

Evaluation for “Take” Avoidance of the Northern Spotted Owl Questions and Answers

1-21-10

The California Department of Forestry and Fire Protection (CAL FIRE) has prepared the following question and answer document in an effort to answer questions about the recently adopted rule package, *Evaluation for “Take” Avoidance of the Northern Spotted Owl, 2009* (new NSO rules).

1. **Question:** When will the new NSO rules go into effect?

Answer: The new NSO rules went into effect January 1, 2010.

2. **Question:** How will the pending lawsuit affect implementation of the new NSO rules?

Answer: The rule is subject to pending litigation, which may enjoin, and therefore render inoperable, portions of 14 CCR §§ 895, 895.1, 919.9 [939.9] and 919.10 [939.10] covered by the Evaluation for “Take” Avoidance of the Northern Spotted Owl 2009 rule package. Until such time as the court acts on the filed petition, plan proponents should apply the new NSO rules to avoid take of the northern spotted owl (NSO). If the court issues a restraining order enjoining the new NSO rules, plan proponents should use the rules in effect before January 1, 2010. Both sets of rules have been incorporated into the 2010 Forest Practice Rulebook published by CAL FIRE and posted on the CAL FIRE webpage.

3. **Question:** How does a prospective spotted owl expert (SOE) submit his or her qualifications to CAL FIRE?

Answer: The following is a list of considerations when submitting SOE qualifications:

- CAL FIRE will request SOE qualifications when a plan is submitted unless a prospective SOE has pre-consulted with CAL FIRE and already provided written documentation for the review team or provided it to CAL FIRE in a previous plan.
- A prospective SOE will normally only have to submit his or her qualifications once if complete and accurate information is provided to CAL FIRE.
- Plan-preparing registered professional foresters (RPFs) may reference an SOE by name or may refer to a plan number in which the SOE’s qualifications are contained.
- CAL FIRE will maintain a list of SOEs and their qualifications on the web (ftp site or regular website) and a printed hardcopy list will be maintained at each of the review team offices (Santa Rosa and Redding).

4. **Question:** Can a prospective SOE become qualified prior to the submission of a plan?

Answer: CAL FIRE will allow prospective SOEs to pre-consult in order to ensure they meet the minimum qualifications and to avoid rejection after a plan submitter has invested significantly in their services.

5. **Question:** Who will determine if an SOE is qualified and when will this occur?

Answer: CAL FIRE, as lead agency in review of the timber harvesting plans, will ultimately determine whether an SOE is qualified. CAL FIRE will seek input from the U. S. Fish and Wildlife Service (USFWS) and the Department of Fish and Game (DFG), and also will consider other pertinent sources of information. CAL FIRE will determine whether the SOE is qualified during plan review or through pre-consultation.

6. **Question:** Will a documented history of successful completion of technical assistance (TA) with USFWS be sufficient to demonstrate five field seasons of verifiable NSO survey and biological evaluation work?

Answer: Yes, if a prospective SOE has five field seasons of documented history of successfully acquiring TA from USFWS and has met the other minimum qualifications listed in 14 CCR § 895.1, CAL FIRE will consider the SOE qualified.

7. **Question:** What if a prospective SOE does not have a history of successful completion of TA with USFWS?

Answer: If someone has less than five field seasons of acquiring TA from USFWS, has other NSO biological evaluation experience, and has met the other minimum qualifications listed in 14 CCR § 895.1, CAL FIRE may need to review the SOE's qualifications more closely. This may include seeking assistance from other responsible agency biologists or private biologists with NSO expertise.

8. **Question:** How will CAL FIRE address comments from DFG or USFWS on the prospective SOE's qualifications?

Answer: If there is any doubt about an individual's qualifications, CAL FIRE review team chairpersons will consult with DFG, USFWS, or CAL FIRE biologists. If DFG or USFWS indicate a prospective SOE is unqualified, then the agency will be asked to provide the justification in writing as to why the individual is not qualified. The Director's determination of an individual's qualifications as an SOE will be based upon information provided in the plan record or during the pre-consultation process.

9. **Question:** Will an SOE have to maintain his or her qualifications at some specified level?

Answer: No. The Board of Forestry and Fire Protection's (BOF's) rules do not include a continuing education requirement to demonstrate adequacy of SOE qualifications. However, if CAL FIRE receives information challenging an SOE's qualification at any time, CAL FIRE will review the information based on its substance and specificity and may require additional information from the plan submitter, RPF or SOE.

10. **Question:** What will CAL FIRE consider biological evaluation work, since five field seasons of such evaluation work are required to qualify as an SOE?

Answer: Biological evaluation work includes analyzing "data from field conditions and presenting written information that substantiates why harm and harassment of the northern spotted owl associated with timber operations will be avoided." See 14 CCR § 919.10 [939.10] for criteria that an SOE should be able to apply to field data in order to determine take avoidance. If the prospective SOE has not acquired a minimum of five seasons of biological evaluation work, then he or she is not qualified according to the BOF's rules. For example, one of CAL FIRE's biologists indicates that he has fourteen years of experience working with NSOs, but barely qualifies as a SOE because his experience in evaluating data from actual field conditions is limited.

11. **Question:** When will CAL FIRE consult with an SOE?

Answer: CAL FIRE is required to consult with an SOE when the plan proponent submits a plan under 14 CCR §§ 919.9(a), (b), (c) or (f) [939.9(a), (b), (c) or (f)]. All consultations must be documented in writing and included in the plan record. Communication by email is satisfactory.

12. **Question:** What needs to be documented regarding the consultation between CAL FIRE and the SOE?

Answer: 14 CCR § 919.9 [939.9] requires CAL FIRE to use the information provided in the plan, pursuant to subdivision (a), (b), (c), or (f) to evaluate whether or not take is avoided. 14 CCR § 919.10 [939.10] provides CAL FIRE with criteria to make a finding as to whether the timber operations, as proposed, will take an individual NSO. Thus, CAL FIRE's consultation with an SOE should substantiate how take will be avoided based on information contained in the plan, and the SOE should be able to demonstrate how each specific criteria set forth in 14 CCR § 919.10 [939.10] will be mitigated.

13. **Question:** How will the SOE interact with CAL FIRE or with the plan proponent in the case of 14 CCR § 919.9(g) [939.9(g)]?

Answer: The new rule says an SOE may aid the RPF in fulfilling the requirements within subdivision (g). This means the plan proponent's SOE may perform the take avoidance analysis required per option (g) and may provide the justification for those exceptions allowed in 14 CCR § 919.9(g)(1)-(4) [939.9(g)(1)-(4)]. Please note CAL

FIRE will carefully evaluate any such proposals and will require an SOE to review such exceptions.

14. **Question:** How will CAL FIRE treat the interaction between the SOE and the Director when adjusting protection and habitat retention standards in 14 CCR § 919.9 [939.9]?

Answer: 14 CCR § 919.9 [939.9] allows CAL FIRE to adjust the protection and habitat retention standards contained in the NSO rules section in consultation with the SOE. CAL FIRE may do this based on consultation with its own SOE, the plan proponent's SOE or by consulting with DFG or USFWS. All such consultations will need to be documented in writing and contained in the plan record.

15. **Question:** How will CAL FIRE treat use of the take avoidance option contained in 14 CCR § 919.9(a) [939.9(a)]?

Answer: This involves pre-submission evaluation of a plan or spotted owl resource plan (SORP) and requires the proponent to consult with an SOE. As per the rule, the private SOE's evaluation is preliminary to, and separate from, the final take avoidance determination to be made under 14 CCR § 919.10 [939.10]. This means that upon plan or SORP submission, CAL FIRE will make the final take avoidance determination under 14 CCR § 919.10 [939.10] based on the information contained in the plan and CAL FIRE SOE review, if necessary. CAL FIRE will request all information used by the plan proponent's SOE to make the preliminary take avoidance determination. **Please note that any take avoidance proposal that receives preliminary review per option (a) will be submitted to CAL FIRE in the plan per option (f).**

16. **Question:** How will CAL FIRE treat a SORP?

Answer: The RPF must amend the SORP to an approved plan (via substantial deviation) or submit the SORP as part of a new plan under review. CAL FIRE will review it as a part of a plan, and after approval, an RPF may make reference to the SORP in subsequent plans submitted to CAL FIRE. Each appropriate review team office will keep a reference copy of the SORP. While the SORP is under review, the plan submitter will be able to submit plans using other take avoidance options. The SORP is effective as long as timber operations are maintained consistent with the measures outlined therein and implementation of the measures contained in the SORP avoids take of the NSO. **Please note that a SORP that receives preliminary review per option (a) will be submitted to CAL FIRE per option (f).**

17. **Question:** What are the contents of a SORP?

Answer: 14 CCR § 895.1 defines a SORP as a plan that demonstrates an approach to preventing a taking of the NSO while conducting timber operations. The definition indicates a SORP necessarily involves more than one timber harvesting plan area. In

other words, a SORP is a programmatic method of avoiding take of the NSO, which likely applies property-wide (or at least to any area larger than a single plan). Non-industrial timber management plans (NTMPs) are not eligible for a SORP and are precluded from using this option. Since the basic manner by which one avoids take of the NSO is by determining its presence and then applying appropriate protection against harm and harassment associated with timber operations, a SORP should describe the program by which a timberland owner will do that. The SORP should describe:

- Methods for determining historic presence of the NSO. This is usually done through reliance on historic survey records and use of DFG's spotted owl database.
- Methods for determining current presence of the NSO. This is usually done through results of current breeding season's surveys.
- Appropriate measures to prevent harm of the NSO associated with timber operations. This should include descriptions of suitable nesting, roosting and foraging habitat and appropriate amounts to be retained post harvest around any activity center on, or within 1.3 miles of, the plan area.
- Appropriate measures to prevent harassment of the NSO associated with timber operations. This should include appropriate measures for any activity centers located on, or near to, the plan area, where timber operations may harass the NSO. This includes appropriate protection measures to be applied during, and outside of, the breeding season. It includes protection of the actual activity center location and protection of the NSO against disturbance associated with timber operations.
- Appropriate measures to address movement of activity centers, or newly discovered activity centers, including appropriate measures to prevent harm and harassment associated with timber operations.
- A description of the information that will be provided in the plan to show conformance with the SORP.
- A description of mitigation measures to be implemented on-the-ground to ensure conformance with the provisions contained in the SORP.

18. **Question:** Can a SORP be developed for a single NTMP?

Answer: No. Since 14 CCR § 895.1 stipulates that a SORP involves more than one timber harvesting plan area and 14 CCR § 1090 indicates where the term timber harvesting plan is used in Chapter 4, Subchapters 1 through 6 and Chapter 4.5 of the Forest Practice Rules, it shall also mean NTMP, a SORP cannot be developed for a single NTMP. However, programmatic measures that are developed to avoid take of NSO can be approved under an NTMP following one of the procedures listed under 14 CCR § 919.9(a)-(g) [939.9(a)-(g)].

19. **Question:** How will CAL FIRE treat use of the take avoidance option contained in 14 CCR § 919.9(b) [939.9(b)]?

Answer: The plan proponent will provide CAL FIRE with information outlined in the subdivision as part of the plan. CAL FIRE has to consult with its own SOE in order to do an independent review. CAL FIRE review team will evaluate if all required information is contained in the plan, and the CAL FIRE SOE will evaluate the proposal for take avoidance per 14 CCR § 919.10 [939.10]. A private SOE is not required for the use of this option.

20. **Question:** How will CAL FIRE treat use of the take avoidance option contained in 14 CCR § 919.9(c) [939.9(c)]?

Answer: Use of option (c) is similar to (b). The plan proponent will provide CAL FIRE with the information outlined in the subdivision as part of the plan. CAL FIRE has to consult with its own SOE in order to do an independent review. CAL FIRE review team will evaluate if all required information is contained in the plan, and the CAL FIRE SOE will evaluate the proposal for take avoidance per 14 CCR § 919.10 [939.10]. A private SOE is not required for the use of this option.

This option—where no owls are present on, or within 1.3 miles of, the plan area—is similar to using 14 CCR § 919.9(e) [939.9(e)] and USFWS programmatic No Take Scenario III. The difference is that using option (c) requires consultation with CAL FIRE’s SOE and USFWS programmatic No Take Scenario III does not.

21. **Question:** How will CAL FIRE treat use of the take avoidance option contained in 14 CCR § 919.9(d) [939.9(d)]?

Answer: Use of this option primarily involves habitat conservation plans or natural community conservation plans that address the NSO. However, it also pertains to use of any other permit covering the northern spotted owl issued by the USFWS or DFG. Use of this option will continue as it has prior to the adoption of the new NSO rules, except that it now covers permits issued by DFG.

22. **Question:** How will CAL FIRE treat use of the take avoidance option contained in 14 CCR § 919.9(e) [939.9(e)]?

Answer: Use of this option remains the same as it has been and will involve direct TA from USFWS, use of the programmatic USFWS no take and take avoidance scenarios, other discussion from USFWS (primarily email variances from the no take or take avoidance scenarios) and USFWS-approved spotted owl management plans.

23. **Question:** How will CAL FIRE treat use of the take avoidance option contained in 14 CCR § 919.9(f) [939.9(f)]?

Answer: This option applies to take avoidance proposals that received preliminary review by a plan proponent’s SOE under option (a). **All such proposals will be submitted with a plan per this option.** Upon plan or SORP submission, CAL FIRE will make the final take avoidance determination under 14 CCR § 919.10 [939.10]

based on the information contained in the plan and CAL FIRE SOE review, if necessary. CAL FIRE will request all information used by the SOE to make the take avoidance determination. In cases where a plan will tier to an already approved SORP, CAL FIRE will determine whether the protection measures and habitat retention measures contained in the plan conform to those contained in the SORP.

24. **Question:** How will CAL FIRE treat use of the take avoidance option contained in 14 CCR § 919.9(g) [939.9(g)]?

Answer: Use of this option will remain largely as it has been the past two years. Take avoidance proposals will have to meet or exceed the requirements of 14 CCR §§ 895.1 (habitat descriptions) and 919.9(g) [939.9(g)] (protection measures and post-harvest habitat retention levels around known activity centers) and include an analysis by a qualified person, which clearly and substantively demonstrates why the proposed, site-specific protection measures and level and configuration of post-harvest habitat retention will avoid take of the NSO. This analysis will need to address how the proposal will not significantly impair or disrupt feeding, breeding, nesting, and sheltering of the NSO (please see 14 CCR § 919.10 [939.10]), and may be performed by someone in direct employ of the timberland owner. An SOE is qualified to provide this information.

Please be aware that USFWS indicates the existing habitat guidelines contained in the Forest Practice Rules are not sufficient for avoiding take (USFWS 2009). Because of this, plans that will rely on the descriptions of suitable NSO habitat contained in 14 CCR § 895.1 and the habitat retention levels described in 14 CCR § 919.9(g)(3)-(4) [939.9(g)(3)-(4)] should review USFWS' basis for providing updated descriptions of suitable NSO habitat and address why use of different habitat parameters and retention levels than those recommended by USFWS should avoid take of the NSO associated with timber operations.

25. **Question:** How will CAL FIRE treat proposals to request exceptions to the requirements contained in 14 CCR § 919.9(g)(1)-(4) [939.9(g)(1)-(4)]?

Answer: New changes to this subdivision allow the plan proponent to propose exceptions to the requirements contained in the subdivision when reviewed and approved by CAL FIRE. Proposed exceptions may allow: (1) timber operations within 500 feet of the activity center during the breeding season; (2) timber operations within 500-1000 feet of the activity center during the breeding season; (3) timber operations in greater than 50% of the retained 500 acres of suitable habitat within 0.7 mile of an activity center in any one year; and (4) the retention of less than 1336 total acres of owl habitat within 1.3 miles of an activity center. As was stated above, the new rule says an SOE may aid the RPF in fulfilling the requirements within subdivision (g). This means the plan proponent's SOE may provide the justification for the exceptions allowed in 14 CCR § 919.9(g)(1)-(4) [939.9(1)-(4)]. However, note CAL FIRE will carefully scrutinize any such proposals and will require an SOE to review such exceptions.

26. **Question:** In using any of the take avoidance options, on what information will CAL FIRE ultimately base its decision?

Answer: Take avoidance strategies should be based on current, best available scientific information, and CAL FIRE will be review each to ensure consistency with current NSO take avoidance evaluation procedures:

- Historical NSO location information (DFG database reports and historic survey results).
- Current NSO location information (results of current breeding season's protocol surveys).
- Pre- and post-harvest habitat analysis around known NSO activity centers.
- Post-harvest retention of appropriate levels of suitable habitat for activity centers located on, or within 1.3 miles of, the plan area.
- Incorporation in the plan of appropriate protection for activity centers located on, or near to, the plan area.

Literature Cited

U. S. 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. Unpublished Report. Sacramento, CA. 77 p.