

Subject: Public Comment regarding NSO Stakeholder Form, October 23, 2019

Dear Ms. Culpepper,

Thank you for the opportunity to provide public input regarding important regulatory and management issues concerning the Northern Spotted Owl (*Strix occidentalis caurina*; NSO). Today, we are providing commentary as a group of biologists, foresters, timberland owners, and forest managers, collectively known as the “Mendocino/Sonoma Northern Spotted Owl Working Group.” Our members have extensive experience in surveying, protecting, tracking and managing spotted owls on working landscapes in Mendocino and Sonoma counties, and many have directly engaged with the regulatory agencies on spotted owl conservation and management for timber harvest plans since the species was federally listed as threatened in 1990.

Over the course of this time, we have experienced changes in survey methodologies, regulatory guidelines, and interpretation and implementation of those guidelines, with the intent to avoid “take” of NSO. Over the past three years the regulatory environment has become more onerous, restrictive, less predictable, and inefficient compared to previous timber harvest review programs administered by the trustee agencies. As a group, we seek a constructive dialogue with all agencies involved in timber harvest review to resolve disputes and clarify the biological reasons underlying the standards we are required to follow for NSO conservation. Enumerated below are some of the issues we would like the trustee agencies to explicitly address:

- The barred owl (*Strix varia*; BADO) continues to be the primary cause of NSO decline, yet landowners face increasing pressure to create larger core area preserves where timber operations are prohibited. Many of these areas have become devoid of spotted owls, and have thus, become de facto barred owl preserves. It appears the current NSO decline is being used as a pretext for increased protection of NSO in timber harvest plans, but there is currently no effort by the trustee agencies to address the barred owl in an economical and time-efficient manner to mitigate this decline. Do the trustee agencies have an action plan to address the barred owl as the primary agent of the NSO’s decline? And, how is the increased level of habitat retention supposed to result in a higher level of take avoidance of NSO in the face of increasing BADO numbers?
- The concept of “take” underlying agency no-take determinations and recommendations in THPs needs more explanation and justification, especially in light of the memorandum issued by the Principal Deputy Director of the United States Fish and Wildlife Service (USFWS) on April 26, 2018. In that memorandum, the USFWS provided interpretive guidance to its regional offices for determining when incidental take is unlikely to occur, particularly with respect to the potential for “harm” occurring as a result of habitat modification. This document further provided a detailed history of administrative procedures and court precedents regarding the concept of “take” in the context of “harm” and “harass.” The fundamental premise underlying the concept of “take,” as articulated in this memorandum, is that a species must be present in the project area, and the habitat modification must be “significant” to a level that is the proximate cause of injury or death of the listed species. We would appreciate if the USFWS would formally address the concept of “take” as discussed in this memorandum and how the revised version of

“Attachment A” is consistent with this guidance. Also, many landowners have had productive NSO territories replaced by barred owls, some for nearly a decade. If there are no NSOs present, how is allowing harvest and other activities within these core areas increasing the likelihood of take?

- The definition of “Activity Center” and how it is implemented needs clarification. There is no explicit process, or decision tree, for determining what detections, in any form or quantity over time, constitute an Activity Center. Neither Attachment A nor the 2012 Protocol provide a process for this fundamental step in the take-avoidance process. Section 16 of the 2012 Protocol is titled “Determining Activity Center Status,” and thus presumes the existence of an Activity Center without ever outlining a process for choosing one. The process we currently have is open-ended, subjective, and results in needless conflict during the THP review process. Formulating a decision-tree for designating Activity Centers (with concrete examples) would be the first step in providing certainty in the process. The trustee agencies should consider a range of factors in determining what historical locations merit protection. This includes, recency of use, concentration of activity, the number of years occupied, nesting activity, barred owls, location of the territory holders if still present on the landscape, and identity of the owls if known.

The definition of an Activity Center in Attachment A and in the 2012 NSO Survey Protocol are reasonable concepts; however, these definitions appear to be inconsistent with current practice. Simply stating that every historical location where a NSO pair, territorial single, or nest was found requires protection without additional information needs to be reevaluated in the context of the procedures and standards the USFWS is required to follow when making take-avoidance determinations per the above mentioned guidance document discussed previously. Additionally, not all nocturnal, or even diurnal, detections are truly representative of the area most utilized by a single or pair. When this approach is combined with NSO displacement by BADOs, it results in core areas becoming larger each year NSOs are detected. Several landowners and resource managers have stated that the “requirement” of protecting nearly all diurnal and some nocturnal detections is a recent development coincident with turnover in agency staff. When and why was there a change in the interpretation and implementation of owl protection measures as they pertain to core areas? We maintain that the administrative record in approved timber harvest plans will illustrate that this concept of NSO protection is a new approach.

- For many years landowners have been promised a mechanism to have Activity Centers (ACs) declared “inactive” after a period of unoccupancy, particularly for territories that are still occupied but exist somewhere else or have been taken over by BADOs. Have the Trustee Agencies made any progress in developing a process?
- Many recommendations made by agency staff are novel interpretations and/or approaches without any basis in biology or experience. For example, in a recent THP, habitat meeting the functional definition of nesting/roosting was downgraded to foraging because of its proximity to Highway 1 and a perceived lack of “significant” owl detections within 0.25-mile. What is the scientific basis for such a recommendation? Northern Spotted Owls have repeatedly roosted and nested successfully in close proximity to both Highway 20 and 128. One such territory, MEN023 (Dimmick Park), nested 70 feet up, directly over the centerline of Highway 128 in 2016 and successfully fledged two young. Nearly all the historical NSO territories along

Highway 128 have nested within several hundred feet of the road. This is not just an isolated incident, but is a symptom that other landowners have been experiencing over the past several years.

- We would like to encourage the trustee agencies to allow, if not mandate, that timber harvest review field personnel attend public forums such as the NSO Stakeholder Forum and annual NSO survey coordination meetings. By doing so it would ensure that supervisory staff and timber harvest review field personnel would hear comments from the public and obtain a “collective understanding” regarding the issues that landowners and NSO surveyors are facing and also, any agreements, intents, or understandings discussed. This would help alleviate misunderstandings and conflict in the field review process and ensure that everybody is “on the same page” regarding regulations.
- Safe Harbor Agreements with USFWS and California Department of Fish and Wildlife (CDFW) have now become an option available to landowners willing to manage their lands in ways to be beneficial to NSO. The process of making Safe Harbor Agreements available to landowners has taken over five years and our understanding is that now there is a template for these agreements, which could streamline the process for other landowners utilizing this option. We strongly encourage both USFWS and CDFW to make personnel available for accepting, reviewing, and processing safe harbor agreements in a quick and timely matter for a variety of landowners.
- It appears as though the USFWS and CDFW are moving from their objective of take avoidance in approving projects to placing the burden of species' recovery onto landowners. This argument is especially strong when we hear federal biologists reiterate that private lands contribute little towards species' recovery. We feel that there is a paradox in requiring more land to be preserved in multiple ACs, resulting in larger “reserves”, which in turn will likely promote more BADO expansion, and yet the agencies have no steps forward with BADO control/surveys/research that supports the small landowner predicament. How long are private landowners expected to protect unoccupied activity centers? Or worse yet, to protect the ACs that have been taken over by BADO?
- There may be other new possibilities for surveying for NSO to help landowners and the trustee agencies in better determining NSO presence in areas affected by BADO such as automated recording units, pellet scent dogs, drone surveys using IR cameras, and the development of a BADO survey protocol.

Overall, we encourage collaboration between the trustee agencies and the various landowners they regulate. We possess the skills, expertise and the land base to facilitate many of the research and learning opportunities mentioned above and would like to be part of relevant future research proposals that may be utilizing Section 6 funding. Finally, we also recommend a method to measure the success of the NSO Stakeholder Forum so the ideas, policies, and proposals put forth at these meetings are considered and responded to by the trustee agencies. It would be desirable to develop a “matrix to measure success” to determine if these meetings are working to achieve the stated goals and objectives of the forum and provide answers to stakeholder concerns as expressed here.

Thank you for your consideration.

Sincerely,

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