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February 6, 2013

Mr. Stan Dixon, Chairman  
California Board of Forestry and Fire Protection  
P.O. Box 944246  
Sacramento, CA 94244

**Re: PETITION FOR ADMINISTRATIVE RULEMAKING (Gov. Code §§ 11340.6, 11340.7, 11346.1, 11346.4): Delete Title 14 California Code of Regulations § 919.9(g)[939.9(g)]**

Dear Responsible Officials,

The Environmental Protection Information Center (“EPIC”) hereby petitions the California Board of Forestry and Fire Protection (“Board”) to amend the California Code of Regulations (“CCR”), Title 14 §919.9 [939.9] to eliminate subsection (g), as provided herein.

EPIC makes this request pursuant to Government Code section 11340.6, which states that “any interested person may petition a state agency requesting the adoption, amendment, or repeal of a regulation . . . .” Further, Government Code section 11340.7, subsection (a), provides that:

Upon receipt of a petition requesting the adoption, amendment, or repeal of a regulation pursuant to Article 5 (commencing with Section 11346), a state agency shall notify the petitioner in writing of the receipt and shall within 30 days deny the petition indicating why the agency has reached its decision on the merits of the petition in writing or schedule the matter for public hearing in accordance with the notice and hearing requirements of that article.

EPIC requests that this matter be placed on the Board’s agenda for adoption as promptly as possible, so that the Board may immediately begin a 45-day notice and comment period pursuant to Government Code section 11346.4, for the purpose of adopting the proposed amendments as permanent regulations at the Board’s regular May 2013 meeting.

### **Purpose**

The purpose of this petition is to bring the California Forest Practice Rules (“FPRs”), particularly Title 14 CCR 919.9 [939.9] into compliance with applicable federal guidelines for “take”

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avoidance of Northern Spotted Owl, (*Strix occidentalis caurina*), a species listed as “threatened” under the Endangered Species Act (“ESA”), by deleting the provisions of Title 14 CCR §919.9(g)[939.9(g)]. Under the ESA, “take” means to “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” 16 U.S.C. § 1532(19). The statutory definition of the term “take” is further defined by regulations promulgated by the U.S. Fish and Wildlife Service (“USFWS”) which define the terms “harm” and “harass,” as used in the Act’s definition of “take.” The USFWS regulations define “harm” to mean:

[a]n act that actually kills or injures wildlife. Such acts 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.

50 C.F.R. § 17.3. The United States Supreme Court upheld this definition of “harm” specifically for Northern Spotted Owls and establishing the precedent for all ESA-listed species in *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*, 527 U.S. 687 (1995). “Harass” is defined to mean “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, including breeding, feeding or sheltering.” *Id.*

The destruction of habitat relied upon by ESA-listed species constitutes “take.” See *Marbled Murrelet v. Babbitt*, 83 F.3d 1060, 1069 (9th Cir. 1996) (activity could be enjoined before take occurs and “a habitat modification which significantly impairs the breeding and sheltering of a protected species amounts to ‘harm’ under the ESA”); *Marbled Murrelet v. Pacific Lumber Co.*, 880 F. Supp. 1343, 1367 (N.D. Cal. 1995) (timber harvesting during breeding season could “harass” marbled murrelets by “annoying them to such an extent that it will significantly disrupt their normal behavior patterns”).

Deletion of subsection “g” (otherwise referenced as “Option g”) results in eliminating but one of several options under the FPRs for avoiding “take” of Northern Spotted Owls. The California Department of Forestry and Fire Protection (“CAL FIRE”) and proponents of individual Timber Harvest Plans (“THPs”) will still be left with Title 14 CCR 919.9[939.3] options (a)-(f). THP submitters will still have the opportunity to consult with the USFWS via the programmatic Technical Assistance process pursuant to 14 CCR §919.9(e) [939.9(e)].

### **Existing Regulations Fail to Adequately Protect Northern Spotted Owls**

The provisions of Title 14 CCR § 919.9(g) [939.9(g)] have been demonstrated through actual implementation and monitoring to be inadequate to prevent “harm” to Northern Spotted Owls and implementation of “Option g” in the FPRs has resulted in “take” of Northern Spotted Owls. Evidence of this is taken from years of analysis and review conducted by the USFWS while providing Technical Assistance on individual THPs as described in the “*Regulatory and Scientific Basis for U.S. Fish and Wildlife Service Guidance for Evaluation of Take for Northern Spotted Owls on Private Timberlands in California’s Northern Interior Region*” (hereinafter “USFWS 2009”). In this document, the expert agency, USFWS, clearly shows that Northern

Spotted Owls and their habitat have not been adequately protected by implementation of the provisions of Title 14 CCR §919.9(g) [939.9(g)]. A copy of this document is incorporated by reference herein and provided in the list of attachments to this petition.

The USFWS Regulatory and Scientific Basis document provides the following statement regarding the effectiveness of Title 14 CCR§ 919.9(g) [939.9(g)] to prevent “harm” to NSO:

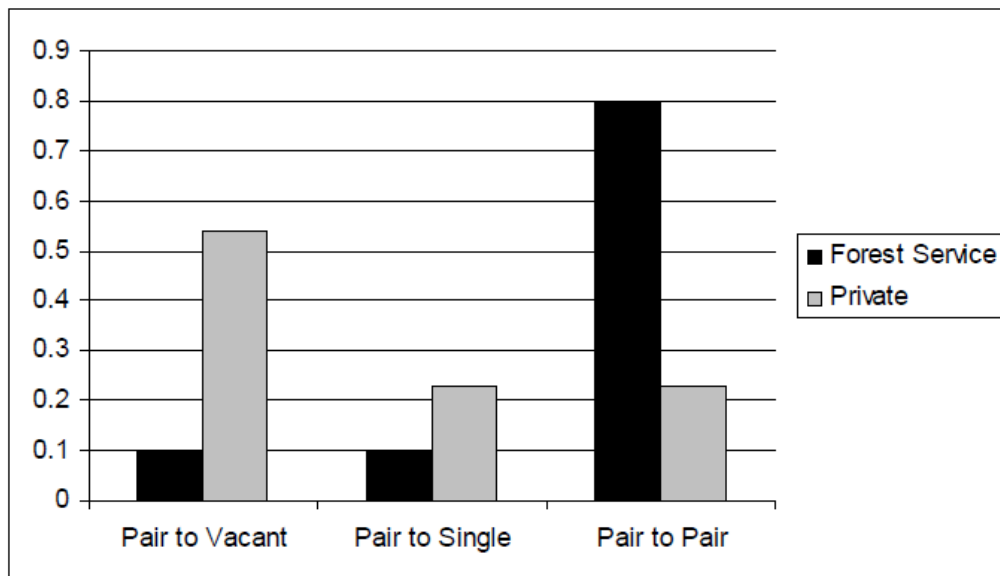
...our combined experience with hundreds of THPs indicates that **the cumulative effects of repeated entries within many NSO home ranges has reduced habitat quality to a degree causing reduced occupancy rates and frequent site abandonment.** In a large proportion of technical assistance letters to CAL FIRE and industrial timberland owners during the past five years, we noted the lack of NSO responses at historic territories, and described habitat conditions considered inadequate to support continued occupancy and reproduction.

(USFWS 2009 at 11 (emphasis added). The same document advises that:

...the strong differences in trends observed on private versus federal lands supports the contention that management on private timberlands is creating habitat conditions that do not support sustained occupancy by [Northern Spotted Owl].

(USFWS 2009 at 12). The graph reproduced below developed by the USFWS illustrates the trends of Northern Spotted Owl occupancy on public versus private ownerships in northern California

**Figure I.B.1.** Status of valid historical northern spotted owl activity centers (pair sites only) when resurveyed after 5-10 years. Data are from U.S. Fish and Wildlife Service technical assistance records and USFS monitoring records



Only a little less than one quarter of Northern Spotted Owl pairs present on private lands in California at the beginning date of the analysis persisted to the end, by contrast to 80% of such pairs that persisted on federal National Forest lands. These striking differences in Northern Spotted Owl occupancy rates on public versus private lands in California are the direct result of habitat modification and removal permitted by the State of California pursuant to the provisions of Title 14 CCR § 919.9(g) [939.9(g)].

The USFWS notes several reasons why the current FPRs are not adequate to evaluate or avoid “take.” These reasons include new information available since the FRPs were enacted (which have changed the amount required, the habitat definitions, and spatial arrangement criteria), the USFWS’ experience with the Technical Assistance process, and analysis indicating loss of territories under the FPRs. The USFWS discussed some of the deficiencies of the current FPRs:

When the FPR guidelines were adopted in 1992, data relating habitat variables to occupancy, reproduction, and survival of [Northern Spotted Owl] were limited. The FPR guidelines for avoiding incidental take of [Northern Spotted Owl] were therefore based on comparison of proposed post-harvest habitat conditions with the amount and of quality of habitat observed at occupied [Northern Spotted Owl] sites described in various studies. Under this standard, habitat modification potentially could result in substantial reduction of reproduction, survival, and occupancy at [Northern Spotted Owl] activity centers without the appearance of take, because habitat conditions resemble other low-quality [Northern Spotted Owl] territories. [Northern Spotted Owls] are known to occupy low-quality sites where their reproduction and survival are substantially reduced (Franklin et al. 2000, Dugger et al. 2005); the existence of these low quality sites suggests that reliance on habitat conditions corresponding to the presence or of owls at historic territories represents a low bar for determining habitat thresholds and take.

(USFWS 2009 at 5). In response to these findings, the USFWS issued its own set of Northern Spotted Owl “take” avoidance guidelines as part of its issuance of the Regulatory and Scientific Basis document, stating that these new guidelines were more effective in avoiding “take.”

One significant difference between the FPRs and the USFWS “take” avoidance guidelines is the use of different definitions for each type of habitat. The USFWS Guidelines contain habitat definitions that are far more detailed and specific than the habitat definitions provided in 14 CCR § 895.1. The magnitude of the difference between the two is demonstrated by the fact that what qualifies as roosting habitat under the FPRs would at best qualify for low-quality foraging habitat under the USFWS’ definitions.

The USFWS further expounds on the inadequacies of the FPR definitions and the implications for NSO:

Service staff in the Yreka Fish and Wildlife Office believe that application of the FPRs **typically does not avoid or reduce the likelihood of take of NSO**. This is because the habitat definitions and retention standards in the FPRs represent minimum values that are below the habitat parameters associated with reasonable levels of territory occupancy, survival, and reproduction by NSO.

(E-mail from Brian Woodbridge, USFWS to Chris Browder, CALFIRE. April 22, 2009).

Another significant difference between the USFWS' guidance and the provisions of Title 14 CCR § 919.9(g) [939.9(g)] is the amount and specific configuration of habitat required for retention within an Northern Spotted Owl home range (1.3 mile radius) required to avoid "take." Currently, the provisions of Title 14 CCR § 919.9(g) [939.9(g)] do not require that specific amounts of individual habitat types be retained. Rather, "Option g" currently relies on an aggregate habitat retention strategy that allows for reduction of habitat quality and quantity to uniformly low values, increasing the likelihood of "harm" or "take." To put it simply, "Option g" treats all owl habitats as equal, and fails to provide sufficient nesting and roosting habitat, which is the primary limiting factor for the species.

Finally, there are currently no provisions to prevent the damaging effects of repeated and successive entries into individual Northern Spotted Owl home ranges, resulting in "take" via cumulative impacts. The USFWS' programmatic guidance addresses this issue by establishing core areas of use (generally 0.5 miles in the interior, 0.7 miles on the coast) in which timber harvest activities are restricted, and specific amounts of high-quality habitat are to be retained.

### **Practical Effect of Proposed Rulemaking**

To date, CAL FIRE has been encouraging project proponents to implement the provisions of the USFWS' programmatic guidance pursuant to Title 14 CCR § 919.9(e)[939.9(e)] but cannot require use of the USFWS guidance because they are not codified in regulation. Nonetheless, most landowners and THP submitters have voluntarily moved away from application of Title 14 CCR § 919.9(g) [939.9(g)]. Thus, the deletion of "Option g" would simply nullify an antiquated set of Rules that have been shown to be inadequate and that very few operations are using.

The benefits of adopting the proposed rulemaking petition are clear. First, deletion of Title 14 CCR § 919.9(g) [939.9(g)] would reconcile remaining FPRs with the guidance of the USFWS with respect to Northern Spotted Owl "take" avoidance. Furthermore, adoption of this petition to remove "Option G" would relieve CAL FIRE of any discretionary duties of making so-called "take avoidance determinations" on a project by project basis. It is and has been EPIC's position that CAL FIRE does not have the legal authority to make such determinations. Deletion of Title 14 CCR § 919.9(g)[939.9(g)] would relieve CAL FIRE of these duties and reduce liability for prosecution of illegal "take" for both the Department and the Board of Forestry. Finally, the deletion of Title 14 CCR § 919.9(g) [939.9(g)] would benefit Northern Spotted Owl and the environment as a whole by raising the standards for protection, thus leading to older, healthier forests.

### **Evidence in Support of This Rulemaking Petition**

In support of this petition, EPIC provides an extensive volume of peer-reviewed and published studies regarding Northern Spotted Owls and the threats posed by irresponsible habitat destruction. EPIC incorporates by reference all the following documentation contained on an

electronic media device submitted with the petition and detailed in the “Supporting Evidence” section at this end of this document.

## **Conclusion**

The proposed rulemaking in this petition is a feasible measure that can be taken by the Board at this time to address a glaring deficiency and inconsistency in the FPRs. Complying with federal standards to protect Northern Spotted Owls is desperately needed as the species is continuing a downward spiral towards extinction. EPIC believes that only a small number of landowners and THP submitters will be affected by the deletion of “Option g” as requested. In contrast, failure to act on this petition could have substantial consequences for Northern Spotted Owls on private lands in California. Furthermore, failure to act leaves both CAL FIRE and the Board of Forestry at risk of legal challenges, and would fail to serve the Board’s responsibilities to protect, enhance, and restore native wildlife.

## **Authority**

The Board has authority to adopt the following regulatory amendments pursuant to Public Resources Code sections 4551, 4551.5, 4553, 4562.7. . The proposed amendments are directly necessary to effectuate the goals of the Z’Berg-Nejedly Forest Practices Act of 1973, including, but not limited to its goals to “to protect the soil, air, fish, and wildlife, and water resources, including, but not limited to, streams, lakes, and estuaries” (§ 4551), and of “[p]roviding watershed protection and maintaining fisheries and wildlife” (§ 4512, subd. (b)). The Board may adopt these amendments promptly, as there is substantial evidence documenting the need to eliminate “Option g.” There is an urgent need to provide necessary protection for Northern Spotted owls impacted by private timber operations that utilize “Option g” as permitted by the State of California in defiance of clear conflicts with federal law.

Sincerely,

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## Amendments

EPIC request that the Board amend California Code of Regulations, Title 14, § 919.9[939.9] in the following manner:

### **919.9, 939.9 Northern Spotted Owl [Coast, Northern]**

Every proposed timber harvesting plan, NTMP, conversion permit, Spotted Owl Resource Plan, or major amendment located in the Northern Spotted Owl Evaluation Area or within 1.3 miles of a known northern spotted owl activity center outside of the Northern Spotted Owl Evaluation Area shall follow one of the procedures required in subsections (a)-(g)(f) below for the area within the THP boundary as shown on the THP map and also for adjacent areas as specified within this section. The submitter may choose any alternative (a)-(g)(f) that meets the on-the-ground circumstances. The required information shall be used by the Director to evaluate whether or not the proposed activity would result in the "take" of an individual northern spotted owl.

When subparagraphs (a), (b), (c) or (f) are used, the Director, prior to approval of a THP, shall consult with an SOE and conduct an independent review. ~~An SOE may aid the RPF in fulfilling the requirements within subdivision (g).~~ The SOE may make written recommendations regarding whether the retained habitat configuration and protection measures proposed in the THP will prevent a take of the owl.

~~(g) Where an activity center has been located within the plan boundary or within 1.3 miles of that boundary, the RPF shall determine and document in the plan: (i) activity center specific protection measures to be applied during timber operations and (ii) owl habitat, including habitat described in (1)-(5) below, that will be retained after the proposed operations are completed:~~

~~(1) Within 500 feet of the activity center the characteristics of functional nesting habitat must be maintained. No timber operations shall be conducted in this area during the northern spotted owl breeding season unless reviewed and approved by the Director as not constituting a take. Timber operations may be conducted in this area outside the breeding season if appropriate measures are adopted to protect nesting habitat.~~

~~(2) Within 500-1000 feet of the activity center, retain sufficient functional characteristics to support roosting and provide protection from predation and storms. No timber operations shall be conducted in this area during the breeding season unless reviewed and approved by the Director as not constituting a take.~~

~~(3) 500 acres of owl habitat must be provided within a .7 mile radius of the activity center, unless an alternative is reviewed and approved by the Director as not constituting a take. The 500 acres includes the habitat retained in subsections (1) and (2) above and should be as contiguous as possible. Less than 50% of the retained habitat should be under operation in any one year, unless reviewed and approved by the Director as not constituting a take.~~

~~(4) 1336 total acres of owl habitat must be provided within 1.3 miles of each activity center, unless an alternative is reviewed and approved by the Director as not constituting a take. The 1336 acres includes the habitat retained within subsections (1)-(3) above.~~

~~(5) The shape of the areas established pursuant to subsections (1) and (2) shall be adjusted to conform to natural landscape attributes such as draws and streamcourses while retaining the total area required within subsections (1) and (2) above.~~