

## **INITIAL STATEMENT OF REASONS**

**“Northern Spotted Owl Protection Measures Amendments, 2013”**

**[Published May 17, 2013]**

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

**Division 1.5, Chapter 4, Subchapters 4, 5, and 6,**

**Article 9 – Wildlife Protection Practices**

### **Amend:**

**§ 919.9, § 939.9 – Northern Spotted Owl [Coast, Northern Forest Districts]**

**§ 919.9(g), § 939.9(g) – Northern Spotted Owl [Coast, Northern Forest Districts]**

The California State Board of Forestry and Fire Protection (Board) is promulgating a regulation to amend existing Forest Practice Rules pertaining to the protection of Northern Spotted Owls (NSO). The proposed amendments are in response to a petition for rulemaking brought before the Board by the Environmental Protection Information Center (EPIC) pursuant to Government Code Section 11340.6.

### **PUBLIC PROBLEM, ADMINISTRATIVE REQUIREMENT, OR OTHER CONDITION OR CIRCUMSTANCE THE REGULATION IS INTENDED TO ADDRESS**

The State Board of Forestry and Fire Protection (Board), prompted by a petition for rulemaking received from the Environmental Protection Information Center (EPIC), proposes to amend existing forest practice regulations for the protection of Northern Spotted Owl. In its petition for rulemaking, EPIC advocates for the deletion in its entirety of 14 CCR Section 919.9 [939.9] subsection (g). EPIC contends that this provision of the Forest Practice Rules has resulted in “take” of a federally listed species and must be removed from regulation to ensure the continued existence of NSO. EPIC believes that the benefits of eliminating Section 919.9 [939.9] subsection (g) include achieving consistency with the best available science on the species; relieving the Board and the Department of Forestry and Fire Protection (*CAL FIRE*) of the responsibility for NSO take determinations for which the agencies lack statutory authority; streamlining agency review of timber harvesting plans through reduction of the necessity for evaluation of timber harvesting plan provisions for NSO; and elevating the standards for NSO protection such that “older, healthier” forests are created and retained.

The California Forest Practice Rules, Title 14 of the California Code of Regulations (14 CCR), are an ever evolving, comprehensive set of regulations adopted by the Board pursuant to its authority under the Z'berg-Nejedly Forest Practice Act of 1973, Public Resources Code Section 4511, *et seq.* Together with the overlapping authorities and responsibilities of other state agencies, the Forest Practice Rules regulate commercial timber management by geographic district throughout California. The Forest Practice Rules include provisions that address timber growth and yield, watercourse and lake protection, erosion control, road construction and maintenance, and protection of fish and wildlife species, among others.

One wildlife protection element contained in Article 9 of the existing Forest Practice Rules addresses an avian species known as Northern Spotted Owl (NSO). The species is federally listed as “threatened” wherever it is found in Oregon, California, and Washington under the federal Endangered Species Act. 14 CCR Section 919.9 [939.9] provides subsections (d), (e), and (g) as stand-alone provisions for addressing NSO and the potential for timber harvesting-related adverse impacts to the species or its habitat. A number of larger industrial timber producers rely upon NSO incidental take permits with the United States Fish and Wildlife Service (USFWS) as described in Section 919.9 [939.9] subsection (d). Other timber producers rely upon the NSO management prescription defined through formal consultation with the USFWS as described in Section 919.9 [939.9] subsection (e). Some number of timber producers choose instead to utilize the procedures and specific protection measures provided in 919.9 [939.9] subsection (g). According to *CAL FIRE* however, those utilizing subsection (g) are also incorporating additional supplemental measures based upon guidance and/or consultation with the USFWS. That is to say, timber producers do not seem to be relying solely upon Section 919.9 [939.9] subsection (g) in their timber harvesting plans.

EPIC contends in its petition that “most landowners and [Timber Harvesting Plan] submitters” have chosen not to utilize Section 919.9 [939.9] subsection (g) to address NSO occupancy. According to EPIC, only a small number of harvesting plan proponents would therefore be affected by the loss of subsection (g). As previously noted herein, use of subsection (g) as a stand-alone option for addressing NSO does appear to be quite limited. Generally, where subsection (g) is used, the approach is augmented through consultation with or incorporation of USFWS measures. Nevertheless, EPIC concludes in its petition that failure to remove subsection (g) from existing regulations will result in “substantial consequences” for NSO on private timberlands. The petition also advises the Board and *CAL FIRE* of the “risk of legal challenges” should the Board fail to act on the petitioners’ demands.

Following public comment, the Board voted to accept EPIC’s petition and directed staff to produce a 45-day Notice of Rulemaking indicating the proposed deletion of Forest Practice Rule Section 919.9 [939.9] subsection (g).

Concurrent with this action, the Board also acknowledged the need to identify what, if any, substitute process or regulation would be required in the absence of Section 919.9 [939.9] subsection (g). Staff was additionally directed to seek the advice of representatives of the USFWS and California Department of Fish and Wildlife.

## **SPECIFIC PURPOSE OF THE REGULATION**

### **Article 9, Wildlife Protection Practices**

#### **Section 919.9 [§ 939.9]**

This rule section is proposed for amendment to remove reference to subsection (g) (also identified as “subdivision (g)”). This amendment ensures consistency with the proposed complete removal of subsection (g) from the existing California Forest Practice Rules for protection of northern spotted owl.

#### **Section 919.9(g) [§ 939.9(g)]**

This subsection of section 919.9 [939.9] is proposed for deletion in its entirety from the remainder of section 919.9 [939.9]. This proposed action is in response to a petition for rulemaking from the Environmental Protection Information Center (EPIC). EPIC contends that this rule section for the protection of Northern Spotted Owl (NSO) is little used and has resulted in illegal “take” of the species. In its petition for rulemaking, EPIC argues that deletion of the rule section would still leave timber harvest proponents with options for addressing the protection of NSO.

## **NECESSITY**

As previously indicated herein, the Environmental Protection Information Center (EPIC) believes the deletion of 14 CCR 919.9(g) [939.9(g)] is necessary to prevent “take” of Northern Spotted Owl (NSO). EPIC asserts subsection (g) is not aligned with federal “take avoidance guidelines” designed by the United States Fish and Wildlife Service (USFWS). Specifically, federal habitat definitions and retention requirements contained in the USFWS guidelines differ from those found in the Forest Practice Rules. According to EPIC, the minimum standards provided in 14 CCR 919.9(g) [939.9(g)] treat all habitat elements for NSO in the same manner, require retention of inadequate amounts to sustain the species, and do not mitigate the effects of cumulative harvest entries into portions of the NSO’s home range.

## **BENEFITS**

The benefits of the rulemaking proposal are not well understood at this time. It is unclear how many timber producers utilize the rule section to be eliminated. The beneficial or adverse effects of the rule section proposed for elimination is likewise not clear. The petitioner, EPIC contends elimination of 14 CCR 919.9 [939.9] subsection (g) will result in increased protection for the federally listed Northern Spotted Owl.

This prospective increase in protection would be due to a projected increase in federal agency participation in harvesting plan review. EPIC simultaneously acknowledges that the rule proposed for elimination is little used and this observation appears to be supported by *CAL FIRE*, the lead agency for harvesting plan review and approval. Arriving at a logical conclusion as to the rulemaking proposal's true beneficial environmental impacts to NSO is therefore difficult to deduce.

Regardless, the rulemaking proposal will have no effects upon public health and safety, worker safety, the prevention of discrimination, or the promotion of fairness or social equity. Nor will the rulemaking proposal increase openness and transparency in business and government.

### **ALTERNATIVES TO THE REGULATION CONSIDERED BY THE BOARD AND THE BOARD'S REASONS FOR REJECTING THOSE ALTERNATIVES**

The following alternatives are under consideration by the Board:

#### **Alternative #1: No Action – Do Not Adopt Regulation**

This alternative would result in no change to the existing Forest Practice Rules for protection of Northern Spotted Owl. Testimony from *CAL FIRE* representatives and timber producers indicates that few timber harvest proponents utilize 14 CCR 919.9 [939.9] subsection (g) as a stand-alone option. A number of larger timber producers appear to be utilizing subsections (d) and (e), both of which require direct consultation with the United States Fish and Wildlife Service (USFWS). Of those timber producers using subsection (g), most if not all include additional measures in their harvesting plans based upon USFWS guidelines. The petitioner, EPIC itself acknowledges elimination of subsection (g) will have little practical effect, as stated on page 5 of the petition letter to the Board:

**...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 Board could therefore choose this alternative with some confidence that it would not result in adverse environmental effects. If this alternative were chosen, the Board could still solicit the assistance of *CAL FIRE*, USFWS, and the California Department of Fish and Wildlife in the review of contemporary timber harvesting plan protection standards for NSO. This alternative would also not preclude future rulemaking if the Board concluded amendment of Forest Practice Rules for NSO was indeed necessary upon such further review.

This alternative remains viable for Board consideration as its deliberations on the petition for rulemaking continue through the Board's scheduled initial hearing on July 10, 2013.

## **Alternative #2: Eliminate All Forest Practice Rules for Northern Spotted Owl.**

This alternative would expand the rule proposal to include all existing Forest Practice Rules pertaining to NSO. The species is currently federally listed by the USFWS as “threatened” throughout its range. Consultation with USFWS or use of USFWS “take avoidance” guidelines for timber harvesting is therefore more useful to timber producers than the Forest Practice Rules for NSO. Two of the three stand-alone rule subsections merely reference two options for consultation with the USFWS. The third, subsection (g), appears also to be somewhat reliant upon use of the USFWS guidelines based upon testimony from *CAL FIRE* and others.

Further, there are a variety of federally listed species for which the Board has created no specific protection rules. Instead, timber producers and government agencies utilize endorsed guidelines and/or direct consultation to achieve adequate species protection in harvesting plans. Eliminating the Forest Practice Rules for NSO would not change the listing status or federal requirements for species protection. It would essentially only bring the protection process for NSO into alignment with that of other federally listed species.

Adoption of this alternative could potentially satisfy the petitioner, *CAL FIRE*, some number of timber producers, and others. This alternative remains viable for Board consideration as its deliberations on the petition for rulemaking continue through the Board’s scheduled initial hearing on July 10, 2013.

## **Alternative #3: Adopt Regulatory Modifications as Proposed Without Additional Revision.**

This alternative would result in adoption of the rulemaking proposal as currently presented. No further substantive revisions to the rule text would be considered or presented for comment in further public noticing. The Board would take action to adopt the regulations following the initial 45-day Notice hearing. In the absence of 14 CCR 919.9 [939.9] subsection (g), *CAL FIRE* and timber producers would be compelled to fall back on consultation with the USFWS to achieve adequate protection of NSO in timber operations. As this is already reportedly common practice for the majority of timber producers, there may indeed be little practical effect on timber harvesting under this alternative.

This alternative remains viable for Board consideration as its deliberations on the petition for rulemaking continue through the Board’s scheduled initial hearing on July 10, 2013.

## **POSSIBLE SIGNIFICANT ADVERSE ENVIRONMENTAL EFFECTS AND MITIGATIONS**

The California Environmental Quality Act (CEQA) requires review, evaluation and environmental documentation of potential significant environmental impacts from a qualified project.

The Board's rulemaking process was determined to be categorically exempt from environmental documentation in accordance with 14 CCR 1153(b) (1), Declaration of Categorical Exemptions.

The proposed regulatory amendments would be added elements to the State's comprehensive Forest Practice Program under which all commercial timber management is regulated. The Board's Forest Practice Rules along with the Department of Forestry and Fire Protection's (*CAL FIRE*'s) oversight of Rule compliance function expressly to prevent adverse environmental effects.

Harvesting plans contain a mix of avoidance and mitigation measures that are specifically designed by a licensed professional forester to reduce the risk for potential adverse effects. Each harvesting plan also contains a comprehensive cumulative effects analysis utilized in part to identify potential risks and effects as an aid to the forester's avoidance and mitigation measure development. State, local, and federal agency representatives review every harvesting plan prior to a decision as to approval or denial. State representatives continue with compliance inspections of approved plans until the conclusion of the plan's lifespan. Where Forest Practice Rule standards or approved plan provisions have been violated, specified corrective and/or punitive enforcement measures, including but not limited to financial penalties, are imposed upon the identified offender(s).

In summary, the proposed regulation will not result in significant adverse environmental effects. The regulation is an element of a comprehensive avoidance and mitigation program for commercial timber harvesting activities.

#### **EVIDENCE SUPPORTING FINDING OF NO SIGNIFICANT ADVERSE ECONOMIC IMPACT ON ANY BUSINESS**

There are no additional costs to any state agency, nor any state-mandated costs to local agencies of government or school districts that require reimbursement under Part 7, Division 4 (commencing with Section 17500) of the Government Code because of any duties, obligations, or responsibilities imposed on state or local agencies or school districts. This order can be accomplished with no additional net costs or where such costs exist they are entered into voluntarily. This order does not create any savings or additional costs of administration for any agency of the United States Government over and above the program appropriations made by Congress.

There are no mandates to local governments or school districts.

The rule elimination proposal would resolve the matter of the petition for rulemaking from the Environmental Protection Information Center (EPIC).

The Board of Forestry has determined that no statewide alternative considered would be any more effective in carrying out the purpose for which this regulation is proposed.

Likewise, no other alternative would be any more effective or least burdensome to affected private persons than the proposed action.

The following economic impact analysis is intended to satisfy the requirements of the Administrative Procedures Act, Government Code Section 11346.3(b).

**I. Will the proposed regulation create or eliminate jobs within the State of California?**

The proposed regulation is an amendment to eliminate a small portion of existing regulation and will not significantly affect jobs in California. Compliance with federal “take avoidance” measures and strategies for protection of the federally listed Northern Spotted Owl is still compelled regardless of the disposition of the rulemaking proposal.

**II. Will the proposed regulation create new businesses or eliminate existing businesses within the State of California?**

The proposed regulation will neither create new businesses nor eliminate existing businesses in the State of California. Commercial timber management will continue to occur at current scales across the state regardless of the disposition of the rulemaking proposal.

**III. Will the proposed regulation result in the expansion of businesses currently doing business within the State of California?**

The proposed regulation will not result in the expansion of businesses currently doing business within the State. The rulemaking proposal is intended to clarify the existing process for protection of the federally listed Northern Spotted Owl. Timber management will continue at current scales across the state with no discernible expansion or contraction as a result of the rulemaking proposal.

**IV. Will the proposed regulation provide benefits to the health and welfare of California residents, worker safety, and the state’s environment?**

The regulation as proposed does not provide benefits to the health and welfare of California residents, or improve worker safety. Advocates for the rulemaking proposal believe that it will benefit the state’s environment through greater protection of Northern Spotted Owl. However, it is not clear to what extent the rulemaking proposal would alter the existing implementation and enforcement of regulations for owl protection. There may in fact be no practical effect of the rulemaking proposal and all improvements in owl protection may be so abstract as to be indiscernible.

**V. What is the estimated expense of proposed regulation upon those most affected?**

Commercial timberland owners and managers are the most likely to be affected by the regulation. However, it is unclear to what extent the proposed rulemaking would alter the existing costs for timber harvest permitting and operations. Those who choose to conduct commercial harvests of their timberlands are currently obligated to comply with the permitting and rule requirements of the State Forest Practice Act and Rules. This regulatory construct is fully compliant with the California Environmental Quality Act. The harvesting permit required for commercial operations is considered the functional equivalent of an Environmental Impact Report. According to a March 2005 report by Thompson and Dicus entitled, The Impact of California's Changing Environmental Regulations on Timber Harvest Planning Costs, the cost of a one-time harvest permit is in excess of thirty-thousand dollars (\$30,000.00). The permit cost does not include the annual or periodic expenses of property tax, insurance, or management activities (erosion control; water, flora, and fauna monitoring; tree planting and timber stand improvement work; pre-commercial thinning and pruning; etc.)

The rulemaking proposal would not significantly alter harvest permitting costs or the ongoing expenses identified above. Protection of the federally listed Northern Spotted Owl would still be a required element in harvesting plans within the owl's range regardless of the disposition of this rulemaking proposal.

**ALTERNATIVES TO THE PROPOSED REGULATORY ACTION THAT WOULD LESSEN ANY ADVERSE IMPACT ON SMALL BUSINESS**

The Board of Forestry finds that the adoption of these regulations would not have a significant adverse economic impact on small businesses. There will be no reporting or record keeping requirements in these regulations and compliance requirements are set out in the *Initial Statement of Reasons* and the proposed text of the regulations.

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

The 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, Title 14, Division 1.5, Chapter 4, Subchapters 4, 5, 6, Article 9 – Wildlife Protection Practices.

2. 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)], Environmental Protection Information Center, February 6, 2013.

**Pursuant to Government Code 11346.2(b)(6)**: 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 *Statement of Reasons*; the Board has directed 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 is represented in the following manner:

UNDERLINE indicates an addition to the California Code of Regulations,  
and

~~STRIKETHROUGH~~ indicates a deletion from the California Code of  
Regulations.

All other text is existing rule language.