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Via First-Class Mail and Email

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Re: Notice of Intent to Sue for Failure to Respond to Pelly Petition Seeking Certification of Mexico for Totoaba Trade

Dear Secretary Jewell, Secretary Pritzker, Director Ashe, and Administrator Sobeck,

On September 29, 2014, the Center for Biological Diversity (“the Center”) submitted a formal rulemaking petition, requesting certification of Mexico pursuant to the U.S. Pelly Amendment and the Administrative Procedure Act (“APA”).¹ The Center sought certification that Mexico’s failure to stem the commercial trade and export of endangered totoaba “diminishes the effectiveness” of the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (“CITES”), as it simultaneously drives the critically endangered vaquita to extinction.²

Despite receiving our petition well-over two years ago – and despite Mexico’s continued totoaba trade that has now reduced the vaquita to only around *30 individuals*, putting the vaquita at the very precipice of extinction – the Secretaries of Interior and Commerce have failed to respond and certify Mexico.³ These failures constitute “agency action[s] unlawfully withheld or unreasonably delayed” in violation of the APA and the Pelly Amendment.⁴ We hereby provide notice of our intent to sue over these legal violations if the Secretaries of your respective agencies do not immediately respond and certify Mexico. Mexico’s totoaba enforcement efforts have been a long-standing and

¹ See Att. A: Center for Biological Diversity, Petition for Certification of Mexico pursuant to the Pelly Amendment for Trade in Violation of the Convention on International Trade in Endangered Species (Sept. 29, 2014) (“Pelly petition”); 22 U.S.C. § 1978; 5 U.S.C. § 553(e).

² Convention on International Trade in Endangered Species of Fauna and Flora, March 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243 (entered into force July 1, 1975); 22 U.S.C. § 1978(a)(2).

³ On October 9, 2014, the Department of Commerce’s National Marine Fisheries Service (“NMFS”) sent a letter acknowledging receipt of the petition, noting that Department of Interior’s Fish and Wildlife Service “is the lead agency for any response to the petition, in coordination with” NMFS.

⁴ 5 U.S.C. § 706; 22 U.S.C. § 1978(a)(2).

well-documented failure, and only the strongest of actions from the U.S. government will halt the ongoing totoaba trade and save the vaquita.

Background

A. 2014 Pelly Petition

As detailed in our 2014 Pelly petition, the totoaba (*Totoaba macdonaldi*) is a large, endangered fish found only in Mexico's northern Gulf of California. Because it is endangered, the totoaba has been listed under Appendix I of CITES since 1976 and thus all international, commercial trade in the species is prohibited.⁵ Yet despite the CITES's ban on trade, there is extensive evidence of Mexico's ongoing totoaba trade in response to Chinese demand for the fish's swim bladder, dubbed "aquatic cocaine" due to its high price and illicit nature.⁶

Mexico's totoaba trade is also driving the critically endangered vaquita (*Phocoena sinus*), another CITES Appendix I species, to extinction. Vaquita become entangled in gillnet gear, particularly in illegal totoaba gillnets, and at the time we filed our petition in 2014, only 97 vaquita remained. At the time, the Comité Internacional para la Recuperación de la Vaquita ("CIRVA") announced that Mexico needed to "immediately" take "drastic steps" to avoid the vaquita's otherwise imminent extinction, including the use of "all available enforcement tools" to stop illegal totoaba fishing and trade.⁷

The U.S. Pelly Amendment requires that, when the Secretaries of Commerce or Interior find that foreign nationals "directly or indirectly, are engaging in trade or taking which diminishes the effectiveness of any international program" to protect endangered species, the Secretaries "shall certify such fact to the President."⁸ Upon receiving such a certification, the President is authorized "to prohibit . . . the importation into the United States of any products from the offending country."⁹

Because Mexican nationals continue to take and illegally trade in totoaba, which is driving the vaquita to extinction, Mexico has violated CITES's mandate to "take appropriate measures to enforce the provisions of [CITES] and to prohibit trade" in Appendix I species and has "diminish[e]d the effectiveness" of the CITES treaty.¹⁰ Accordingly, we petitioned the Secretaries to

⁵ CITES, at Appendix I; Art. III.

⁶ Att. A: Pelly Petition, at 6-9 (documenting expert statements, news articles, and U.S. seizures of totoaba bladders, demonstrating substantial totoaba exports from Mexico).

⁷ CIRVA. 2014. Report of the Fifth Meeting of the International Committee for the Recovery of the Vaquita. Ensenada, Baja California, México, 8-10 July 2014, Unpublished Report, 38pp., at 5, 12.

⁸ 22 U.S.C. § 1978(a)(2).

⁹ *Id.* § 1978(a)(4), (b).

¹⁰ CITES, at Art. VIII(1); 22 U.S.C. § 1978(a)(2). We note that Pelly has been triggered for several reasons, including: (1) Mexican nationals "directly" engaging in "trade" of totoaba that diminishes CITES's effectiveness for protecting totoaba; (2) Mexican nationals "directly" engaging in "trade" of totoaba that diminishes CITES's effectiveness for protecting vaquita; (3) Mexican nationals "directly" engaging in "take" of both totoaba and vaquita that diminishes CITES's effectiveness for protecting both species; and (4) Mexican nationals "indirectly" engaging in "trade" of totoaba by commercially fishing for totoaba, which diminishes CITES's effectiveness for protecting both species. *Id.*

certify Mexico under the Pelly Amendment and to recommend that the President prohibit importation of certain Mexican wildlife products until Mexico takes substantive and sustained action to end the illegal totoaba harvest and trade.

B. 2016 Letter Urging Action

On June 28, 2016, the Center sent a letter to the Secretaries of Interior and Commerce, reminding the Secretaries of our outstanding Pelly petition and urging a prompt response.¹¹ The situation in Mexico had become even more dire, making both Pelly certification and a potential Presidential embargo against Mexico more urgent.

Specifically, in May 2016, CIRVA released new estimates that only 60 vaquita remained as of 2015.¹² This represents an 80% population decline between 2011 and 2015 alone, coincident with the surge in Mexican totoaba fishing and international trade. Additionally, despite Mexico's 2015 gillnet ban and very public commitment to enhanced enforcement, widespread totoaba fishing was nevertheless documented after the ban, providing strong evidence of an ongoing, illegal international trade in totoaba. Specifically, between January and May of 2016, the non-profit Sea Shepherd documented 42 illegal totoaba gillnets and 16 longlines in the upper Gulf, including freshly-set totoaba nets, and they filmed poachers hauling totoaba nets, as well as totoaba fishing camps.¹³ Disturbingly, in March 2016, three vaquita were found dead,¹⁴ with evidence of recent totoaba gillnet gear entanglement.¹⁵ Totoaba continued to be seized by officials in the United States and Hong Kong, and the Environmental Investigation Agency documented an active totoaba market in both Hong Kong and Guangzhou, China.¹⁶

C. Further Vaquita Declines and Illegal Totoaba Fishing and Trade

As the Secretaries delay their Pelly response and certification, vaquita have declined yet further, now to the point of near-extinction. In November 2016, CIRVA estimated that *only roughly 30 vaquita remain on Earth*, and thus half of the vaquita's population was lost last year alone – despite Mexico's much-touted totoaba enforcement efforts.¹⁷ Additionally, a recent effort by several non-

¹¹ Center for Biological Diversity, Request for Response to 2014 Pelly Petition to Certify Mexico for Totoaba Trade in Violation of CITES (June 28, 2016).

¹² CIRVA. 2016. Seventh Meeting of the Comité Internacional para la Recuperación de la Vaquita. Ensenada, BC, Mexico. 10-13 May 2016, Unpublished Report, 76pp., at 4. *See also* Taylor, B. L., Rojas-Bracho, L., Moore, J., Jaramillo-Legorreta, A., Ver Hoef, J. M., Cardenas-Hinojosa, G., Nieto-Garcia, E., Barlow, J., Gerrodette, T., Tregenza, N., Thomas, L. and Hammond, P. S. (2016), Extinction is Imminent for Mexico's Endemic Porpoise Unless Fishery Bycatch is Eliminated. CONSERVATION LETTERS. doi:10.1111/conl.12331.

¹³ CIRVA at 14.

¹⁴ *Id.* at 17.

¹⁵ *See* Necropsy Form PS1, *Phocoena sinus*, male (March 24, 2016); Necropsy Form PS2, *Phocoena sinus*, female (March 24, 2016); Necropsy Form PS3, *Phocoena sinus*, male (March 25, 2016).

¹⁶ Environmental Investigation Agency, *Dual Extinction: The illegal trade in the endangered totoaba and its impact on the critically endangered vaquita*. Briefing to the 66th Standing Committee of CITES (Jan. 2016). Available at: <https://eia-international.org/wp-content/uploads/EIA-Dual-Extinction.pdf>.

¹⁷ *See* Associated Press. Mexico Plans to Catch, Protect Last Few Vaquita Porpoises (Dec. 15, 2016). Available at: <http://www.nytimes.com/aponline/2016/12/15/world/americas/ap-lt-mexico-endangered-porpoise.html>. While CIRVA has not yet released its final report, several U.S. government scientists and policymakers are CIRVA members and thus the report is already available in the U.S. government's files.

profits and the Mexican government to retrieve “ghost” or lost gear in the Upper Gulf found shocking numbers of active totoaba fishing nets, suggesting Mexican enforcement efforts are simply not working. In fact, in just 21 days, between October 10 and December 7, 2016, 36 totoaba gillnets were found – and 28 of these nets were actively catching totoaba.¹⁸ Because totoaba fishing supplies the international totoaba trade, ongoing totoaba fishing is direct evidence of the ongoing totoaba trade.¹⁹

Legal Violations

As described below, the Secretaries of Interior and Commerce have violated the APA and the U.S. Pelly Amendment by failing to properly and timely respond to the Center’s petition and to certify Mexico.

A. Unreasonably Delayed Petition Response

First, the Secretaries of Interior and Commerce have unreasonably delayed and unlawfully withheld their response to the Center’s Pelly petition. The Center submitted its petition in September 2014 – well-over two years ago. The APA requires that, “within a reasonable time, each agency shall proceed to conclude a matter presented to it.”²⁰ Further, the Pelly Amendment expressly directs that the Secretaries “shall . . . promptly investigate any activity by foreign nationals that . . . may be cause for certification . . . and promptly conclude, and reach a decision with respect to, any [such] investigation commenced.”²¹ The Secretaries’ now-substantial delay in responding to the Center’s Pelly petition is unreasonable and clearly violates the APA.²²

Egregiously, during the Secretaries’ 27-month delay, Mexico’s continued and unlawful totoaba trade has reduced the vaquita to near-extinction, with the vaquita’s population dropping by roughly 60% since the petition was filed. Certification of Mexico – and attendant economic sanctions – are critical and much-needed, in order to press the Mexican government to finally take real and concerted action to stop the international totoaba trade and save the vaquita. The vaquita is in its most desperate hour, and the United States must act now before it is simply too late.

¹⁸ Sea Shepherd, Press Release: “Ghost nets” are retrieved from the Upper Gulf of California Reserve to save the Vaquita (Dec. 22, 2016). Available at: <http://www.seashepherd.org/news-and-commentary/news/ghost-nets-are-retrieved-to-save-the-vaquita.html>.

¹⁹ See Mexico Submission to CITES CoP 17: Totoaba – *Totoaba Macdonaldi* Oportunidades de Colaboración Internacional en el Marco de la CITES, CoP17 Doc. 74 (undated) (noting “there is fishing and illegal trade in Totoaba whose main target is the Asian market”); Jaramillo-Legorreta, A., G., Cardenas-Hinojosa, E., Nieto-Garcia, L., Rojas-Bracho, J., Ver Hoef, J., Moore, N., Tregenza, J., Barlow, T., Gerrodette, L., Thomas, & B. Taylor. 2016. Passive acoustic monitoring of the decline of Mexico’s critically endangered vaquita. CONSERVATION BIOLOGY, 1–9.

²⁰ 5 U.S.C. § 555(b).

²¹ 22 U.S.C. § 1978(a)(3)(B), (C) (emphasis added).

²² 5 U.S.C. § 706(1); see *Telecomm. Research & Action Ctr. v. FCC*, 750 F.2d 70, 76-77 (D.C. Cir. 1984) (“agencies should act within reasonable time frames”); *In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 418 (D.C. Cir. 2004) (finding “a reasonable time for agency action is usually counted in weeks or months, not years”).

B. Failure to Certify Mexico under the Pelly Amendment

Second, the Pelly Amendment requires that “[w]hen the Secretary of Commerce or the Secretary of the Interior finds that nationals of a foreign country, directly or indirectly, are engaging in trade or taking which diminishes the effectiveness of any international program for endangered or threatened species, the Secretary . . . shall certify such fact to the President.”²³ The provision creates a clear, mandatory, and discrete duty for the Secretaries to certify Mexico unless and until Mexico fully and effectively halts totoaba harvesting and trade. Yet even though the Secretaries – and particularly Interior’s FWS and Commerce’s NMFS – have long-been aware of Mexico’s totoaba harvest and unlawful trade that violates CITES, the agencies have failed to act, in violation of the Pelly Amendment and the APA.²⁴

Conclusion

As detailed above, the Secretaries of Interior and Commerce and their respective agencies’ failures to respond to the Center’s September 2014 Pelly petition and their larger failure to implement the Pelly Amendment constitute “agency action[s] unlawfully withheld or unreasonably delayed” in violation of the Pelly Amendment and APA.²⁵ The Center, our members, and the broader conservation community are increasingly frustrated by the U.S. government’s failure to take action against Mexico for its continuing totoaba trade and concomitant failure to conserve the vaquita, despite the United States’ clear ability and mandate to do so. Accordingly, the Center provides notice of our intent to sue to remedy these long-standing violations. Please contact us within the next 30 days if you have questions or would like to discuss this issue.

Sincerely,



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²³ 22 U.S.C. § 1978(a)(2) (emphasis added).

²⁴ 5 U.S.C. § 706(1); *Norton v. Southern Utah Wilderness Ass’n*, 542 U.S. 55 (2004) (holding a claim can proceed under APA Section 706(1) if “an agency failed to take a discrete agency action that it is required to take”).

²⁵ 22 U.S.C. § 1978(a)(2); 5 U.S.C. § 706.

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