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Public Comments Processing
Attn: Docket No. FWS-R8-ES-2013-0104
Division of Policy and Directives Management
U.S. Fish and Wildlife Service
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Re: Proposed Rule to List the Yellow-billed Cuckoo in the Western Portion of the
United States, Docket No. FWS-R8-ES-2013-0104

To Whom It May Concern:

Please accept the following comments from Defenders of Wildlife on the United States Fish and Wildlife Service's (FWS) proposed rule to list the Western yellow-billed cuckoo under the Endangered Species Act (ESA). 78 Fed. Reg. 61622 (Oct. 3, 2013).

Defenders is a national non-profit conservation organization headquartered in Washington, D.C. It has more than one million members and supporters nationwide, including tens of thousands in the states in which the Western yellow-billed cuckoo is found. Defenders is a science-based advocacy organization focused on conserving and restoring native species and the habitat upon which they depend, and has been involved in such efforts since the organization's establishment in 1947. Defenders has a longstanding organizational interest in the preservation of species such as the Western yellow-billed cuckoo.

Distinct Population Segment Finding

FWS proposes to list yellow-billed cuckoo, *Coccyzus americanus*, as a threatened species in western North America as a distinct vertebrate population segment (DPS) under the ESA. 78 Fed. Reg. 61622. Defenders agrees that the yellow-billed cuckoos in western North America qualify as a DPS under FWS' DPS policy. 61 Fed. Reg. 4721 (February 7, 1996). However, the "significance" prong of FWS' DPS finding in the proposed rule could be more robustly supported. Under FWS' DPS policy a discrete population segment may be considered significant based on several factors including: (1) Evidence of the persistence of the discrete population segment in an ecological setting unusual or unique for the taxon, (2) evidence that loss of the discrete population segment would result in a significant gap in the range of the taxon, (3) evidence that the population segment represents the only surviving natural occurrence of a taxon that may be more abundant elsewhere as

an introduced population outside its historic range, or (4) evidence that the discrete population segment differs markedly from the remainder of the species in its genetic characteristics. Id. FWS determined that the discrete western population of yellow-billed cuckoo meets significance criteria (2) and (4). 78 Fed. Reg. 61629. We agree with FWS' conclusion as to significance factors (2) and (4) and that criteria (3) is not applicable in this situation. However, the western yellow-billed cuckoo population also meets significance criteria (1) – persistence of the discrete population segment in an ecological setting unusual or unique for the taxon. There is ample evidence elsewhere in FWS's proposed rule that western yellow billed cuckoos inhabit unique streamside riparian areas in the arid West, that differ dramatically from the habitats occupied by eastern yellow-billed cuckoos. See e.g. 78 Fed. Reg. 61633-4 (discussing habitat use and needs of western yellow-billed cuckoo). Accordingly, FWS should bolster its significance determination by relying on criteria (1) in addition to criteria (2) and (4).

Determination that the DPS qualifies for Threatened Status

Defenders supports the listing of the western yellow-billed cuckoo under the ESA. FWS has determined “that the western yellow-billed cuckoo DPS meets the definition of threatened under the Act, rather than endangered.” 78 Fed. Reg. 61662. We believe the DPS should be listed as endangered.

FWS supports its conclusion that the DPS is only threatened rather than endangered by stating “the rate of population decline and contraction of its breeding range is not so severe to indicate extinction is imminent for the western yellow-billed cuckoo” and that the species “currently does not show any substantial reduction in numbers.” 78 Fed. Reg. 61663. Both these conclusions are highly suspect.

A scientific paper relied upon by FWS for taxonomic purposes, Franzreb and Laymon (1993, pp. 17-28) describes the western yellow-billed cuckoo as “critically endangered.” 78 Fed. Reg. 61625. The State of California originally listed the western yellow-billed cuckoo under the California Endangered Species Act (CESA) as threatened in 1971, but reclassified the species as endangered in 1987. 78 Fed. Reg. 61637. The State of Nevada identifies the species as “critically imperiled.” 78 Fed. Reg. 61657. NatureServe's comprehensive species report for the western yellow-billed cuckoo indicates the species is possibly extirpated in Oregon, and critically imperiled in California, Nevada, and Colorado. NatureServe lacked data to rank the species' status in Washington, Idaho, Wyoming, Utah, and Texas, but found it was vulnerable in both Arizona and New Mexico. See <http://www.natureserve.org/explorer> (Comprehensive Report Species *Coccyzus americanus occidentalis*) FWS itself has described the threats to the western yellow-billed cuckoo as imminent and of high magnitude, assigning the species a listing priority number of 3. See e.g. 70 Fed. Reg. 24875 (May 11, 2005) (upgrading the listing priority number for the western yellow-billed cuckoo from 6 to 3 based on imminent threats of a high magnitude). It is odd that FWS now considers a species that has been assigned one of the highest listing priority numbers possible for over eight years to be merely “threatened,” rather than “endangered” once actual protection is at hand.

Moreover, data supplied by FWS elsewhere in its proposed rule indicates the western yellow-billed cuckoo is suffering from dramatic, current, and ongoing population declines and substantial reductions in breeding pairs and contraction of its breeding range, contrary to FWS's later position, quoted above, when it assessed the species as merely threatened. For example, FWS states “[i]n Oregon, the last confirmed breeding records are from the 1940s” and “if yellow-billed cuckoos still

breed in Oregon the numbers are extremely low, with pairs numbering in the single digits.” 78 Fed. Reg. 61634. “In Washington, the last confirmed breeding records of yellow-billed cuckoos are from the 1930s, and it is likely to have been extirpated as a breeder in the State.” *Id.* “[I]f yellow-billed cuckoos still breed in Washington, the numbers are extremely low, with pairs numbering in the single digits.” *Id.* FWS acknowledges the species is “considered extirpated” as a breeder in Canada, and for Montana, FWS states “it is unlikely that a breeding population exists within the State.” 78 Fed. Reg. 61635. As to Idaho, FWS concludes the “most recent statewide assessment estimated the breeding population in Idaho is likely limited to no more than 10 to 20 breeding pairs.” *Id.* In Wyoming, FWS determined there are “likely fewer than five breeding pairs.” *Id.* Similarly, in Colorado FWS concluded “the population of breeding pairs numbers in the low single digits.” 78 Fed. Reg. 61636. For Utah, FWS concluded the “number of breeding pairs in the State is fewer than 10.” *Id.* Similarly, for Nevada, FWS concluded “fewer than 10 breeding pairs occur in the State.” *Id.* In California, where the State considers the species endangered, FWS states: “Yellow-billed cuckoos have declined by more than 99 percent from historic levels in California, and declines appear to be continuing, especially along the Sacramento River and at isolated sites that recently supported small populations, but are now unoccupied. Current nesting populations for the State are found at only 3 locations, and likely do not exceed 40 to 50 pairs, down from approximately 280 pairs as recently as 1977 and perhaps as many as 15,000 pairs prior to the increased human settlement in the 1850s.” 78 Fed. Reg. 61639. In Arizona, which contains the largest remaining population of the species in the United States (78 Fed. Reg. 61639) “the available literature and surveys suggest that yellow-billed cuckoo populations in Arizona over the past 30 years have declined by 70 to 80 percent, with recent declines since approximately 2000 at some of [the] largest populations ...[a]t present, it appears that the State’s population could be as low as 170 pairs of yellow-billed cuckoos, and probably does not exceed 250 pairs.” 78 Fed. Reg. 61640. New Mexico has “an estimated 100 to 155” breeding pairs and Texas has “fewer than 10.” 78 Fed. Reg. 61641. Finally, as to Mexico FWS concluded “that the western yellow-billed cuckoo in Mexico has a breeding population of 330 to 530 pairs that is likely declining.” 78 Fed. Reg. 61642.

In sum, the available data indicates that FWS’ analysis to justify a proposed listing as threatened - that “the rate of population decline and contraction of its breeding range is not so severe to indicate extinction is imminent for the western yellow-billed cuckoo” and that the species “currently does not show any substantial reduction in numbers” (78 Fed. Reg. 61663) is specious. To the contrary, the western yellow-billed cuckoo is extirpated as a breeding species in Canada and likely extirpated as a breeding species in Washington and Montana. If not yet extirpated from Oregon, Wyoming, and Colorado, the number of breeding pairs in each of these states is most likely less than five. In Nevada, Idaho and Texas the number of breeding pairs is approximately ten in each state. Thus, the species is on the edge of being extirpated as a breeding species from the geographic majority of its breeding range.

Even, in those states which do still retain greater numbers of breeding pairs, declines are ongoing. In California, which hosted 280 pairs in 1977, the current estimate is 40 to 50 pairs and the historic population decline is 99%. California considers the species endangered. In Arizona, the State with the best remaining population, declines of 70% to 80% have been observed in recent years and the population is estimated at 170 to 250 pairs. New Mexico provides an additional 100 to 155 pairs and Mexico provides 330 to 550 pairs, but FWS acknowledges the Mexican population is declining – and Mexico’s breeding pair total may in fact represent “double-counting” of the Arizona and New Mexico populations, as yellow-billed cuckoos may move into southern Sonora and Sinaloa during

the rainy season after they bred (and were counted) in Arizona or New Mexico. 78 Fed. Reg. 61642-3.

Based on the above data, FWS concludes the current total breeding population of the species is between 680 and 1,025 pairs. 78 Fed. Reg. 61642. However, again as stated above, FWS acknowledges the breeding population may actually be lower because of the double counting of pairs that might breed in Arizona and New Mexico early in the breeding season and then breed again in Mexico later in the season. 78 Fed. Reg. 61642-3. Analogous species with similarly low breeding populations have been listed as endangered rather than threatened. For example, FWS listed the similarly riparian dependent Southwestern Willow Flycatcher as endangered based on its population failing to approximately 500 breeding pairs. 60 Fed. Reg. 10694, 10711 (February 27, 1995).

Finally, FWS recognizes habitat loss as a primary threat to the western yellow-billed cuckoo. 78 Fed. Reg. 61643-55. The above described reductions in western yellow-billed cuckoo populations have occurred under the current habitat threat environment. However, climate change will increase both the rate and severity of western yellow-billed cuckoo habitat loss. 78 Fed. Reg. 61651-3. FWS expects “long-term climate trends to have an overall negative effect on the available habitat throughout the breeding range of the western yellow-billed cuckoo.” *Id.* At 61653. It follows that as a primary threat to the western yellow-billed cuckoo (habitat loss) is expected to worsen due to climate change, that the observed declines in the species’ population can also be expected to worsen. Accordingly, though we support the listing of the western yellow-billed cuckoo under the ESA, we believe the best available scientific information indicates the species should be listed as endangered rather than threatened.

Listing Factor Analysis

FWS specifically requested comment on its use of the five ESA listing factors in its analysis in the proposed rule. 78 Fed. Reg. 61623. FWS determined that the western yellow-billed cuckoo is threatened under two of the five listing factors (A) and (E). 78 Fed. Reg. 61622. We agree the western yellow-billed cuckoo is threatened by listing factor (A) (the present or threatened destruction, modification, or curtailment of its habitat or range) and (E) (other natural or manmade factors affecting its continued existence). However, we believe the proposed DPS is also threatened under listing factor (D) (the inadequacy of existing regulatory mechanisms).

FWS begins its analysis of listing factor (D) by examining other federal laws which might protect the western yellow-billed cuckoo and starts with the Migratory Bird Treaty Act (MBTA). 78 Fed. Reg. 61656. While this federal statute protects individual yellow-billed cuckoos from take, as FWS acknowledges, there are “no provisions in the MBTA [to] prevent habitat destruction unless direct mortality or destruction of active nests occurs.” *Id.* Accordingly, the MBTA offers no protection to western yellow-billed cuckoo habitat during those portions of the year (outside of the breeding season) when birds have migrated south. Thus, though FWS stops short of making the obvious conclusion - that the MBTA is not an effective regulatory measure protecting the western yellow-billed cuckoo – this fact is readily apparent. The MBTA has been in effect for over 75 years. If the MBTA offered effective protection to the western yellow-billed cuckoo, its populations would not have crashed so catastrophically while the species was protected by the MBTA.

FWS next turns its attention to the laws governing the management of federal lands, the Federal Land Policy and Management Act (FLPMA) and the National Forest Management Act (NFMA). These statutes govern Bureau of Land Management (BLM) and Forest Service (USFS) lands respectively. They have both been in effect since 1976. Thus like the MBTA, they have exhibited no effective protection to stem the western yellow-billed cuckoo's ongoing and recent population declines. FWS recognizes that these statutes are unlikely to be effective in protecting the species in the future. "[G]iven that the BLM and USFS have discretion in how these statutes are carried out and measures are implemented, we continue to see continued loss and degradation of habitat for the western yellow-billed cuckoo on lands that these agencies manage." 78 Fed. Reg. 61656. We agree with this conclusion. The more fundamental point, however, is not explicitly stated by FWS – neither FLPMA or NFMA provides adequate alternative regulatory measures to protect the western yellow-billed cuckoo.

Other federal statutes discussed by FWS in the proposed rule are even less relevant. The Clean Water Act (CWA) arguably protects some wetlands from destruction without a permit issued by the United States Army Corps of Engineers (Corps). See 78 Fed. Reg. 61656. However, the Corps routinely issues such permits, and a large amount of the western yellow-billed cuckoo habitat destruction that FWS details under its analysis of listing factor (A) (see 78 Fed. Reg. 61643-55) has resulted from Corps' projects that complied with the Clean Water Act. FWS at least partially acknowledges this point finding "many actions that resulted in adverse hydrological modifications, such as channelization and levees, were implemented in compliance with the CWA." 78 Fed. Reg. 61656. The more important point is that the Clean Water Act (which has been in effect since the early 1970s) does not offer effective protection to western yellow-billed cuckoo habitat.

The National Environmental Policy Act (NEPA), discussed by FWS at 78 Fed. Reg. 61656, provides no direct environmental protection, but only forces federal agencies to publicly analyze the environmental impacts of proposed actions and consider alternatives to them. However, once an agency performs the required analysis and discloses it to the public, NEPA leaves the agency free to act in the most environmentally destructive or irresponsible manner possible. NEPA regulates the ultimate behavior of federal agencies only through shame. Similarly, the Fish and Wildlife Coordination Act, which allows FWS to recommend discretionary conservation measures to avoid, minimize, and offset impacts to fish and wildlife from federal water development projects, is a toothless and ineffective statute. Id. An ability to "recommend" a conservation measure which is "discretionary" with the agency pursuing the project does not amount to an effective regulatory measure. Rather, all the Fish and Wildlife Coordination Act does is give FWS an opportunity to recommend conservation measures which can be legally ignored by other agencies.

In sum, though FWS does not directly say so, the analysis above, which is consistent with FWS' own analysis in the proposed rule, 78 Fed. Reg. 61656-7, demonstrates that existing federal laws and regulatory procedures are entirely inadequate to protect the western yellow-billed cuckoo and have proven themselves ineffective over the past several decades as western yellow-billed cuckoo populations have continually declined under the illusory "protection" offered by these laws..

The potential for State or foreign laws to provide adequate regulatory protection for the western yellow-billed cuckoo is even more remote. As to State regulatory mechanisms FWS states: "In summary, where the yellow-billed cuckoo is State-listed (CA), a State candidate (WA), a species of concern (AZ, ID, WY, MT, CO, TX), or critically imperiled (NV), these designations contain no protection for the western yellow-billed cuckoo from habitat modification or destruction, as

described under Factors A and E. Existing State regulatory mechanism have not protected the western yellow-billed cuckoo from habitat loss and degradation from altered hydrology from upstream dams and surface water and ground water diversions, encroachment into the floodplain by agricultural and other development activities, bank stabilization and levee construction and maintenance activities, overgrazing, pesticide use on adjacent agricultural lands, conversion of habitat to monotypic stands of nonnative vegetation, gravel mining, wildfire, drought, and climate change across the range of the western yellow-billed cuckoo.” 78 Fed. Reg. 61657. Defenders completely agrees with this summary, however, again what is missing is the honest conclusion – existing state regulatory measures to protect the cuckoo are entirely inadequate.

As to foreign laws and regulations, FWS states: “[t]he yellow-billed cuckoo is not identified as a species that is sensitive, threatened, or endangered under Canadian law.” 78 Fed. Reg. 61658. It follows that the species receives no ESA like protections under Canada’s Species at Risk Act (SARA). Similarly, “[t]he western yellow-billed cuckoo is not listed by the Mexican Government’s Official Mexican Norm NOM-059-SEMARNAT-2010, Mexico’s threatened species law” and FWS anticipates “continued threats in Mexico, with little or no protection to the western yellow-billed cuckoo.” *Id.* See also 78 Fed. Reg. 61659 (“Based on the best available information, the regulatory mechanisms in Mexico that would protect the western yellow-billed cuckoo from threats described under Factors A and E are either lacking or not being fully implemented.”). Accordingly, the western yellow-billed cuckoo lacks any ESA style protection in either Canada or Mexico. It is already extirpated as a breeding species in Canada and is declining in Mexico – so whatever other potential protections exists in these nations, they have proven ineffective.

To review, FWS’ own analysis indicates that there are no adequate federal, state, or foreign existing regulatory mechanisms available to protect the western yellow-billed cuckoo. Nonetheless, FWS reaches the entirely illogical and unsupported conclusions that “[v]arious, Federal, State, and international regulatory mechanisms in place provide varying degrees of conservation oversight that may to some degree address the threat of ongoing habitat loss and degradation resulting from altered hydrology, conversion of habitat to nonnative vegetation, climate change, agricultural activities (Factor A), or exposure to pesticides and effects of small and isolated habitat patches (Factor E).” 78 Fed. Reg. 61659. This statement is simply untrue. FWS’ analysis (78 Fed. Reg. 61656-9) did not point to a single Federal, State, or international regulatory mechanism in place that effectively addresses the ongoing loss and degradation of western yellow-billed cuckoo habitat. FWS analysis mentions no effective regulatory mechanisms addressing altered hydrology, conversion of habitat to nonnative vegetation, or agricultural activities. The idea that there are any effect existing regulatory mechanisms that will address threats to the western yellow-billed cuckoo’s habitat resulting from climate change is laughable – and indeed FWS’s analysis of existing regulatory mechanisms (78 Fed. Reg. 61656-9) does not mention the words “climate change.” Additionally, the argument that there are effective, existing regulatory mechanisms addressing the threats to the western yellow-billed cuckoo from pesticide use is totally unsupported. Pesticides are designed to kill insects – thus when pesticides are used in or near cuckoo habitat, cuckoo food supplies are necessarily reduced. FWS acknowledges “[e]ven if approved applications procedures are followed, pesticides could reduce available insect prey for the western yellow-billed cuckoo.” 78 Fed. Reg. 61657. Viola’ even when used in accordance with existing regulations, pesticides will harm the cuckoo. Finally, as to FWS’ conclusion that some existing regulatory scheme will protect the western yellow-billed cuckoo from the effects of small and isolated habitat patches, a reader of the proposed rule is left totally mystified. Similar to FWS’ climate change analysis, no regulation discussing any

protection of the western yellow-billed cuckoo from the effects of small and isolated habitat patches is discussed in the proposed rule and, more importantly, there is no such regulation.

In short, FWS' own analysis and the best available information indicate that, contrary to the finding in the proposed rule, the western yellow-billed cuckoo is threatened by the inadequacy of existing regulatory measures. FWS first found the western yellow-billed cuckoo DPS warranted listing in 2001. 66 Fed. Reg. 38611 (July 25, 2001) (warranted-but-precluded finding on petition to list the western yellow-billed cuckoo). Thus, for the last 12 years, all federal agencies with regulatory authority over any aspect of the activities threatening the DPS, all State governments and agencies, and all foreign governments, have been on notice that FWS intended to list the western yellow-billed cuckoo under the ESA once bureaucratic backlogs were addressed. During this dozen-year period, these agencies and governments should have used all their regulatory authority to protect the species. Indeed, typically while a species languishes on FWS "warranted-but-precluded" list, state and local governments, with FWS' assistance, actively try to develop alternative regulatory measures to avoid an ESA listing. Yet none of this has happened for the western yellow-billed cuckoo. Its status has declined the entire time it has remained on the warranted-but-precluded list. See e.g. 70 Fed. Reg. 24875 (May 11, 2005) (upgrading the listing priority number for the western yellow-billed cuckoo from 6 to 3 based on imminent threats of a high magnitude). Accordingly, to the extent any existing regulatory mechanism do protect the western yellow-billed cuckoo, as FWS opines, there is abundant evidence that they are failing.

FWS should list the western yellow-billed cuckoo as imperiled by listing factors (A), (D), and (E). There are no effective regulatory mechanisms currently protecting the western yellow-billed cuckoo from the existing threats under factors (A) and (E).

Critical Habitat Determination

The ESA requires that a final regulation designating critical habitat for an endangered or threatened species shall be published concurrently with the final regulation implementing the determination that such species is endangered or threatened. 16 U.S.C. § 1533(b)(6)(C). The only exceptions to this mandatory duty allow FWS to publish a final critical habitat regulation earlier (without waiting a year), or to delay for one year if critical habitat is not determinable at the time of final listing. Id. §§ 1533(b)(6)(C)(i) & (ii). Accordingly, given this statutory requirement, it is surprising that the proposed rule does not also contain a proposed critical habitat designation. It does not appear that critical habitat is undeterminable for the western yellow-billed cuckoo as the proposed rule contains abundant information about currently used and historic breeding sites and important habitats. Additionally, as habitat destruction and adverse modification of habitat is a primary threat to the western yellow-billed cuckoo, it would appear prudent to designate critical habitat for this species promptly. Maybe FWS intends to do so. For example, there is a statement in the "peer review" section of the proposed rule which reads: "The purpose of peer review is to ensure that our critical habitat designation is based on scientifically sound data assumptions and analysis." 78 Fed. Reg. 61664. Yet, no critical habitat is proposed. Accordingly, to the extent FWS is not planning to promptly issue a proposed critical habitat designation, Defenders urges it to do so in order to comply with the law. 16 U.S.C. § 1533(b)(6)(C).

Best Regards,

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