

INITIAL STATEMENT OF REASONS

Evaluation for "Take" Avoidance of Northern Spotted Owl, 2009

[Published March 20, 2009]

Title 14 of the California Code of Regulations (14 CCR):

Amend:

§ 895	Abbreviations Applicable Throughout Chapter
§ 895.1	Definitions
§ 919.9 [939.9]	Northern Spotted Owl
§ 919.10 [939.10]	Take of Northern Spotted Owl

PUBLIC PROBLEM, ADMINISTRATIVE REQUIREMENT, OR OTHER CONDITION OR CIRCUMSTANCE THE REGULATIONS ARE INTENDED TO ADDRESS

In June 1990, the U.S. Fish and Wildlife Service (Service) listed the Northern Spotted Owl (*Strix occidentalis caurina*) as threatened under the Endangered Species Act. As a result of the listing, the Board of Forestry and Fire Protection adopted, and the Office of Administrative Law certified, the existing Forest Practice Rule sections 919.9 and 919.10 (rules) for implementation in 1991. However, the rules were seldom used because the Service began providing informal assistance to the California Department of Forestry and Fire Protection (CAL FIRE) regarding the review of timber harvest plans (THPs) and nonindustrial timber management plans (NTMPs) to ensure that harvest activities do not result in incidental take of the owl.

Formal review by the Service began in 1999 with a request from the former CAL FIRE Director Andrea Tuttle. The request cited the CAL FIRE 's lack of in-house biological expertise to assess whether harvest activities would result in incidental take of northern spotted owl. Since 1999, the Service has worked closely with CAL FIRE to facilitate timely, efficient, and defensible review of THPs and NTMPs. However, in November 2007, due to its own limited budget and increasing workload, the Service notified CAL FIRE that beginning in February 2008 it would be unable to continue providing technical assistance on timber harvest activities.

CAL FIRE must make preliminary determinations of incidental take avoidance for the owl in order to approve Timber Harvesting Plans, Modified Timber Harvesting Plans, Program Timber Harvesting Plans, and Nonindustrial Timber Management Plans (Plans) proposed within the range of the species in California (ref. 14 CCR §§ 898.2(d)). In order to make such determinations prior to plan approval and to assure compliance with the disclosure requirements of the Forest Practice Act and the California Environmental Quality Act, CAL FIRE must ensure all plans located within the range of the northern spotted owl incorporate sufficient information related to the species and its associated habitat and include enforceable protection measures for the species.

Since receiving notification that the Service would no longer be able to provide technical assistance to CAL FIRE, obstacles have surfaced which make implementation of the existing rules extremely difficult in the short-term and perhaps in the long-term. First,

CAL FIRE needs the opportunity to receive as much biological input as possible to assess whether harvest activities would result in an incidental take of northern spotted owl. Second, the California Department of Fish and Game (DFG) is unable due to funding constraints to assist in the process by providing a qualified biologist from their department. This creates an insurmountable obstacle to implementation of the rule because both existing rule sections require either a "state-employed designated biologist" or "review" by the Department of Fish and Game."

SPECIFIC PURPOSE AND NECESSITY OF THE REGULATIONS

The purpose of the proposed regulation is to provide CAL FIRE a mechanism for obtaining biological expertise to assist in the process and still maintain scientific integrity in the review process. The proposed regulation is necessary to ensure that (1) harvest activities do not result in the incidental take of a northern spotted owl; and (2) Plans are approved in an efficient and timely manner.

Section 895 Abbreviations.

This section adds abbreviations for new definitions for 1) Activity Center, 2) Northern Spotted Owl Breeding Season, and 3) Qualified Spotted Owl Consultant. The abbreviations are necessary for clarity and brevity of rules.

Section 895.1 Definitions

This section adds three new definitions: 1) Activity Center, 2) Northern Spotted Owl Breeding Season, and 3) Spotted Owl Expert. The definition for "Activity Center" establishes criteria for determining occupancy or absence of the northern spotted owl. This definition is needed to effectuate certain northern spotted owl protection requirements stated in section 916.9 (g) and (g)(1)-(4).

The definition for "Northern Spotted Owl Breeding Season" establishes the annual period during any year when northern spotted breeding is likely to occur. This definition is needed to effectuate certain northern spotted owl protection requirements stated in section 916.9 (g) and (g)(1)-(2).

The definition for "Spotted Owl Expert" describes the type of qualifications, training and expertise necessary for a person to be designated as an "expert" for northern spotted owl habitat assessments and recommendations on whether proposed protection measures will result in a "take". The definition is needed to ensure professional and credentialed personnel are assisting CAL FIRE on northern spotted owl protection measures.

Section 919.9 [939.9] Northern Spotted Owl

The first paragraph of this section deletes existing reference to "State Employed Biologist", and their necessary qualifications. It replaces this term with "Spotted Owl Expert". The amendment is necessary because the director needs qualified, professional advice on northern spotted owl protection requirements and the State does not have access to qualified State employed biologists due to fiscal constraints.

Other amendments to section 919.9 [939.9] involve 1) replacing the term "State Employed Biologist" with the term "Spotted Owl Expert", and describing how the expert will be used, and 2) adding non-substantive edits for consistency for section numbering and clarification of the terms used for naming the Department of Fish and Game.

The amendment to section 919.9 [939.9] (g)(2) establishes additional operating restrictions within 500 to 1000 feet of an active nest site or pair activity center. This amendment is necessary to ensure protection during the breeding season and qualified entities are reviewing operations to ensure a “no take” determination.

Section 919.10 [939.10] Take of Northern Spotted Owl

Similar to amendments in 919.9, this section deletes existing references to a “designated biologist” and replaces this with “director”. This requires the director to make a determination of take. The amendments are necessary to make clear the determination of take rests with the lead agency.

ALTERNATIVES TO THE REGULATIONS CONSIDERED BY THE BOARD AND THE BOARD'S REASONS FOR REJECTING THOSE ALTERNATIVES

The Board has considered several alternatives to the proposed regulation.

Alternative 1(proposed alternative) Minor Amendments to the Existing NSO Rules.

This alternative would leave the existing rules intact for the most part. The proposed changes expand CAL FIRE's options in selecting biological expertise. Because this rule does not address all weaknesses within the existing rules, it may be only a short-term solution.

Alternative 2: Complete Rewrite of the NSO Rules.

This major amendment creates a process-only rule and is intended to supersede the existing rules. It reduces the Plan submitter's options from seven to three, eliminating options that are currently unusable, and utilizes current knowledge gained from the Service's technical assistance over the past decade. Because this rule addresses all of the weaknesses in the existing rules, it is a long-term solution. This alternative was rejected as a complete rewrite of the northern spotted owl rules could take considerable time and not be available for the next field season (2009).

Alternative 3: No alterations to NSO rules.

This alternative would result in a process that would increasingly become “ad hoc”, given the lack of guidance to landowners and agencies as to how to proceed, and the outdated provisions of the FPRs.

POSSIBLE SIGNIFICANT ADVERSE ENVIRONMENTAL EFFECTS AND MITIGATIONS

The Board has not identified any adverse environmental effects as a result of the proposed rules. Because the proposed rule changes are process-only, the proposed rules do not change the existing environmental protection standards in the Forest Practice Rules deemed necessary to meet the goals of avoiding the incidental take of northern spotted owls during timber harvesting activities.

ALTERNATIVES TO THE PROPOSED REGULATORY ACTION THAT WOULD LESSEN ANY ADVERSE IMPACT ON SMALL BUSINESS

Alternative #2 above would lessen any adverse impact on small business.

EVIDENCE SUPPORTING FINDING OF NO SIGNIFICANT ADVERSE ECONOMIC IMPACT ON ANY BUSINESS

The Board staff estimated that this regulation should not have any adverse economic impact on any business. The amendments provide the Director with alternatives in the selection of biological experts. As such, this process-only change should result in more timely and efficient approval of Plans. This efficiency will have a significant positive financial effect on Plan submitters and CAL FIRE.

TECHNICAL, THEORETICAL, AND/OR EMPIRICAL STUDY, REPORTS, OR DOCUMENTS

The State Board of Forestry and Fire Protection consulted the following listed information and/or publications as referenced in this *Initial Statement of Reasons*. Unless otherwise noted in this *Initial Statement of Reasons*, the Board did not rely on any other technical, theoretical, or empirical studies, reports or documents in proposing the adoption of this regulation.

1. California Forest Practice Rules. 2008. *Range of the Northern Spotted Owl*. 14 CCR 895.1
2. California Forest Practice Rules. 2008. *Northern Spotted Owl*. 14 CCR 919.9
3. California Forest Practice Rules. 2008. *Take of Northern Spotted Owl*. 14 CCR 919.10
4. United States Fish and Wildlife Service. February 17, 1995. *Endangered and Threatened Wildlife and Plants; Proposed Special Rules for the Conservation of the Northern Spotted Owl on Non-Federal Lands*. 60 FR 9484, - 9514.
5. California Department of Fish and Game. January 2, 1996. *Northern Spotted Owl- Northeast Boundary for Consultations*. Memorandum from John Turner, Chief of Environmental Services Division to Dean Cromwell, Executive Secretary to the Board of Forestry.
6. United States Fish and Wildlife Service, Yreka Office. May 3, 2006. *Technical Assistance Regarding the Southern Regulatory Boundary for Northern Spotted Owl in Northeastern California*. Letter from Phil Detrich, Field Supervisor to Mike Wyhlidko, Fruit Growers Supply Company.
7. California Department of Forestry and Fire Protection. May 6, 2008. *Evaluation Process for Northern Spotted Owl Information to Determine Compliance with 14 CCR §§ 919.9(g) [939(g)] and 919.10 [939.10]*. Draft.
8. California Department of Forestry and Fire Protection. May 15, 2008. *Information Required for Plans Submitted within the Range of the Northern Spotted Owl Relative to Process for Determining Take Avoidance*. Draft.
9. California Department of Forestry and Fire Protection. March 25, 2005. *Northern Spotted Owl (NSO) Review Guidelines for Timber Harvesting Plans*,

Modified Timber Harvesting Plans, Program Timber Harvesting Plans, and Nonindustrial Timber Management Plans.

10. California Department of Forestry and Fire Protection. February 2008. *Important Information for Timber Operations Proposed within the Range of Northern Spotted Owl.*
11. U.S. Fish and Wildlife Service. February 1, 2008. *Information Needed for US Fish and Wildlife Service Timber Harvest Plan – Northern Spotted Owl Technical Assistance Analysis.*
12. California Department of Forestry and Fire Protection. February 1, 2008. *Northern Spotted Owl Take Avoidance Scenarios.*
13. United States Department of the Interior, Fish and Wildlife Service Region 8. November 16, 2007. *Letter to Ruben Grijalva, Director CalFIRE.* Subject: Fish and Wildlife Service review of timber harvest plans and non-industrial timber management plans.
14. U.S. Fish and Wildlife Service. May 2008. *Final Recovery Plan for the Northern Spotted Owl (Strix occidentalis caurina).*
15. California Forest Practice Rules. 2008. *Review of plan; public comments; time ;hearing; determination by board and director.* Cal. Pub. Res. Code 4582.7
16. California Forest Practice Rules. 2008. *Special Conditions Requiring Disapproval of Plans.* 14 CCR 898.2(d) and (f).
17. California Forest Practice Rules. 2008. *Take.* 14 CCR 895.1
18. California Fish and Game Code. 2008. *Take.* California Fish and Game Code § 86; 14 CCR 1.80
19. Section 9 Endangered Species Act. 2008. *Take.* 16 USC 1532(19); 50CFR10.12.
20. *Environmental Council of Sacramento v. City of Sacramento* (2006) 142 Cal. App. 1018

Pursuant to Government Code § 11346.2(b)(6)

In order to avoid unnecessary duplication or conflicts with federal regulations contained in the Code of Federal Regulations addressing the same issues as those addressed under the proposed regulation revisions listed in this *Initial Statement of Reasons*; the Board has directed the staff to review the Code of Federal Regulations. The Board staff determined that no unnecessary duplication or conflict exists.

PROPOSED TEXT

The proposed revisions or additions to the existing rule language are represented in the following manner:

The following revisions or additions to the existing rule language are represented in the following manner:

UNDERLINE indicates an addition to the California Code of Regulations, and

~~strikeout~~ indicates a deletion from the California Code of Regulations.

All other text is existing rule language.

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