

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 222

(Docket No. 41034-4134)

Endangered Fish or Wildlife; Cochito

AGENCY: National Marine Fisheries Service (NMFS), NOAA, Commerce.

ACTION: Final rule.

SUMMARY: The NMFS has determined that the cochito (*Phocoena sinus*) should be listed as an endangered species pursuant to the Endangered Species Act of 1973 (ESA) based principally on the presumed low number of animals, the known mortality associated with incidental takings in fisheries for over 40 years, and the continuation of similar fisheries. Since this species does not occur within the jurisdiction of the United States, no critical habitat is being designated. Concurrent with this rule, the Fish and Wildlife Service, Department of the Interior, is amending the U.S. List of Endangered and Threatened Wildlife by adding the cochito as an endangered species. The intended effect of listing the cochito is to provide it with the protection afforded endangered species under the ESA.

EFFECTIVE DATE: The effective date of this rule is February 8, 1985.

ADDRESS: The complete file for this rule is available for review in the Office of Protected Species and Habitat Conservation, National Marine Fisheries Service, 3300 Whitehaven Street, NW., Washington, D.C. 20235.

FOR FURTHER INFORMATION CONTACT: Patricia Montanio, Protected Species Division, Office of Protected Species and Habitat Conservation (202-634-7529).

SUPPLEMENTARY INFORMATION:

Background

On September 5, 1978, the NMFS received a petition from the Defenders of Wildlife to list the cochito (*Phocoena sinus*) as a threatened species under the ESA (16 U.S.C. 1531) for the following reasons:

1. The cochito comprises a single, restricted population.
2. *P. sinus* is vulnerable to gillnet fishing operations.
3. The paucity of biological data and the failure to sight *P. sinus* on extended cruises is evidence of the increasing rarity of the species.
4. The IUCN-SSC Whale Specialist Group recommended that *P. sinus* be listed as vulnerable in the IUCN Red Data Book.

The Assistant Administrator for Fisheries, NMFS, determined that the petition presented substantial information indicating that the petitioned action may be warranted and commenced a review of the status of the cochito to determine whether or not it should be listed under the ESA (June 3, 1983; 48 FR 24903). On April 25, 1984, the NMFS published its proposed determination that the cochito should be listed as endangered (49 FR 17781) and requested comments and information by June 25, 1984. The comment period was extended until July 25, 1984 (49 FR 25017). After a thorough review of all information available, the NMFS has determined that the cochito should be classified as endangered under the terms of the ESA. The list of endangered species under the jurisdiction of the NMFS, Department of Commerce, is contained in 50 CFR 222.23(a), and is amended to reflect this final determination. The Fish and Wildlife Service, Department of the Interior, maintains the U.S. List of Endangered and Threatened Wildlife (50 CFR Part 17) of all species determined by the NMFS or the FWS to be endangered or threatened. Concurrent with this rule, the FWS is amending the List by adding the cochito as an endangered species (see document in the Final

Rules section of this issue under Department of the Interior, Fish and Wildlife Service).

Summary of Comments and Recommendations

The NMFS solicited comments and information concerning the cochito in its notice of status review (June 3, 1983; 48 FR 24903) and proposed rule (April 25, 1984; 49 FR 1181).

The following individuals and organizations provided information and/or comments: Defenders of Wildlife; Dr. Robert Brownell, Jr., U.S. Fish and Wildlife Service; Smithsonian Institution; Marine Mammal Commission; Whale Protection Fund, Center for Environmental Education; Whale Center; Friends of Animals; American Cetacean Society; Conservation Monitoring Centre, IUCN; and Monitor. The Direccion General de Flora y Fauna Silvestres, Government of Mexico also provided information regarding the cochito.

In general, reviewers believed that the apparent small population size and limited range of the cochito make it extremely vulnerable, and recommended that it be listed as either endangered or threatened under the ESA. The following potential threats to the species were cited:

** Incidental capture in gillnet fisheries and shrimp trawling.

** Reduction of the available nutrients in the Gulf of California and possible declines in fish prey abundance as a result of the damming of the Colorado River which has reduced the water flow into the Gulf of California.

** Reduction of the cochito's available food supply from overfishing.

** Increased harassment from the tourboat industry.

** Impacts to the species' habitat from pesticide runoff.

Status Review

The cochito (*Phocoena sinus*), also known as the Gulf of California harbor porpoise or the vaquita, was described by Norris and McFarland in 1958. The size of the population is not known, but is believed to be extremely small. The range of this species is thought to be confined to the northern portion of the Gulf of California, Mexico, and is the smallest known range of any marine mammal. Only 26 confirmed records of this species exist. Since 1978, there have been only five sightings at sea, the most recent being in 1980. Little is known about the behavior and food habits and nothing is known about the genetics or physiology of the cochito. Knowledge of food habits is based on the examination of one specimen that contained parts of bronze-striped grunts (*Orthopristis reddingi*) and Gulf croakers (*Bairdiella icistius*). Both these fish are abundant throughout the upper Gulf of California.

Summary of Factors Affecting the Species

An endangered species is any species that is in danger of extinction throughout all or a significant portion of its range; and, a threatened species is any species that is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.

Section 4(a)(1) of the ESA and implementing regulations (50 CFR Part 424) establish procedures and criteria for listing, delisting or reclassifying species. A species may be determined to be an endangered or threatened species based on the best scientific and commercial data available due to one or more of the five factors described in section 4(a)(1) of the ESA.

These factors and their applicability to *P. sinus* are described below:

1. The Present or Threatened Destruction, Modification or Curtailment of Its Habitat or Range

Damming of the Colorado River has reduced the flow of water into the upper Gulf of California. Increased pesticide runoff into the Gulf may

also affect the cochito's habitat. However, it is not known how these factors have affected the species.

2. Overutilization for Commercial, Recreational, Scientific or Educational Purposes

There is no evidence that the cochito has ever been utilized for commercial or recreational purposes or taken for scientific or educational purposes. All scientific specimens were obtained from animals found dead.

3. Disease of Predation

There is no information indicating that disease or predation constitutes a threat to the continued welfare of this species.

4. Inadequacy of Existing Regulatory Mechanisms

P. sinus is listed on Appendix I to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) which prohibits trade for commercial purposes of this species. Although Mexico is not a party to the Convention, these prohibitions would apply to trade with a signatory party to the Convention.

The cochito is also protected under the provisions of the Marine Mammal Protection Act of 1972 (MMPA, 16 U.S.C. 1361) which prohibits the import of marine mammals into the U.S. except for scientific research or public display. Section 108 of the MMPA establishes an international program which directs the Secretary of Commerce, through the Secretary of State, to initiate the development of bilateral or multilateral agreements with other nations for the protection and conservation of marine mammals. Under the authority of this section, the NMFS has informally cooperated with the Government of Mexico in marine mammal scientific research programs that can be continued or expanded.

The Whaling Convention Act of 1949 (WCA, 16 U.S.C. 916) implements the International Convention for the Regulation of Whaling and authorizes U.S. participation in all activities of the International Whaling Commission (IWC). The participation of U.S. scientists in the standing Subcommittee on Small Cetaceans of the IWC's Scientific Committee allows a continuous access to the status reports developed for all species of cetaceans and opportunity to contribute to small cetacean research programs as they develop.

5. Other Natural or Manmade Factors Affecting Its Continued Existence

The cochito was frequently taken incidentally to the gillnet fishery for totoaba (*Cynoscion macdonaldi*). This fishery operated from the late 1940's through 1975 in the northern Gulf of California, Mexico, coinciding with the known range of the cochito. There is no information on the total or annual incidental catch of cochito associated with the fishery, but estimates have been made placing incidental catch at tens to hundreds of animals per year.

The Government of Mexico has placed a continuing ban on the totoaba gillnet fishery since 1975. A gillnet fishery for sharks still operates in the Gulf of California as does a shrimp fishery, both with unknown fishing effort and incidental take of smaller cetacean species. All legal measures regarding these fisheries are under the jurisdiction of the Government of Mexico. The apparent rarity of the cochito and the fact that this species historically has been taken incidentally by gillnet fisheries suggest that the use of this type of fishing gear anywhere within the range of *P. sinus* constitutes a threat to the continued existence of the species.

Discussion

Although there is little information available concerning the abundance, biology, and ecology of *P. sinus*, the biological information

available indicates that the species is in danger of extinction. This determination is based upon the presumed small population size, limited range, and the mortality of *P. sinus* associated with the totoaba and other fisheries for over 40 years. This threat continues since some of these fisheries continue in the Gulf of California. The reduction of the population size from past fishing activities combined with continued fishing with an unknown incidental mortality throughout the species' range warrant the listing of *P. sinus* as endangered under the ESA.

Critical Habitat

Section 4(a)(3) of the ESA requires that the maximum extent prudent and determinable the Secretary should designate critical habitat at the time the species is determined to be endangered or threatened. However, the critical habitat provisions do not apply to areas outside the jurisdiction of the United States. This policy is reflected in the regulations implementing section 4 of the ESA (49 FR 38900 ; October 1, 1984). Because the entire known range of the cochito is located within Mexican territory, no critical habitat has been designated.

Classification

As noted in the Conference Report on the 1982 Amendments to the ESA economic consideration have no relevance to determinations regarding the status of species. Therefore, the NMFS has determined that the economic analysis requirements of Executive Order 12291, the Regulatory Flexibility Act, and the Paperwork Reduction Act are not applicable to the listing process.

NOAA has categorically excluded all ESA listing actions from the environmental assessment and environmental impact statement requirements of the National Environmental Policy Act (NOAA Directives Manual 02-10, July 23, 1984; 49 FR 29644) because these actions do not normally have the potential to significantly affect the human environment. Thus, no NEPA document has been prepared for the listing of the cochito as an endangered species.

References

- Brownell, R.L., Jr. 1976. Status of the cochito, *Phocoena sinus*, in the Gulf of California. Proc. Scientific Conf. Marine Mammals, Bergen, Norway, 31 August-9 September 1976; FAO/ACMRR/MM/SC63.
- Brownell, R.L., Jr. 1982. Status of the cochito, *Phocoena sinus* in the Gulf of California. Mammals of the Sea Vol. 4, pp 85-90, small cetaceans, seals, sirenians and otters. FAO Fisheries Series No. 5, Rome, Italy.
- Brownell, R.L., Jr. 1983. *Phocoena sinus*. Mammalian Species No. 198. American Society of Mammalogists. April, 1983. 3 pp.
- Flanagan, C.A. and J.R. Hendrickson. 1976. Observations on the commercial fishery and reproductive biology of the totoaba, *Cynoscion macdonaldi*, in the northern Gulf of California. Fishery Bull. 74(3):531-544.
- International Union for Conservation of Nature and Natural Resources. 1978. Species account for vaquita or cochito, *Phocoena sinus*. (Norris and McFarland, 1958). Red Data Book, Vol. 1: Mammalia. IUCN, Morges, Switzerland.
- Noble, B.A. and F.C. Fraser. 1971. Description of a skeleton and supplementary notes on the skull of a rare porpoise, *Phocoena sinus*. J. Nat. Hist., 5:447-464.
- Norris, K.S. and W.N. McFarland. 1958. A new porpoise of the genus *Phocoena* from the Gulf of California. J. Mammal. 39(1):29-39.

Norris, K.S. and J.H. Prescott. 1961. Observations on Pacific cetaceans of California and Mexican waters. Univer. Calif. Publ. Zool. 63:294-402.

Villa, R.B. 1977. Report on the status of *Phocoena sinus*, Norris and McFarland 1958, in the Gulf of California. Anals del Instituto de Biologia, Serie Zoologia, (2):203-208.

Wells, R.S., B.G. Wursig, and K.S. Norris. 1981. A summary of the marine mammals of the upper Gulf of California, Mexico, with a assessment of the status *Phocoena sinus*. Final Report to the Marine Mammal Commission. National Technical Information Service. PB81-168791. 51 pp.

List of Subjects in 50 CFR Part 222
Administrative practice and procedure, Endangered and threatened wildlife, Exports, Fish, Import, Marine mammals, Reporting and recordkeeping requirements, Transportation.

Dated: October 22, 1984.

William G. Gordon, Assistant Administrator for Fisheries, National Marine Fisheries Service.

PART 222--ENDANGERED FISH OR WILDLIFE

For the reasons set out in the preamble, Part 222 of Title 50 of the Code of Federal Regulations is amended as follows:

1. The authority citation to Supart C of Part 222 is revised to read as follows:

Authority: 16 U.S.C. 1531-1543.

Sec. 222.23 (Amended)

2. Section 222.23(a) of Subpart C, is amended by adding the phrase "Cochito (*Phocoena sinus*);" immediately after the phrase "Sperm whale (*Physeter catodon*);" in the second sentence.

(FR Doc. 85-602 Filed 1-8-85; 8:45 am)

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Legal Publications:

Pub. Law 91-190 -- National Environmental Policy Act of 1969

Pub. Law 93-205 -- Endangered Species Act of 1973

Pub. Law 92-522 -- Marine Mammal Protection Act of 1972

Pub. Law 81-676 -- Whaling Convention Act (Act of 8/9/50)

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