

INITIAL STATEMENT OF REASONS

Northern Spotted Owl Definitions, 2008

[Published July 11, 2008]

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

Amend:

§ 895.1 Definitions

§ 919.9, 939.9 - Northern Spotted Owl

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

Two definitions in the California Forest Practice Rules (FPRs) are proposed for amendments to conform to current U.S. Fish and Wildlife Service (Service) federal regulatory requirements for northern spotted owl (*Strix occidentalis caurina*) and to clarify state and federal Endangered Species Act "Take" definitions. The two definitions proposed for amendment more precisely define the range of the northern spotted owl and incorporate the state of California definition of "Take" in addition to the federally listed species definition. Section 919.9 and 939.9 are revised to insert the proposed amended definition for the range of the northern spotted owl.

Amendments for the range of the northern spotted owl: 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 (Board) adopted, and the Office of Administrative Law certified, the existing Forest Practice Rule sections 14 CCR §919.9, §919.10, and added to section §895.1 several new definitions including "Range of the Northern Spotted Owl" (Rules), for implementation in 1991. On February 17, 1995 the Service described the range of the northern spotted owl within the California Cascade Province in a Federal Register notice (60 FR 9484 - 9517). However, the definition adopted by the Board is inconsistent with the range boundary adopted by the Service primarily with regard to the eastern and southern regulatory boundaries.

The Rules require the California Department of Forestry and Fire Protection (CAL FIRE) to make preliminary determinations of incidental take avoidance for the northern spotted 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. 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 that avoid "take" (as defined in Section 9 of the Endangered Species Act, 16 USC 1532(19)) of northern spotted owls.

The existing definition of "Range of the Northern Spotted Owl" that triggers Plan submitters to incorporate, and CAL FIRE to implement and enforce the provisions of 14 CCR 919.9 and 919.10 is inconsistent with current information. The current definition has resulted in unnecessary work loads, costs and analyses for both CAL FIRE, review team members and Plan submitters.

Amendments for state definition of Take: Currently, the FPR's definition of "Take" reflects the definition found in the federal Endangered Species Act (ESA), without citation to the federal code. The definition was added to the FPRs, along with other definition subsections when the Northern Spotted Owl rules were adopted [14 CCR §§ 919.9, 919.10] in 1991. The owl is a federally listed species which accounts for the limited definition of "Take."

Application of the federal (ESA) definition of "Take" is much broader than the state (CESA) definition of "Take." While the federal allows that "Take" may occur under specific modifications to a species habitat, the state ESA does not.

Take is referred to frequently in the FPRs, applying to both federally- and state-listed species. Because only the federal definition of "Take" is provided in the FPRs, the potential exists that it may be inappropriately applied to state-listed species.

SPECIFIC PURPOSE AND NECESSITY OF THE REGULATIONS

The proposed amendments modify FPRs to conform to current Service regulatory requirements for northern spotted owl and to clarify state and federal Endangered Species Act "Take" definitions. Section 919.9 and 939.9 are revised to insert the proposed amended definition for the range of the northern spotted owl.

Amendments for the range of the northern spotted owl: The purpose of this proposed amendment is to resolve a discrepancy between the FPRs and the Federal Register Notice that describes the range of the northern spotted owl within the California Cascade Province. The proposed changes primarily modifies, and more precisely describes, the boundary for the northeastern portion of the evaluation area

To more closely reflect the range of the northern spotted owl, as described by the Service in the Federal regulations, and to direct reviewers and submitters as to where the evaluation would take place, the current definition found in the FPRs must be amended. In addition, for clarity and to avoid confusion, Northern Spotted Owl Evaluation Area is being substituted for the term "range" in 895.1 and 919.9. The realignment of the northeastern regulatory boundaries and clarification to the existing northern spotted owl consultation process will focus detection efforts within areas of confirmed long-term northern spotted owl distribution, and eliminate surveys in unsuitable habitat.

The proposed definition will provide clarity and consistency with the Service's interpretation of the geographic area where northern spotted owls may be impacted while reducing unnecessary application, costs and review by CAL FIRE staff, review team members and Plan submitters, without resulting in any significant risk to northern spotted owls.

Amendments for state definition of Take The purpose of the regulation is to provide clarification to, and the appropriate application of, the definition of "Take." In order to avoid confusion or an overbroad application of Take when state-listed species are at issue, they must reflect both federal and state code. The Board has proposed two mutually exclusive alternatives for consideration of adoption for this purpose: Alternative #4 or Alternative #5, and one combined alternative, Alternative #6.

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

Alternative 1: Provide a written description of the Evaluation Area.

This is the proposed alternative as it provides a complete description of the Evaluation Area to Plan preparers, consistent with the Service's regulatory boundary. Further, it accurately and simply describes the regions of California that provide suitable northern spotted owl habitat based on ecological and physiographic features such as forest type, precipitation regimes, elevations and climate.

Alternative 2: Reference Federal Register Notice [60 FR 9484].

This alternative is rejected because it requires Plan preparers to locate the 1995 Federal Register Notice. The Federal Register description is lengthy, lacks clarity, and is inconsistent with actual geographical landmarks.

Alternative 3: Provide a "metes and bounds" description of the Evaluation Area.

While this alternative would increase precision, it was rejected as it is complex in both writing and application, and would add considerable length to 14 CCR 895.1. This alternative requires Plan preparers and review team members to carefully follow numerous lines of text defining a specific area, most of which would be geographically distant from the actual Plan boundaries. The likelihood for errors would be high and further complicate the process.

Alternative 4: Provides the federal and state code definitions of "Take" in their entirety.

This alternative would leave the existing federal definition of "Take" in place while adding the state definition. This alternative was rejected as it does not clearly state the federal regulation..

Alternative 5: Provides citation to federal and state code defining "Take."

This alternative provides only the citations to the federal and state codes for their respective definitions of "Take." This alternative was rejected by the Board because it did not provide explanation of the content of the state or federal code of regulation.

Alternative 6: Combines the approaches outlined in Alternative 4 and 5 above.

This is the proposed alternative. This alternative provides for both approaches outlined above in Alternative 4 and 5, and maximizes clarity.

POSSIBLE SIGNIFICANT ADVERSE ENVIRONMENTAL EFFECTS AND MITIGATIONS

The Board has considered adverse environmental effects from the proposed action. Such consideration was conducted to meet California Environmental Quality Act (CEQA) requirements for a project by using the functional equivalent certification to an EIR granted to the Board for its rulemaking process. The Board has not identified any adverse environmental effects as a result of the proposed rules because the proposed rule does not change the existing environmental protection standards in the FPRs 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

The Board has considered alternatives to lessen the impact on small business, see ALTERNATIVES TO THE REGULATION CONSIDERED BY THE BOARD AND THE BOARD'S REASONS FOR REJECTING THOSE ALTERNATIVES in this initial statement of reasons. The Board has determined the proposed action (adoption of Alternative 1 and 6) would lessen any adverse impact on small businesses compared to other alternatives considered.

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 will result in more timely and efficient review of Plans. This efficiency will have a significant positive financial effect on Plan submitters, CAL FIRE and review team members.

Amendments to clarify the range of the northern spotted owl would lessen any adverse impact on small business because it relieves small landowners, improperly included in the current definition, from including costly and time consuming analyses in their Plans. The amendments regarding clarity in the "Take" restrictions are process-only changes and should result in more timely and efficient approval of Plans.

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

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

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

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.

File: ISOR Definition of Evaluation Area and Take NSO 06_26_08