

CalForests' Draft Proposed Emergency Statement

FISH AND GAME COMMISSION STATEMENT OF EMERGENCY ACTION

Emergency Action to Add Section 749.8, Title 14, CCR,
Re: Special Order Relating to Incidental Take of Northern Spotted Owl
(*Strix occidentalis caurina*) During Candidacy Period

I. INTRODUCTION

The Fish and Game Commission ("Commission") is the decision-making body that implements the California Endangered Species Act ("CESA") (Fish & G. Code, § 2050 et seq.). As described in greater detail below, CESA authorizes the Commission to establish lists of threatened and endangered species, and to add or remove species from those lists if it finds, upon receipt of sufficient scientific information, that the action is warranted. Pursuant to Section 2084 of the Fish and Game Code ("FGC"), the Commission may authorize, subject to the terms and conditions it prescribes, the taking of any candidate species while the Department of Fish and Wildlife ("Department") and Commission evaluate whether the species should be listed as threatened or endangered under CESA. The Commission has relied on the authority in Section 2084 to permit take of candidate species on ten previous occasions: in 1994 for the southern torrent salamander; in 1994 for the coho salmon south of San Francisco; in 1997 and 1998 for the spring-run chinook salmon; in 2000 for coho salmon throughout its range in California; in 2002 for the Xantus's murrelet; in 2008 for the longfin smelt; in 2009 for the California tiger salamander; in 2009 for the Pacific fisher; in 2010 for the mountain yellow-legged frog; and in 2011 for the black-backed woodpecker.

On December 11, 2013, the Commission considered the adoption of findings designating the Northern Spotted Owl as a candidate species under CESA. The Commission has prepared this Emergency Action Statement under the Administrative Procedure Act (APA) (Gov. Code, § 11340 et seq.) in connection with its subsequent adoption of Section 749.8 of Title 14 of the California Code of Regulations. The Commission's adoption of Section 749.8 as an emergency action under the APA is based, in part, on authority provided by FGC sections 240 and 2084. Pursuant to the latter section of the FGC, Section 749.8 will authorize incidental "take" of Northern Spotted Owl during candidacy, subject to certain terms and conditions prescribed by the Commission. (See generally Fish & G. Code, §§ 2080, 2084, 2085, and 86.)

As set forth below, the Commission designated Northern Spotted Owl as a candidate species under CESA and finds that adoption of Section 749.8 pursuant to FGC 240 and 2084 constitutes a necessary emergency action by the Commission under the APA. In the absence of this emergency regulation, individuals engaging in activities authorized pursuant to Section 749.8 would need to obtain an incidental take permit ("ITP") or other authorization from the Department on a project-by-project basis to avoid potential criminal liability for violating CESA. The issuance of individual ITPs authorizing incidental take is a complicated and lengthy process, and the Commission finds specifically that it is not feasible for the great majority of the regulated community to obtain, and the Department to issue, ITPs or other authorizations on a project-by-project basis for the numerous activities that would otherwise be prohibited during the candidacy period for Northern Spotted Owl. Without this emergency regulation, prospective permittees, many of whom already have the necessary entitlements to proceed with their approved projects, would be subject to CESA's take prohibition without, by any reasonable measure, an ability to obtain the necessary state authorization during the candidacy period. As a practical matter, activities

CalForests' Draft Proposed Emergency Statement

that result in the take, as defined by CESA, of Northern Spotted Owl would be prohibited, and could not be implemented pending final action by the Commission on the listing petition, an action whereby Northern Spotted Owl may or may not be listed as endangered or threatened under CESA. As a result, many projects that are planned or underway that provide great economic and other benefits to the permittees, their employees, their local communities, and the State of California would be postponed during the candidacy period or canceled entirely. The Commission finds this threatened result constitutes an emergency under the APA requiring immediate action, especially against the backdrop of the continuing serious economic challenges faced by the State of California.

II. BACKGROUND

In September 2012, the Commission received a petition to list the Northern Spotted Owl as a threatened or endangered species under CESA from the Environmental Protection Information Center ("EPIC"). At its March 2013 meeting, the Commission received the Department's report evaluating the petition, concluding that the petitioned action may be warranted. The Commission considered the petition at its April 2013 meeting, and decided to postpone action on the petition until its August meeting to allow further time to review the NSO data submitted by forest owners and forestry professionals. At its August 2013 meeting, the Commission considered the petition, the Department's evaluation report and recommendation, and other information presented to the Commission and determined by a 3-2 vote that sufficient information existed to indicate the petitioned action may be warranted. The Commission postponed the adoption of findings documenting its determination until a later date.

In advance of the Commission meetings of April and May 2013, Calforests submitted requests for adoption of a 2084 rule to authorize incidental take of Northern Spotted Owl during the candidacy period. The Commission rejected both of these requests as untimely until the Commission adopts findings advancing the Northern Spotted Owl to candidacy.

If at its December 11, 2013 meeting, the Commission adopts findings designating the Northern Spotted Owl a candidate species under CESA, CESA's prohibition on "take" of Northern Spotted Owl as a candidate species will be effective upon publication of the Commission's finding in the California Regulatory Notice Register, which would be expected on or about December 27, 2013. (See *Id.*, §§ 2080, 2085, and 86.) In the absence of the take authorization provided by Section 749.8, or as otherwise provided by the Department, take of Northern Spotted Owl will be prohibited by CESA at that time and unauthorized take will be subject to criminal liability and potential prosecution under state law.

III. FACTS CONSTITUTING THE NEED FOR EMERGENCY ACTION

The APA defines an "emergency" to mean "a situation that calls for immediate action to avoid serious harm to the public peace, health, safety, or general welfare." (§ 11342.545.) To make a finding of emergency, the agency must describe the specific facts supported by substantial evidence that demonstrate the existence of an emergency and the need for immediate adoption of the proposed regulation. (*Id.*, § 11346.1, subd. (b)(2).) Some of the factors an agency may consider in determining whether an emergency exists include: (1) the magnitude of the potential harm, (2) the existence of a crisis situation, (3) the immediacy of the need, i.e., whether there is a substantial likelihood that serious harm will be experienced unless immediate action is taken, and (4) whether the anticipation of harm has a basis firmer than simple speculation. The

CalForests' Draft Proposed Emergency Statement

Commission has considered all of these factors and the definition of an emergency provided in the APA, as well as pertinent authority in FGC section 240. Under this latter authority, notwithstanding any other provision of the FGC, the Commission may adopt an emergency regulation where doing so is necessary for the immediate preservation of the general welfare. The Commission finds that such necessity exists in the present case.

Section 749.8 authorizes incidental take of Northern Spotted Owl during candidacy for four categories of activities:

- In connection with otherwise lawful timber harvest activities and operations authorized by the Z'Berg Nejedly Forest Practice Act (Pub. Resources Code, § 4511 et seq.), the Forest Practice Rules of the Board of Forestry, which are found in Chapters 4, 4.5, and 10, of Title 14 of the California Code of Regulations, or other applicable law.
- In connection with vegetation management activities necessary to prevent or reduce, or respond to wildland fire;
- In connection with response to and suppression of wildland fire; and
- In connection with management, monitoring, and research activities.

The Commission finds as set forth below that an emergency exists with respect to each of these covered activities.

A. Otherwise Lawful Timber Harvest Operations

Section 749.8, subdivision (a)(1), authorizes incidental take of Northern Spotted Owl incidental to otherwise lawful timber harvest activities. As explained below, the Commission finds that the designation of Northern Spotted Owl as a candidate species under CESA, and the related take prohibition, constitutes an emergency under the APA with respect to otherwise lawful timber harvest activities and operations. The Commission also finds that immediate emergency action to adopt Section 749.8, subdivision (a)(1), is necessary to preserve the general welfare, as authorized by Fish and Game Code section 240.

In general, timber harvest review in California is administered by the California Department of Forestry and Fire Protection ("CalFire") pursuant to the Z'Berg Nejedly Forest Practice Act (Pub. Resources Code, § 4511 et seq.), the Forest Practice Rules (Cal. Code Regs., tit. 14, § 895 et seq.), and other applicable law, including the California Environmental Quality Act ("CEQA") (Pub. Resources Code, § 21000 et seq.). In the absence of Section 749.8, subdivision (a)(1), many existing, already-approved otherwise lawful timber harvest operations in Northern Spotted Owl range could not move forward absent additional review and re-approval. Likewise, without Section 749.8, many already-approved, otherwise lawful timber harvest operations and activities would require a project-specific authorization under CESA from the Department. Yet, many otherwise lawful existing timber operations that are about to commence or are already underway currently include measures that will reduce the prospect of adverse impacts to, and minimize and mitigate take of, Northern Spotted Owl. Re-opening and re-negotiating these agreements to address the Northern Spotted Owl's legal status as a candidate species and, where necessary, to obtain an ITP (FGC section 2081(b)) or other take authorization under CESA (FGC section 2080.1 or 2835) would unnecessarily delay these already-approved and otherwise lawful timber operations, resulting in undue burden on the

CalForests' Draft Proposed Emergency Statement

THP holder. Without this emergency regulation, many routine and ongoing otherwise lawful timber operations on land already managed for timber harvest would be delayed while awaiting the necessary State CESA authorization or cancelled entirely. In many cases, the delays would cause THP holders to substantially delay or cancel their projects entirely, resulting in great social and economic harm to the THP holders, their employees, registered professional foresters, the local communities that rely on timber harvest activities, and the State of California.

CalFire review of existing otherwise lawful timber operations, along with project-specific CESA permitting by the Department, would also pose a significant burden to these state agencies. Both CalFire and the Department would likely face a sudden and potentially large increase in requests for timber harvest review and related no-take determinations and take authorizations under CESA. Neither agency is equipped with appropriate resources to handle and address the likely workload associated with this scenario, creating a significant permitting backlog. When, in late 2012, the Pacific fisher reverted to candidate status and it was no longer possible to have a 2084 rule for incidental take of the species, CalFire delayed processing THPs in the range of the Pacific fisher for many months because regulatory uncertainty.

The Commission believes that risk of take of Northern Spotted Owl incidental to otherwise lawful timber harvest operations is very low. The Commission recognizes that the Northern Spotted Owl has been listed under the federal Endangered Species Act ("FESA") since 1990, and that the California Board of Forestry has devised a robust and detailed regulatory program to avoid take under FESA. The difference between the FESA and CESA definitions of "take" -- FESA's definition of "take" includes habitat modification, while CESA's definition of "take" does not -- supports the Commission's conclusion that the risk of take of Northern Spotted Owl incidental to otherwise lawful timber harvest operations is very low. This conclusion is also supported by the fact that Habitat Conservation Plans for Northern Spotted Owl issued to timberland owners in California do not authorize the direct take prohibited by CESA, but rather take through the habitat modification prohibited by FESA's take definition. In addition to the very low risk of CESA take of Northern Spotted Owl from otherwise lawful timber harvest operations, if such take were to occur it would be very unlikely to have a significant impact on the Northern Spotted Owl population in California. The Commission is well aware of the health of the Northern Spotted Owl population in California relative to that in Washington and Oregon. The Forest Practice Rules comprising the Board of Forestry's "NSO Program," administered by CalFire, the Department, and the U.S. Fish and Wildlife Service working cooperatively, are set forth in **Exhibit A** attached hereto.

B. Vegetation Management, Wildland Fire Suppression and Response

Section 749.8, subdivision (a)(2) and (3), authorizes take of Northern Spotted Owl incidental to otherwise lawful vegetation management to prevent or reduce wildfires, and wildland fire suppression and response activities. As explained below, the Commission finds that the designation of Northern Spotted Owl as a candidate species under CESA, and the related take prohibition, constitutes an emergency under the APA with respect to vegetation management to prevent or reduce wildfires, and wildland fire suppression and response activities. The Commission also finds that immediate emergency action to adopt Section 749.5, subdivision (a)(2), is necessary to preserve the general welfare, as authorized by Fish and Game Code section 240.

In the absence of Section 749.8, subdivision (a)(2) and (3), take of Northern Spotted Owl

CalForests' Draft Proposed Emergency Statement

incidental to otherwise lawful vegetation management to prevent or reduce wildfires, and wildland fire suppression and response activities, would require authorization by the Department through an individual ITP and, as previously stated, doing so is a lengthy and complicated process. (There are other means by which take can be authorized under CESA, however they either take longer than individual ITPs or are not likely to be available for use for vegetation management, wildland fire suppression and response activities.) It is important to note that unlike many other regulatory statutes, CESA does not contain an exemption from the permitting requirements or the take prohibition for emergency situations like fuel (vegetation) control, wildfire suppression and response.

California's fire seasons have recently involved far-ranging catastrophic wildland fires. The role of the emergency regulation in allowing activities related to fire-related vegetation management, fire suppression and response to continue falls squarely within virtually any statutory definition of "emergency," including one of the most narrow--CEQA's definition of an emergency that states it is an activity "involving a clear and imminent danger, demanding immediate action to prevent or mitigate loss of, or damage to, life, health, property, or essential public services." (Pub. Resources Code, § 21080; see also CEQA Guidelines, § 15359.)

According to CalFire's website, creating a "defensible space" by controlling vegetation within 100 feet of dwellings and other buildings "dramatically increases the chance of your house surviving a wildfire" and "provides for firefighter safety" when fighting a fire. It is precisely these vegetation control activities that are authorized under the emergency regulation without the need for additional take authorization. The emergency regulation also removes impediments to critical wildland fire suppression and response. Delays due to permitting would cause risks to public safety, should fire suppression activities be delayed or cancelled entirely. In addition, there would be grave social and economic harm to the employees and agencies tasked with carrying out the fire suppression activities and the local communities where those activities might be critically needed.

Adoption of this emergency regulation would minimize these hardships while providing safeguards to protect the Northern Spotted Owl, including continued regulatory oversight by CalFire and the Department pursuant to the Forest Practice Act and Forest Practice Rules, CEQA, and other applicable laws. Therefore, the Commission finds that impacts to vegetation management for wildfire prevention, and wildland fire suppression and response activities, caused by designating the Northern Spotted Owl as a candidate species, constitute an emergency under the APA requiring immediate action.

At the same time, the Commission believes that such activities are unlikely to have a significant impact on the Northern Spotted Owl population in California because they occur predominately outside of the breeding season and, therefore, enabling the birds to relocate from areas where such activities are conducted.

C. Management, Research, and Monitoring

Subdivision (a)(4) of the emergency regulation would authorize take of Northern Spotted Owl incidental to otherwise lawful management, monitoring, and research activities. As explained below, the Commission finds that the designation of Northern Spotted Owl as a candidate species under CESA, and the related take prohibition, constitutes an emergency under the APA with respect to management, research and monitoring. The Commission also finds that immediate emergency action to adopt Section 749.8, subdivision (a)(4), is necessary to

CalForests' Draft Proposed Emergency Statement

preserve the general welfare, as authorized by Fish and Game code section 240.

In the absence of the emergency regulation, take of Northern Spotted Owl incidental to management, monitoring, and research activities would require authorization by the Department through an individual ITP which is a lengthy, complicated process. (See previous discussion on CESA's other forms of take authorization and why they are not likely to authorize these activities to continue during the candidacy period.) For some of the activities authorized by this subdivision, there is one other unique form of take authorization available, FGC section 2081(a). Because this form of take authorization still requires "permits or memorandums of understanding (to) authorize individuals ...and scientific or educational institutions" to take, it is unlikely that permits under this section could be issued much more quickly than the standard ITP; and, even if less time would be required for such permits to issue, the Northern Spotted Owl survey season starts shortly, running from March 15 to August 31. Moreover, and in any event, it is uncertain what Northern Spotted Owl survey activities posing risk of take could be authorized under these "scientific collecting" permits. For example, banding currently requires such permits (as well as a "recovery permit" from the U.S. Fish and Wildlife Service authorizing take under FESA), but would calling, which poses a risk of attack on a Northern Spotted Owl by other, larger and/or more aggressive owl species, be authorized by a 2081(a) permit?

Northern Spotted Owl surveys are carried out for discrete timber operations, as well as for long-term, property-wide monitoring and research. For timber operations pursuant to the Forest Practice Act and Forest Practice Rules, current survey protocol requires two years of survey prior to operations and continuing surveys during operations if the plan extends beyond one year into the next breeding season. This survey information is needed to implement take avoidance measures during timber operations, as required by the Forest Practice Rules. In addition, if timberland owners are unable to collect such data, their lands risk being "locked down" by assumptions of Northern Spotted Owl presence, regardless of what the on-the-ground reality is: this "lock down" effect could be rolling and cumulative, eventually taking a ballooning number of productive timber tracts off line. Although the methodological baseline for surveys has long been set by the U.S. Fish and Wildlife Service through periodically updated protocols, that agency has approved a number of HCPs for Northern Spotted Owls on California timberlands that impose additional requirements for surveys, monitoring and research.

Northern Spotted Owl management, research and monitoring are critical during this candidacy period. During this period, the Department is expected to prepare a status review for the species so the Commission can determine if the species should in fact be listed. During this candidacy period, the Department needs all of the scientific information that is available to make the most scientifically sound recommendation to the Commission, so the Commission can make the most scientifically sound decision. Ongoing Northern Spotted Owl studies, which are occurring throughout the species' range, must continue to ensure a complete data set. In addition, new studies during this period that might be proposed should also be facilitated without delay to fill in any data gaps.

Adoption of this emergency regulation would minimize the hardships that would be caused by delays in ongoing or new management, research and monitoring while providing safeguards to protect the Northern Spotted Owl, including continued regulatory oversight by CalFire and the Department pursuant to the Forest Practice Act and Forest Practice Rules, CEQA, and other applicable laws, and by the U.S. Fish and Wildlife Service. Therefore, the Commission finds that impacts to management, research and monitoring activities, caused

CalForests' Draft Proposed Emergency Statement

by designating the Northern Spotted Owl as a candidate species, constitute an emergency under the APA requiring immediate action.

D. Application of the California Environmental Quality Act

Subdivision (b) of the emergency regulation is different from the previous sections described herein. It is not an additional activity for which take is authorized under the regulation. Subdivision (b) is guidance from the Fish and Game Commission, the entity with responsibility for designating the status of a species under CESA, to other CEQA lead agencies that are reviewing projects that could impact Northern Spotted Owl. This guidance is designed to assist lead agencies in their CEQA review by setting out the Commission's expectations as to how this species should be treated under CEQA. This CEQA review may be ongoing or may arise during the candidacy period. The Commission believes that this information is needed as soon as the candidacy period begins so lead agencies will know what measures, if any, are needed to protect the species.

E. Reporting

As discussed in C. above, it is vital that during this candidacy period detections and observations of Northern Spotted Owl be reported to the Department so it can have the most complete information possible as it prepares its recommendation to the Commission on whether to recommend listing the species, and for the Commission that must make the ultimate decision to list or not.

For these reasons, the immediate adoption of this emergency regulation is necessary to allow numerous projects and activities to continue during the candidacy review period for Northern Spotted Owl under CESA. This regulation includes conditions designed to protect the species for all of the activities covered. The Commission believes the activities permitted under this regulation will result in very limited take and will not likely jeopardize the continued existence of the species. The Commission finds, in this respect, that the regulation subject to this determination will ensure appropriate interim protections for Northern Spotted Owl while the Department conducts a 12-month review of the status of the candidate species and the Commission makes its final determination regarding listing under CESA.

IV. EXPRESS FINDING OF EMERGENCY

Pursuant to the authority vested in the Commission by FGC Section 240, and for the reasons set forth above, the Commission expressly finds that the adoption of this regulation is necessary for the immediate preservation of the general welfare. The Commission specifically finds that the adoption of this regulation will allow activities that may affect Northern Spotted Owl to continue during the candidacy period as long as those activities are conducted in a manner consistent with the protections specified in this regulation.

V. AUTHORITY AND REFERENCE CITATIONS

Authority: FGC Sections 200, 202, 240, and 2084.

Reference: FGC Sections 200, 202, 240, 2080, 2084, and 2085.

CalForests' Draft Proposed Emergency Statement

VI. INFORMATIVE DIGEST

The sections below describe laws relating to listing species under CESA, the effect of this emergency regulation, a description of related federal law, and a policy statement overview.

A. Laws Related to the Emergency Regulation - Listing under CESA

1. Petition and Acceptance

FGS section 2070 requires the Commission to establish a list of endangered species and a list of threatened species. Any interested person may petition the Commission to add a species to the endangered or threatened list by following the requirements in FGC sections 2072 and 2072.3. If a petition is not factually incomplete and is on the appropriate form, it is forwarded to the Department for evaluation.

FGC Section 2073.5 sets out the process for accepting for further consideration or rejecting a petition to list a species and, if the petition is accepted, a process for actually determining whether listing of the species as threatened or endangered is ultimately warranted. The first step toward petition acceptance involves a 90-day review of the petition by the Department to determine whether the petition contains sufficient information to indicate that the petitioned action may be warranted. The Department prepares a report to the Commission that recommends rejection or acceptance of the petition based on its evaluation.

FGC Section 2074.2 provides that, if the Commission finds that the petition provides sufficient information to indicate that the petitioned action may be warranted, the petition is accepted for consideration and the species that is the subject of the petition becomes a "candidate species" under CESA. CESA prohibits unauthorized take of a candidate species. FGC Section 86 states "take" means to hunt, pursue, catch, capture, or kill, or attempt to hunt, pursue, catch, capture, or kill. Killing of a candidate, threatened, or endangered species under CESA that is incidental to an otherwise lawful activity and not the primary purpose of the activity constitutes take under state law. (Department of Fish and Game v. Anderson-Cottonwood Irrigation District(1992) 8 Cal.App.4th 1554; see also Environmental Protection and Information Center v. California Dept. of Forestry and Fire Protection (2008) 44 Cal.4th 459, 507 (in the context of an ITP issued by the Department under CESA the California Supreme Court stated, "'take' in this context means to catch, capture or kill".))

CESA's take prohibition applies to candidate species pursuant to FGC Section 2085 upon public notice by the Commission of its finding that sufficient information exists to indicate the petitioned action may be warranted. Upon publication of such notice in the California Regulatory Notice Register, take of candidate species is prohibited absent authorization as provided in the FGC. Following such notice, all activities, whether new or ongoing, that cause incidental take of the candidate species are in violation of CESA unless the take is authorized in regulations adopted by the Commission pursuant to FGC section 2084 or the Department authorizes the take through the issuance of an ITP or other means available under CESA.

2. Status Review and Final Action on the Petition

The Commission's acceptance of a petition initiates a 12-month review of the species' status by the Department, pursuant to FGC Section 2074.6. This status review helps to determine whether the species should be listed as threatened or endangered. Unlike the Department's initial evaluation, which focuses largely on the sufficiency of information submitted in the

CalForests' Draft Proposed Emergency Statement

petition, the 12-month status review involves a broader inquiry into and evaluation of available information from other sources. The Commission is required to solicit data and comments on the proposed listing soon after the petition is accepted, and the Department's written status report must be based upon the best scientific information available.

Within 12 months of the petition's acceptance, the Department must provide the Commission a written report that indicates whether the petitioned action is warranted. (Fish & G. Code, § 2074.) The Commission must schedule the petition for final consideration at its next available meeting after receiving the Department's report. (Id., § 2075.) In its final action on the petition, the Commission is required to decide whether listing the species as threatened or endangered "is warranted" or "is not warranted." If listing is not warranted in the Commission's judgment, take of the former candidate species is no longer prohibited under CESA. (Id., § 2075.5.)

B. Effect of the Emergency Action

Section 749.8 of Title 14 of the California Code of Regulations would authorize and provide for take of Northern Spotted Owl during its candidacy subject to the following terms and conditions:

1. Take Authorization.

The Commission authorizes the take of Northern Spotted Owl during the candidacy period subject to the terms and condition herein.

a. Forest Practices and Timber Harvest.

Incidental take of Northern Spotted Owl is authorized for otherwise lawful timber operations. For purposes of this authorization, an otherwise lawful timber operation shall mean a timber operation authorized or otherwise permitted by the Z'Berg Nejedly Forest Practice Act (Pub. Resources Code Section 4511 et seq.), the Forest Practice Rules of the Board of Forestry, which are found in Chapters 4, 4.5, and 10 of Title 14 of the California Code of Regulations, or other applicable law. The Z'Berg Nejedly Forest Practice Act and Forest Practice Rules can be found at the following website: http://www.fire.ca.gov/resource_mgt/downloads/2013_FP_Rulebook_with_Tech_RuleNo1.pdf.

b. Vegetation Management to Prevent or Reduce Wildland Fire.

Incidental take of Northern Spotted Owl is authorized for otherwise lawful vegetation or fuels management activities necessary to reduce hazardous fuels and prevent or reduce the risk of catastrophic wildland fires. For purposes of this authorization, an otherwise lawful vegetation or fuels management activity shall mean an activity to reduce hazardous fuels and prevent or reduce the risk of catastrophic wildland fires authorized or otherwise permitted by the Z'Berg Nejedly Forest Practice Act (Pub. Resources Code Section 4511 et seq.), the Forest Practice Rules of the Board of Forestry, which are found in Chapters 4, 4.5, and 10 of Title 14 of the California Code of Regulations, or other applicable law.

c. Wildland Fire and Fire Response.

Take of Northern Spotted Owl incidental to otherwise lawful wildland fire response and suppression activities is authorized.

CalForests' Draft Proposed Emergency Statement

d. Management, Monitoring, and Research Activities.

Incidental take of Northern Spotted Owl is authorized relative to survey, monitoring, and research activities approved or supported by the U.S. Fish and Wildlife Service or the Department.

e. Application of the California Environmental Quality Act.

Consistent with the California Environmental Quality Act (Division 13 (commencing with Section 21000) of the Public Resources Code), if a state or local agency determines that an activity identified in subdivision (a) will result in a significant impact on Northern Spotted Owl, the agency should not approve the activity as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant impact on Northern Spotted Owl (See Pub. Resources Code Section 21002). Measures or project changes required as part of a state or local agency authorization to address significant impacts on Northern Spotted Owl may include measures to conserve the species, including avoidance or preservation of habitat attributes relied on by the species. Voluntary measures to aid in the conservation of Northern Spotted Owl shall also be encouraged.

f. Reporting.

Any person, individual, organization, or public agency for which incidental take of Northern Spotted Owl is authorized pursuant to subdivision (a), shall report observations and detections of Northern Spotted Owl, including take, to the Department of Fish and Wildlife on a semi-annual basis during the candidacy period. Observations, detections, and take of Northern Spotted Owl pursuant to this subdivision for the previous six months shall be reported by the first day of March and the first day of September, respectively, during the candidacy period for Northern Spotted Owl. Observations, detections, and take shall be reported pursuant to this subdivision to the Department of Fish and Wildlife, Wildlife Branch, Attn: NSO Observations, 1812 Ninth St., Sacramento, CA 95814, or by email submission to owlobs@wildlife.ca.gov. Information reported to the Department pursuant to this subdivision shall include as available: a contact name; the date and location (GPS coordinate preferred) of the observation, detection, or take; and details regarding the animal(s) observed.

g. Additions, Modification or Revocation.

(1) Incidental take of Northern Spotted Owl from activities not addressed in this section may be authorized during the candidacy period by the Commission pursuant to Fish and Game Code Section 2084, or by the Department on a case-by- case basis pursuant to Fish and Game Code Sections 2080.1 or 2081, or other authority provided by law.

(2) The Commission may modify or repeal this regulation in whole or in part, pursuant to law, if it determines that any activity or project may cause jeopardy to the continued existence of Northern Spotted Owl.

C. Existing, Comparable Federal Regulations or Statutes

The Federal Endangered Species Act (FESA)(16 U.S.C. § 1531 et seq.) includes a listing process that is comparable to the listing process under CESA, except that take of a candidate species is not prohibited under FESA. The Northern Spotted Owl has been listed as threatened under FESA since 1990 and, since that time, has been subject to numerous

CalForests' Draft Proposed Emergency Statement

comprehensive conservation regulatory and comprehensive planning efforts on public and private lands in California, Oregon and Washington, including the Northwest Forest Plan and multiple Recovery Plans, as well as 815,000 acres of private timberlands in California under HCPs and other related State documents and programs.

D. Policy Statement Overview

The objective of this emergency regulation is to allow specified activities to continue on an interim basis, subject to the measures in the regulation designed to protect Northern Spotted Owl, pending final action by the Commission under CESA related to the proposed listing. The Department's evaluation of the species during the candidacy period will result in the status report described in Section VI.A.2 above. The status report provides the basis for the Department's recommendation to the Commission before the Commission takes final action on the petition and decides whether the petitioned action is or is not warranted.

VII. SPECIFIC AGENCY STATUTORY REQUIREMENTS

The Commission has complied with the special statutory requirements governing the adoption of emergency regulations pursuant to FGC section 240. The Commission held a public hearing on this regulation on April 8, 2009, and the above finding that this regulation is necessary for the immediate preservation of the general welfare meets the requirements of section 240.

VIII. IMPACT OF REGULATORY ACTION

The potential for significant statewide adverse economic impacts that might result from the emergency regulatory action has been assessed, and the following determinations relative to the required statutory categories have been made:

A. Costs/Savings in Federal Funding to the State:

The Commission has determined that the adoption of Section 749.8 of Title 14 of the California Code of Regulations as an emergency regulation pursuant to FGC Section 2084 will not result in costs or savings in federal funding to the State.

B. Nondiscretionary Costs/Savings to Local Agencies:

The Commission has determined that adoption of Section 749.8 of Title 14 of the California Code of Regulations as an emergency regulation pursuant to FGC section 2084 will likely provide cost savings to local agencies in an undetermined amount. In the absence of the emergency regulation, the Department would have to authorize take of Northern Spotted Owl on a project-by-project basis, which is both time-consuming and costly to local agencies seeking take authorization. Without this emergency regulation, many routine and ongoing otherwise lawful timber operations on land already managed for timber harvest would be delayed or cancelled entirely, as would vegetation management, wildfire suppression and response, and research and monitoring while awaiting the necessary CESA authorization. These delays and cancellations would cause great economic harm to persons already lawfully engaged in such activities, their employees, their local communities, and the State of California.

CalForests' Draft Proposed Emergency Statement

C. Programs Mandated on Local Agencies or School Districts:

The Commission has determined that the adoption of Section 749.8 of Title 14 of the California Code of Regulations as an emergency regulation does not impose a mandate on local agencies or school districts.

(a) Costs Imposed on Any Local Agency or School District that is Required to be Reimbursed Under Part 7 (commencing with Section 17500) of Division 4; and

(b) Effect on Housing Costs:

The Commission has determined that the adoption of Section 749.8 of Title 14 of the California Code of Regulations as an emergency regulation will not result in any cost to any local agency or school district for which Government Code sections 17500 through 17630 require reimbursement and will not affect housing costs.

D. Costs or Savings to State Agencies:

The Commission has determined that adoption of Section 749.8 of Title 14 of the California Code of Regulations as an emergency regulation pursuant to FGC section 2084 will likely provide cost savings to state agencies in an undetermined amount. In the absence of the emergency regulation, the Department would have to authorize take of Northern Spotted Owl on a project-by-project basis, which is both time-consuming and costly for both the Department in processing and authorizing such take, as well as to state agencies seeking take authorization.

Additionally, reopening existing THPs, in addition to participating in review and issuance of new THPs in Northern Spotted Owl range, would pose a significant burden on CalFire as well as the Department. Without this emergency regulation, many routine and ongoing otherwise lawful timber operations on land already managed for timber harvest would be delayed or cancelled entirely while awaiting the necessary State CESA authorization. These delays and cancellations would cause great economic harm to persons already lawfully engaged in such activities, their employees, their local communities, and the State of California.

CalForests' Draft Proposed Emergency Statement

EXHIBIT A

895.1. Definitions

The definitions contained in the Z'berg-Nejedly Forest Practice Act of 1973 as amended (commencing with PRC § 4511) shall apply to this chapter, as well as the following definitions, unless the context clearly requires otherwise.

Activity Center means a known northern spotted owl site documented from detections, pursuant to the USFWS document "Protocol For Surveying Proposed Management Activities That May Impact Northern Spotted Owls" revised March 17, 1992.

(a) An activity center is established by:

(1) Resident Single Status is established by:

(A) The presence or response of a single owl within the same general area on three or more occasions within a breeding season, with no response by an owl of the opposite sex after a complete survey;

(B) Multiple responses over several years (i.e., two responses in year one and one response in year 2, from the same general area).

(2) Pair Status Unknown is where the presence or response of two birds of the opposite sex is detected but pair status cannot be determined and where at least one member must meet the resident single requirements.

(3) Pair Status wherein a male and female are heard and/or observed (either initially or through their movement) in proximity (less than one-quarter mile apart) to each other on the same visit; or a male takes a mouse to a female; or a female is detected on the nest; or one or both adults are observed with young.

(4) Unoccupied Status 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.

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.

Functional Foraging Habitat is dependent upon the presence and availability of prey on the forest floor or in the canopy; presence of accessible perching limbs; and adjacency to stands with canopy closures >40%. Average stem diameter is usually >6" D.B.H. for hardwoods and >11" D.B.H. for conifers among dominants, and codominants, and the total overhead canopy closure, including intermediate trees is at least 40%. Where overall canopy closure is >80%, foraging habitat is limited to areas with ample flight space below limbs and among stems. Foraging habitat in smaller size classes and lower percentage canopy closures must be justified by local information.

Functional Nesting Habitat means habitat with a dominant and codominant tree canopy closure of at least 40% and a total canopy (including dominant, codominant, and intermediates) of at least 60%. Usually the stand is distinctly multi-layered with an average stem diameter in dominant, and codominant conifers, and hardwoods >11" D.B.H. The stand usually consists of

CalForests' Draft Proposed Emergency Statement

several tree species (including hardwoods) of mixed sizes. All nests, snags, down logs, and decadent trees shall also be considered as part of the habitat. Nesting substrates are provided by broken tops, cavities, or platforms such as those created by a hawk or squirrel nest, mistletoe broom, or accumulated debris. Owls are known to occasionally nest in less than optimal habitat. Nesting areas may also be associated with characteristics of topographic relief and aspect which alter microclimates.

Functional Roosting Habitat during the territorial breeding season, consists of stands where average stem diameter is >11" D.B.H. among dominant and codominant trees. Hardwood and conifers provide an average of at least 40% canopy closure but the stand can have a high degree of variability. Stand size and configuration must be sufficient to provide multiple perch sites which are suitable for protection from various environmental conditions, including wind, heat, and precipitation.

Harm means an act where it actually kills or injures a federally listed wildlife species. Such acts may include a significant habitat modification or degradation which actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.

Harass means an intentional or negligent act or omission which creates the likelihood of injury to a federally listed wildlife species by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding or sheltering.

Northern Spotted Owl Breeding Season means the period February 1 through July 31 for the Coast Forest District and February 1 through August 31 for the Northern Forest District.

Northern Spotted Owl Evaluation Area means the following counties: Marin, Napa, Del Norte, Mendocino, Colusa, Tehama (west of Interstate-5), Sonoma, Humboldt, Lake, Trinity, and Glenn (west of Interstate-5) and those portions of Siskiyou and Shasta counties west of the line indicated by the following descriptions: south from the California-Oregon border along the east boundary of Township 48N, Range 2W, MDB&M; thence west along the south boundary of Township 48N, Range 2W, MDB&M; thence south along Secret Spring Road; thence south and east along Meiss Lake Sams Neck Road; thence southwest along U.S. Highway 97; thence, at the southern end of the town of Macdoel, south along Old State Highway to due east of Orr Mountain; thence east and south along Tennant Road to about one half mile south of the town of Tennant; thence east along Forest Highway 77 (44N01) to its junction with Forest Highway 15; thence east along 44N01; thence south along the line dividing Ranges 4E and 5E, MDB&M; thence west along the line dividing Townships 42N and 41N, MDB&M; thence south along the line dividing Ranges 2E and 3E, MDB&M; thence south along State Highway 89; thence west along the Pit River to Shasta Lake; thence west along the south shore of Shasta Lake to Interstate 5; thence south along Interstate 5 to the Shasta County line.

Owl Habitat means Type A, B, or C owl habitat or those areas with functional foraging habitat, functional nesting habitat, and functional roosting habitat which support the owl's biological needs for breeding, sheltering, and feeding. An area of habitat could have characteristics which support all of the functional needs for nesting, roosting, and foraging or a combination of those functions. Because owls are known to occasionally inhabit less than optimal forest structure, local information can be used to justify the modification of functional habitat definitions.

CalForests' Draft Proposed Emergency Statement

Spotted Owl Expert means a person with at least a Bachelor of Science degree in Wildlife Biology, Biology, Forestry, Zoology or related field and 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 and present written information which substantiates why harm and harassment of the northern spotted owl associated with timber operations will be avoided. The individual shall be able to verify such experience, knowledge and education upon the Director's request. The Director shall refer all SOE qualifications received to the U.S. Fish and Wildlife Service and California Department of Fish and Game for evaluation of qualifications.

Spotted Owl Resource Plan means a plan that demonstrates an approach to preventing a taking of the northern spotted owl while conducting timber harvest operations. A Spotted Owl Resource Plan necessarily involves more than one timber harvest plan area.

Take for Federally Listed Species means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct as stated in 16 United States Code 1532(19).

Take for State Listed Species means to hunt, pursue, catch, capture, or kill, or attempting to do so, pursuant to Fish and Game Code Section 86.

Type A Owl Habitat means timber stands that have as a minimum the following characteristics for live-tree structure:

1. Canopy layers: The stand has two distinct tiers or is multi-layered with dominant conifers greater than 120 ft. tall (trees greater than 90 ft. tall on poor sites, less than site III, and for some montane tree species). Conifers or hardwoods dominate the canopy layers less than 120 ft. tall.

2. Canopy Closure: The canopy closure of conifers greater than 120 ft. tall (or greater than 90 ft. tall on poor sites, less than site III, and for some montane tree species) averages greater than 40% and not less than 20%. The total canopy closure for all trees, conifers or hardwoods, is greater than 60%.

3. Large Trees: The density of conifers greater than 35 in. d.b.h. averages more than nine stems per acre and not less than six stems per acre and includes a component of trees with sparse, broken, or dead tops.

4. Medium Trees: The density of conifers or hardwoods 18 to 35 in. d.b.h. averages more than 15 stems per acre and not less than 8 stems per acre.

5. Small Trees: The density of conifers or hardwoods less than 18 in. d.b.h. averages more than 50 stems per acre and not less than 20 stems per acre.

Type B Owl Habitat means timber stands that have as a minimum the following characteristics for live-tree structure:

1. Canopy Layers: Moderately to strongly two-tiered or multi-layered with dominant conifers greater than 100 ft. tall (greater than 70 ft. tall on poor sites, less than site III, and for some montane tree species). Conifers or hardwoods dominate the canopy layers less than 100 ft. tall.

2. Canopy Closure: The canopy closure of conifers greater than 100 ft. tall (or greater than 70 ft. tall on poor sites, less than site III, and for some montane tree species) averages greater than 40% and not less than 20%. The total closure for all trees, conifers or hardwoods, is greater than 60%.

3. Large Trees: The density of conifers greater than 35 in. d.b.h. averages more than six stems per acre and not less than two stems per acre.

CalForests' Draft Proposed Emergency Statement

4. Medium Trees: The density of conifers or hardwoods 18 to 35 in. d.b.h. averages more than 25 stems per acre and not less than 20 stems per acre.

5. Small Trees: The density of conifers or hardwoods less than 18 in. d.b.h. averages more than 50 stems per acre and not less than 20 stems per acre.

Type C Owl Habitat means timber stands that have as a minimum the following characteristics for live-tree structure:

1. Canopy Layers: Uniform to moderately layered with dominant conifers or hardwoods 50 to 100 ft. tall although low numbers of emergent trees greater than 100 ft. tall may be present.

2. Canopy Closure: The canopy closure of conifers or hardwoods 50 to 100 ft. tall averages greater than 40% and not less than 20%. The total canopy closure for all trees, conifers or hardwoods, is greater than 60%.

3. Large Trees: The density of conifers greater than 35 inches d.b.h. averages less than six stems per acre and may be absent.

4. Medium Trees: The density of conifers or hardwoods 18 to 35 in. d.b.h. averages more than 15 stems per acre, but may be absent.

5. Small Trees: The density of conifers or hardwoods less than 18 inches d.b.h. averages more than 160 stems per acre and not less than 50 stems per acre. The average d.b.h. for all trees in the stand, including small, medium, and large trees is greater than 10 inches.

898.1 Review of Plan by Director

The Director shall review plans to determine if they are in conformance with the provisions of PRC 4582.75 which requires that rules adopted by the Board shall be the only criteria employed by the Director in reviewing plans pursuant to PRC 4582.7.

(a) In reviewing plans, the Director shall apply all applicable rules promulgated by the Board.

(b) When in doubt as to the feasible alternative which best carries out the intent of the Act, the Director shall seek the advice of other state agencies charged with protecting the public interest in forest-related resources.

(c) In reviewing plans, the Director shall disapprove all plans which:

(1) Do not incorporate feasible silvicultural systems, operating methods and procedures that will substantially lessen significant adverse impacts on the environment.

(2) Would not meet the requirements of individual rules which provide a range of feasible alternatives through which to carry out the intent of the Act.

(3) Meet the special conditions for disapproval set by the Board in 14 CCR 898.2.

898.2 Special Conditions Requiring Disapproval of Plans

The Director shall disapprove a plan as not conforming to the rules of the Board if any one of the following conditions exist:

(d) Implementation of the plan as proposed would result in either a "taking" or finding of jeopardy of wildlife species listed as rare, threatened or endangered by the Fish and Game Commission, the National Marine Fisheries Service, or Fish and Wildlife Service, or would cause significant, long-term damage to listed species. The Director is not required to disapprove a plan which would result in a "taking" if

CalForests' Draft Proposed Emergency Statement

the "taking" is incidental and is authorized by a wildlife agency acting within its authority under state or federal endangered species acts....

(f) Implementation of the plan as proposed would result in the taking of an individual Northern Spotted Owl prohibited by the Federal Endangered Species Act.

919.9, 939.9 Northern Spotted Owl [Coast, Northern]

Every proposed timber harvesting plan, NTMP, conversion permit, Spotted Owl Resource Plan, or major amendment located in the Northern Spotted Owl Evaluation Area or within 1.3 miles of a known northern spotted owl activity center outside of the Northern Spotted Owl Evaluation Area shall follow one of the procedures required in subsections (a)-(g) below for the area within the THP boundary as shown on the THP map and also for adjacent areas as specified within this section. The submitter may choose any alternative (a)-(g) that meets the on-the-ground circumstances. The required information shall be used by the Director to evaluate whether or not the proposed activity would result in the "take" of an individual northern spotted owl.

When subparagraphs (a), (b), (c) or (f) are used, the Director, prior to approval of a THP, shall consult with an SOE and conduct an independent review. An SOE may aid the RPF in fulfilling the requirements within subdivision (g). The SOE may make written recommendations regarding whether the retained habitat configuration and protection measures proposed in the THP will prevent a take of the owl.

In consultation with the SOE, the Director may adjust standards established by this section based on site specific circumstances in a manner which is consistent with information collected on owl behavior in California, and the prohibitions of the Federal Endangered Species Act.

(a) If the project proponent requests preliminary review of the proposed operation or Spotted Owl Resource Plan prior to filing, the proponent shall consult with an SOE to evaluate whether the proposed operation would result in the taking of an individual northern spotted owl. This evaluation is preliminary to and separate from the final "take" determination to be made under 14 CCR § 919.10 [939.10]. In making that evaluation:

(1) The SOE shall apply the criteria set forth in 14 CCR § 919.10 [939.10].

(2) The SOE may request that the submitter provide additional information which the SOE finds necessary to evaluate if a "take" would occur, provided that the SOE states the type of information needed, the purpose of the information, and the level of accuracy necessary to meet the stated purpose.

(3) If the SOE concludes that no prohibited taking would occur, the SOE shall inform the submitter as soon as practicable and shall document the decision and the information which was relied upon by the SOE in the above evaluation. Reference data shall be readily available for the Director's review upon request;

(4) If the SOE concludes that the proposed timber operation or Spotted Owl Resource Plan would result in a taking, he or she shall inform the submitter as soon as practicable and shall comply with 14 CCR § 919.10(c) [939.10(c)] within 10 working days of making this determination.

(5) Requests for pre-filing consultation shall be handled in the order in which received.

(b) The RPF shall include the following information:

CalForests' Draft Proposed Emergency Statement

(1) On a planimetric or topographic map of a minimum scale of 1:24,000, provide the following:

(A) The location and acreage of owl habitat. This information shall be shown for the area within the boundary both as it exists before and after timber operations. The Director shall determine if timber typing maps may qualify as showing owl habitat.

(B) Identify any adjoining owl habitat by type within .7 miles of the boundary.

(C) When mapping functional owl nesting, roosting, and foraging habitat, include additional information which helps define those areas such as: location of topography features, riparian vegetation, hardwood component, water, potential nest and roost sites, and potential suitable forage areas.

(D) All known owl observations, identified by location and visual or nonvisual confirmation within 1.3 miles of the boundary. This information shall be derived from the landowners and RPF's personal knowledge, and from the Department of Fish and Game's spotted owl data base.

(2) Discussion on how functional characteristics of owl habitat will be protected in terms of the criteria stated within 14 CCR § 919.10 subsections (a) and (b) [939.10 subsections (a) and (b)].

(3) As adjacent landowners permit and from other available information, a discussion of adjacent owl habitat up to .7 mile from the proposed boundary and its importance relative to the owl habitat within the boundary.

(4) Describe any proposals for monitoring owls or owl habitat which are necessary to insure their protection. Monitoring is not required for approval.

(5) Discussion of any known owl surveys that have been conducted within 1.3 miles of the THP boundary. Include the dates, results and methodologies used if known.

(6) A proposed route that will acquaint the SOE and other reviewers with the important owl habitat.

(7) Attach aerial photos of the area, if available. (Aerial photos are not required.)

(c) Where certification is made by the RPF and adequate records are kept showing that owl surveys were conducted sufficient to demonstrate the absence of owls from an area, the THP will be reviewed on a high priority basis. The THP shall contain verification that:

(1) The surveys have been conducted throughout the area within .7 miles of the boundary in accordance with the USFWS approved protocol ("Protocol For Surveying Proposed Management Activities That May Impact Northern Spotted Owls"; USFWS; March 17, 1992).

(2) The surveys were conducted during the current or immediately preceding survey period as prescribed by the previously cited USFWS approved protocol.

(3) The surveys reveal no nest sites, activity centers or owl observations in the area surveyed; and

(4) The surveys reveal no activity center or repeated observations indicating the presence of mates and/or young within 1.3 miles of the boundary based on a review of the landowner's and RPF's personal knowledge and the Department of Fish and Game's spotted owl data base.

(d) If the plan submitter proposes to proceed under an "incidental taking" permit or any other permit covering the northern spotted owl issued by the U.S. Fish and Wildlife Service or the Department of Fish and Game, the submitter shall supply

CalForests' Draft Proposed Emergency Statement

a copy of the permit upon the Department's request.

(e) If the submitter proposes to proceed pursuant to the outcome of a discussion with the U.S. Fish and Wildlife Service, the submitter shall submit a letter prepared by the RPF that the described or proposed management prescription is acceptable to the USFWS.

(f) If:

(1) the submitter's proposed operations were reviewed by a SOE under 14 CCR § 919.9, subsection(a) [939.9, subsection(a)]; and

(2) the SOE recommended minimum modifications to the proposed operations which would be necessary to bring the impacts to a level at which no "take" would occur and the submitter has adopted those recommendations; and

(3) the proposed operations remain substantially the same as the operations which the SOE reviewed, the submitter shall provide a copy of the recommendations made by the SOE and the submitter shall explain how the proposed operations comply with those recommendations.

(g) Where an activity center has been located within the plan boundary or within 1.3 miles of that boundary, the RPF shall determine and document in the plan: (i) activity center-specific protection measures to be applied during timber operations and (ii) owl habitat, including habitat described in (1)-(5) below, that will be retained after the proposed operations are completed:

(1) Within 500 feet of the activity center the characteristics of functional nesting habitat must be maintained. No timber operations shall be conducted in this area during the northern spotted owl breeding season unless reviewed and approved by the Director as not constituting a take. Timber operations may be conducted in this area outside the breeding season if appropriate measures are adopted to protect nesting habitat.

(2) Within 500-1000 feet of the activity center, retain sufficient functional characteristics to support roosting and provide protection from predation and storms. No timber operations shall be conducted in this area during the breeding season unless reviewed and approved by the Director as not constituting a take.

(3) 500 acres of owl habitat must be provided within a .7 mile radius of the activity center, unless an alternative is reviewed and approved by the Director as not constituting a take. The 500 acres includes the habitat retained in subsections (1) and (2) above and should be as contiguous as possible. Less than 50% of the retained habitat should be under operation in any one year, unless reviewed and approved by the Director as not constituting a take.

(4) 1336 total acres of owl habitat must be provided within 1.3 miles of each activity center, unless an alternative is reviewed and approved by the Director as not constituting a take. The 1336 acres includes the habitat retained within subsections (1)-(3) above.

(5) The shape of the areas established pursuant to subsections (1) and (2) shall be adjusted to conform to natural landscape attributes such as draws and streamcourses while retaining the total area required within subsections (1) and (2) above.

§ 919.10 [939.10] Take of Northern Spotted Owl.

The Director shall apply the following criteria to the information provided by the plan submitter and obtained during the review period to make a finding as to whether the timber operations, as proposed, will "take" an individual northern spotted owl.

(a) The Director shall determine that the proposed habitat modification would

CalForests' Draft Proposed Emergency Statement

result in "harm" to an individual spotted owl 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.

(b) The Director shall determine that an individual northern spotted owl would be "harassed" by the proposed timber operations if there is a likelihood that any of the following conditions exist:

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

(2) Breeding success would be significantly disrupted;

(3) Nesting behavior would be significantly disrupted because activities would be conducted within 500 feet of a nest site; or

(4) Sheltering (which includes roosting, nesting, or feeding) would be significantly disrupted because the ability to escape predators, survive severe weather, find appropriate microclimes would be adversely altered.

(c) If the Director concludes that the proposed operations will result in a taking of the owl, he/she shall provide the plan submitter with the following information:

(1) The reasons for the determination, including an analysis of the factors set forth in this section;

(2) The information which was relied upon and which was instrumental in making the determination; and

(3) Recommendations for minimum modifications to the proposed operations which would be necessary to bring the impacts to a level at which "take" would not occur.