

Board of Forestry and Fire Protection

INITIAL STATEMENT OF REASONS

**“Northern Spotted Owl Take Avoidance Pathways and Habitat Definition Updates,
2023”**

**Board of Forestry and Fire Protection
Title 14 of the California Code of Regulations (14 CCR):
Division 1.5, Chapter 4, Subchapters 1, 4, and 5
Subchapter 1, Abbreviations and Definitions and Article 9 – Wildlife Protection
Practices**

**INTRODUCTION INCLUDING PUBLIC PROBLEM, ADMINISTRATIVE
REQUIREMENT, OR OTHER CONDITION OR CIRCUMSTANCE THE REGULATION
IS INTENDED TO ADDRESS (pursuant to GC § 11346.2(b)(1)) ...NECESSITY
(pursuant to GC § 11346.2(b)(1) and 11349(a))....BENEFITS (pursuant to GC §
11346.2(b)(1))**

Pursuant to the Z’berg-Nejedly Forest Practice Act of 1973, PRC § 4511, *et seq.* (FPA) the State Board of Forestry and Fire Protection (Board) is authorized to construct a system of forest practice regulations applicable to timber management on state and private timberlands.

PRC § 4551 requires the Board to “...adopt district forest practice rules... to ensure the continuous growing and harvesting of commercial forest tree species and to protect the soil, air, fish, wildlife, and water resources...” of the state and PRC § 4553 requires the Board to continuously review the rules in consultation with other interests and make appropriate revisions.

The Northern Spotted Owl was listed as Threatened pursuant to the Endangered Species Act (ESA) in 1990, prohibiting “take”, defined as “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct” (16 U.S. Code §1532(19)). In 2017, the California Fish and Game Commission (FGC) listed the species as Endangered pursuant to the California Endangered Species Act (CESA) which also prohibits “take” defined as “to hunt, pursue, catch, capture, or kill, or attempt to hunt, pursue, catch, capture, or kill” (Fish and Game Code §86).

Since the initial listings, various mechanisms have been developed at the state and federal level to avoid take of this species or to provide for some form of “incidental take” for otherwise lawful activities. Current Forest Practice Rules related to the Northern Spotted Owl¹ were initially adopted in 1990 and, though they have received minor updates and amendments, still contain regulations related to unused or outdated procedures to avoid take, such as reference the 1992 US Fish and Wildlife Service

¹ 14 CCR §§ 919.9, 919.10, 939.9, 939.10, and related definitions within 14 CCR § 895.1

(USFWS) document “Protocol For Surveying Proposed Management Activities That May Impact Northern Spotted Owls” and the known habitat for the species described therein. Thirty years of study, data collection, and analysis has revealed additional information on the protection of Northern Spotted Owl, leading to the 2012 USFWS release of an updated “Protocol For Surveying Proposed Management Activities That May Impact Northern Spotted Owls”, and in 2019 the release of two guidance documents specific to private lands in California: “Northern Spotted Owl Take Avoidance Analysis and Guidance for Private lands in California Attachment A: Take Avoidance Analysis- Coast Redwood Region” and “Northern Spotted Owl Take Avoidance Analysis and Guidance for Private lands in California, Attachment B: Take Avoidance Analysis-Interior).” This rulemaking seeks to update the Forest Practice Rules with the current guidelines and protocols that reflect the survey protocols, habitat definitions, and landscape level protections that have resulted from three decades of study, including incorporating by reference the 2012 USFWS Protocol For Surveying Proposed Management Activities That May Impact Northern Spotted Owls.

The **problem** is that the current regulations refer to outdated Northern Spotted Owl survey protocols and pathways for take avoidance of this species.

The **purpose** of the proposed action is to update regulations to reflect existing survey protocols and pathways for take avoidance of this species.

The **effect** of the proposed action is Forest Practice Rules that conform with the existing survey protocols and pathways for take avoidance of this species.

The **benefit** of the proposed action is consistency between the updated survey protocols and pathways for take avoidance of this species as described in the Forest Practice Rules and as described by the listing agencies.

SPECIFIC PURPOSE OF EACH ADOPTION, AMENDMENT OR REPEAL (pursuant to GOV § 11346.2(b)(1)) AND THE RATIONALE FOR THE AGENCY’S DETERMINATION THAT EACH ADOPTION, AMENDMENT OR REPEAL IS REASONABLY NECESSARY TO CARRY OUT THE PURPOSE(S) OF THE STATUTE(S) OR OTHER PROVISIONS OF LAW THAT THE ACTION IS IMPLEMENTING, INTERPRETING OR MAKING SPECIFIC AND TO ADDRESS THE PROBLEM FOR WHICH IT IS PROPOSED (pursuant to GOV §§ 11346.2(b)(1) and 11349(a) and 1 CCR § 10(b)). *Note: For each adoption, amendment, or repeal provide the problem, purpose, and necessity.*

The Board is proposing action to amend 14 CCR § 895.1, §919.9, and § 939.9

Amend §§ 895.1

The proposed action amends various definitions related to the Northern Spotted Owl (see below). The purpose of these amendment is to reflect the current survey protocols and pathways for take avoidance of this species. These amendments are necessary in order to clarify the most accurate source of information regarding protection of this species in order to achieve appropriate resource protection under the Act.

“Activity Center” to cite and incorporate by reference the 2012 USFWS Protocol For Surveying Proposed Management Activities That May Impact Northern Spotted Owls.

“Functional Nesting Habitat” this definition is removed because those terms are no longer used in the 2012 USFWS Protocol For Surveying Proposed Management Activities That May Impact Northern Spotted Owls.

“Functional Roosting Habitat”, this definition is removed because those terms are no longer used in the 2012 USFWS Protocol For Surveying Proposed Management Activities That May Impact Northern Spotted Owls.

“Functional Foraging Habitat” this definition is removed because those terms are no longer used in the 2012 USFWS Protocol For Surveying Proposed Management Activities That May Impact Northern Spotted Owls.

“Owl Habitat” this definition is updated to specify that it refers to “Northern Spotted Owl Habitat”, as there are other species of owl in the state. It also amends that definition to remove references to terms that are no longer used and adds an option that Plans may use regional information consistent with guidance from listing agencies or the director of CAL FIRE to account for existing populations of the species found in habitats other than those defined in the USFWS Protocol.

“Type A Owl Habitat” this definition is removed because those terms are no longer used in the 2012 USFWS Protocol For Surveying Proposed Management Activities That May Impact Northern Spotted Owls.

“Type B Owl Habitat” this definition is removed because those terms are no longer used in the 2012 USFWS Protocol For Surveying Proposed Management Activities That May Impact Northern Spotted Owls.

“Type C Owl Habitat” this definition is removed because those terms are no longer used in the 2012 USFWS Protocol For Surveying Proposed Management Activities That May Impact Northern Spotted Owls.

Remove §§ 919.9(b), 919.9(c), 919.9(f), 939.9(b), 939.9(c), 939.9(f)

The proposed action removes sections 919.9 (b), (c), and (f) and 939.9 (b), (c), and (f) because those pathways for take avoidance do not meet the standards set in the 2012 USFWS Protocol For Surveying Proposed Management Activities That May Impact Northern Spotted Owls. The purpose of this amendment is to reflect the current survey protocols and pathways for take avoidance of this species provided by agencies responsible for identifying take of the species. This amendment is necessary in order to clarify the most accurate source of information regarding protection of this species in order to achieve appropriate resource protection under the Act.

Amend §§ 919.9 and 939.9

Section (a) is amended to reflect changes throughout the section, as well as to update defined terms and is necessary to promote the clarity and consistency of the regulations.

Section (b) (previously (d)) is amended to specifically reference additional permits which cover the Northern Spotted Owl. The provision provides requirements for “incidental take” or “any other permit covering the northern spotted owl”, and the proposed amendment provides an inclusive list of additional permits which exist and are related to the northern spotted owl. This amendment is necessary to clarify these types of permits to the regulated public in order to promote appropriate implementation and enforcement of the regulations.

Section (d) (previously (g)) is amended to add specific information about Activity Center distances, as specified in the 2019 USFWS documents “Northern Spotted Owl Take Avoidance Analysis and Guidance for Private lands in California, Attachment A: Take Avoidance Analysis- Coast Redwood Region.” and “Northern Spotted Owl Take Avoidance Analysis and Guidance for Private lands in California, Attachment B: Take Avoidance Analysis-Interior”. References to specific habitat requirements as defined in the 1992 USFWS document “Protocol For Surveying Proposed Management Activities That May Impact Northern Spotted Owls” have been removed as they are no longer current. Requirements for preservation of habitat specific to region, and avoidance of take consistent with guidance from listing agencies or the Director of CAL FIRE have been added. The purpose of these amendment is to reflect the current survey protocols and pathways for take avoidance of this species. These amendments are necessary in order to clarify the most accurate source of information regarding protection of this species in order to achieve appropriate resource protection under the Act.

ECONOMIC IMPACT ANALYSIS (pursuant to GOV § 11346.3(b)(1)(A) -(D) and provided pursuant to 11346.3(a)(3)

The **effect** of the proposed action is to update rules to reflect existing pathways for take avoidance and appropriate survey protocols for this species

The proposed action represents a continuation of existing rules for the protection of threatened and endangered species as defined under the Forest Practice Rules. There is no economic impact associated with the proposed action.

Creation or Elimination of Jobs within the State of California

The proposed action does not mandate any action on behalf of the regulated public and represents a continuation of existing forest practice regulations. It is anticipated that any firms or jobs which exist to engage in this work will not be affected. No creation or elimination of jobs will occur.

Creation of New or Elimination of Businesses within the State of California

The regulatory amendments as proposed represent a continuation of existing forest practice regulations and are intended to clarify in their application. Given that the businesses which would be affected by these regulations are already extant, it is

expected that proposed regulation will neither create new businesses nor eliminate existing businesses in the State of California.

Expansion of Businesses Currently Doing Business within the State of California

The regulatory amendments as proposed represent a continuation of existing forest practice regulations and are intended to clarify their application. The proposed regulation will not result in the expansion of businesses currently doing business within the State.

Benefits of the Regulations to the Health and Welfare of California Residents, Worker Safety, and the State's Environment

The action will result in Forest Practice Rules that reflect the knowledge gained by three decades of study of the habitat needs of the Northern Spotted Owl, supporting the use of take avoidance pathways and habitat protections for a species that is federally listed as "Threatened" and State listed as "Endangered".

The proposed action also provides conformity between the Forest Practice Rules and guidance and take avoidance methods provided by listing agencies.

Business Reporting Requirement (pursuant to GOV § 11346.5(a)(11) and GOV § 11346.3(d))

The proposed regulation does not require a business reporting requirement.

STATEMENTS OF THE RESULTS OF THE ECONOMIC IMPACT ASSESSMENT (EIA)

The results of the economic impact assessment are provided below pursuant to **GOV § 11346.5(a)(10)** and prepared pursuant to **GOV § 11346.3(b)(1)(A)-(D)**. The proposed action:

- Will not create jobs within California (GOV § 11346.3(b)(1)(A)).
- Will not eliminate jobs within California (GOV § 11346.3(b)(1)(A)).
- Will not create new businesses (GOV § 11346.3(b)(1)(B)).
- Will not eliminate existing businesses within California (GOV § 11346.3(b)(1)(B)).
- Will not affect the expansion or contraction of businesses currently doing business within California (GOV § 11346.3(b)(1)(C)).
- Will yield nonmonetary benefits (GOV § 11346.3(b)(1)(D)). The proposed action would result in increased clarity and efficacy in the Forest Practice Rules, and as a result, promote more efficient implementation and enforcement of the regulations. The proposed action will not affect the health and welfare of California residents or worker safety.

TECHNICAL, THEORETICAL, AND/OR EMPIRICAL STUDY, REPORT, OR SIMILAR DOCUMENT RELIED UPON (pursuant to GOV SECTION 11346.2(b)(3))

The Board of Forestry and Fire Protection relied on the following list of technical, theoretical, and/or empirical studies, reports, or similar documents to develop the proposed action:

1. CAL FIRE and California Department of Fish and Wildlife (2021). Eastside Spotted Owl Resource Plan. California Natural Resources Agency.
2. Dugger, K. M., Forsman, E. D., Franklin, A. B., Davis, R. J., White, G. C., Schwarz, C. J., ... & Sovern, S. G. (2016). The effects of habitat, climate, and Barred Owls on long-term demography of Northern Spotted Owls. *The Condor: Ornithological Applications*, 118(1), 57-116.
3. Dunk, J. R., Woodbridge, B., Schumaker, N., Glenn, E. M., White, B., LaPlante, D. W., & Thrailkill, J. (2019). Conservation planning for species recovery under the Endangered Species Act: A case study with the Northern Spotted Owl. *PloS one*, 14(1), e0210643.
4. Franklin, A. B., Anderson, D. R., Gutiérrez, R. J., & Burnham, K. P. (2000). Climate, habitat quality, and fitness in northern spotted owl populations in northwestern California. *Ecological Monographs*, 70(4), 539-590.
5. Franklin, A. B., Dugger, K. M., Lesmeister, D. B., Davis, R. J., Wiens, J. D., White, G. C., ... & Wise, H. (2021). Range-wide declines of northern spotted owl populations in the Pacific Northwest: A meta-analysis. *Biological Conservation*, 259, 109168.
6. US Fish and Wildlife Service. (2012). Protocol for Surveying Proposed Management Activities That May Impact Northern Spotted Owls. US Department of Interior, Portland, Oregon, USA.
7. US Fish and Wildlife Service. (1992). Protocol for Surveying Proposed Management Activities That May Impact Northern Spotted Owls. US Department of Interior, Portland, Oregon, USA
8. US Fish and Wildlife Service. (2019). Northern Spotted Owl Take Avoidance Analysis and Guidance for Private lands in California, Attachment A: Take Avoidance Analysis- Coast Redwood Region. US Department of Interior, Portland, Oregon, USA.
9. US Fish and Wildlife Service. (2019). Northern Spotted Owl Take Avoidance Analysis and Guidance for Private lands in California, Attachment B: Take Avoidance Analysis-Interior. US Department of Interior, Portland, Oregon, USA.

REASONABLE ALTERNATIVES TO THE PROPOSED ACTION CONSIDERED BY THE BOARD, IF ANY, INCLUDING THE FOLLOWING AND THE BOARD'S

REASONS FOR REJECTING THOSE ALTERNATIVES (pursuant to GOV § 11346.2(b)(4)(A) and (B)):

- **ALTERNATIVES THAT WOULD LESSEN ANY ADVERSE IMPACTS ON SMALL BUSINESS AND/OR**
- **ALTERNATIVES THAT ARE LESS BURDENSOME AND EQUALLY EFFECTIVE IN ACHIEVING THE PURPOSES OF THE REGULATION IN A MANNER THAT ENSURES FULL COMPLIANCE WITH THE AUTHORIZING STATUTE OR OTHER LAW BEING IMPLEMENTED OR MADE SPECIFIC BY THE PROPOSED REGULATION**

Pursuant to **GOV § 11346.2(b)(4)**, the Board must determine that no reasonable alternative it considers, or that has otherwise been identified and brought to the attention of the Board, would be more effective in carrying out the purpose for which the action is proposed, would be as effective and less burdensome to affected private persons than the proposed action, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

Alternative 1: No Action Alternative

The Board considered taking no action, but this alternative was rejected because it would not address the problem.

Alternative #2: Make regulation less prescriptive

This action would replace the prescriptive standards in the definition of Spotted Owl habitat and provisions for take avoidance of Northern Spotted Owl with performance-based regulations. This alternative may reduce clarity and consistency with other portions of the rules which rely upon the existence of the current operational limitations in order to ensure that forest resources are preserved.

Alternative #3: Proposed Action

Alternatives 1 and 2 would not be more effective or equally effective while being less burdensome or impact fewer small businesses than the proposed action. Specifically, alternatives 1 and 2 would not be less burdensome and equally effective in achieving the purposes of the regulation in a manner that ensures full compliance with the authorizing statute or other law being implemented or made specific by the proposed regulation.

Additionally, alternatives 1 and 2 would not be more effective in carrying out the purpose for which the action is proposed and would not be as effective and less burdensome to affected private persons than the proposed action or would not be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law than the proposed action. Further, none of the alternatives would have any adverse impact on small businesses.

Prescriptive Standards versus Performance Based Standards (pursuant to GOV §§11340.1(a), 11346.2(b)(1) and 11346.2(b)(4)(A)):

Pursuant to **GOV §11340.1(a)**, agencies shall actively seek to reduce the unnecessary regulatory burden on private individuals and entities by substituting performance standards for prescriptive standards wherever performance standards can be reasonably expected to be as effective and less burdensome, and that this substitution shall be considered during the agency rulemaking process.

The proposed action is as prescriptive as necessary to address the problem and contains a mix of performance-based and prescriptive requirements. Current forest practice rules surrounding Northern Spotted Owl take avoidance during timber operations are based in a mix of performance based, and prescriptive minimum, requirements for the protection of the state's forest resources, which are necessary in order to accommodate for the various levels of individual project review which occurs for various permitting vehicles for timber operations. The regulations proposed in this action do not impose any new prescriptive regulations than already exist.

Pursuant to **GOV § 11346.2(b)(1)**, the proposed action does not mandate the use of specific technologies or equipment.

Pursuant to **GOV § 11346.2(b)(4)(A)**, the abovementioned alternatives were considered and ultimately rejected by the Board in favor of the proposed action. The proposed action does not mandate the use of specific technologies or equipment, but does prescribe specific actions.

FACTS, EVIDENCE, DOCUMENTS, TESTIMONY, OR OTHER EVIDENCE RELIED UPON TO SUPPORT INITIAL DETERMINATION IN THE NOTICE THAT THE PROPOSED ACTION WILL NOT HAVE A SIGNIFICANT ADVERSE ECONOMIC IMPACT ON BUSINESS (pursuant to GOV § 11346.2(b)(5))

The fiscal and economic impact analysis for these amendments relies upon contemplation, by the Board, of the economic impact of the provisions of the proposed action through the lens of the decades of experience practicing forestry in California that the Board brings to bear on regulatory development.

The regulatory take avoidance pathways for the Northern Spotted Owl are defined by the listing agencies; United States Fish and Wildlife Service (USFWS) and California Department of Fish and Wildlife (CDFW). Take avoidance pathways as specified by those agencies are already extant, this will update the Forest Practice Rules to reflect those existing regulations. There is no economic impact associated with the proposed action.

The proposed action will not have a statewide adverse economic impact directly affecting businesses as it does not impose any requirements on businesses.

DESCRIPTION OF EFFORTS TO AVOID UNNECESSARY DUPLICATION OR CONFLICT WITH THE CODE OF FEDERAL REGULATION (pursuant to GOV § 11346.2(b)(6))

The Code of Federal Regulations has been reviewed and based on this review, the Board found that the proposed action neither conflicts with, nor duplicates Federal regulations. There are no comparable Federal regulations related to conducting Timber Operations on private, state, or municipal forest lands.

POSSIBLE SIGNIFICANT ADVERSE ENVIRONMENTAL EFFECTS AND MITIGATIONS CEQA

CEQA requires review, evaluation, and environmental documentation of potential significant environmental impacts from a qualified Project. Pursuant to case law, the review and processing of Plans has been found to be a Project under CEQA.

Additionally, the Board's rulemaking process is a certified regulatory program having been certified by the Secretary of Resources as meeting the requirements of PRC § 21080.5.

While certified regulatory programs are excused from certain procedural requirements of CEQA, they must nevertheless follow CEQA's substantive requirements, including PRC § 21081. Under PRC § 21081, a decision-making agency is prohibited from approving a Project for which significant environmental effects have been identified unless it makes specific findings about alternatives and mitigation measures

Further, pursuant to PRC § 21080.5(d)(2)(B), guidelines for the orderly evaluation of proposed activities and the preparation of the Plan or other written documentation in a manner consistent with the environmental protection purposes of the regulatory program are required by the proposed action and existing rules.

The proposed action is an element of the state's existing comprehensive Forest Practice Program under which all commercial timber harvest activities are regulated. The Rules which have been developed to address potential impacts to forest resources, including both individual and cumulative impacts, project specific mitigations along with the Department oversight (of rule compliance) function expressly to prevent the potential for significant adverse environmental effects. The proposed action does not represent any change to the levels of environmental protection provided by the Rules, it updates references in the Forest Practice Rules to reflect the regulations and guidance documents from the listing agencies.

In summary, the proposed action amends or supplements standards to an existing regulatory scheme and is not a mitigation as defined by CEQA. The Board concludes that the proposed action will not result in any significant or potentially significant adverse environmental effects and therefore no alternative or mitigation measures are proposed to avoid or reduce any significant effects on the environment (14 CCR § 15252(a)(2)(B)).