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Sent via e-mail to: william.condon@wildlife.ca.gov, director@wildlife.ca.gov on date shown

January 31, 2014

Mr. Charlton H. Bonham
Director
California Department of Fish and Wildlife

Mr. William Condon
Environmental Program Manager
California Department of Fish and Wildlife
1416 9th Street, 12th Floor
Sacramento, CA 95814

Re: January 16, 2014 Letter to CAL FIRE regarding Candidacy of Northern Spotted Owl for Listing under California Endangered Species Act

Dear Messrs. Bonham and Condon:

The Environmental Protection Information Center (EPIC) submits the following in response to Director Bonham's January 16, 2014 letter to the California Department of Forestry and Fire Protection (CAL FIRE) stating the California Department of Fish and Wildlife's (CDFW or "Department") position concerning private land timber operations during the candidacy period for Northern Spotted Owl (*Strix occidentalis caurina*) (NSO) under the California Endangered Species Act (CESA). EPIC believes that the Department must not simply rely on the process established under sections 919.10 and 939.10 to assure that timber operations will not cause "take" of the NSO. To do so improperly yields the Department's duties under state law to ensure protection of the NSO as a candidate species.

Summary

The CDFW's reliance upon CAL FIRE and existing California Forest Practice Rules (FPRs) to

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ensure avoidance of “take” of NSO pursuant to CESA during the species’ candidacy period fails to take into account the Department’s own responsibilities under CESA and the California Environmental Quality Act (CEQA), and fails to consider the well-documented failures of the FPRs to prevent “take” of NSO as defined pursuant to the federal Endangered Species Act (ESA). The CDFW’s presumption that existing regulatory mechanisms on private timberlands in California are adequate to protect NSO is not based in the best available science or evidence, and runs contrary to statements made by the United States Fish and Wildlife Service, as well as officials at CAL FIRE itself.

Background

EPIC filed a petition to list NSO as either “threatened” or “endangered” pursuant to CESA with the Fish and Game Commission (Commission) in September 2012. Our petition maintained, in part, that existing regulatory mechanisms to protect, enhance, conserve and recover NSO on both public and private lands are inadequate and have failed to reverse the downward trend of this species in the wild in California and elsewhere. In support, EPIC provided considerable evidence to show that existing regulatory mechanisms for millions of acres of private forestlands in California remain inadequate, and are a primary factor in the ongoing decline of this species.

In its initial evaluation of our petition, the CDFW found that management factors related to conservation of NSO are “varied and complex” and that it is “uncertain” whether the existing management efforts can successfully address the factors that limit the species.

In August 2013 the Commission heard EPIC’s petition to list NSO, and voted to accept our petition, finding that the petitioned action “may be warranted.” At its December 2013 meeting, the Commission adopted its findings for this decision, thus initiating the candidacy period for NSO under CESA.

History of Northern Spotted Owl Regulation and Consultation in California

Northern Spotted Owls have been listed as “threatened” under the ESA since 1990. In the early days of the species’ listing, the CDFW provided CAL FIRE and private landowners with consultation services that evaluated the potential for “take” to occur as defined by the ESA. In 1999, the United States Fish and Wildlife Service (Service) began conducting a process known as “technical assistance” to evaluate the potential for individual timber harvest projects to result in “take” as defined by the ESA. The Service provided this technical assistance to CAL FIRE and private landowners until 2008. The process of determining “take” avoidance pursuant to the federal ESA definition has now fallen into the hands of CAL FIRE.

U.S. Fish and Wildlife Service Critique of Existing Forest Practice Rules

Upon cessation of its practice of providing technical assistance to landowners and CAL FIRE on a project-by-project basis, the Service provided CAL FIRE with a critical review of existing FPRs and the consequences of their implementation for NSO across the private landscape, and provided CAL FIRE with an alternate set of “take” avoidance guidelines. This document, entitled *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 [Attachment A] sums up the Service's findings related to the effectiveness of existing FPRs:

*"...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"*(emphasis added) (p 11).

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 NSO." (p 12)

As the CDFW is aware, the FPRs offer a suite of options (a)-(g) for landowners to ensure avoidance of "take" as defined by the federal ESA. Until 2008, the provisions of 14 CCR 919.9(g) [939.9(g)] otherwise known as "option-g" were the primary evaluation criteria. The Service demonstrated that the existing habitat definitions contained in 14 CCR 895.1 for NSO as applied pursuant to "option-g," as well as the habitat retention standards found in "option-g" are not adequate or effective to prevent "take" under the federal ESA definition. Today the provisions of "option-g" are employed almost exclusively by a single landowner.

EPIC, CAL FIRE, and "Option-g"

Since 2010, EPIC has worked to address the inadequacies of "option-g" through comments on individual THPs, issuance of a 60-day notice of intent to sue Sierra Pacific Industries for continued implementation of "option-g," and submission of a rulemaking petition to the California Board of Forestry and Fire Protection to delete the provisions of "option-g." [Attachment B]

There are several reasons why reliance on "option-g" is not adequate, and may in fact be illegal. First, EPIC contends that CAL FIRE has no authority to determine the likelihood of "take" for a listed species, or the likelihood of significant ecological impacts to the NSO; this authority lies with the trustee agency with biological expertise. Instead, CAL FIRE is prohibited from approving a plan that may result in "take" (14 CCR 898.2(f)). This subtle nuance was acknowledged by CAL FIRE at the March 2013 Board of Forestry hearing on EPIC's petition to delete 14 CCR 939.9(g). At this hearing, Mr. Duane Shintaku of CAL FIRE clearly stated: "The Department of Forestry is not authorized to determine whether "take" will occur; that decision lies with the trustee wildlife agency" (Shintaku 2013).

EPIC further contends that the provisions of "option-g" are antiquated, obsolete, and likely result in "take" of, as well as significant impacts to (e.g., per CEQA), NSO.

As noted by CAL FIRE itself at the March 2013 hearing before the Board of Forestry, option “g” is out-of-date, and no longer reflects the best available science. Mr. Duane Shintaku of CAL FIRE explained to the Board:

“...the Department recognizes that frankly Ken [Hoffman] knows we have been working with him prior to retirement in the Service and we have recognized the problems with option “g” for quite some time and even before we were handed the full brunt of the responsibility back in 2008 we had heard from the Service that option “g” was really not adequate.” (Shintaku 2013)

Mr. Shintaku went on to largely agree with points made by EPIC at the hearing that option “g” is obsolete and inadequate:

“...so first of all CAL FIRE agrees with EPIC in terms of the obsolete nature of option “g”.... so really where we are today is what we are call “g-plus”.... what that means is we recognize “g” is not going to get it done, but the rules specifically say an RPF only has the choices “a”-“g” in order to address a spotted owl in a THP, so because the RPF has to say I am using option “g,” coupled with the fact that we know option “g” is obsolete that forces the Department into what I would consider a full-blown CEQA analysis; we have to make sure that significant impacts, cumulative impacts and take are all addressed in the plan, and we just use the g vehicle to get that done.” (Shintaku 2013)

Furthermore, at the March 2013 hearing, CAL FIRE acknowledged that the entirety of 14 CCR 919 [939] is largely antiquated:

“What I would suggest for you to consider is to take a look at section 919 itself - maybe we should get rid of all of 919; because what does the Department rely on? It doesn't rely on the Rules, it relies on the best available science we have been given by the Service, the site-specific circumstances to do the CEQA analysis, and essentially what I am telling you is that there is no prescriptive recipe that will address all of the situations in this part of the state. That forces the Department to go through a very detailed analysis..... so I would ask you to consider what value is all of 919 at this point in time?” (Shintaku 2013)

Finally, CAL FIRE initiated an undefined review process for plans proposing to use “option-g,” known only as “g-plus.” While CAL FIRE has touted the adequacy and effectiveness of the so-called “g-plus” review approach, it has not actually used the term “g-plus” in writing, and has failed, through a regulatory process or otherwise, to describe or disclose exactly what this process is or how it works. CAL FIRE acknowledges it uses its “g-plus” approach to undertake the review and decision process for THPs utilizing “option-g,” even though “g-plus” is not prescribed by law or regulation. CAL FIRE has therefore created a heretofore undefined and uncodified review and decision process that is not based in the provisions of 919.10, 939.10. In our view, this is a consequence of a lack of expertise and a lack of authority within CAL FIRE.

Reliance by CDFW on CAL FIRE’s process to protect the NSO is fraught with peril. All the

available evidence suggests that existing FPRs designed to protect NSO are largely antiquated, inconsistent with the latest federal guidance, and are ineffective. Existing regulatory mechanisms are not adequate, and CDFW's intervention is necessary.

CDFW Responsibilities under CESA and CEQA

The intent of the legislature in enacting CESA is clearly spelled out in sections 2050-2056 of the California Fish and Game Code. Section 2052 of the Fish and Game Code provides that it is the policy of the state to conserve, protect, restore, and enhance any endangered species or any threatened species and its habitat. Further, section 2055 of the Fish and Game Code provides that it is the policy of this state that all state agencies, boards, and commissions shall seek to conserve endangered species and threatened species and shall utilize their authority in furtherance of the purposes of the CESA.

Section 2080 of the Fish and Game Code provides that "take" of a "threatened" or "endangered" species is prohibited. "Take" is defined at Fish and Game Code section 86 to mean "hunt, pursue, catch, capture, or kill, or attempt to hunt, pursue, catch, capture, or kill." Fish and Game Code section 2085 provides that all provisions of the CESA apply to candidate species designed under section 2074.2.

CESA therefore imposes on CDFW a dual mandate with respect to "threatened," "endangered" or "candidate" species. This dual mandate not only includes the duty of the CDFW to ensure "take" avoidance, but also charges the Department with conservation, protection, restoration, and enhancement of any "threatened," "endangered," or "candidate" species. "Conserve" means "conserve, conserving," and "conservation," which requires CDFW "to use, and the use of, all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary." Fish and Game Code section 2061.

CDFW's CEQA responsibilities

CDFW is a "trustee" agency with legal jurisdiction over the fish and wildlife of the state that are held in trust for all Californians (14 CCR 15386 (CEQA Guidelines)). CDFW has been noticeably absent from the review and decision process surrounding "take" avoidance of NSO for the past 14 years. With the candidacy status granted to the NSO, CDFW must re-engage its involvement in THP review as it relates to the protection of NSO to reinstate a credible review and decision process for such plans which require CDFW's biological expertise and interagency input. The CDFW has a responsibility under CESA, CEQA, and the Fish and Game Code to assist CAL FIRE as the lead agency to ensure that feasible mitigations and alternatives are employed to avoid significant adverse impacts to public trust fish and wildlife resources. CDFW abdicates its statutory and public trust responsibilities by relying on CAL FIRE, an agency with no biological expertise, to determine the likelihood of whether proposed activities may result in "take."

Conclusion

Given the current regulatory scheme and the need for scientific review, there is no rational basis upon which CDFW can merely rely on the existing process under 14 CCR sections 919.10 and 939.10 as adequate to assure protection for the NSO. CDFW's active engagement is needed to achieve the intent and requirements of CESA and CEQA. CDFW has already acknowledged that the existing regulatory scheme may not be adequate to protect the NSO, and that scientific study is required. There is not sufficient evidence to establish that existing regulatory mechanisms are working to protect, enhance, conserve, and restore NSO. There is a growing body of evidence as put forth by the Service, EPIC and others that existing regulatory mechanisms are not adequate, and that existing regulatory mechanisms are largely antiquated, out-of-date, and ineffectual. Because CDFW has had little to no involvement in the existing regulatory framework for more than a decade, the Department cannot credibly decide that the existing framework is adequate. In our view, CDFW fails to meet its duties under CESA, CEQA, and the Fish and Game Code by deferring to CAL FIRE, as the Director's January 16, 2014 letter advises.

EPIC requests that CDFW retract its January 16, 2014 stated position to rely on the process established under sections 919.10 and 939.10, and that the Department undertake active review of and consultation for timber harvest plans and other plans that implicate the NSO. This is needed to ensure that CDFW is properly discharging its public trust duties in a manner consistent with CESA and, CEQA, as well as the Fish and Game Code.

EPIC also requests that CDFW consider the available evidence with regard to the existing process under 919.10 and 939.10 as it engages in review of proposed timber operations. There currently is sufficient evidence to demonstrate that the existing scheme certainly may not be adequate. Given these circumstances, CDFW's independent role in the review of timber harvest plans is all the more imperative.

EPIC encourages the Department to proceed with its status review to critically evaluate what the NSO needs for protection, including what regulatory schemes may be required. CDFW simply cannot presume that CAL FIRE has an adequate handle on what is needed to protect the NSO at this point, particularly considering the available evidence, which is stacked decidedly against the existing regulatory framework.

We appreciate your careful consideration of these concerns, and invite your response. Please do not hesitate to contact me at the number provided below if there are questions or if there is a desire to discuss this matter further.

Sincerely,

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