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**WESTERN ENVIRONMENTAL LAW CENTER**

May 18, 2023

*via U.S. Postal Service Certified Mail*

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**Re: Sierra Pacific Industries Incidental Take Permit, Habitat Conservation Plan, and Biological Opinion, FWS Ref. No. 08EYRE00-2020-F-0151.**

Dear Sirs and Madames,

We write on behalf of the Environmental Protection and Information Center (“EPIC”) to notify the U.S. Fish and Wildlife Service (“FWS”), pursuant to the citizen suit provision of the Endangered Species Act (“ESA”), that notifiers intend to sue FWS for violating and continuing to violate the ESA. FWS has violated the ESA by authorizing, approving, causing, or otherwise carrying out agency actions that jeopardize the continued existence of northern spotted owls in California, a species listed under the ESA as threatened with extinction. Among other things, FWS has approved a Habitat Conservation Plan (“HCP”) and issued an Incidental Take Permit (“ITP”) that authorize, approve, or acquiesce to the actions of Sierra Pacific Industries, whose activities in California cause or contribute to jeopardizing the northern spotted owl’s continued existence. Further, FWS has not obtained adequate assurances that Sierra Pacific Industries will minimize and mitigate the impacts of taking northern spotted owls to the maximum extent practicable. Finally, FWS has violated and is violating by proceeding with this action in reliance on its Biological Opinion (“BiOp”) that fails to adequately account for and analyze its effects.

This letter constitutes notice required by Section 11(g)(2)(A)(i) of the ESA, 16 U.S.C. § 1540(g)(2)(A)(i), prior to commencement of legal action. Unless FWS promptly remedies its past and continuing violations of the ESA, notifiers will file suit in federal court to seek appropriate relief.

## Background.

### I. The ESA.

The ESA is “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.” *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978). Under Section 7 of the ESA, federal agencies must consult with FWS to “insure that any action authorized, funded, or carried out by [the] agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species” of anadromous fish, “or result in the destruction or adverse modification of” such species’ critical habitat. 16 U.S.C. § 1536(a)(2). Where a federal action is likely to adversely affect a listed species or its critical habitat, the “consulting agency” must prepare a Biological Opinion (“BiOp”) that addresses the status of the species and analyzes whether the proposed action, along with direct, indirect, and cumulative effects, will jeopardize it. *Wild Fish Conservancy v. Salazar*, 628 F.3d 513, 518 (9th Cir. 2010) (citing 50 C.F.R. § 402.14(g)).<sup>1</sup>

“To ‘jeopardize the continued existence’ of a species is to ‘engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of the species.’” *Id.* (quoting 50 C.F.R. § 402.02). “[T]he jeopardy regulation requires [the consulting agency] to consider both recovery and survival impacts.” *Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Service*, 524 F.3d 917, 931 (9th Cir. 2008). “The goal of the ESA is not just to ensure survival, but to ensure that the species recovers to the point that it can be delisted. Survival and recovery are intertwined and are the complementary goals of the consultation process.” *Alaska v. Lubchenko*, 723 F.3d 1043, 1054 (9th Cir. 2013) (internal citation omitted). When an agency relies arbitrarily and capriciously on a flawed BiOp, it violates its substantive duty under the ESA to ensure that its actions are not likely to jeopardize a listed species or adversely modify its critical habitat. *Wild Fish Conservancy*, 628 F.3d at 532.

The ESA’s “core protection is [S]ection 9’s prohibition of ‘take’ of a protected species.” *S. Yuba River Citizens League v. Nat’l Marine Fisheries Service*, 629 F. Supp. 2d 1123, 1125 (E.D. Cal. 2009). Section 9 of the ESA provides that “it is unlawful for any person,” which includes “an individual, corporation, partnership . . . or any other private entity,” to “take” an endangered species. 16 U.S.C. § 1538(a)(1)(B). “Take” is defined to mean “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, collect, or attempt to engage in any such conduct.” 16 U.S.C. § 1532(19). Each of these types of “take” has independent meaning. *Sweet Home Chapter, Communities for Greater Or. v. Babbitt*, 515 U.S. 687, 697–98, 702 (1995). “Harm” is one form of “take,” and is defined as actions resulting in “significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.” 50 C.F.R. § 17.3.

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<sup>1</sup> An agency engaged in intra-agency consultation (i.e. where it is both the action and consulting agency), as FWS is here, has the same duty to avoid jeopardy. *Env’t Prot. Info. Ctr. v. Pacific Lumber Co.*, 67 F. Supp. 2d 1113, 1120–21 (N.D. Cal. 1999), *vacated in part on other grounds*, 257 F.3d 1071 (9th Cir. 2001).

If, during consultation under Section 7, FWS “concludes that an action will not jeopardize the existence of a listed species or adversely modify its habitat, but the project is likely to result in incidental taking of listed species, [it] must provide a written statement with the BiOp that authorizes such takings.” *Or. Nat. Res. Council v. Allen*, 476 F.3d 1031, 1034 (9th Cir. 2007). A purpose of an incidental take statement is to set a permissible amount or extent of take of members of the species, to “set forth a ‘trigger’ that, when reached” requires the parties to reinitiate consultation to ensure excessive take does not jeopardize the species. *Arizona Cattle Growers’ Ass’n v. FWS*, 273 F.3d 1229, 1249 (9th Cir. 2001).

Section 10 of the ESA creates limited exceptions to the Section 9 prohibition on take. Relevant here, FWS may permit any taking otherwise prohibited by Section 9 “if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.” 16 U.S.C. § 1539(a)(2). In order to obtain an ITP, the applicant must submit an HCP specifying “(i) the impact which will likely result from such taking; (ii) what steps the applicant will take to minimize and mitigate such impacts, and the funding that will be available to implement such steps; (iii) what alternative actions to such taking the applicant considered and the reasons why such alternatives are not being utilized; and (iv) such other measures that [FWS] may require as being necessary and appropriate for the purposes of the plan.” 16 U.S.C. § 1539(a)(2)(A).

If FWS finds that “(i) the taking will be incidental; (ii) the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such taking; (iii) the applicant will ensure that adequate funding for the plan will be provided; (iv) the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild; and (v) the measures, if any [identified by the applicant] under [16 U.S.C. § 1539(a)(2)(A)(iv)], will be met; and [FWS] has received such other assurances as [FWS] may require that the plan will be implemented,” the permit may issue. 16 U.S.C. § 1539(a)(2)(B).

## **II. Sierra Pacific Industries’ ITP and HCP.**

On December 14, 2018, Sierra Pacific Industries applied for an ITP and submitted a proposed HCP for incidental take that may result to northern and California spotted owls from timber operations it plans to conduct on 1,565,707 acres of land it owns in California over a 50-year term.<sup>2</sup>

On September 25, 2020, FWS transmitted a BiOp on its proposed action to approve Sierra Pacific Industries’ HCP and issue the ITP. In the BiOp, FWS concluded that issuing

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<sup>2</sup> Although California spotted owls are not currently listed as threatened or endangered, Sierra Pacific Industries anticipates they might be during the 50-year permit term. On February 23, 2023, FWS proposed listing two distinct population segments of California spotted owl under the ESA. *Endangered Status for the Coastal-Southern California Distinct Population Segment and Threatened Status With Section 4(d) Rule for the Sierra Nevada Distinct Population Segment*, 88 Fed. Reg. 11,600 (Feb. 23, 2023). EPIC through this letter preemptively puts FWS on notice that, should it list the California spotted owl, the same violations concerning northern spotted owls it details will also be violations with respect to California spotted owls, unless otherwise noted.

the permit was not likely to jeopardize the continued existence of northern spotted owls or California spotted owls, or result in destruction or adverse modification to either species' critical habitat. BiOp, 31–33. FWS concluded that up to 115 northern spotted owls and 649 California spotted owls may be incidentally taken over the 50-year term as a result of granting the ITP. BiOp, 35.

FWS approved the HCP and granted the ITP on September 30, 2020.

### **Violations of the ESA.**

#### **III. The ITP and HCP are unlawful because Sierra Pacific Industries will not minimize and mitigate the impacts of incidental take to the maximum extent practicable.**

FWS violated by approving the Sierra Pacific Industries' HCP despite it failing to minimize and mitigate the impacts of take to the maximum extent practicable. Of the eight conservation measures ("CM") set forth in the HCP, at least four fail to meet this standard.

##### **A. CM1**

CM1 calls for increasing aggregations of spotted owl habitat over time, as measured by the number of Potential Habitat Areas ("PHAs") in the plan area. The number of PHAs is modeled to increase from 147 to 497 in the northern spotted owl range over the permit term (BiOp, 19) and from 723 to 1,232 in the California spotted owl range over the permit term. This purported benefit is central to the HCP, and FWS's finding that approval of the HCP will benefit spotted owl survival and recovery. The PHAs are also the method the ITP and BiOp use to determine incidental take.

The definition of nesting habitat used for Nest Hexagons is inconsistent with the best available science and analyses contained in the HCP appendices, because it contains fewer large trees and overestimates the amount of actual functioning nesting habitat. Habitat Form ("HF") 4, which represents nesting habitat in the HCP, relies on lower canopy cover and other key parameters than the best available science on spotted owl nesting habitat discussed in HCP Appendix 3.4, such as North et al. 2017.

The HCP assumes that HF4 is preferred by spotted owls as nesting habitat even though the modeling presented in Appendix 3.4 shows spotted owls strongly select for stands with higher mean tree diameter and a higher density of larger trees. The data collected by SPI in Appendix 3.8 (Figures 5, 6, and 7, pp. 28-30) do not show strong selection for HF4, whereas leading studies (e.g., Verner et al. 1992, Blakesley et al. 2005, Tempel et al. 2016, North et al. 2017, Blakey et al. 2019) indicate selection for stands with high basal area, high canopy, and high density of large trees. Tempel et al. (2016) concluded "that forest with 40–69% canopy cover cannot simply be substituted for forest with >70% canopy cover. The importance of >70% canopy cover forests as nesting and roosting habitat for California spotted owls has been well documented (Bias and Gutierrez 1992, Gutierrez et al. 1992, Moen and Gutierrez 1997, Bond et al. 2004)." Further, Jones et al. (2018) "found that local extinction rates were higher when owl territories contained less forest characterized by large

trees (>61 cm dbh) and high canopy cover (>70%), and extinction rates declined as this forest type increased (Figure 3).”

The amount of nesting habitat protected under CM1 (150 acres of HF4 and 100 acres of HF4 and/or HF2H in a PHA) is less than what is called for in Appendix 3.4 or published studies. Nesting PHAs (500 acres) are defined in the HCP (p. 56) as having at least 150 acres of HF4 and 100 acres of HF2H and/or HF4, with an additional 50 acres of contiguous forest including 30 acres of HF4 and 20 acres of HF2H. This is significantly less than the amounts identified in the HCP and published research. The best available science and FWS guidance calls for a 500-acre core use area associated with at least 900 more acres of nesting/roosting habitat across a 3000-acre home range area.

Including greater amounts of nesting habitat is also supported by recent work by Blakey et al. (2019) in a study of habitat use in the northern Sierra Nevada. They found: Based on the relatively low overlap between PAC areas and roosting and foraging habitat use by the owls we studied, we hypothesize that insufficient habitat protection from stand-altering activities outside PAC areas could partially explain ongoing population declines. Most of the habitat used by owls for roosting and foraging in our study was outside of PACs and therefore available for stand-altering forestry activities. Even where PACs protect nesting stand conditions conducive to successful reproduction, stand-altering activities elsewhere in owl home ranges may reduce occupancy or reproductive success.

The HF's also fail to account for other attributes that may be essential components of spotted owl habitat, such as slope position, downed logs and woody debris, hardwood presence, mid-canopies, and deformed trees with nesting features. Results presented in the HCP and published studies all indicate that both higher quality habitat and more of it needs to be included in the definition of nesting PHA. SPI has not shown, nor has FWS confirmed, that application of the best available science on spotted owl nesting habitat is not practicable.

## **B. CM2**

CM2 purports to protect habitat around known activity centers. Under the HCP, application of this measure can be terminated following three consecutive years of surveyed non-occupancy. Basing habitat protections on the results of occupancy surveys alone is contradicted by the best available science and FWS's 2009 regulatory guidance prepared at the request of the California Department of Forestry.

The presence of barred owls on the landscape has been linked to reduced spotted owl responses and false-negative results. The FWS's own guidance to CAL FIRE summarizes studies finding that sites may be unoccupied for more than 3 years then subsequently utilized by nesting NSO, and 3 or more years of negative surveys where owls were later determined to be present. FWS concluded in its guidance letter that it “does not concur that the sole use of 3 years of protocol surveys is appropriate to determine the permanent abandonment of historic NSO sites.” But here, without adequate explanation, FWS approved precisely that same survey protocol. Its decision to do so is arbitrary, capricious, and not in accordance with law.

### **C. CM3**

Under CM3, SPI will retain “green trees” during salvage harvesting, to accelerate the development of future habitat for spotted owls in sites that are reforested following salvage logging. However, the HCP does not require the completion of owl surveys or the adoption of avoidance measures if territorial birds are occupying an area proposed for salvage logging.

This decision is unsupported by the best available science: spotted owls are known to return to areas affected by wildfire, and nest in areas with a wide range of fire severity including high severity. This use is negatively affected by salvage logging. Recent studies have documented variable use by spotted owls in forests burned by wildfire, depending on the extent and severity of the fire (Gaines et al. 1995, King et al. 1998, Bond et al. 2002, Jenness et al. 2004, Clark 2007, Bond et al. 2009, Clark et al. 2011, Roberts et al. 2011, Lee et al. 2012, Clark et al. 2013, Eyes 2014, Bond et al. 2016, Jones et al. 2016). Therefore, salvage harvesting has the potential to result in take by logging trees used by spotted owls for nesting, roosting, or foraging, which is not accounted for in the HCP and ITP.

This measure is also not materially different from SPI’s current practices, representing the minimum required under the mandatory California Forest Practice Rules (CFPRs). It cannot be regarded as a conservation measure that minimizes or mitigates for the effects of SPI’s logging, given the “no action alternative” in the EIS assumes continued logging consistent with the CFPRs.

The HCP indicates that the other measures it contains may not be implemented under timber harvesting permit frameworks other than Timber Harvest Plans (“THPs”), such as Exemption harvests (Title 14, California Code of Regulations 1038), or Emergency Timber Operations (Title 14, California Code of Regulations 1052). Both Exemption and Emergency timber harvesting permit frameworks available to nonfederal timberland owners are ministerial permitting frameworks, meaning that the normal requirement to prepare a full THP is waived, and that the administering agency (CAL FIRE) does not exercise discretionary authority over the harvest activities, nor is there a multi-disciplinary inter-agency review, or provision for public comment or inspection. Timber harvest under these frameworks have a much higher likelihood of resulting in take due to the lack of regulatory oversight and prescriptive constraints, and yet it is precisely here that the HCP relaxes its own constraints. This represents a further failure to minimize and mitigate impacts of take to the maximum extent practicable.

### **D. Adaptive management.**

The adaptive management framework described in the HCP does not remedy these deficient conservation measures. The framework is not capable of timely identifying and correcting dangerous conditions created by inadequate conservation measures. For instance, if the conservation measure for reducing the risk of fire proves inadequate, or the even-aged forestry regime is confirmed to increase the risk of wildfire, it would likely be too late to meaningfully correct these shortcomings through adaptive management. The adaptive management framework also does not specifically seek to evaluate habitat conditions outside of the habitat type system that SPI uses, to independently evaluate the habitat conditions that support spotted owl life cycles.

#### **IV. The BiOp's legal violations.**

FWS violated the ESA by approving the HCP and granting the ITP—actions likely to adversely affect coho—based on an unlawful BiOp. The BiOp contains legal and factual flaws, and FWS's decision to issue the permit notwithstanding these flaws violates its duty to ensure its actions are not likely to jeopardize the continued existence of coho or destroy or adversely modify its critical habitat. 16 U.S.C. § 1536(a)(2).

##### **A. The BiOp fails to analyze adverse effects of the action in its jeopardy analysis.**

A BiOp is arbitrary and capricious if it “entirely failed to consider an important aspect of the problem[.]” *Native Fish Society v. Nat'l Marine Fisheries Serv.*, 992 F. Supp. 2d 1095, 1111 (D. Or. 2014) (quoting *Motor Vehicle Mfrs. Ass'n. v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 42 (1983)). “In the context of the ESA, the ‘problem’ is whether a proposed project will cause jeopardy to a listed species[,] and ‘any effect that is likely to adversely affect the species is plainly an important aspect of the problem.’” *Native Fish Society*, 992 F. Supp. 2d at 1111 (quoting *S. Yuba River Citizens League v. Nat'l Marine Fisheries Serv.*, 723 F. Supp. 2d 1247, 1270 (E.D. Cal. 2010)). The BiOp fails to analyze several adverse effects of approving the ITP and HCP.

##### **i. Reduction in stable PHAs over first 25 years.**

The BiOp fails to account for a substantial decline in the number of stable PHAs in the first 25 years of the permit term. The BiOp states that the “number of PHAs is modeled to increase over 50 years,” BiOp at 12, but fails to disclose that the modeling in fact shows a decline in the number of stable PHAs in the first 25 years. Figure 3-5 in FWS's EIS shows the number of suitable and stable PHAs modeled to decrease from 114 to 107 between 2016 and 2040. EIS at 76.

When consulting under Section 7(a)(2), FWS “must consider near-term habitat loss” to species with life cycles shorter than the the period in which lost habitat will be regained. *Pac. Coast Fed'n of Fishermen's Ass'ns v. U.S. Bureau of Reclamation*, 426 F.3d 1082, 1094 (9th Cir. 2005). FWS “fail[s] to adequately assess the short-term impacts of [logging]” when it only considers the effects of harvest after a longer period that “ignores the life cycle” of the species. *Pac. Coast Fed'n of Fishermen's Ass'ns v. Nat'l Marine Fisheries Serv.*, 265 F.3d 1028, 1037 (9th Cir. 2001).

FWS unlawfully failed to disclose the initial decline in stable PHAs, and to analyze the effect on spotted owls of reducing the number of stable PHAs year over year for 25 years. This omission is especially important in light of the findings of Jones et al. (2018) showing that the loss of large trees 30 years ago is contributing to the ongoing population decline observed today and that persists even though the practice of removing large trees on federal lands has stopped.

## ii. Climate change.

Second, the BiOp fails to account for climate change impacts. The ESA and its implementing regulations require the Services to consider current and projected climate change effects in their ESA decision-making process, using the best scientific data available. *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 184 F. Supp. 3d 861, 917–23 (D. Or. 2016) (BiOp must “quantitatively *estimate* climate impacts”) (emphasis original). A BiOp violates the ESA if it “fail[s] to utilize the best available scientific information by not addressing the . . . issue of climate change” *Nat. Res. Def. Council v. Kempthorne*, 506 F. Supp. 2d 322, 388 (E.D. Cal. 2007).

Here, the BiOp fails to consider how climate change will interact with the effects of the action. Climate change is projected to increase variability in northern California weather leading to more extreme fire effects. This will likely lead to more of SPI's ownership being subject to wildfire and the effects that follow, including loss of canopy cover, invasive species incursion, BiOp at 22, and salvage logging, BiOp at 30. This risk is compounded by the even-aged logging regime that SPI intends to apply across its vast holdings, which is likely to result in even more catastrophic extreme fire events. By the end of the 50-year permit term, approximately 55% of SPI's covered lands are projected to be composed of even-aged timber stands. BiOp at 12. The HCP claims that this even-aged management strategy may reduce the risk of fire, but the BiOp correctly notes the best available science for this claim is inconclusive at best and “does not provide evidence that even-aged management reduces fire risk.” BiOp at 30. Recent studies find even-aged plantations may increase the rate of wildfire spread and have lower relative humidity and higher wind speeds than uneven-aged forests which can make them highly flammable for a decade or more following the early growth phase. BiOp at 30.

Attached to the BiOp as Appendix A is a 2020 document discussing the status of the northern spotted owl and its critical habitat, including a section summarizing the best available science on climate change impacts to the species. These projected impacts include shifts in tree species composition that influence habitat suitability, pre- and early- seral stands especially vulnerable while old-growth stands will likely buffer from impacts of regional warming including forest fires for longer. BiOp Appx. A at 20 (citing Frey 2016, Lesmeister 2019). Climate change impacts “will also likely alter or interrupt forest growth and development processes that influence forest turnover rates and the emergence of suitable habitat attributes in new locations.” *Id.* All of these impacts will negatively impact spotted owls and their habitat. Despite this, there is no dedicated section in the BiOp that addresses the impacts of climate change. In fact, the words “climate change” are only mentioned once in the BiOp itself, in an enumeration without further detail of range-wide threats to spotted owls. BiOp at 19.

What the BiOp critically lacks is any attempt at a synthesis of the anticipated effects of the proposed action and those of climate change. For instance, the BiOp does not consider whether or to what extent the HCP conservation measures' effectiveness may be diminished by climate impacts. *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 184 F. Supp. 3d 861, 917 (D. Or. 2016) (“One inadequacy with NOAA fisheries' analysis of climate impacts is that it does not consider whether the effectiveness of the . . . actions designed to offset adverse effects . . . will be diminished by climate change.”). Nor does the BiOp



consider how climate change impacts might delay, preclude, or alter the species composition of post-logging forest regrowth. These failures cannot be excused by any uncertainty, as the ESA does not require scientific certainty. *See Nm. Ecosystem All. v. U.S. Fish & Wildlife Serv.*, 475 F.3d 1136, 1147 (9th Cir. 2007) (NOAA Fisheries “may not ignore evidence simply because it falls short of absolute scientific certainty”); *see also Arizona Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160, 1164 (9th Cir 2010). Ultimately, FWS failed to analyze an important aspect of the problem when they failed to discuss how to deal with climate change impacts for this Project. *Kemphorne*, 506 F. Supp. 2d at 370.

**B. The BiOp unlawfully relies on conservation measures that are uncertain to occur or meaningfully address threats to the species.**

When preparing a BiOp under Section 7(a)(2) of the ESA, FWS may rely on mitigation and conservation measures to support a conclusion the action is unlikely to jeopardize the continued existence of a listed species only if such measures “constitute a clear, definite commitment of resources, and [are] under agency control or otherwise reasonably certain to occur.” *Ctr. for Biological Diversity v. Bernhardt*, 982 F.3d 723 (9th Cir. 2020) (citations omitted). Such measures “must be subject to deadlines or otherwise-enforceable obligations; and most important, they must address the threats to the species in a way that satisfies the jeopardy and adverse modification standards.” *Id.* (citing *Ctr. for Biological Diversity v. Rumsfeld*, 198 F. Supp. 2d 1139, 1152 (D. Ariz. 2002)). Mitigation measures relied on in a BiOp “cannot refer only to generalized contingencies or gesture at hopeful plans; they must describe, in detail, the action agency's plan to offset the environmental damage caused by the project.” *Id.*

In the BiOp, FWS relied on eight conservation measures in concluding that issuing the ITP was not likely to jeopardize the continued existence of spotted owls. As discussed above, CM1, CM2, CM3, and the adaptive management framework detailed in the HCP are inadequate, uncertain to occur, and uncertain to meaningfully address threats to the species. For these same reasons, the BiOp's reliance on them is arbitrary and capricious.

**C. The BiOp unlawfully adopted Sierra Pacific Industries' flawed definition of “take.”**

The BiOp, HCP, and ITP use the same PHA hexagon methodology described above for determining whether incidental take has occurred. One instance of take is estimated if (1) harvest occurred in a hexagon in a five-year period that was known to be occupied by spotted owls at the baseline modeling date at the outset of that period, and (2) either the harvest caused the hexagon to drop Below Threshold, or the harvest occurred in a hexagon that was already Below Threshold at the beginning of the period.

This method is flawed in several respects. First, if incidental take is determined to occur by covered activities within a given occupied hexagon, additional take will not be counted for covered activities in the same occupied hexagon over the five following years. The BiOp states that this design feature exists “to maintain consistency with the modeled estimate of take and as a practical accounting matter,” (BiOp 25) even though “[t]he biological reality of this accounting method means that in some cases, multiple entries for harvest could occur in an occupied hexagon for up to five years in a row, . . . impact[ing]

reproduction in consecutive years rather than only once as was modeled.” (BiOp 25). But the Section 7 does not countenance a federal agency prioritizing “practical accounting” and modeling consistency over “biological reality.”

Second, the method of determining take is based solely on generalized habitat values and the question of survey-detected occupancy or non-occupancy. No other metrics or essential life history behaviors are described or utilized. As discussed above, reliance on surveyed occupancy as a sole indicator fails to account for the interactive influences of barred owls on spotted owl survey detection and response probability. Moreover, as discussed above, it goes against FWS’s 2009 guidance against relying on non-occupancy alone, which it cautioned was unlikely to avoid take of northern spotted owls. This framework fails to account for survival, fecundity, nesting success or failure, fledgling success or failure, or any other essential biological criteria. Moreover, it entirely fails to account for take that may result from post-fire green tree salvage logging, further worsened by surveys not being required before salvage logging may commence.

Finally, the method of determining take is based on baseline modeling data that is refreshed only every five years. The modeling data that the BiOp relied on is from 2016, which predates several extreme California wildfire seasons, most notably in 2020. Because these wildfires are not reflected in the baseline data on which the hexagons are currently categorized, it is entirely possible that a hexagon is already Below Threshold such that any logging should trigger take, but will not be counted as take.

#### **D. The BiOp unlawfully defines the environmental baseline.**

Section 7(a)(2) of the ESA requires FWS to evaluate the effects of its actions on listed species, by adding them to the “environmental baseline” and determining whether an action is likely to jeopardize the continued existence of a listed species. 16 U.S.C. § 1536(a)(2); 50 C.F.R. §§ 402.14(g)(4), 402.02. The environmental baseline includes “the past and present impacts of all Federal, State or private actions and other human activities in the action area” *Id.* § 402.02. FWS may not conduct its jeopardy analysis “in a vacuum,” nor does it satisfy the ESA by comparing the effects of its action to the risk posed by baseline conditions and concluding no jeopardy only if those effects are “appreciably” worse than baseline conditions. *Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 524 F.3d 917 (9th Cir. 2008). “Under this approach, a listed species could be gradually destroyed, so long as each step on the path to destruction is sufficiently modest. This type of slow slide into oblivion is one of the very ills the ESA seeks to prevent.” *Id.* at 930.

The BiOp looks to Sierra Pacific Industries’ past forestry practices in determining the environmental baseline for the project area, and assumes that without an ITP, Sierra Pacific Industries would “continue to conduct the covered activities but would need to do so in a manner that avoids take of the covered species.” This assumption is flawed for two important reasons. First, under the definition of take Sierra Pacific Industries proposed in the ITP and HCP and that FWS carried forward in the BiOp, Sierra Pacific Industries’ past forestry practices have resulted in take. Thus, because of past logging, many PHAs are currently Below Threshold.

Second, Sierra Pacific Industries asserted in its own comment on the draft EIS that its current timber management practices are unlikely to continue if an ITP is not issued. FWS acknowledged this admission in the EIS and ROD but dismissed it by stating that it “cannot reliably predict future management changes.” According to FWS, “any such changes would be speculative.” EIS at 6. FWS concluded that “relative to the conditions that would exist in the absence of the HCP, . . . the HCP will benefit both the survival and recovery in the NSO population as a whole.” BiOp at 26.

### **Conclusion.**

FWS’s decisions to approve the HCP, grant the ITP, and issue the BiOp are unlawful and likely to jeopardize the continued existence of northern spotted owls, and of California spotted owls should the species be listed. If these violations are not corrected within 60 days, we intend to pursue legal action on behalf of our clients. If you have questions, or would like to discuss this matter, please contact us.

Sincerely,

A handwritten signature in blue ink, appearing to read 'S. Ince-Johannsen', with a stylized flourish.

Sangye Ince-Johannsen  
Sadie July Normoyle  
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