and fisheries at the conclusion of the five-year exemption, with the Assistant Administrator considering documentary evidence submitted by the Government of Mexico and other relevant, readily-available information. This information includes including scientific literature and the reports of the “Comité Internacional para la Recuperación de la Vaquita” (CIRVA) (the international recovery team for vaquita) and has determined that the Upper Gulf of California shrimp trawl fishery for both small and large vessels; Upper Gulf of California shrimp suripera fishery; Upper Gulf of California sierra purse seine fishery; Upper Gulf of California sierra hook and line fishery; Upper Gulf of California chano trawl fishery, for small vessels; Upper Gulf of California curvina purse seine fishery; and Upper Gulf of California sardine/curvina purse seine fishery for both small and large vessels; have met the MMPA’s requirements to receive comparability findings. The Assistant Administrator has determined that the El Golfo de Santa Clara curvina rodeo-style gillnet fishery has not met the requirements to receive a comparability finding, will be denied such, and will remain subject to import restrictions in accordance with 50 CFR 216.24(h)(9).

Although this comparability finding would allow the importation into the United States of fish and fish product derived from these non-gillnet fisheries operating in the Upper Gulf of California under the Government of Mexico’s jurisdiction, as noted above, CIT required the U.S. Government to ban all fish and fish products from said fisheries (effectuated through 83 FR 43792, August 28, 2018). Due to CIT’s injunction, imports of sierra, shrimp, chano, and curvina fish and fish products must continue to be accompanied by a Certification of Admissibility in accordance with the provisions of 50 CFR 216.24(h)(9) until a court of competent jurisdiction

lifts the injunction and further notice from NMFS (See August 28, 2018 (83 FR 43792) for a list of HTS and instructions for the Certification of Admissibility).

In accordance with 50 CFR 216.24(h)(8)(vii), a comparability finding will be terminated or revoked if the Assistant Administrator determines that the requirements of 50 CFR 216.24(h)(6) are no longer being met.

Pursuant to 50 CFR 216.24(h)(8)(iv) the Assistant Administrator may specify the period for which a comparability finding is valid, particularly, when nations are requesting a finding during the exemption period. The comparability finding for the Government of Mexico's affected fisheries included in this **Federal Register** notice will remain valid through January 1, 2022. Additionally, in accordance with 50 CFR 216.24(h)(9)(ii), the Government of Mexico can reapply for a comparability finding for the El Golfo de Santa Clara curvina rodeo-style gillnet fishery at any time. All other exempt and export fisheries operating under the control of the Government of Mexico are still subject to the five-year exemption period under 50 CFR 216.24(h)(2)(ii). Therefore, prior to the conclusion of the five-year exemption period, per the requirements of 50 CFR 216.24(h)(6), the Government of Mexico, as is the case with all harvesting nations, must apply for and receive a comparability finding for all fisheries, including those in this **Federal Register** document, in order to export fish and fish products from those fisheries to the United States after January 1, 2022. Also, the Government of Mexico is still required to provide a progress report in accordance with 50 CFR 216.24(h)(10) for these fisheries and all other fisheries on its List of Foreign Fisheries.

The Government of Mexico has requested that NMFS update its LOFF to reflect only those fisheries and gear types authorized to fish in the upper Gulf of California. NMFS will add these

fisheries (both those that have and were denied a comparability finding) and remove all gillnet fisheries listed as operating in the upper Gulf of California from the List of Foreign Fisheries for Mexico. This action is taken in accordance with 50 CFR 216.24(h)(8)(vi).

Dated: November 30, 2018.

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National Marine Fisheries Service.

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