



February 24, 2015

Via Certified Mail Return Receipt Requested

Lt. General Thomas P. Bostick, Chief
U.S. Army Corps of Engineers
441 G Street NW
Washington, DC 20314-1000

Daniel M. Ashe, Director
U.S. Fish and Wildlife Service
1849 C Street N.W.
Washington, D.C. 20240

John D'Antonio, District Engineer
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Albuquerque District
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Dr. Benjamin Tuggle, Regional Director
Southwest Regional Office
U.S. Fish and Wildlife Service
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Sally Jewell, Secretary of the Interior
U.S. Department of the Interior
1849 C Street, N.W.
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RE: Notice of Intent to Sue the U.S. Army Corps of Engineers for Violations of the Endangered Species Act

Dear Lt. General Bostick, District Engineer D'Antonio, Secretary Jewell, Director Ashe and Regional Director Tuggle:

In accordance with the 60-day notice requirement of Section 11(g) of the Endangered Species Act ("ESA" or "Act"), 16 U.S.C. § 1540(g), you are hereby notified that WildEarth Guardians ("Guardians") intends to bring a civil action against the U.S. Army, Corps of Engineers ("Corps") for violating sections 7 and 9 of the ESA, 16 U.S.C. § 1536 and 1538 and its implementing regulations, 50 C.F.R. § 402 *et seq.*: (1) by failing to initiate and/or reinitiate and complete consultation with the U.S. Fish and Wildlife Service ("Service") to ensure that the Corps' construction, operation and maintenance of the Rio Grande Floodway in the San Acacia to Bosque del Apache Unit, in Socorro County, New Mexico ("San Acacia Levee Project" or "Project") is not likely to jeopardize the continued existence of the yellow-billed cuckoo (*Coccyzus americanus*) ("cuckoo"); and (2) by causing ongoing and imminent future "take" without a permit authorized by law of the endangered cuckoo. *See* 16 U.S.C. §§ 1536(a)(2), 1536(d) and 1538(g).

I. The ESA Requires Federal Agencies to Reinitiate Consultation When a Species is Newly Listed.

In 1973, Congress enacted the Endangered Species Act to provide “a program for the conservation of . . . endangered species and threatened species” and “a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved.” 16 U.S.C. § 1531(b). In enacting the statute, the plain intent of Congress was “to halt and reverse the trend towards species extinction, whatever the cost.” *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978).

Section 2(c) of the ESA establishes that it is “. . . the policy of Congress that all Federal . . . agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of” the ESA. 16 U.S.C. § 1531(c)(1). To implement this policy, section 7(a)(2) of the ESA requires that each federal agency, including the Corps, consult with the Service to insure that any action authorized, funded, or carried out by the agency is not likely to: 1) jeopardize the continued existence of any threatened or endangered species or 2) result in the destruction or adverse modification of the critical habitat of such species. 16 U.S.C. § 1536(a)(2). “Action” is broadly defined to mean “all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies” and includes “actions directly or indirectly causing modifications to the land, water, or air.” 50 C.F.R. § 402.02.

For federal actions, the federal agency must request from the Service a determination of whether any listed or proposed species may be present in the area of the agency action. 16 U.S.C. § 1536(c)(1). If listed or proposed species may be present, the federal agency must prepare a “biological assessment” to determine whether the listed species may be affected by the proposed action. *See id.*; 50 C.F.R. § 402.12. If the agency determines that its proposed action “may affect” any listed species or its critical habitat, the agency must engage in “formal consultation” with the Service. 50 C.F.R. § 402.14; *see also*, 51 Fed. Reg. 19,926, 19,949 (June 3, 1986) (explaining that “may affect” broadly includes “[a]ny possible effect, whether beneficial benign, adverse or of an undetermined character”).

After formal consultation, the Service issues a biological opinion to explain whether the agency action is likely to “jeopardize” any species’ existence. 16 U.S.C. § 1536(a)(2). The biological opinion must include a summary of the information on which it is based and must adequately detail and assess how the proposed action affects listed species. 50 C.F.R. § 402.14(h). If the action is likely to cause jeopardy, then the biological opinion shall specify reasonable and prudent alternatives that avoid jeopardy.¹ *See* 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(h)(3). If the Service concludes that the action or the implementation of

¹ *Bennett v. Spear*, 520 U.S. 154, 170 (1997) (a biological opinion may be advisory in nature, but the agency disregards “at its own peril”).

reasonable and prudent alternatives will not cause jeopardy in violation of section 7(a)(2), the Service will issue an incidental take statement that specifies “the impact, i.e., the amount or extent, of . . . incidental taking” that may occur. *See* 50 C.F.R. § 402.14(i)(1). The ESA requires agencies to use the best available science when conducting their analysis. *See* 16 U.S.C. § 1536(a)(2).

However, an agency’s consultation duties do not end with the issuance of a biological opinion. Instead, an agency must reinitiate consultation when: 1) the amount of take specified in the incidental take statement is exceeded, 2) new information reveals that the action may have effects not previously considered, 3) the action is modified in a way not previously considered, or 4) “[i]f a new species is listed or critical habitat designated that may be affected by the identified action.” *See* 50 C.F.R. § 402.16.

After consultation is initiated (or reinitiated pursuant to one of the triggers set forth in the paragraph immediately preceding), ESA section 7(d) prohibits the agency or any permittee from “mak[ing] any irreversible or irretrievable commitment of resources” toward a project that would “foreclos[e] the formulation or implementation of any reasonable and prudent alternative measures.” 16 U.S.C. § 1536(d). The section 7(d) prohibition “is in force during the consultation process and continues until the requirements of section 7(a)(2) are satisfied.” 50 C.F.R. § 402.09.

Additionally, section 9 of the ESA prohibits the “take” of all listed endangered species. 16 U.S.C. § 1538(a)(1)(B). The term “take” means “to harass, harm, . . . wound, kill, trap, [or] capture” an endangered species.² *Id.* § 1532(19). Congress intended to define “take” in the “broadest possible manner to include every conceivable way” in which any person could harm or kill wildlife. *Babbitt v. Sweet Home Chapter of Cmty. for a Great Oregon*, 515 U.S. 687, 704 (1995).

It is also unlawful for any “person” to “cause [an ESA violation] to be committed,” and thus the ESA prohibits a governmental agency from authorizing any activity resulting in take. *See* 16 U.S.C. § 1538(g); *see also, e.g., Strahan v. Coxe*, 127 F.3d 155, 163 (1st Cir. 1997). Without a valid biological opinion and an incidental take statement from the Service covering the activity’s take of an endangered species, an action agency is not authorized to “take” or jeopardize *any* members of that species.

The ESA provides for citizen enforcement of the provisions of the Act. To enforce sections 7 and 9 of the ESA, 16 U.S.C. § 1536(a)(2), (d) and 1538(g), “any person may

² “Harass” means “an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering.” 50 C.F.R. § 17.3. “Harm” means “an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.” *Id.*

commence a civil suit on his own behalf . . . to enjoin any person, including the United States and any other governmental instrumentality or agency, who is alleged to be in violation of any provision of the this chapter.” 16 U.S.C. §1540(g)(1)(A).

II. The Service Listed the Yellow-billed Cuckoo (*Coccyzus americanus*) as a Threatened Species on October 3, 2014.

The Service listed the western yellow-billed cuckoo (*Coccyzus americanus*) as a threatened species under the ESA on October 3, 2014. 79 Fed. Reg. 59,992 (Oct. 3, 2014). Anticipating the final listing rule, the Service proposed critical habitat for the cuckoo on August 15, 2014. 79 Fed. Reg. 48,548 (Aug. 15, 2014). The final critical habitat designation rule is forthcoming.

Historically, the yellow-billed cuckoo was widespread in the arid and semiarid portions of the western and southwestern United States, including New Mexico. 78 Fed. Reg. 61,622, 61,631 (Oct. 3, 2013). In the past 90 years, the species’ range in the western United States has significantly decreased. *Id.* The cuckoo’s decline is primarily the result of historical and ongoing riparian habitat loss and degradation. 78 Fed. Reg. at 61,643.

The yellow-billed cuckoo requires large blocks of riparian habitat for breeding. 78 Fed. Reg. at 61,633. Landscapes with cottonwood–willow dominated vegetation cover and wide riparian habitat facilitate the distribution and abundance of the cuckoo. *Id.* Cuckoos typically nest in lowland riparian woodlands that cover 50 acres or more within arid and semiarid landscapes, and they require these large, moist habitats for successful hatching and rearing of young. *Id.* The cuckoo’s breeding season varies regionally with the availability of its preferred food. 78 Fed. Reg. at 61,632. Generally arriving on its breeding grounds in mid-June, the birds begin their southbound migration in mid-August, and most have left the breeding grounds by mid-September. *Id.*

In the Middle Rio Grande the Service has proposed critical habitat for the yellow-billed cuckoo that stretches as a continuous segment along the lower Rio Grande from Elephant Butte Reservoir in Sierra County upstream through Socorro, Valencia, and Bernalillo Counties to below Cochiti Dam in Cochiti Pueblo in Sandoval County, New Mexico. 78 Fed. Reg. 48566. This proposed critical habitat Unit 52, NM–8, covers 61,959 acres and is approximately 170-miles long. *Id.* This unit is consistently occupied by a large number of breeding cuckoos and currently is home to the largest breeding group of cuckoos north of Mexico. *Id.*

Man-made development has negatively impacted the cuckoo’s habitat. Past actions by humans have changed the landscape and hydrology such that they prevent the growth of riparian plants that are the basis of the species’ habitat. 78 Fed. Reg. at 61,643. Once habitat is lost, the changed conditions (such as changed hydrologic regime) also prevent riparian habitat from regenerating, even without other impacts. *Id.* For example, “channelization—through manmade levees . . .—may leave the geographical area where riparian plants once grew (such as the

watercourse's floodplain) physically untouched, but the altered hydrology prevents riparian plant species from germinating and growing." *Id.*

Principal causes of riparian habitat destruction in the cuckoo's range include levees, channelization and other forms of bank stabilization, water diversions, alteration of hydrology due to dams, and riverflow management that differs from natural hydrological patterns. *Id.* Flood control efforts, like levee construction and bank stabilization, cause direct habitat loss from construction and maintenance activities that remove woody vegetation from the structures. 78 Fed. Reg. at 61,646. By design, these structures effectively sever the hydrologic connection of the river's main channel and the river's immediate floodplain, thereby preventing overbank flooding. *Id.* Consequently, levees and other similar structures reduce the amount of water available to riparian vegetation in the floodplain, which results in desiccation and eventual loss and degradation of riparian habitat suitable for the cuckoo. *Id.*

Floodplain conversion for agricultural uses further exacerbates habitat loss. 78 Fed. Reg. at 61,643. In combination with altered hydrology, these threats convert existing, primarily native habitats to monotypic stands of nonnative vegetation, which reduces the suitability of riparian habitat for the cuckoo. *Id.*

III. The Corps' Rio Grande, San Acacia Levee Project May Affect the Yellow-billed Cuckoo.

The San Acacia Levee Project involves the construction of 43 miles of engineered levee along the west bank of the Rio Grande from the San Acacia Diversion Dam to Elephant Butte Reservoir. U.S. Fish & Wildlife Service, Consultation No. 02ENNM00-2012-F-0015, Biological Opinion, at 1 (Feb. 28, 2013) [hereinafter "2013 BiOp"]. The new levee will have a functional flood control life of 50 years and so the Project will continue to at least 2082. *Id.* at 5.

On May 20, 2014 the Corps' issued a Record of Decision for the San Acacia Levee Project, authorizing levee construction. Construction is estimated to occur over the next 20 years, or until 2032. *Id.* The levee construction plan is divided into 6 segments and 14 phases, with construction occurring within the segments at approximately 2 miles per year, over a period of 20 years. *Id.* at 97.

The Corps engaged in formal consultation resulting in a Biological Opinion that was finalized in February of 2013. The 2013 BiOp analyzes the San Acacia Levee Project's effects on the endangered Rio Grande silvery minnow (*Hybognathus amarus*) ("silvery minnow") and its designated critical habitat, and the endangered southwestern willow flycatcher (*Empidonax traillii extimus*) ("flycatcher") and its designated critical habitat. *Id.* at 1. The Service was unable to concur with the Corps' findings that the San Acacia Levee Project "may affect, is not likely to adversely affect" the flycatcher, or flycatcher designated critical habitat because effects of the proposed action are not "wholly beneficial, discountable, or insignificant." *Id.* at 2. Additionally, the Corps found that the proposed action, "may affect, likely adversely affect" silvery minnow and silvery minnow designated critical habitat. *Id.*

As described in the 2013 BiOp Opinion, direct and indirect effects of the proposed action to flycatchers and flycatcher habitat are “likely to adversely affect” flycatchers, and their designated critical habitat. *Id.* Vegetation removal resulting from levee construction will adversely affect flycatcher critical habitat within the floodway. *Id.* at 115. The proposed action plans to remove 58.9 acres of riparian vegetation during levee installation and in the vegetation free zone, ultimately converting 29.5 acres of riparian vegetation into grasslands. *Id.* The levee will exacerbate sediment accumulation in the floodway, further increasing the physical separation of riparian vegetation from groundwater that is necessary to support habitat for the bird species. *Id.* at 115. Furthermore, earthen levees can cause receding groundwater levels that, in turn, stress or kill willows necessary for riparian flycatcher habitat. *Id.* at 116.

The Corps’ failure to initiate or reinstate consultation with the Service regarding the San Acacia Levee Project upon the listing of the yellow-billed cuckoo violates the ESA. As required by 50 C.F.R. § 402.16, the Corps must reinstate consultation when: 1) the amount of take specified in the incidental take statement is exceeded, 2) new information reveals that the action may have effects not previously considered, 3) the action is modified in a way not previously considered, or 4) “[i]f a new species is listed or critical habitat designated that may be affected by the identified action.” *See* 50 C.F.R. § 402.16. Further, it is important to note that “[w]hen reinstatement of consultation is required, the original biological opinion loses its validity, as does its accompanying incidental take statement, which then no longer shields the action agency from penalties for takings.” *See Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.*, 698 F.3d 1101, 1037 (9th Cir. 2012).

Nevertheless, the Corps’ has not yet initiated or reinstated consultation to determine the Project’s effects on the cuckoo, newly listed as threatened on October 3, 2014. Because the cuckoo requires habitat conditions that are similar to the flycatcher, impacts to the flycatcher may be similar to those that would adversely affect the cuckoo. For example, permanent removal of riparian vegetation may adversely modify cuckoo critical habitat. Furthermore, because of differences in the natural history of the cuckoo and the flycatcher, the Levee Project may impact the cuckoo more or less severely than the flycatcher. However, because the Corps failed to analyze impacts to the cuckoo, the Project’s specific impacts to the cuckoo are unknown. Thus, because the Corps’ has failed either to initiate consultation about the San Acacia Levee Project’s effects on the cuckoo or to reinstate consultation related to its implementation of the 2013 BiOp, the agency has violated and continues to violate the ESA.

The Corps’ San Acacia Levee Project may result in harm or harassment of the yellow-billed cuckoo in violation of section 9 of the ESA. Because the Corps has failed to consult with the Service and obtain an incidental take permit that covers the yellow-billed cuckoo, any harm to or harassment of the species—even if incidental to the proposed action—constitutes a take in violation of the law.

IV. Violations of the ESA

Guardians hereby puts the Corps on notice that it will promptly seek judicial relief if the agency fails to remedy the ongoing and imminent future³ violations of the ESA and its implementing regulations. 16 U.S.C. §§ 1536(a)(2), (d) and 1538(g).

A. Violations of Section 7(a)(2) of the ESA

Guardians hereby puts the Corps on notice that it is violating section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2), and its implementing regulations, 50 C.F.R. § 402 *et seq.*, by: 1) failing to insure that the San Acacia Levee Project is not likely to jeopardize the continued existence of the yellow-billed cuckoo. 16 U.S.C. § 1536(a)(2).

B. Violations of Section 9 of the ESA

Guardians hereby provides notice that the Corps is violating section 9 of the ESA, 16 U.S.C. § 1538(g), and its implementing regulations by causing ongoing and imminent future “take” without a permit authorized by law of the threatened yellow-billed cuckoo as the result of the San Acacia Levee Project.

C. Violations of ESA’s Implementing Regulations

Guardians hereby puts the Corps on notice that the agency is violating 50 C.F.R. § 402.14(i)(4) and 402.16 by failing to immediately reinitiate consultation upon the listing of the cuckoo as threatened in October 2014.

V. Noticing Party

WildEarth Guardians is a non-profit, public interest, environmental advocacy, and conservation organization. Guardians’ mission is to protect and restore wildlife, wild rivers, and wild places in the American West. Guardians has over 66,500 members and activists, many of whom live, work, and recreate in areas affected by the ESA violations described herein. Guardians and its members have a substantial interest in the conservation and recovery of the yellow-billed cuckoo, adversely affected by the agency’s failure to protect the listed species and their habitat in compliance with the ESA.

³ See *Colorado Env’tl. Coal. v. Office of Legacy Mgmt.*, 819 F.Supp.2d 1193, 1220 (D. Colo. 2011) (finding Plaintiff’s pre-suit notice under the ESA was effective as to future agency actions, where the letter contained sufficient description of the challenged activities, some of which occurred after the notice letter was sent).

The name, address and telephone number of the party giving this notice is as follows:

WildEarth Guardians
c/o Jen Pelz
516 Alto Street
Santa Fe, New Mexico 87501
(303) 884-2702
jpelz@wildearthguardians.org

VI. Conclusion

One of the purposes of the ESA's citizen suit provision, 16 U.S.C. § 1540(g), is to encourage discussions among parties in order to avoid potential litigation. We encourage the Corps to seriously consider the concerns detailed in this notice and ask that you discuss the steps the agency may take going forward to remedy these legal violations. However, if the aforementioned violations of the ESA are not remedied within 60 days of the date of this letter, we intend to file a citizen's suit in federal court seeking preliminary and permanent injunctive relief, declaratory relief, and attorneys' fees and costs concerning these violations.

If you believe any of the above information is incorrect, have any additional information that might help avoid litigation, or wish to discuss this matter further, please feel free to contact me at the phone or email address listed below.

Sincerely,

Jen Pelz
Wild Rivers Program Director