



*Sent via electronic mail*

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**RE: 60-Day Notice of Intent to Sue Regarding Violations of the Endangered Species Act;  
Failure to Designate Critical Habitat for the Nassau Grouper (*Epinephelus striatus*)**

Dear Mr. Ross and Mr. Oliver:

This letter serves as a sixty-day notice of intent to sue the National Marine Fisheries Service (Service) over violations of Section 4 of the Endangered Species Act (Act), 16 U.S.C. § 1531 *et seq.* This notice is submitted on behalf of the Center for Biological Diversity, WildEarth Guardians, and Miami Waterkeeper. Specifically, the Service has failed to designate critical habitat for Nassau grouper (*Epinephelus striatus*). *Id.* §§ 1533(a)(3)(A), 1533(b)(6)(C). The Service's failure deprives the grouper important protections and puts it at further risk of extinction. This letter is provided pursuant to the 60-day notice requirement of the citizen suit provision of the Act, to the extent that such notice is deemed necessary by a court. *Id.* § 1540(g).

**A. The ESA Requires the Service to Designate Critical Habitat for Nassau Grouper**

In enacting the ESA, Congress recognized that certain species “have been so depleted in numbers that they are in danger of or threatened with extinction.” *Id.* § 1531(a)(2). Accordingly, a primary purpose of the ESA is “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such . . . species.” *Id.* § 1531(b).

To accomplish these goals, Congress amended Section 4 of the ESA in 1978 to mandate that, when the Service lists a species as endangered or threatened, the Service generally must also concurrently designate critical habitat for that species. Section 4(a)(3)(A)(i) of the Act now states that, “to the maximum extent prudent and determinable,” the Fisheries Service “shall, concurrently with making a determination . . . that a species is an endangered species or

threatened species, designate any habitat of such species which is then considered to be critical habitat.” *Id.* § 1533(a)(3)(A); see also *id.* § 1533(b)(6)(C).<sup>1</sup>

Section 3 of the Act defines critical habitat as:

(i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the [Act], on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and (ii) specific areas outside the geographical area occupied by the species at the time it was listed . . . upon a determination by [the Service] that such areas are essential for the conservation of the species. 16 U.S.C. § 1532(5)(A).

“Conservation,” in turn, means recovery of the species “to the point at which the measures provided pursuant to this chapter are no longer necessary.” *Id.* § 1532(3).

Critical habitat provides important protection for imperiled species beyond that provided by listing alone. Pursuant to Section 7(a)(2) of the Act, federal agencies must ensure through consultation with the Service that any action they authorize, fund, or carry out will not “jeopardize the continued existence of any [listed] species.” *Id.* § 1536(a)(2). For species with critical habitat, each federal agency must additionally guarantee that its actions will not “result in the destruction or adverse modification” of the critical habitat. *Id.*

When critical habitat is prudent, but not determinable at the time of final listing, the Service may take one additional year to designate critical habitat, giving the Service two years from the proposed listing to finalize the critical habitat designation. *Id.* 1533(b)(6)(C)(ii). The Act requires publication of a finalized critical habitat rule no later than this two-year deadline, “based on such data as may be available at that time.” *Id.*

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<sup>1</sup> The Service may only find that it is “not prudent” to designate critical habitat for a species where designating critical habitat would either increase the degree of threat to a species or would not be beneficial to the species. 50 C.F.R. § 424.12(a)(1)(i)-(ii) (2011). As Congress made clear when it passed the ESA, it only intended the Service to invoke the “not prudent” exception to designating critical habitat in “rare circumstances.” H.R.Rep. No. 95-1625 at 17 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9453, 9467. See *Natural Res. Def. Council v. U.S. Dept. of the Interior*, 113 F.3d 1121, 1126 (9th Cir. 1997).

## B. The Nassau Grouper



Photo Courtesy of NOAA

The Nassau grouper are a friendly fish and have playful personalities as they have been known to interact with scuba divers around the Cayman Islands. They are one of the largest reef fish and have a recorded lifespan of 29 years. They are intelligent and have demonstrated the ability to differentiate between people and recognize familiar divers. They are a favorite subject of underwater photographers due to their zebra-like coloration and knack for posing for pictures. They use this camouflage print to blend in with their surrounding environment when threatened by predators.

On September 2, 2014, the Service proposed listing the Nassau grouper as threatened. 79 Fed. Reg. 51929. In the proposed listing rule, the Service stated it would publish a proposed critical habitat designation in a separate rule. *Id.* at 51941. On June 29, 2016, the Service finalized listing for the Nassau grouper. 81 Fed. Reg. 42268 (June 29, 2016). However, the Service did not designate critical habitat at that time, instead stating critical habitat was not yet determinable and that the Service would designate critical habitat in subsequent rulemaking. *Id.* at 42270. The Service's "not determinable" finding gave the agency one additional year from the date of the proposed listing publication to designate critical habitat, for a final, nondiscretionary critical habitat determination deadline of September 2, 2016. As of the date of this notice letter, the Service has not issued a final critical habitat determination.

## C. Violations of the Act

The Service's failure to designate critical habitat for the Nassau grouper constitutes a violation of the Act. The Service proposed listing the Nassau grouper on September 2, 2014 and 60-Day Notice of Intent to Sue Regarding Violations of the Endangered Species Act; Failure to Designate Critical Habitat for the Nassau Grouper (*Epinephelus striatus*)

issued a final rule listing the species on June 29, 2016. Years later, the Service has still not designated critical habitat for the Nassau grouper, leaving that potential habitat vulnerable to destruction that could jeopardize the continued existence of the fish or retard its recovery.

We are deeply concerned about and actively involved in the protection of the Nassau grouper and its habitat. Our members and staff engage in professional, recreational, aesthetic, and scientific activities involving this species and its habitat, including observing and attempting to observe the species. On their behalf, we urge you to take prompt action to protect the species under mandatory requirements of the Act. Accordingly, an acceptable remedy would be prompt issuance of a rule designating critical habitat for the Nassau grouper, or at a minimum, a binding commitment to date certain by which NMFS will finalize the critical habitat.

We are eager to address these violations and to discuss with the Service prospects for resolution at the earliest possible date. If the Service does not act within 60 days to correct these violations of the Act, however, we may pursue litigation in federal court. We will seek injunctive and declaratory relief regarding these violations. If you have any questions, wish to discuss this matter, or feel this notice is in error, please contact me at 727-490-9190 or [jlopez@biologicaldiversity.org](mailto:jlopez@biologicaldiversity.org). Thank you for your prompt attention to this matter.

Sincerely,



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