



January 29, 2018

Mandy Culpepper  
Environmental Scientist  
Timberland Conservation Program  
California Department of Fish and Wildlife

Dear Mandy,

Involved with California forestry-wildlife issues since 1990, my background with Northern Spotted Owls (NSOs) goes back to 1988 when I field-tested the original NSO survey protocol for the U.S. Forest Service in Oregon. Sadly, these NSOs have mostly vanished and the same thing is now happening in Northern California. Perplexed by a governmental approach that focuses exclusively on protecting NSO habitat while ignoring the root cause of its decline, I am submitting the following questions, comments and suggestions.

**1. Barred owls (BOs) have been characterized by the U.S. Fish and Wildlife Service (USFWS) as an extremely pressing and complex problem requiring immediate consideration<sup>1</sup>. How is the decision-making body planning to deal with this significant threat? What is the BOs status in California presently?**

It is believed this exotic invasive species made the leap around the Rocky Mountains and into Northeastern British Columbia around the late 1800s. A century later, BOs have effectively out-competed NSOs in Canada, overrun the Pacific Northwest and made substantial inroads in Northern California. However, in the sixteen years that I have lobbied for a meaningful solution, neither the Service nor the California Department of Fish and Wildlife (CDFW) has shown any significant interest in addressing this problem.

Nonetheless, Timber Harvest Plan (THP) NSO “take avoidance” is a Lead Agency responsibility and having recently set an important precedent by requiring a landowner to mitigate impacts from exotic invasive plants<sup>2</sup>, removing barred owls from privately owned timberlands may ultimately be a CalFire matter. In light of recent litigation affirming the legality of removing barred owls under the Migratory Bird Treaty Act (MBTA), what steps is the decision-making body taking to remove barred owls in California?

---

<sup>1</sup> Experimental Removal of Barred Owls to Benefit Threatened Northern Spotted Owls Final Environmental Impact Statement Prepared by: Oregon Fish and Wildlife Office U.S. Fish and Wildlife Service Portland, Oregon July, 2013

<sup>2</sup> [ftp://thp.fire.ca.gov/THPLibrary/North\\_Coast\\_Region/THPs/THPs2017/1-17-034DEL/20170908\\_1-17-034DEL\\_ADD-CDF.pdf](ftp://thp.fire.ca.gov/THPLibrary/North_Coast_Region/THPs/THPs2017/1-17-034DEL/20170908_1-17-034DEL_ADD-CDF.pdf)

**2. The placement of NSO “Activity Centers” (ACs) is of the utmost importance to small private timberland owner’s ability to manage their forest. Who is responsible for the accuracy of this information?**

Operated by CDFW, the California Natural Diversity Data Base (CNDDDB) is a clearing-house for sensitive biological observations, which includes NSO detections dating back thirty years. However, because it only takes a handful of night responses to qualify for Single Resident Status, the CNDDDB is rife with commission errors. Review of its metadata shows that it grossly overestimates the California NSO population.

Collection and analysis of public wildlife information is clearly a CDFW responsibility, but there appears a schism between the agency charged with protecting NSO habitat and the one responsible for keeping track of them. The CNDDDB dataset is available to private customers for an annual subscription fee, which comes with an important disclaimer:

*“The data represented on this site vary in correctness, accuracy, scale, completeness, and extent of coverage, and have been contributed from various sources. We highly recommend reviewing available metadata prior to interpreting these data.”*

The Forest Practice Regulations (FPRs) constitute a Certified Regulatory Program under California Environmental Quality Act (CEQA), but whereas violations of the Endangered Species Act (ESA) are automatically regarded as significant, it is important to keep in mind that federal law limits consideration to sites with a reasonable expectation of occupancy. However, taking advantage of [the FPRs quasi-CEQA status](#), CDFW has made CalFire believe even the most remote possibility of harm to a “listed species” could potentially be significant. Compounding the problem, the Service has directed CalFire to continue considering the CNDDDB’s spotted owl data as substantial evidence, effectively forcing landowners to set aside significant amounts of land for owls that are long gone or were never there in the first place.

Nevertheless, the manner in which the USFWS had directed CalFire to consider anecdotal and highly speculative owl sites as “active nests” is highly problematic as it contradicts both the ESA and CEQA. Curiously, CDFW used a different dataset to list the species under the California Endangered Species Act (CESA), begging the question, why are they insisting landowners protect habitat for ACs they may have already written off.

**3. What are the criteria for NSO site abandonment and AC relocation?**

The ESA limits consideration to sites with a reasonable expectation of occupancy. It also requires that jeopardy be evaluated against existing baseline conditions. The frequency and detail in which environmental baselines are discussed in the [Section 7 USFWS Consultation Handbook](#) clearly indicate the importance of this little known aspect in conducting a “take” analysis. The consideration of existing baseline condition when analyzing environmental impacts is also an explicit CEQA requirement, this crucial facet is entirely absent from CalFire NSO take avoidance process.

Nevertheless, “Activity Center” is a legal term under the FPRs and thus subject to CEQA compliance, but not only do many of the sites identified by the CNDDDB as “Territories” fail to qualify as ACs under USFWS protocol, there is also reason to question the motivation behind locating such sites in suboptimal habitat. However, an active nest means a site at which breeding efforts have recently occurred. “Unoccupied Status” is defined by the FPRs as site where no responses have been obtained from a previously identified northern spotted owl activity center after 3 years of survey, barring other evidence to the contrary. The rules go on to state:

*“An activity center with unoccupied status will not be considered an activity center when it has been evaluated and a determination made by the Director. The determination shall be based upon available information on survey history, habitat conditions within the home range, and changes to habitat that may have occurred since the northern spotted owl site was first identified.”*

Although the FPRs also contain survey guidelines, habitat retention standards and minimum qualifications of persons making NSO AC status determinations, because the USFWS and CDFW does not seem to recognize State law in this matter, CalFire has in effect abrogated this responsibility. Consequently, timberland owners seeking resolution to abandoned ACs must now deal with three agencies, none of which has been able to put forth a protocol for abandoning unoccupied ACs. How long does a landowner have to wait before declaring an AC abandoned?

#### **4. Why is CDFW heading up this endeavor when protecting federally listed species from logging on privately owned timberlands is ultimately a CalFire responsibility?**

Whereas Oregon operates in accordance to a statewide Safe Harbor Agreement (SHA), under the tutelage of the Board of Forestry (BOF), CalFire has since 1990 adhered to informal USFWS NSO take avoidance guidelines. Relying on a system of Private Consulting Biologists (PCB), CalFire initially outsourced this task to CDFW. However, when this program ended in 2000, the Service stepped in to provide Technical Assistance (TA) for timberland owners seeking THPs.

For the next ten years the TA process functioned reasonably well; harvesting-plans were reviewed in a timely manner and on a case-by-case basis by staff with the experience to design effective NSO protection measures. Allowing the Service to stay involved without complying with National Environmental Policy Act (NEPA), USFWS TA offered project proponents the opportunity to propose voluntary protection measures intended to minimize likelihood of NSO take, thereby gaining a letter of concurrence.

Unfortunately, the fundamental assumptions under which USFWS developed these guidelines were never subject to the type of rigorous environmental analysis required of State and federal law. To make things worse, the new set of NSO recommendations USFWS handed to CalFire in 2012 suffered the same regulatory deficiencies. Nonetheless, in 2017 the USFWS announced that CalFire is to be the primary agency for providing additional technical assistance, adding:

*“The Arcata Office’s Northern Spotted Owl Technical Assistance Program will be phased out and solely respond to northern spotted owl site abandonment and relocations of activity centers.”*

Effectively ruling over a process in which they only serve as advisors, I have deep concerns about the USFWS Arcata Office’s participation in NSO take avoidance process. Although also listed under the CESA, Federal law superseded State and given that incidental take is far more permissive under the CESA, I question if CDFW can legally enforce any stricter standards than already enshrined in the FPRs. Challenged by the Environmental Protection and Information Center (EPIC) as Underground Regulation, given that any litigation in this regard will be directed at the lead agency, should not CalFire be making this determination.

##### **5. What is the science behind requiring the same habitat retention for Resident Single NSOs as for Pairs?**

The Service in 2011 issued new NSO take avoidance guidelines over concerns that management on private timberlands was creating unsuitable habitat conditions. In *“Evaluation of Take for Northern Spotted Owls on Private Timberlands in California’s Northern Interior Region”* (Attachment A) they sum up the alleged failure of the FPRs to protect owls the following way:

*“...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.”*

The same document advises:

*“... the strong difference 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.”*

On closer examination, however, the abovementioned NSO site abandonment appears largely a function of private landowners trying to correct CDFW’s casual database management. In fact, during that time, NSO populations on private timberlands in Northern California compared very favorably to federal lands; something a formal peer-reviewed study would have revealed.

To determine whether the timber operations, as proposed, will "take" an individual northern spotted owl the Director shall apply the criteria outlined in 14 CCR §919.10. However, whereas the science supports the premise of an NSO core-area, below which their ability to reproduce is diminished; I fail to see how any THP could possibly affect the breeding success or nesting behavior of a single owl. Considering that these sites tend to occupy substandard habitat, the requirement that Resident Singles have the same

habitat retention as Pairs not only violates State and federal law, it contradicts the USFWS recovery plan.

Incidentally, the same can also be said for the 1,336-acre home-range habitat requirements in the (“Outer Doughnut”), as Dugger<sup>3</sup> review of draft recovery plan state that demographic models were only intended for application on a territory level, and according to Franklin<sup>4</sup>, a misinterpretation of scale has led to an inappropriate application of land management options. Is an Environmental Impact Statement (EIS) or Environmental Impact Report (EIR) formally addressing these issues forthcoming?

**6. The FPRs define minimum experience for Spotted Owl Expert (SOE), do these requirements apply to government agencies too?**

A professional forester is licensed to perform forestry services only in those areas of expertise in which the person is fully competent because of training or experience and because it takes extensive surveying experience to interpret NSO metadata, the FPRs contain minimum qualifications for persons reviewing NSO take avoidance:

*“Spotted Owl Expert means a person with .... a minimum of five field seasons of verifiable northern spotted owl survey and biological evaluation work. The SOE shall possess sufficient experience, knowledge and education in order to analyze data from field conditions .... The individual shall be able to verify such experience, knowledge and education upon the Director’s request.”*

The SOE shall apply the criteria set forth in 14 CCR § 919.10, and to accomplish this they must have both the required field experience as well as a firm understanding of the law. However, the establishment of new activity centers now appears based on the landowner’s inability to disprove government assertions to the contrary. Nevertheless, in addition to the direction of a response, its time and date, establishing a Single Resident AC may also require consideration of the order in which stations were called and the areas topography, to assure the response could not have come from a nearby site.

The Director shall refer all applications for Spotted Owl Expert to the Service and CDFW for evaluation, but whereas previously handled by experienced agency personnel, neither of the biologists CalFire retained to handle NSO take avoidance qualify as SOEs. As a result, they often err on the side of caution in ways that are contrary to previous agency reviewers. For example, continuing operations to retrieve downed logs after February 1 or adjustments to survey coverage that used to be a matter of course are now disallowed.

In conclusion, the USFWS’s most recent guidelines have complicated the take process without providing a commensurate conservation benefit. Devoid of a meaningful way of addressing the root cause of NSO Territory abandonment, whilst failing to adopt the least burdensome means of complying with the ESA, the absence of due diligence environmental regulatory review has exposed the NSO take avoidance process to significant legal jeopardy. Continuing to assign AC status to anecdotal detections,

---

<sup>3</sup> Dugger, K.M. (2007) Review of draft recovery plan for the Northern Spotted Owl

<sup>4</sup> Franklin, A.B. (2007) Review of draft recovery plan for the Northern Spotted Owl

perhaps CDFW and the Service expects that CalFire will lean on landowners to restore suboptimal habitats. Nevertheless, habitat recovery is not a private landowner's responsibility and given the importance of determining the location and status of NSOs in an effective and feasible manner, I believe State law intends for a licensed CalFire official with SOE credentials to make this determination.

Sincerely,

Troy Leopardo  
(707) 502-9357  
[leowild@prodigy.net](mailto:leowild@prodigy.net)