



Keeping Northwest California wild since 1977

February 2, 2012

Via Certified U.S. Post, Return Receipt Requested

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RE: Notice of Intent to Sue for Violations of the Endangered Species Act; Actions Threatening the Northern Spotted Owl

Dear Responsible Parties,

The Environmental Protection Information Center ("EPIC") hereby provides notice of intent to sue Sierra Pacific Industries, Inc. ("Sierra Pacific") for violations of the federal Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531 *et seq.*, threatening the Northern Spotted Owl. The citizen-suit provision of the ESA requires that the alleged violator and the Secretary of Interior be given 60 days notice prior to filing a lawsuit suit in federal district court. 16 U.S.C. 1540(g)(2). This letters serves as the requisite legal notice of ESA violations.

The violations of the ESA arise from Sierra Pacific's actions, including logging, road-building and other disturbance in northern California that result in significant habitat modification or degradation that is likely to actually kill and injure the Northern Spotted Owl (*Strix occidentalis caurina*), a species listed as "threatened" under the ESA. As described in more detail below, Sierra Pacific's actions result in unlawful "take" of threatened Northern Spotted Owls by significantly impairing essential behavioral patterns, including breeding, feeding and sheltering, in violation of Section 9(a) of the ESA, 16 U.S.C. § 1538(a).

In this letter we summarize the status of the Northern Spotted Owl, and the relevant regulatory framework. Next, we describe how Sierra Pacific Industries' actions are likely to kill and injure Northern Spotted Owls by degrading and destroying their habitat, and explain why these actions constitute violations of Section 9 of the ESA. Finally, we set out the relief that

Environmental Protection Information Center

145 G Street, Suite A, Arcata, CA 95521

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EPIC will seek if this matter cannot be settled short of litigation. EPIC is willing to engage in negotiations with Sierra Pacific to find a mutually satisfactory settlement to this matter prior to litigation.

Identity of Organization Giving Notice

The name, address, and phone number of the organization giving notice of intent to sue under the ESA is:

Environmental Protection Information Center, Inc.
145 G Street, Suite A
Arcata, California 95521
Tel: (707) 822-7711

EPIC is a non-profit organization based in Humboldt County, California, dedicated to the protection and restoration of forests, watersheds and biodiversity in northern California. EPIC's members and supporters have a direct interest in the protection of the Northern Spotted Owl and its habitat and the recovery of the species. EPIC's members and supporters live and recreate near areas and in the region where Sierra Pacific Industries destroys and degrades spotted owl habitat and harms individual owls. Sierra Pacific's actions harming Northern Spotted Owl cause direct harm to the interests of EPIC's members and supporters.

Requirements of the Endangered Species Act

The United States Supreme Court describes the ESA as the “most comprehensive legislation for the preservation of endangered species ever enacted by any nation.” *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978). The ESA is designed to provide “a means whereby the ecosystems upon which endangered and threatened species depend may be conserved.” 16 U.S.C. § 1531(b). The U.S. Fish and Wildlife Service (“USFWS”), an agency of the Department of the Interior, administers the Act with respect to the Northern Spotted Owl. *See* 50 C.F.R. § 402.01(b). Species are listed as “endangered” or “threatened” by the USFWS under Section 4 of the Act, 16 U.S.C. § 1533. A species is “endangered” if it “is in danger of extinction throughout all or a significant portion of its range” 16 U.S.C. § 1532(6).

Under Section 9(a)(1)(B) of the ESA it is “unlawful for any person subject to the jurisdiction of the United States to . . . take any [endangered] species within the United States.” 16 U.S.C. § 1538(a)(1)(B). Section 9(a)(1)(G) of the ESA makes it unlawful to violate any regulation pertaining to a threatened or endangered species. 16 U.S.C. § 1538(a)(1)(G). Under Section 4(d) of the Act, USFWS may promulgate regulations extending this prohibition to threatened species when “necessary and advisable to provide for the conservation of the species.” 16 U.S.C. § 1533(d). The take prohibition has been extended by regulation to include the threatened Northern Spotted Owl. 50 C.F.R. § 17.31.

The legislative history of the ESA indicates that “[t]ake is defined . . . in the broadest possible manner to include every conceivable way in which a person can ‘take’ or attempt to ‘take’ any fish or wildlife.” S. Rep. No. 93-307 at 7 (1973). Section 3 of the ESA defines “take” to mean “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 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” 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”).

The primary mechanism for avoiding liability under Section 9 is to apply for and receive an incidental take permit (“ITP”). 16 U.S.C. § 1539(a)(1)(B). In exchange for permission to “take” a listed species pursuant to an ITP, the permit applicant must commit to implement a plan that conserves the species. *Id.* §§ 1539(a)(1)(B), (a)(2)(A); *see also Sierra Club v. U.S. Fish and Wildlife Serv.*, 245 F.3d 434, 441-42 (5th Cir. 2001) (“‘[c]onservation’ is a much broader concept than mere survival” because the “ESA’s definition of ‘conservation’ speaks to the recovery of a threatened or endangered species” (emphasis added)). This plan is called a Habitat Conservation Plan (“HCP”) and it must delineate “the impact which will likely result from such taking” and the “steps the applicant will take to minimize and mitigate such impacts” 16 U.S.C. § 1539(a)(2)(A).

Status of the Northern Spotted Owl in California

The Northern Spotted Owl is associated with late-successional and old-growth forests from southern British Columbia to central coastal California. The USFWS listed the Northern Spotted Owl as a threatened species in 1990 due to the extensive loss of suitable habitat from intensive logging of native forests. 55 Fed. Reg. 26114 (June 26, 1990). Since the ESA listing, population analyses have documented the continued range-wide declines that are attributed to the continued loss of habitat from logging and from the invasion of a non-native competitor, the Barred Owl. (Anthony et al 2006, Forsman et al. 2011). The fragmentation of older forests exacerbates the threat posed by Barred Owl invasion into forests once occupied by Northern Spotted Owl (Dugger et al 2011). Indeed, researchers have found a direct correlation between the likelihood of Barred Owl invasion of Spotted Owl territories and the lack of older forest. *Id.*

In northern California, Northern Spotted Owls inhabit three different ecological

provinces: Coastal California Province, California Klamath Province and California Cascade Province. Based upon over a decade of monitoring and technical assistance the USFWS has determined that a significant decline in spotted owls has already occurred on private lands in the interior region of northern California, which include the Cascades and Klamath Provinces. Specifically, the USFWS states:

Our combined experience with hundreds of [private land timber harvest plans] indicates that the cumulative effects of repeated entries within many [Northern Spotted Owl] 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 [the California Department of Forestry] and industrial timberland owners during the past five years, we noted the lack of [Northern Spotted Owl] responses at historic territories, and described habitat conditions considered inadequate to support continued occupancy and reproduction.

USFWS 2009. The USFWS describes “strong differences in trends observed by private versus federal lands” and that the available data “supports the contention that management on private timberlands is creating habitat conditions that do not support sustained occupancy by [Northern Spotted Owl].” *Id.*

Violations of the Endangered Species Act

Sierra Pacific Industries’ actions, including logging, road-building and other disturbance in owl habitat is currently resulting in illegal “take” of Northern Spotted Owls by causing harm through significant habitat modification or degradation, resulting in death or injury to the Northern Spotted Owls by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering. Sierra Pacific’s actions are currently, and in the future will result in injury and death to known Northern Spotted Owls as a result of the destruction and degradation of suitable spotted owl habitat.

In addition to ongoing logging operations that presently result in “take,” multiple planned timber harvest plans (“THPs”) that will also result in illegal “take” of Northern Spotted Owls. Attached to this letter, we list a number of Sierra Pacific’s THP that destroy or degrade Northern Spotted Owl habitat. In total these THPs destroy or degrade over 5,500 acres of habitat across four counties in northern California. The destruction and degradation of owl habitat in these THPs constitutes illegal “take” under the ESA. This listing of THPs is not inclusive of all of Sierra Pacific’s actions resulting in “take” and EPIC is continuing to investigate and conduct discovery to ascertain the full extent of Sierra Pacific’s illegal “taking” of Northern Spotted Owl. EPIC may supplement this notice upon discovery of additional evidence of “take.”

Requested Relief

First, EPIC requests that Sierra Pacific immediately cease and desist from any actions that impact Northern Spotted Owl habitat, including the suspension of all logging and other disturbance of owl habitat. Second, EPIC requests that Sierra Pacific immediately begin to develop a habitat conservation plan in consultation with the U.S. Fish and Wildlife Service, as required under the ESA.

Conclusion

EPIC has satisfied its obligation under the ESA for providing Sierra Pacific Industries with notice of violations of the ESA as required by 16 U.S.C. § 1540(g). EPIC is willing to engage in negotiations with Sierra Pacific Industries to find a mutually satisfactory settlement to this matter prior to litigation. Please contact us immediately to discuss this matter.

Sincerely,



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Cc:

Erin Williams, Field Supervisor, Yreka Field Office, U.S. Fish and Wildlife Service
Ken Salazar, Secretary of the Interior, U.S. Department of the Interior

Attachments:

Table 1: Sierra Pacific Industries timber harvest plans that “take” Northern Spotted Owls

Literature Cited:

Anthony R.G., et al. 2006. Status and trends in demography of northern spotted owls, 1985–2003. *Wildlife Monograph* No. 163.

Dugger, K., et al. 2011. Transient dynamics of invasive competition barred owls, spotted owls, habitat, and demons of competition present. *Ecological Applications*.

Forsman E.D., et al 2011. Population demography of northern spotted owls: 1985-2008. *Studies in Avian Biology*.

U.S. Fish and Wildlife Service (USFWS). 2009. 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. Available at:
[http://www.fire.ca.gov/resource_mgt/downloads/USFWS %20NSO TakeAvoidanceGuidelines ScienceSupportDocument_121409.pdf](http://www.fire.ca.gov/resource_mgt/downloads/USFWS_%20NSO_TakeAvoidanceGuidelines_ScienceSupportDocument_121409.pdf)

**Sierra Pacific Industries' Timber Harvest Plans (THPs)
Causing "Take" of the Northern Spotted Owl**

THP number	THP Name	Spotted Owl Habitat Destroyed (acres)
1-09-054HUM	Roweisner	157
1-10-025HUM	Green Mule	130
1-10-048HUM	Kragness	112
1-10-085HUM	Marvel	34
2-09-010TRI	Hogs	83
2-09-038TRI	Wilcox	727
2-09-041TRI	Halls	227
2-09-042SHA	Derby	68
2-09-078LAS	Big Widow	123
2-09-085TRI	Bowman	91
2-09-091TRI	Lowball	64
2-10-011TRI	Dyno	403
2-10-019TRI	Ebert	321
2-10-074TRI	Ranger	189
2-10-075TRI	Hinkey	22
2-11-004TRI	Llium	54
2-11-014TRI	3B's	138
2-11-035TRI	Bowtie	2
2-11-061TRI	Pappy	895
2-11-064TRI	Southern Star	271
2-11-070TRI	Thurman	426
2-11-076SHA	Tea Kettle	167
2-11-078SHA	Uncle	717
2-11-080TRI	Hay	173
	Total	5594 acres destroyed