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Sent via e-mail to: reddingpubliccomment@fire.ca.gov on date shown below

April 4th, 2014

Mr. Mike Bacca
CALFIRE Forest Practice Manager
6105 Airport Rd
Redding, CA 96002

Re: EPIC Comments Regarding Timber Harvest Plan 2-13-081TRI “Donkey”

Dear Mr. Bacca and CAL FIRE:

The Environmental Protection Information Center (EPIC) submits the following comments regarding Sierra Pacific Industries (SPI) Timber Harvest Plan (THP) 2-13-081TRI, “Donkey.” Please include these comments and associated attachments in the record for the above-referenced THP.

I. Introduction

1. Summary

The “Donkey” THP fails to establish that the methods chosen to avoid "take" of Northern Spotted Owl (NSO) will meet this requirement. Application of 14 CCR 939.9(g) in this instance is insufficient to protect NSO from unauthorized “take.” Furthermore, this THP as proposed fails to fully demonstrate compliance with the letter and intent of 14 CCR 939.10.

SPI continues to propose THPs that remove NSO habitat from known historic home ranges without securing a Federal Incidental Take Permit (ITP) and associated Habitat Conservation Plan (HCP). Furthermore, SPI continues to insist on applying the protective provisions of 14 CCR 939.9(g), or “g-+” instead of following the U.S. Fish and Wildlife Service’s NSO take avoidance guidelines, thus further increasing the risk of unauthorized “take” of NSO. At this time, SPI operations as proposed under this THP and many others

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like it are out of compliance with applicable federal prohibitions against “take” of NSO, and are thus also out of compliance with the provisions of 14 CCR 939.10.

2. Project details

The “Donkey” THP is located Nelson Creek, Billie Gulch, Hatchet Creek, Clawton Gulch and Hay Gulch state planning watersheds near Trinity Lake in Trinity County, California. The “Donkey” THP proposes a total of 401 acres of timber harvest. Silviculture includes 80 acres of clearcutting, 305 acres of alternative prescription most closely resembling clearcutting, and 11 acres of road-right-of-way construction. According to Section II, Item #14(c) of the plan, there are four ‘oversized’ evenaged management units proposed for harvest in the THP. Paragraph 2 of Item #14(a) of the plan contains a reference to post-harvest stocking levels within unevenaged management prescription areas. However this item does not actually disclose any unevenaged prescriptions to be applied.

According to Section III, page 34 of the plan stand types are typical of the Klamath/mixed conifer forest type. Stand age is disclosed as ranging from 70-100 years old, with an average age of 100 years. According to this same page and section, commercial thinning and shelterwood removal prescriptions have previously been applied to the THP area.

There is one known Northern Spotted Owl activity center located within 1.3 miles of the “Donkey” THP area. This is TRI0169 “Linton Ridge.” As indicated above, SPI is employing the provisions of 14 CCR 939.9(g) or the so-called “g-+” as standards for NSO “take” avoidance.

II. SPI’s Use of Option “g” has the Potential to Cause Take of the NSO.

A. “Option g” Cannot Support a Determination of Take Avoidance

EPIC objects to the continued use by SPI of 14 CCR 939(g) (option "g") as a tool to try and evaluate impacts on NSO, and CAL FIRE’s complicity in relying on this subsection, because as a result the THP fails to demonstrate that take will be avoided.

1. Standards to Be Applied

CAL FIRE may not approve a plan that would result in take of NSO. 14 CCR 898.2(f). CAL FIRE claimed in 2008 it “must determine whether a plan will result in take of state and federally listed species and NSO before approval,” citing to 14 CCR 898.2(d) and (f). (See, CAL FIRE, *Important Information for Timber Operations Proposed with the Range of the Northern Spotted Owl*, Feb. 2008, at p. 6 #1 (CAL FIRE 2008) [**Attachment B**]) However, as recently admitted, CAL FIRE does not have the authority to determine likelihood of take – but only that a plan will not result in take. Deputy Director Duane Shintaku acknowledged this limitation over a year ago, stating: “The Department of Forestry is not authorized to determine whether “take” will occur; that decision lies with the trustee wildlife agency.”(Shintaku 2013)

In addition, the Department must find that "harm" to NSO will occur if any of the following conditions exist:

(1) Feeding habits would be significantly impaired because prey base or ability to catch prey would be adversely altered;

(2) Breeding success would be significantly impaired because of a reduction in surrounding owl habitat before the young have had an opportunity to successfully disperse from their nesting site;

(3) Nesting behavior would be significantly impaired because the nest site or adjoining area up to 500 feet from the nest site would be adversely altered; or

(4) Sheltering (which includes roosting, feeding, and nesting) would be significantly impaired because the ability to escape predators, survive severe weather, or find appropriate microclimes would be adversely altered. (14 CCR 919.10[939.10]).

2. Option "g" is Insufficient to Meet These Standards.

CAL FIRE cannot perform its duty to avoid take when reviewing a THP using "option g," because the implementation of option "g" under the FPRs has the potential to cause "take" of the NSO. This potential not only violates the Board's obligation to have rules that protect wildlife, but also means that CAL FIRE's reliance on this subsection can result in an authorization of take. This is illustrated not only by the Fish and Wildlife Guidelines in 2009 that reliance on "option g" is not sufficient to guarantee no take, but equally by CAL FIRE's own admissions that option g is inadequate to guarantee no take.

a. FWS Guidelines reject "Option g"

In 2009 the U.S. Fish and Wildlife Service identified several failings in the standard provisions and application of option "g." These include inadequate habitat retention standards and out dated habitat definitions.

---. Inadequate habitat retention standards

Reliance upon the habitat levels of Option "g" is inadequate and will not avoid "take" of NSO as outlined by the USFWS in its *Regulatory and Scientific Basis for U.S. Fish and Wildlife Service Guidelines for Evaluation of Take for Northern Spotted Owl on Private Timberlands in California's Northern Interior Region* (Regulatory and Scientific Basis).[**Attachment D**]

Under item B in its document, the Service notes several reasons why the current FPRs are not adequate to evaluate or avoid "take." These reasons include new information available since the rules were enacted (which have changed the amount required, the habitat definitions, and spatial arrangement criteria), the Service's experience with the TA process, and analysis indicating loss of territories under the FPRs. (Regulatory and Scientific Basis) The Service discussed some of the deficiencies of the current FPRs:

“When the FPR guidelines were adopted in 1992, data relating habitat variables to occupancy, reproduction, and survival of NSO were limited. The FPR guidelines for avoiding incidental take of NSO were therefore based on comparison of proposed post-harvest habitat conditions with the amount and of quality of habitat observed at occupied NSO sites described in various studies. Under this standard, habitat modification potentially could result in substantial reduction of reproduction, survival, and occupancy at NSO activity centers without the appearance of take, because habitat conditions resemble other low-quality NSO territories. NSO are known to occupy low-quality sites where their reproduction and survival are substantially reduced (Franklin et al. 2000, Dugger et al. 2005); the existence of these low quality sites suggests that reliance on habitat conditions corresponding to the presence or of owls at historic territories represents a low bar for determining habitat thresholds and take.”(Regulatory and Scientific Basis)

While the Service’s Take Avoidance Scenarios (U.S. Fish and Wildlife Service 2008) represent a greater degree of protection for NSO activity centers associated with logging operations, even the FWS acknowledges that those Take Avoidance Guidelines are not adequate to promote population growth or recovery:

“It is important to recognize that the habitat conditions described in the document are intended for use in estimating the likelihood of take of an individual NSO under the ESA; they do not represent habitat conditions required for habitat growth or recovery. The FWS guidelines focus solely on individual NSO territories and do not incorporate large- scale issues such as connectivity and dispersal of habitat, wintering habitat, or long-term habitat disturbance patterns.” (U.S. Fish and Wildlife Service Regulatory and Scientific Basis)

As this document explains, even the FWS standards have reduced habitat viability and quality to the point where "take" has most clearly occurred. (See Regulatory and Scientific Basis Figure I.B.1)

--- Outdated habitat definitions

One significant difference between the FPRs and the USFWS guidelines is the use of different definitions for each type of habitat. The FWS Guidelines' habitat definitions are far more detailed and specific than the habitat definitions provided in 14 CCR 895.1. The magnitude of the difference between the two is demonstrated by the fact that **what qualifies as roosting habitat under the FPRs would at best qualify for low-quality foraging habitat under the FWS definitions.** The Service notes:

“...use of [California] W[ildlife] H[abitat] Relationship[s] habitat definitions in the FPRs is unlikely to avoid take. This is because the WHR types considered to be NSO habitat (4M & 4D) are widely variable, and at the lowest end of size class/density are typically poor habitat or non-habitat.” (1-24-08 e-mail from USFWS' Brian Woodbridge to CAL FIRE's Chris Browder)

The Service expounds on the inadequacies of the FPR definitions:

“Service staff in the Yreka Fish and Wildlife Office believe that application of the FPRs typically does not avoid or reduce the likelihood of take of NSO. This is because the habitat definitions and retention standards in the FPRs represent minimum values that are below the habitat parameters associated with reasonable levels of territory occupancy, survival, and reproduction by NSO.”(ibid)(Emphasis added)

Below are two tables representing the differences in habitat definitions in the Forest Practice Rules versus the FWS Take Avoidance Guidelines for the interior region of California:

FWS Interior Definitions:

FWS Interior				
	Basal Area	TPA 26”+	Canopy closure	QMD (DBH)
HQNR	210	> 8	>60%	>15”
N/R	150-180	>8	>60%	>15”
F	Mix ranging 120-180	>5	Mix 40-100%	>13”
LQF	Mix ranging 80-120		>40%	>11”

FPR Standard Definitions:

CAL FIRE - Forest Practice Rules		
	Canopy closure	DBH
N	>60% total (40% dominant and co-dominant)	>11”
R	>40% with high degree of variability	>11”
F	>40% but if more than 80% must be “fly space”	>11” conifer >6” hardwoods

As can be seen, there are substantial differences between the FWS interior Take Avoidance Guidelines definitions and the FPR definitions. These differences include basal area, canopy closure, trees greater than 26 inches DBH, and average tree diameter required to meet the standard of the definitions.

Even though SPI is utilizing the FWS definitions for NSO habitat in analysis for this THP, SPI is not following the Service's guidelines. Use of the FWS definitions without implementation of the rest of the Service's standards is a cherry-picking approach that meets neither the intent of the guidelines or the higher standards of "take" avoidance they represent.

b. CAL FIRE has conceded that "Option g" is inadequate.

In a 2009, CAL FIRE issued a document which accepted the Fish and Wildlife Service position that compliance with option "g" does not prevent take of NSO. (*CAL FIRE Use of 14 CCR § 919.9(g) [939.9(g)] in making Northern Spotted Owl Take Avoidance Determinations*, 8/17/2009[**Attachment C**] (CAL FIRE, 8/17/09), In fact, CAL FIRE

"[The Department] encourages RPFs to use Fish and Wildlife standard, because the Fish and Wildlife guidelines document (2009) included "is the most effective manner of avoiding take." (CAL FIRE 2009)

CAL IFRE quotes the Service, stating:

*"The habitat definitions contained in 895.1 describe habitat typically **unsuitable**, , or at best represent the bare minimum conditions. Take may easily occur as repeated harvest entries reduce stand structure from whatever the owls originally occupied to the uniformly low values under the rules...in our review/assessment of NSO habitat relationships in the interior zone, **we were unable to find any support for significant NSO use of habitat conditions allowed under the definitions in 895.1.**"(CAL FIRE 2009)(Emphasis added)*

In the absence of actual consultation with FWS to establish no "take," CAL FIRE cannot make a determination of no "take," under option "g." CAL FIRE does not have the authority, the standards, or the best science upon which to make such a determination. Without first conducting an evaluation with Fish and Wildlife Service as to whether take is being avoided, it is not possible for CAL FIRE to determine no "take" under option "g."

In addition, just a year ago in March, the Department admitted to the Board of Forestry that option "g" is out-of-date, and no longer reflects the best available science. At the March 2013 Board of Forestry meeting, Deputy Director Duane Shinktaku stated:

"...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 largely agreed with EPIC 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+".... 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)

3. CAL FIRE Has No Valid Tool to Deal with the Inadequacies of “Option g.”

Given the recognized inadequacy of option g as a tool to ensure against take of the NSO CAL FIRE has created what it calls “option g+”, an undefined standard, which like the so-called “Take Avoidance Determination” is uncodified and likely an underground regulation. Thus far, CAL FIRE has not articulated what exactly is “g+”, or how it works. By using “option g+” in lieu of the THP option g, CAL FIRE is clearly undertaking a review and approval process that is not specified in the Rules, which relies on information and standards that are not otherwise in the Rules. The result is an illegal failure to provide a publically transparent process which clearly states what information is used or will be required, and what review process is employed to evaluate that information.. Moreover, in the absence of codified standards, the use of “option g+” lacks sufficient clarity and detail to allow meaningful public participation and review.

It is unclear at this point whether CAL FIRE may resort to use of the uncodified “Take Avoid Determination” for this THP. If CAL FIRE does use a TA, as a way to get around the inadequacy of “option g” the Department must be done within the public review process. Moreover, any attempt to make a so-called “TAD” determination -- whether before or after a THP is approved -- requires documented consultation with Fish and Wildlife Service, because CAL FIRE does not have the expertise or legal authority to make a determination of “take” of a federally listed species.

In any event, the use either “option g +” or the “TAD” is objectionable because these provisions have not been vetted through the required rule-making process the use is illegal as a tool to satisfy take avoidance. EPIC contends that any decisions which rely on these internal processes are not in compliance with the Forest Practice Act and other laws.

There is no mention or requirement for site specific measures that would serve to avoid take in the absence of compliance with the Service’s take avoidance guidelines. These are necessary because “take” can occur even with an abundance of habitat post-harvest, especially if that habitat is unsuitable or very low quality habitat as defined using the FPRs. “Take” also occurs when operations are limited to the fringe of the outer circle of the activity centers, especially when the rest of the habitat in the territory has been fragmented and degraded by extensive timber harvest.

B. Comments Specific to the “Donkey” THP Which Document Potential for Take

SPI and the RPF have provided precious little evidence in support of the contention that “take” as defined herein will be avoided. The “Donkey” THP relies heavily on simple aggregate habitat

retention standards to presume a margin of safety that also presumes that “take” will not occur. The RPF does not provide any actual meaningful data however that would support the contention that SPI’s proposed operations will meet the intent of 14 CCR 939.10. For instance, there is no information related to climate conditions that would support the RPF’s contention that feeding, sheltering, and escapement from predators will not be adversely affected. Similarly, no information on prey or prey base is found that would demonstrate how foraging will not be impeded by the proposed removal of suitable NSO habitat from within known NSO territories. In sum, there is no science, research or other data provided to substantiate claims that “take” will be avoided.

There is simply insufficient and inadequate information in the THP record as posted on the CAL FIRE FTP website to allow CAL FIRE, SPI, EPIC, or the general public to make a determination that "take" of NSO will be avoided. Please provide a detailed analysis from a qualified person demonstrating how proposed operations will avoid “take.” Please address how removal of suitable habitat within a known NSO activity center will avoid "harm" as described in 14 CCR 939.10. Please include a detailed analysis demonstrating that microclimates will not be adversely affected, and that essential behaviors including feeding, sheltering, breeding, escapement, and dispersal will not be significantly impacted. Lacking such a detailed analysis, it is difficult, if not impossible for CAL FIRE, SPI, EPIC, or the public to evaluate the potential for "take" of NSO.

The following comments contained are designed to address the potential for “take” of NSO based on the information provided in the THP, and our own records, and are organized by activity center.

1. Activity Center TRI0169 “Linton Ridge”

a). Location of activity center TRI0169 “Linton Ridge”

Activity center TRI0169 “Linton Ridge” is located at T35N-R7W Section 4, according to Section V, page 162 of the plan. The activity center is located on U.S. Forest Service lands. According to Section V, page 164 of the plan, the nearest harvest unit proposed in the “Donkey” THP is approximately 5,200 feet away from the activity center.

b). Survey and Detection History for Activity Center TRI0169 “Linton Ridge”

Activity center TRI0169 “Linton Ridge” was verified as territory with an identified pair in 1985 in CNDDDB. The last noted detection in the CNDDDB is from 1992. Protocol surveys from 2002-2004 did not elicit responses from NSO. (See “Hay Nelson” TA, page 7 (1-11-05-TA-56)) Section V, pages 170-172 of the “Donkey” THP provide summary survey sheets showing results for the 2011, 2012, and 2013 survey seasons. No NSO detections are noted in these summary sheets.

c). Known harvest history of activity center TRI0169 “Linton Ridge”

There are two known past harvest entries into the range of activity center TRI0169 “Linton Ridge” over the last 12 years. These timber harvest operations were conducted under THP 2-02-165TRI “Hay Nelson” and THP 2-12-092TRI “Bragdon.”

For the “Hay Nelson” THP, SPI removed 36 acres of nesting/roosting habitat from within 1.3 mile radius. No harvest proposed within 0.7 miles. (See “Hay Nelson” TA, page 4 (1-11-05-TA-56))

For the “Bragdon” THP, SPI proposed to remove a total of 20 acres suitable foraging habitat from within 1.3 mile radius. No harvest proposed within 0.5 or 0.7 miles. (See Section V, page 169 of plan).

It is unknown what, if any, timber harvest operations occurred within the range of this activity center prior to the last decade.

d). Proposed operations at activity center TRI0169 “Linton Ridge”

According to Section V, page 166 of the “Donkey” THP, SPI intend to remove 42 acres of suitable foraging habitat from within 1.3 miles of the activity center. No harvest is proposed within 0.5 or 0.7 miles. As indicated above, the nearest harvest unit lies within approximately 5,200 feet of the activity center location.

e). Discussion of potential for “take” to occur at activity center TRI0169 “Linton Ridge”

The potential for “take” to occur based on the federal definition exists due to the potential for “harm” to occur as a result of high quality habitat deficiencies within the core area of use. The RPF argues that because the habitat retention standards are above the minimum, and that no harvest is proposed within 0.5 miles, no “take” will occur. This statement is not supported by any scientific or other evidence that would rise to the level of “substantial evidence” as defined by CEQA. The RPF indicates that the THP will not result in the adverse modification of any essential life history behaviors, but does not actually provide any data or other discussion to address any of said life history behaviors.

The potential for “take” to occur pursuant to the CESA definition cannot be evaluated due to a lack of discussion of “take” in the CESA context in the THP itself, and due to the lack of site-specific measures to ensure that any such “take” will be avoided. The “Donkey” THP is currently incomplete and inadequate to assess the potential for “take” to occur as a result of the lack of adequate evidence or discussion of CESA.

III. Conclusion

As you are aware, 14CCR 898.2(c) requires the plan to be disapproved by the Director if “*There is evidence that the information contained in the plan is incorrect, incomplete, or misleading in a material way, or is insufficient to evaluate significant environmental effects.*” This plan is clearly

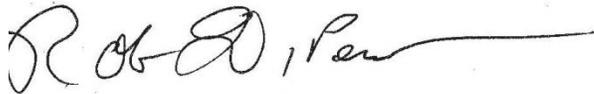
incomplete and inadequate to assess potentially significant direct impacts to NSO. This plan as proposed also run a high risk of "take" at the activity center associated with the THP due to previous successive entries that have resulted in significant cumulative impacts due to habitat loss, as well as the current lack of high-quality available habitats.

For the reasons outlined, CAL FIRE's reliance on option "g," or "g +" or a TAD would be insufficient to ensure that this THP will avoid "take" of the NSO. Moreover, compliance with the provisions of 14 CCR 939.10 has not been demonstrated for this plan due to the lack of sufficient information, analysis, and discussion from SPI or the RPF that would demonstrate "take" avoidance based on substantial evidence rather than the inadequate retention standards of the FPRs. The NSO take avoidance analysis for the "Donkey" THP provided by SPI does not actually discuss any facts that would demonstrate avoidance of "harm" as defined in 14 CCR 939.10, nor does it discuss the potential for "take" to occur pursuant to the CESA definition.

Furthermore, it is difficult to consider the RPF's "take" avoidance analysis as expert opinion supported by facts, as the standards for certification as a so-called "spotted owl expert" have been universally decried as inadequate, and the RPF provides no facts that would support his opinion other than reiteration of the FPRs retention standards. The RPF in this case is not a biologist, and represents the interests of SPI rather than the interests of the NSO or the public. Decisions made by RPFs and staff foresters at the Department are not based on independent scientific review of facts, as is demonstrated by the lack of such supporting facts in this THP.

The "Donkey" THP as proposed will likely result in "take" of NSO. It is clear that currently there is no credible established process for how "take" avoidance will be determined, what will be required, when it is required in the record, or even what document will ultimately serve as certification that a THP has avoided "take." As such, the plan should be denied unless substantial changes are made, substantial issues are addressed, and substantial information is provided. Once these deficiencies are corrected and the information is provided in this THP, then it must be recirculated for review and comment by the public. These revised and recirculated THPs must include any determination as to "take" of the NSO. EPIC further suggests that Cal Fire refer this THP to the Service for Technical Assistance on proposed harvesting operations within the range of all NSO activity centers associated with this THP due to existing significant adverse and cumulative impacts related to habitat loss. Lacking this, the THP should be denied due to the likelihood of "take" of NSO.

Sincerely,



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Attachments

Attachment A: Background Information on Northern Spotted Owl

Attachment B: CAL FIRE 2008. Important Information for Timber Operations Proposed with the Range of the Northern Spotted Owl.

Attachment C: CAL FIRE. 2009. CAL FIRE Use of 14 CCR § 919.9(g) [939.9(g)] in making Northern Spotted Owl Take Avoidance Determinations.

Attachment D: United States Fish and Wildlife Service. 2009. 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.