

P.O. Box 944246
SACRAMENTO, CA 94244-2460
(916) 653-8007
(916) 653-0989 FAX
[BOF Website \(www.bof.fire.ca.gov\)](http://www.bof.fire.ca.gov)



September 22, 2020

To: Board Members

From: Board staff

Re: Joint Committee: Conversion Exemption Amendments to 14 CCR § 1104.1.

Background

The Forest Practice Act governs the process for conducting various timber operations and the requisite conditions for permitting, such as converting timberland to a non-timber-growing use, which generally requires a conversion permit and a Timber Harvesting Plan (THP).¹ The Board has statutory authorization to exempt certain types of timber operations from some or all of the Act's requirements.² Pursuant to that authorization, the Board adopted 14 CCR § 1104.1, a long-standing regulation that exempts three types timber operations from conversion permit and timber harvesting plan requirements: 1) conversions of less than 3-acres of land, 2) construction or maintenance of a public agency right-of-way, and 3) construction or maintenance of a public or private utility right-of-way.

The Board has initiated an informal scoping process in advance of formal rulemaking proceedings to amend 14 CCR § 1104.1's conversion exemption process. Some of the changes included in the proposed rulemaking include:

- Improving the organizational clarity of the regulation, including documentation for, and processing of, exemption notices and identifying what additional requirements apply to each type of exemption.
- Separating the provisions for right-of-way exemptions for public agencies and utilities from the general exemption for less than 3-acre conversions.
- Harmonizing the exemption requirements, as appropriate, with those imposed pursuant to 14 CCR § 1038 et seq., including updated mapping requirements.

The July and August Joint Committee meetings considered draft rule pleads that generated significant discussion and input from Board members and stakeholders. The wide-ranging comments addressed the proposed amendments but also raised a broad spectrum of additional potential issues with existing provisions of 14 CCR § 1104.1. The Board recommended convening a noticed workshop as an appropriate forum for further discussion and potential resolution of some of the issues raised during the Joint Committee meetings.

¹ Public Resources Code (PRC) § 4621 et seq.; 14 CCR § 1100 et seq.

² PRC §§ 4584, 4628.

Board staff have prepared an updated draft rule plead for consideration at the workshop that incorporates rule text revisions to address some comments and suggestions from the August meeting. This memo provides additional background, analysis, and Board staff recommendations in response to other comments made at that meeting.

Draft Rule Plead: Organizational Overview

Board staff acknowledge concerns raised by Board members and stakeholders that the rule plead amendments are difficult to digest due to the amount of text reflected in ~~strikeout~~ and underline, as required by the Administrative Procedure Act. This is due in part to the organizational complexity of 14 CCR § 1104.1, which has evolved over decades via dozens of adopted amendments. But changes inherent to separating the right-of-way exemptions from the less than 3-acre exemption also contribute to the amount of text in ~~strikeout~~ and underline. A general organizational overview of the rule plead would be as follows:

- 14 CCR § 1104.1 is amended to delete the provisions that are specific to the right-of-way exemptions so that they can be transferred (verbatim in most cases) into a new stand-alone section, 14 CCR § 1114. Additional substantive changes are made to harmonize, where appropriate and operations are analogous, the less than 3-acre conversion exemption requirements with recent regulatory amendments made to update the exemption requirements in 14 CCR § 1038 et seq.
- Proposed 14 CCR § 1114 is a new stand-alone section for right-of-way exemptions. In addition to the existing requirements for those exemptions imported from 14 CCR § 1104.1, it also incorporates certain requirements from 14 CCR § 1104.1 that currently apply only to the less than 3-acre exemption, as well as harmonizing requirements in 14 CCR § 1038 et seq. for those operations which may be analogous in scope and nature. Thus, the entire section appears in underline even though many of the provisions have simply been relocated from 14 CCR § 1104.1 or copied from 14 CCR § 1038 et seq.
- The remaining sections of the rule plead are amended to make technical changes. Certain defined terms in 14 CCR 895.1 are revised or updated to reflect interpretative clarifications. Other sections are amended non-substantively to update cross-references impacted by creating the new stand-alone section for right-of-way exemptions.

Thus, the substantive changes are not necessarily as significant as the extent of ~~strike out~~ and underlined text might suggest. Editorial annotations have been incorporated into the draft rule plead as an interpretive aid for readers. Board staff believe that these provisions will reflect improved organizational clarity once adopted as clean text that is stripped of the APA-required ~~strike out~~ and underlining.

Certified Professional Arborists

14 CCR § 1104.1(i)(2) currently establishes a role for a “professionally certified arborist” as someone who may identify large old trees that may be harvested under a conversion exemption. The draft rule plead proposes an additional role for professionally certified arborists: identifying and evaluating the need for removal of Danger Trees from public agency and utility right-of-ways under an exemption.³

Joint Committee discussion questioned whether the term “professionally certified arborist” should be defined. Public comments also suggested several organizations whose certification may represent suitable qualification for an arborist to perform these functions, including the International Society of Arboriculture and the American Society of Consulting Arborists.

Defining the term “professionally certified arborist” could be attempted one of two ways: 1) draft a definition with specific educational and experience qualifications for a professionally certified arborist, or 2) define certification in reference to a third-party organization that certifies arborists.

The first option appears problematic given that the Board lacks the subject matter expertise to make an informed determination of the minimum education and experience requirements to qualify as a professionally certified arborist. Nor does the Board or CAL FIRE have the resources necessary to administer such a definition (i.e., verification of experience/education qualifications). Relying on the criteria of generally recognized certification programs is also problematic, insofar as those organizations do not rely on uniform criteria.⁴ By borrowing the certification criteria of one organization, the Board may unwittingly exclude competent arborists certified by other organizations. Moreover, the educational and experience requirements of some certifying organizations only reflect the minimum eligibility requirements necessary to take a certification exam. Even if the Board were to borrow those eligibility requirements for the definition, there would be no corresponding exam to confirm the applicant’s aptitude and competence for arboriculture.

The second option is primarily problematic because the Office of Administrative Law (OAL) has historically been resistant to proposed regulations that utilize a third-party organization to establish a qualifying standard. The concern is that this may constitute an unlawful delegation of authority to the certifying organization – i.e., the Board lacks control over the

³ Proposed 14 CCR §§ 895.1, 1114(f)(19).

⁴ Compare International Society of Arboriculture certification eligibility requirements [1) minimum of three years of full-time experience in arboriculture or 2) two-year associate degree with a minimum of two courses directly related to arboriculture plus two years of practical full-time experience in arboriculture or 3) four-year bachelor degree with a minimum of four courses directly related to arboriculture plus one year of practical full-time experience in arboriculture] with American Society of Consulting Arborists membership requirements of five years of experience in arboriculture plus one of the following educational requirements: 1) four-year degree in arboriculture or a closely related field, or 2) ISA certification as a Board Certified Master Arborist, or 3) a minimum of 240 approved Continuing Education Units. (<https://www.isa-arbor.com/>, <https://www.asca-consultants.org/>.)

third-party organization's standards, and those organizations could make drastic changes to its certifying qualifications that would be binding on the Board until a subsequent rulemaking changes the standard. As a result, OAL often requires regulations to incorporate the third-party organization's standards by reference into the regulation as part of the rulemaking. Assuming that the Board could obtain those standards from a certifying organization, this would "lock in" those requirements, requiring additional rulemaking proceedings each time the organization updates its standards and risking periodic non-functional regulations as a result of such an update.

In the alternative, OAL will usually accept regulatory proposals that use a general definition that is associated with an inclusive list of organizations that are illustrative of the types of organizations whose certifications are deemed appropriate. For instance, a professional certified arborist might be defined as "a person with demonstrated experience and expertise in the practice of arboriculture, as certified by a generally recognized professional organization, such as the International Society for Arboriculture or the American Society of Consulting Arborists." This approach avoids the delegation problem, but the issue of having to amend the regulation if the organization's standards falter over time remains. Any list – illustrative or otherwise – that identifies specific third-party organizations also presents practical concerns. Specifically, organizations that are not identified in the list will likely pressure the Board for inclusion on the list or advocate that their organization should replace another organization on the list. Non-listed organizations may also make fairness-related complaints that the Board is favoring certain organizations by publicizing them by name in the regulation, thereby putting non-listed organizations at a competitive disadvantage.

Staff Recommendation: Board staff recommend against defining the term "professionally certified arborist" at this time. This approach avoids the above-referenced concerns and preserves Board flexibility to address substandard arborist qualifications on a case by case basis.

"Danger Tree" Terminology

Stakeholders questioned whether "danger tree" should be replaced with the term "hazard tree," as a preferred term of art. However, Board staff research demonstrates that both terms are commonly used, sometimes interchangeably, to describe trees with structural defects likely to result in tree failure that will impact a target (i.e., damage property or injure persons).⁵ In instances where an entity distinguishes between the terms, "danger tree" generally describes *any* tree that could impact a target *if* it fails and "hazard trees" are a subset of danger trees that have an observable structural defect that is likely to cause such a failure.

⁵ "Properly speaking, hazard trees and danger trees are synonymous terms, referring to trees that have the potential to cause death, injury or property damage if they fail. This document uses the two terms interchangeably." (*Hazard Tree Guidelines For [USDA/US] Forest Service Facilities and Roads in the Pacific Southwest Region*, 2012, Angwin, et. al).

It has been the longstanding practice of the Board to use the term “Danger Tree,” which is already formally defined in 14 CCR § 895.1. As a result, that term has been incorporated into untold numbers of guidance documents. Changing the term is likely to create unnecessary confusion and would require efforts to locate and update guidance documents using the outdated terminology.

Recommendation: Insofar as “hazard tree” is not the universally accepted term of art and is often used interchangeably with “danger tree,” which is the Board’s historically used term defined in the Fire Practice Rules, Board staff recommend that the existing “danger tree” terminology be retained.

WLPZ “Public Safety” Exemption

The draft rule plead includes, as an operational condition for all three types of exemptions, a prohibition against timber operations within a WLPZ with limited exceptions, including for “operations conducted for public safety.”⁶ These provisions are identical to language in the Rules for watersheds with listed anadromous salmonids⁷ and are included in the rule plead to promote consistency for all exemption timber operations. The language ensures that persons operating under a ministerial exemption proceed with caution to minimize or avoid adverse impacts in WLPZs.

Joint Committee discussions indicate potential stakeholder concern with this provision. Stakeholders raised generalized objections to the scope of the public safety exception. Expressed concerns included that the exception may not be broad enough to allow utilities to utilize the right-of-way exemption, that more specificity may be needed to ensure that vegetation management qualifies for the public safety exception, and that it may create confusion as to how the provision is to be enforced.

Board staff are withholding recommendations pending further discussion at the workshop. Board staff believe that the rule plead language is appropriate, as drafted, for the previously stated reasons. The comments submitted thus far lack the specificity necessary to enable Board staff to properly evaluate stakeholder concerns and contemplate rule text revisions. Stakeholders are encouraged to provide more specific feedback at the workshop that Board staff may evaluate for rule text revision, if appropriate, for consideration at the full Board meeting.

Recommendation: No recommendation for rule plead text change. More specific stakeholder input at the workshop is invited for board staff consideration prior to September Board meeting.

⁶ Proposed 14 CCR §§ 1104.1(g)(6), 1114(f)(5).

⁷ 14 CCR §§ 916.9(s), 936.9(s), 956.9(s).

Completion Reports / Inspection Authority

14 CCR § 1104.1 currently requires the submission of a work completion report following completion of a less than 3-acre conversion exemption.⁸ It also requires CAL FIRE to provide for inspections, as needed, to determine that the conversion was completed.⁹ The draft rule plead extends the completion report requirement to public agency and utility right-of-way exemptions and clarifies that CAL FIRE is authorized – not required – to provide for inspections, as needed.¹⁰

Stakeholders questioned the necessity of work completion reports for right-of-way exemptions and the necessity to reference CAL FIRE's inspection authority for those exempt timber operations.

The work completion report will provide CAL FIRE, as well as other agency and public stakeholders via CALTREES, with consistent, timely notice that those operations are complete and the opportunity for CAL FIRE to inspect, *as needed*. The submission and filing of completion reports would impose minor administrative burdens on CAL FIRE and entities operating under right-of-way exemptions via the existing technology and process of CalTREES, though it admittedly will result in an increase in the volume of completion reports filed. Board staff acknowledge that it is unrealistic to expect CAL FIRE to provide for inspection of each right-of-way exemption. Accordingly, the rule plead text was further clarified to reflect that CAL FIRE's "as needed" inspections are discretionary – not required.

The proposed combination of a work completion report for right-of-way exemptions and the possibility of inspection is likely to have a deterrent effect on rogue timber operations that violate the spirit or letter of the Forest Practice Rules. In addition, the work completion reports provide CAL FIRE the relevant information to perform inspections, as needed, by randomly auditing timber operations or engaging in targeted oversight of repeat offenders.

Recommendation: Board staff recommend that the work completion report requirement be retained as an essential component for oversight of these exemption timber operations. Board staff also recommend that the corresponding clarifications to CAL FIRE's inspection obligations be retained, as drafted. The draft rule plead text adequately addresses any concerns that the completion report requirement carries an implicit expectation that CAL FIRE provide for inspections of all completed right-of-way exemptions.

⁸ 14 CCR §1104.1(a)(5).

⁹ 14 CCR §1104.1(a)(7).

¹⁰ Proposed 14 CCR §§ 1114(f)(11)-(12).

Right-of-Way Widths

Several comments at the Joint Committee meeting invited the Board to pursue a variety of substantive changes to 14 CCR § 1104.1's provisions for utility right-of-way widths.¹¹ For instance, some comments suggest that the Board should consider changing the currently designated right-of-way widths in 14 CCR § 1104.1, or make changes to harmonize vegetation clearance requirements with those imposed by the California Public Utilities Commission (CPUC). A couple points of clarification may be instructive here relating to the interplay between utility line vegetation clearance requirements and the right-of-way width provisions of 14 CCR § 1104.1.

First, there is a distinction between a utility's *legal* right-of-way and the right-of-way widths described in 14 CCR § 1104.1. A legal right-of-way is secured by eminent domain or other appropriate agreements governed by property law. 14 CCR § 1104.1, on the other hand, specifies the *maximum* width of a utility right-of-way that will qualify for a conversion exemption.¹² In other words, a conversion exemption authorizes timber operations on the utility's legal right-of-way, subject to the maximum width specified in 14 CCR § 1104.1. Thus, increasing the designated right-of-way widths impacts utility right-of-way maintenance operations only to the extent that the utility's legal right-of-way is larger than widths currently designated in 14 CCR § 1104.1. Moreover, a decision to increase the right-of-way widths must be balanced against the principle that exemptions from THP and conversion permit requirements are justified in part due to the de minimis impacts that these exempt activities are anticipated to have. Authorizing an increase in the acreage eligible for right-of-way exemptions will necessarily result in a corresponding increase on the impacts of those exemption timber operations.

Second, 14 CCR § 1104.1 does not directly address utility line vegetation clearance requirements. Utility line clearance requirements are imposed primarily by PRC §§ 4292 and 4293 and the corresponding implementing regulations 14 CCR §§ 1250-1258. Thus, proposals to change vegetation clearance requirements for utilities would require revisions to those code sections and regulations.¹³ 14 CCR § 1104.1's relevance to those clearance requirements is limited to the procedural prerequisite that a notice of conversion exemption be submitted and accepted prior to engaging in timber operations for vegetation

¹¹ 14 CCR § 1104.1's current right-of-way width provisions are transferred verbatim to proposed 14 CCR § 1114 in the draft rule plead. For ease of reference and to avoid confusion, this portion of the memo refers only to the existing version of 14 CCR § 1104.1.

¹² "The said right-of-way, however, shall not exceed the width specified in the Table of Normal Rights-of-Way Widths for Single Overhead Facilities and Single Underground facilities and the supplemental allowable widths. Nothing in this section shall exclude the applicable provisions of PRC §§ 4292 and 4293, and 14 CCR §§ 1250 through 1258 inclusive for fire hazard clearance from being an allowable supplement to the exempt widths." (14 CCR § 1104.1(c).)

¹³ As a practical matter, the CPUC's vegetation clearance requirements, including General Order No. 95, were revised in 2017-18 to harmonize their minimum vegetation clearance requirements with the requirements of PRC §§ 4292-4293 and 14 CCR §§ 1250-1258. The CPUC presented a summary of these revisions in a presentation to the Board at its November 2018 meeting. (*CPUC Vegetation Management (VM) Requirements* [Power Point Presentation], 2018, Tomassian, pp. 9, 13-14.) Also, to the extent clearance requirements are codified in statute, such as in PRC § 4293, the Board may lack the authority to change those standards via rulemaking to reconcile those standards with any differing CPUC standards.

management. Accordingly, 14 CCR § 1104.1's right-of-way widths are technically unrelated to vegetation clearance requirements. Perhaps more to the point, 14 CCR § 1104.1 already authorizes "supplemental" expansion of the designated right-of-way widths to accommodate compliance with the above-referenced clearance requirements and the removal of Danger Trees.¹⁴ Thus, any changes to the clearance requirements in PRC §§ 4292 and 4293 and 14 CCR §§ 1250-1258 are incorporated by reference automatically.

Recommendation: Board staff recommend that substantive changes to 14 CCR § 1104.1's right-of-way width requirements, which the draft rule plead proposes to transfer verbatim to 14 CCR § 1114, are unnecessary and should be disregarded as beyond the scope of this proposed rulemaking effort. However, a non-substantive, technical clarification recommended by a Board member pertaining to how the right-of-way width is measured has been incorporated into the revised draft rule plead.

¹⁴ See fn 12, *supra*; 14 CCR §§ 1104.1(e) and (g).