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Public Comments Processing  
Division of Policy and Directives Management  
U.S. Fish and Wildlife Service

*Submitted electronically via email:* [www.regulations.gov](http://www.regulations.gov), Docket No. FWS–R8–ES–2013–0104

Re: 78 Fed. Reg. 78321 (Dec. 26, 2013), Endangered and Threatened Wildlife and Plants; Proposed Threatened Status for the Western Distinct Population Segment of the Yellow-billed Cuckoo (*Coccyzus americanus*); Proposed Rule.

To Whom it May Concern:

Please consider these comments on the proposed rule to protect the western distinct population segment (DPS) of the yellow-billed cuckoo under the Endangered Species Act, on behalf of the 675,000 supporters and members of the Center for Biological Diversity. The Center has long advocated for protection of the yellow-billed cuckoo, and we petitioned the Fish and Wildlife Service to list the species in 1998. We are pleased to see the cuckoo finally poised to receive the protection it so badly needs. The documented record of ongoing decline, river by river and region by region, of the western yellow-billed cuckoo, shows that it unquestionably warrants federal protection.

The Center for Biological Diversity recommends the designation of the DPS as an endangered species instead of as a threatened species, in light of the widespread and synergistic effects of multiple threats. Though the species still has a somewhat widespread distribution, prompting the Service to propose listing as threatened, when compared to its historical distribution and given ongoing threats to its habitat, the cuckoo warrants listing as endangered. We are concerned that with ongoing habitat loss and decline in the number of breeding pairs, the DPS is in danger of extinction throughout its range. We urge the Fish and Wildlife Service to finalize the listing and to begin expeditious recovery planning. In answer to your request, on page 61663, the Center for Biological Diversity is interested in participating in recovery efforts for the western population of yellow-billed cuckoo.

We also urge the Service to make better use of the Endangered Species Act's authorities by designating critical habitat for the western yellow-billed cuckoo. The scope of threats to the western population of the yellow-billed cuckoo, particularly the historic and ongoing loss, degradation and fragmentation of the cuckoo's riparian habitat, and accompanying reduction and division of the cuckoo into small and increasingly isolated populations, can best be addressed through designation of critical habitat. Critical habitat should encompass all streamside stretches and accompanying riparian areas where cuckoos currently nest or recently or historically nested, including areas that are seasonally or periodically inundated through operation of dams but have provided breeding habitat for cuckoos since the original filling of such dams. We suggest

exceptions for this broad critical habitat designation for (a) areas that have been continuously inundated by reservoirs, precluding growth of riparian vegetation since such dams' original fillings, and that are not anticipated to provide riparian habitat in the foreseeable future; (b) areas in which riparian habitat has been permanently eliminated due to existing residential or commercial (non-agricultural) development; or (c) areas in which natural riparian vegetation has been permanently eliminated due to loss of all riparian trees coupled with groundwater depletion or permanent channel alteration that precludes short-term restoration of riparian habitat. But aside from those exceptions, habitats that supported historical cuckoo occurrences can in many instances, as acknowledged in the proposed rule, once again support cuckoos and aid their recovery. By including historical occurrences of nesting, such a designation would aid recovery through increasing the number of lone birds, outside of current breeding range, that may be able to successfully nest in the future and expand the population, and thereby re-connect fragmented and isolated populations of the cuckoo.

Critical habitat is vital to achieving the purposes of the Endangered Species Act. In enacting the Act, Congress emphasized the importance of critical habitat designation as follows:

“[C]lassifying a species as endangered or threatened is only the first step in insuring its survival. Of equal or more importance is the determination of the habitat necessary for that species' continued existence...If the protection of endangered and threatened species depends in large measure on the preservation of the species' habitat, *then the ultimate effectiveness of the Endangered Species Act will depend on the designation of critical habitat.*” [H.R. Rep. No. 94-887 at 3 (1976) (emphasis added).]

Since the enactment of the Act, the case for designating critical habitat has only grown stronger. The best available scientific and commercial data demonstrate that critical habitat designation is crucial to species' survival and recovery. Where critical habitat is protected, species tend to recover faster.<sup>1</sup> Species with critical habitat for two or more years appear to be more likely to be improving and less likely to be declining than species without critical habitat.<sup>2</sup>

The proposed rule's description of what would be considered 'take' under section 9 of the Act includes correct application of section 9 to handling etc. of cuckoos, introduction of deleterious non-native species, and application of pesticides. In terms of habitat destruction, the proposed rule would ban, under section 9:

Unauthorized destruction or alteration of western yellow-billed cuckoo habitat from alteration of the hydrology or fluvial geomorphic processes that include, but are not limited to, channelization, impoundment, bank stabilization, water extractions and diversions, and channel clearing along any watercourse in which the western yellow-

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<sup>1</sup> Suckling KF, Taylor M. 2006. Critical habitat and recovery. Pages 75-89 in Goble DD, ed. The Endangered Species Act at Thirty. Washington (DC): Island Press.

<sup>2</sup> Taylor, M. T., K. S. Suckling, and R. R. Rachlinski (2005). "The Effectiveness of the Endangered Species Act: A Quantitative Analysis." Available on-line at <http://www.biologicaldiversity.org/publications/papers/bioscience2005.pdf>

billed cuckoo is known to occur. (4) Unauthorized activities that result in removal, destruction, or degradation of riparian vegetation from actions that include, but are not limited to, streamside clearings, prescribed fire, off-road vehicle use, human trampling, tree harvesting, and intensive livestock grazing along any watercourse in which the western yellow-billed cuckoo is known to occur. (61664)

These are all activities in which the loss of cuckoos could occur relatively gradually and be poorly documented, but would contribute individually and collectively to further decline and fragmentation of the western yellow-billed cuckoo population. In addition to protection of the cuckoo's habitat from take under Section 9 of the Act, the Service must designate and protect critical habitat under section 4 of the Act to aid the cuckoo's survival and recovery.

Designation of critical habitat is a straight-forward means to address the gravest threats to the population. Critical habitat designation would provide greater regulatory certainty than widespread regulation of habitat-destroying activities via the take prohibitions in section 9. Section 9 is best-suited to preventing and when necessary prosecuting the impact of direct take of a listed species by a person or person. In addition to the proposed section 9 prohibitions on handling, etc of cuckoos, introduction of non-natives to their habitats, and application of pesticides to habitats, prohibitions which we support, we urge the Service to propose critical habitat for the cuckoo. Critical habitat designation under section 4 and accompanying section 7 prohibition on Federal actions that destroy or adversely modify the habitat of a listed species, would entail broader protection for the western yellow-billed cuckoo than section 9 alone. Habitat destruction in the case of the western yellow-billed cuckoo is a greater threat than direct take, through a myriad of mechanisms that are less direct than take, such as through shrinking and fragmenting the large stretches of interior riparian habitat in which the cuckoo nests, and through degrading those habitats and thereby reducing the availability of the invertebrate species on which the cuckoo feeds. In sum, critical habitat designation is the most straight-forward, effective and appropriate means to protect and where feasible restore the habitat needed by the western DPS of the yellow-billed cuckoo to survive and to recover.

Thank you for your consideration.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael J. Robinson". The signature is fluid and cursive, with a large initial "M" and "R".

Michael J. Robinson  
Conservation Advocate