



***Via electronic and certified mail***

June 26, 2019

Secretary David Bernhardt  
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Ms. Margaret Everson  
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Authority of the Director  
U.S. Fish and Wildlife Service  
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**Re: Sixty-Day Notice of Intent to Sue: ESA Violation for Failure to Make Timely  
12-Month Finding on Listing of Okinawa Woodpecker (*Dendrocopos  
noguchii*)**

Dear Secretary Bernhardt and Director Everson,

In accordance with Section 11(g) of the Endangered Species Act (ESA),<sup>1</sup> the Center for Biological Diversity (the Center) provides this 60-day notice of its intent to sue the U.S. Fish and Wildlife Service (the Service) over the Service's failure to make a timely 12-month finding on the listing of the Okinawa woodpecker (*Dendrocopos noguchii*). Specifically, the Service violated and continues to be in violation of Section 4 of the ESA, which requires the Service to make a finding as to whether listing "is warranted" within 12 months of finding that listing is precluded by other pending proposals.<sup>2</sup> The Service found that listing of Okinawa woodpecker was warranted but precluded on October 17, 2016. 81 Fed. Reg. 71,457 (Oct. 17, 2016). Two and a half years have passed, and the Service's renewed 12-month finding is now 20 months late.

The time has come to finally list the Okinawa woodpecker under the ESA. The species is critically endangered according to the IUCN, and only 50-249 mature individuals remain. A petition was submitted to list the woodpecker under the ESA in 1980, yet the species has lingered on FWS's warranted but precluded list for *nearly 40 years*. This letter is provided pursuant to the 60-day notice requirement of the ESA's citizen suit provision.<sup>3</sup>

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<sup>1</sup> 16 U.S.C. § 1540(g).

<sup>2</sup> *Id.* § 1533(b)(3)(C); 50 C.F.R. § 424.14(h)(3).

<sup>3</sup> 16 U.S.C. § 1540(g).

## **I. Legal Background**

Under the ESA, upon receipt of a petition to list a species as threatened or endangered, the Service must first determine if the species may warrant protection within 90 days of the petition's receipt.<sup>4</sup> Within 12 months of receiving the petition, the Service must: (1) find listing "is warranted" and prepare a proposed rule to protect the species, (2) deny the petition, or (3) find listing "is warranted" but the "immediate proposal and timely promulgation of a final regulation implementing the petitioned action ... is precluded by pending proposals" and that "expeditious progress is being made to add qualified species" to the threatened or endangered species lists.<sup>5</sup> If the Service finds a species' listing is warranted but precluded, within 12 months of that finding, the Service must again make a determination whether protection is warranted, treating the petition as if it had been resubmitted on the date of the warranted-but-precluded finding.<sup>6</sup>

In enacting these strict timelines, Congress emphasized that the "warranted but precluded" designation was not designed to justify "the foot-dragging efforts of a delinquent agency."<sup>7</sup> Instead, these deadlines assure that species tagged for protection "are not forgotten in an administrative quagmire, but instead are periodically monitored and reconsidered for listing."<sup>8</sup>

## **II. The Okinawa Woodpecker**

Found only in the northern reaches of the small Japanese island of Okinawa, the Okinawa woodpecker is one of the rarest birds in the world. It is the only endangered woodpecker in all of Asia, Africa, and Europe and has an estimated population of only 50-249 mature individuals.<sup>9</sup> It is at extreme risk of extinction. The IUCN placed the Okinawa woodpecker in the "Critically Endangered" category in 1994.<sup>10</sup> The species' population is believed to still be declining.

Past habitat loss, continued habitat destruction, and fragmentation remain the most significant threats to the Okinawa woodpecker. The species prefers undisturbed, mature, subtropical evergreen broadleaf forests for nesting and foraging.<sup>11</sup> Importantly, the woodpecker relies on old-growth forests for foraging.<sup>12</sup> The continued destruction of these old-growth forest habitats is the primary reason that the species' decline.<sup>13</sup> Most of the older forests that support the species are located within the U.S. Marine Corps' Jungle Warfare Training Center on Okinawa.<sup>14</sup> In addition to U.S. military operations, such as the construction of six new helipads in the U.S. Training Center near the village of Takae, the IUCN has determined that logging, dam construction, agriculture, and golf course development pose the greatest threats to the old-

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<sup>4</sup> 16 U.S.C. § 1533(b)(3)(A).

<sup>5</sup> *Id.* § 1533(b)(3)(B)(i), (ii), (iii).

<sup>6</sup> *Id.* § 1533(b)(3)(C)(i); 50 C.F.R. § 424.14(h)(3).

<sup>7</sup> H. Conf. Rep. No. 97-835, at 22 (1982), reprinted in 1982 U.S.C.C.A.N. 2860, 2863.

<sup>8</sup> *Id.*

<sup>9</sup> <https://www.iucnredlist.org/species/22681531/125513230>; 81 Fed. Reg. 71,457, 71,465 (Oct. 17, 2016).

<sup>10</sup> <https://www.iucnredlist.org/species/22681531/125513230>

<sup>11</sup> 81 Fed. Reg. at 71,465.

<sup>12</sup> <https://www.iucnredlist.org/species/22681531/125513230>

<sup>13</sup> *Id.*

<sup>14</sup> 81 Fed. Reg. at 71,465.

growth forests relied on by the woodpecker.<sup>15</sup> The threats to the woodpecker are exacerbated by stochastic factors such as disease and typhoons; in addition, the species is vulnerable to introduced predators such as feral dogs and cats, Javan mongoose, and weasels.<sup>16</sup>

The Okinawa woodpecker was first petitioned for listing by the International Council for Bird Preservation in 1980.<sup>17</sup> It has been on the candidate list since 1984<sup>18</sup> and was assigned an Listing Priority Number of 2 because the threats to the species are ongoing and imminent and high in magnitude due to its restricted population size, past habitat loss, and endemism.<sup>19</sup> The Service last issued a finding of warranted but precluded for the woodpecker in October 2016,<sup>20</sup> and is now 1½ years past the deadline required by the ESA to make its listing determination anew for the species.<sup>21</sup>

### **III. Violation of the Endangered Species Act**

The Service is in violation of the ESA by failing to make a timely 12-month finding on whether listing of the critically imperiled Okinawa woodpecker is warranted. The Service will continue to be in violation of the law until it publishes either a new finding that listing is denied, precluded, or by publishing a proposed rule to finally list the Okinawa woodpecker under the Endangered Species Act. If the Service does not make the required finding within the next 60 days, the Center intends to file suit in federal court. Please contact us if you have any questions or if you would like to discuss this matter.

Sincerely,



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<sup>15</sup> <https://www.iucnredlist.org/species/22681531/125513230>

<sup>16</sup> 81 Fed. Reg. at 71,465.

<sup>17</sup> *Notice petition acceptance and status review, Endangered and Threatened Wildlife and Plants*, 46 Fed. Reg. 26,464 (May 12, 1981).

<sup>18</sup> *Id.*

<sup>19</sup> 81 Fed. Reg. at 71,466.

<sup>20</sup> *Id.* at 71,457; <https://ecos.fws.gov/ecp0/profile/speciesProfile?spcode=B0D1>

<sup>21</sup> *Id.* § 1533(b)(3)(C)(i); 50 C.F.R. § 424.14(h)(3).

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