



California Department of Forestry
and Fire Protection

**Report to the Board of Forestry
and Fire Protection on
Newly Effective Forest Practice Rules
and Suggested Rule Modifications for Consideration**

December 9, 2020

Introduction

The California Department of Forestry and Fire Protection (CAL FIRE) presents this report to the Board of Forestry and Fire Protection (Board) in response to the procedures outlined in the memo entitled, *Board Procedure for the Review of Forest Practice Rules* (December 6, 2017). The memo states that following the Board's public notice of their "Annual Board Regulation and Policy Review," at a regularly scheduled meeting of the Board, the Board shall request agency and public comment to address the following:

- **Areas where questions exist on interpretation of the regulatory standards, including potential solutions.**
- **Issues encountered in achieving compliance with the regulatory standard of rules, including potential solutions.**
- **Suggested regulatory modifications which would either 1) clarify existing rule language to better achieve the intended resource protection, or 2) which would reduce regulatory inefficiencies and maintain the same or better level of protection.**

Interpretation Questions or Compliance Issues with Implementation of New Rules

To provide the Board with the above-requested information, CAL FIRE has queried plan review and field inspection staff regarding implementation of recently adopted rules, and any other area of the rules that has presented difficulty in implementation or interpretation.

To date, no significant interpretation questions or compliance issues have emerged during the initial period of new rule implementation. The Department supported both the regular and emergency rulemaking amendments, and will continue to monitor their implementation from this point forward.

This report presents information related to the following:

- Summary of recently implemented rules, including legislation
- Suggestions for Board rule review

Forest Practice Rules Implemented in 2020

Three Board of Forestry and Fire Protection regular (non-emergency) Forest Practice rulemaking proposals were adopted in 2019 and became effective upon approval of the Office of Administrative Law (OAL) on January 1, 2020. The approved rulemaking proposals were: “Nonindustrial Timber Management Plan (NTMP) Amendments, 2019;” “Stocking and Silvicultural Amendments, 2019;” and the “Permanent Post-Fire Recovery Exemption.” Additionally, the Board adopted and OAL approved the emergency rulemaking proposal entitled, “Emergency Emergency Fuel Hazard Reduction Amendments, 2019.”

To date, the Department is not aware of any implementation concerns with the three rule adoptions from 2019. The proposal below for a minor amendment of the Emergency Notice for Fuel Hazard Reduction rules is intended to correct a recently discovered clarity issue that preceded the Board’s Emergency adoption.

Suggestions for Board Rule Review

The Department appreciates the Board’s adoption of new rules for implementation in 2021 related to topics brought forward by the Department in previous reporting years, namely the “LTO Education and Limited LTO Amendments” and the “Tethered Operations, 2020” rulemaking proposals. The Department also appreciates the Board’s ongoing consideration of critically important rulemaking amendments to the 1104.1(b) and (c) right-of-way and utility conversion exemptions.

It should also be noted that the Department is continuing to evaluate more comprehensive amendments to the rules for Licensed Timber Operators and expects to work with the LTO community to bring those forward for consideration sometime in 2021.

The following constitute the Department’s suggestions for Board review and amendment of existing Forest Practice Rules. Included with specific amendment requests, there is also discussion of challenges the Department is currently experiencing with interpretation of discretionary rule elements pertinent to ministerial permits.

1. Consideration of Repeal of 14 CCR 917.4(d) Prohibition of Broadcast Burning for Slash Treatment in the Southern Subdistrict of the Coast Forest District and Amendment of 917.3

14 CCR § 917.4 provides specific requirements for treatment of logging slash to reduce fire hazard in the Southern Subdistrict of the Coast Forest District. Among these requirements is a strict prohibition on the use of broadcast burning.

Section 917.4(d) states: “Use of the Broadcast Burning prescription for Slash is prohibited in the Southern Subdistrict of the Coast Forest District.”

Companion rule language that underscores this prohibition is found in 917.3, the rule section that provides broadcast burning requirements for the rest of the Coast Forest District. This rule section states in part: “Outside the Southern Subdistrict, Broadcast Burning may be prescribed for Slash treatment...”

Broadcast burning of logging slash can be a useful treatment option for reduction of slash and associated fire hazard. It is an allowable practice throughout much of the rest of the state. Prescribed broadcast burning would otherwise be allowable in the Southern Subdistrict under the CalVTP EIR outside of timber harvesting operations. The intensity of the 2020 CZU Lightning Complex that burned in portions of San Mateo and Santa Cruz within the Southern Subdistrict has forestry practitioners there discussing whether broadcast burning prior to the wildfire could have reduced fuel loads sufficiently to significantly moderate the intensity and impact of that fire.

Repealing the rule would not eliminate the need for careful planning and implementation of broadcast burning. It would allow the Soquel Demonstration State Forest to implement demonstration burns and study the results for the benefit of practitioners in the Southern Subdistrict. Regardless of outcome, the Department would appreciate the Board’s prioritization of this topic for committee review and discussion in 2021.

Suggested amended rule language for the Board’s consideration is as follows:

“917.3 Prescribed Broadcast Burning of Slash [Coast]

~~Outside the Southern Subdistrict,~~ Broadcast Burning may be prescribed for Slash treatment...” [Strikethrough added]

“917.4 Treatment of Logging Slash in the Southern Subdistrict [Coast]

~~(d) Use of the Broadcast Burning prescription for Slash is prohibited in the Southern Subdistrict of the Coast Forest District.”~~ [Strikethrough added]

2. “Cutover Land” and “Meadows and Wet Areas” and “Wet Meadows and Other Wet Areas”

Prior to 2012, the term “Cutover Land” was defined within the Forest Practice Act as “...land which has borne a crop of commercial timber from which at least 70 percent of the merchantable original growth timber stand has been removed by logging or destroyed by fire, insects, or tree diseases and which is now supporting, or capable of growing, a crop of commercial timber or other forest products, and which has not been converted to other commercial or agricultural use.”

This definition was repealed by statutory amendment in 2011 (Chapter 584, AB 1414) and the references to the repealed statute (PRC § 4522.5) were repealed from the Forest Practice Rules in 2017. However, the use of the term “Cutover Land” persists in various provisions of the rules, which now lack clarity in the application of that term. It is recommended that the term “Cutover Land” be removed from the following sections: 14 CCR §§ 895.1, 906, 953.12, and 1027.1.

Within 14 CCR § 895.1, the term “Cutover Land” is used within the definition for “Wet Meadows and Other Wet Areas” to exclude those cutover Timberlands from those natural areas which are moist on the surface throughout most of the year and support aquatic vegetation, grasses and forbs as their principal vegetative cover, as defined by the term “Meadows and Wet Areas” and to create a distinction between the two terms.

Provided that the term “Cutover Land” no longer exists with any clarity, it is recommended that the term “Wet Meadows and Other Wet Areas” be removed from the Rules and replaced with the more clearly defined term “Meadows and Wet Areas”. Additionally, the definition for “Meadows and Wet Areas” should be made applicable and identical across all forest districts, as it is currently undefined within the Coast Forest District.

3. Consistency Between Sections 1080 and 913.8

The regulations for the Southern Subdistrict of the Coast Forest District (14 CCR § 895.1) include “Special Harvesting Methods” (14 CCR § 913.8), which identifies, among other requirements, stocking and retention requirements for Timber Operations conducted within the Southern Subdistrict. These requirements are introduced in the section with the statement “[o]nly the following regeneration methods and stocking requirements shall apply in the Southern Subdistrict of the Coast Forest District.” Substantially Damaged Timberlands are defined within the Forest Practice Rules as follows:

“...areas of Timberland where wildfire, insects, disease, wind, flood, or other blight caused by an act of God occurs after January 1, 1976 and the damage reduced Stocking below the requirements of PRC § 4561 or other higher minimum Stocking requirements that may be applicable under Articles 3 and 11 of Subchapter 4, Article 3 of Subchapter 5, and Articles 3 and 11 of Subchapter 6.” (14 CCR § 895.1).

Between these two provisions (14 CCR §§ 895.1 and 913.8), there exists an issue of clarity and consistency regarding what stocking requirements apply on Substantially Damaged Timberlands within the Southern Subdistrict of the Coast Forest District. The regulations related to Substantially Damaged Timberlands exist within 14 CCR § 1080 *et seq.* and include, among other requirements, Stocking standards where “...substantial damage has occurred prior to the start of Timber Operations, or where such damage has occurred following the start of Timber Operations but before a stocking report has been submitted or approved by the Director...” (14 CCR § 1080.1(a)).

The modern language of the definition for Substantially Damaged Timberlands was adopted in 1983 to address, in part, certain situations such as (from Board Rulemaking File 53, p. 22), “...an area is being harvested and a wildfire destroys stocking before timber operations are complete and before a stocking report can be filed. Under current regulations the land must still meet minimum stocking standards. Landowners, despite the fact that their land was satisfactorily stocked before the fire, must spend money to restock the land. This can be a special burden on low site lands where the economic returns to planting investments are marginal at best.”

Provided that a state of Substantial Damage to timberlands can certainly include those timberlands within the Southern Subdistrict, as evident through the fire conditions this year, and the understanding that the Substantially Damaged Timberland regulations were adopted to address situations which could occur within the Southern Subdistrict (14 CCR § 913.8 exists within Article 3 of Subchapter 4, as identified within the definition for Substantially Damaged Timberland), the ability to classify lands as Substantially Damaged Timberlands should be clarified within 14 CCR § 913.8.

Suggested amended rule language for the Board's consideration is as follows:

"913.8 Special Harvesting Methods for Southern Subdistrict [Coast]

Only the following regeneration methods and stocking requirements, and those described in 14 CCR § 1080 et seq. shall apply in the Southern Subdistrict of the Coast Forest District." [Underline added]

4. Clarification of apparent conflict between Emergency Notice lifespan and slash treatment deadlines in 14 CCR 1052(e) and 1052.4(d)(5)

14 CCR 1052(e) states in part, "Timber Operations shall not continue beyond 1 year from the date the Emergency Notice is accepted by the Director..." This language clearly articulates that the lifespan of an Emergency Notice is 12 months, notwithstanding the allowance for burning operations to occur by April 1 of the year following creation. However, 14 CCR 1052.4(d)(5) states in part, "Fuel treatments...shall be accomplished within one (1) year from the *start of operations*..." This language appears to indicate, at least where slash treatment is concerned, the lifespan of an Emergency Notice is 12 months from the start of operations rather than 12 months from the date it is accepted by the Director.

This apparent conflict in the rules has resulted in slash treatment other than burning under an Emergency Notice for Fuel Hazard Reduction occurring beyond the 12 month lifespan indicated in Section 1052(e). This inconsistency has resulted in Forest Practice Rule enforcement issues in a number of CAL FIRE's Administrative Units. Clarification by the Board would resolve the enforcement issues and ensure consistent application of rule standards statewide.

Suggested amended rule language for the Board's consideration is as follows:

"1052.4(d)

(5) Fuel treatments...shall be accomplished within one (1) year from the date the Emergency Notice is accepted by the Director ~~start of operations~~, except for burning operations..." [Underline and strikethrough added]

5. Conversion Exemptions in Timberland Production Zones

Currently, timberland conversion on non-TPZ land in 14 CCR § 1101(g)(1) is identified as transforming timberland to a non-timber use where "(A) Future timber harvests will be prevented or infeasible because of land occupancy and activities thereon", among other conditions.

However, on TPZ lands, timberland conversion is identified as "...the immediate rezoning of TPZ lands," but conversion exemptions pursuant to 14 CCR § 1104.1 are excepted from this requirement of immediate rezoning. This presents a potential issue with the regulations where the filing of a conversion exemption on TPZ land simply becomes a *de jure* conversion even when there is no "conversion" of the land, as defined by plain English or other Board regulations or statute. One potential way to address this issue would be to identify that timberland conversions pursuant to 14 CCR § 1104.1 exemptions on TPZ lands must comply with those conditions of 1101(g)(1)(A)-(C), which would ensure that actual physical conversion was occurring and that this process is used appropriately.

Suggested amended rule language for the Board's consideration is as follows:

"1100 Definitions

(g) "Timberland Conversion" means:

(1) Within non-TPZ Timberland, transforming Timberland to a nontimber growing use through Timber Operations where:

(A) Future timber harvests will be prevented or infeasible because of land occupancy and activities thereon; or

(B) Stocking requirements of the applicable district forest practice Rules will not be met within five years after completion of Timber Operations; or

(C) There is a clear intent to divide Timberland into ownerships of less than three acres (1.214 ha.).

(2) Within TPZ lands, the immediate rezoning of TPZ lands, whether Timber Operations are involved or not, except as exempt from a Timberland conversion permit under 14 CCR § 1104.1. For exemptions pursuant to 14 CCR § 1104.1 on TPZ lands, "Timberland Conversion" means transforming Timberland to a nontimber growing use through Timber Operations where:

(A) Future timber harvests will be prevented or infeasible because of land occupancy and activities thereon; or

(B) Stocking requirements of the applicable district forest practice Rules will not be met within five years after completion of Timber Operations; or

(C) There is a clear intent to divide Timberland into ownerships of less than three acres (1.214 ha.)." [Underline added]

6. Challenges Associated with Discretionary Elements in Ministerial Projects

Exemptions and Emergency Notices are ministerial notices accepted by the Department that are bound by prescriptive standards for protection of natural and cultural resources. The Department has a short timeframe in which to conduct a ministerial review of the notices and determine whether or not to accept them. Despite their ministerial nature however, not every notice is devoid entirely of a discretionary element. In certain instances, there are also rule standards for these notices that direct or imply discretion by the Department. For example, the rule standards for § 1038 and 1104.1 Exemptions and §1052 Emergency Notices contain allowances for operations on archaeological or historical sites where a CAL FIRE Archaeologist has reviewed and concurred with the RPF's plan to cap the site. This includes the three Exemption types for which RPF involvement is not compulsory.

The number of post-fire salvage Emergency Notice submissions thus far this year for which operations are proposed on archaeological or historical sites and a CAL FIRE Archaeologist's concurrence was required has been a challenge for our existing staff. This challenge is in addition to the more general Department concern about capping or covering an archaeological or historical site in a ministerial notice. Capping or covering a site may not be adequate protection in a less than 3-acre Conversion Exemption where stumps may be ripped from the site in the conduct of the conversion.

Another example of a discretionary element in a ministerial notice is the allowance for in-lieu and alternative practices, and exceptions to rules for the protection of Watercourse and Lake Protection Zones to protect public health and safety. This rule applies to Emergency Notices and is found in 14 CCR § 1052(c). A further complication of this rule is found in the anadromous salmonid protection rules, 14 CCR § 916.9 [936.9, 956.9] subsection (t). This rule section likewise allows timber operations in a WLPZ or ELZ under an Emergency Notice for public safety and other reasons including harvesting recommended in writing by the California Department of Fish and Wildlife. In order to be assured public safety concerns have been properly evaluated prior to acceptance of an Emergency Notice, we have at times asked our Unit Forest Practice Inspectors to verify in the field and provide written concurrence that the public safety concern is legitimate. With the number of timberland acres burned in WLPZs this year and the number of Emergency Notices likely to be submitted, an elevation in the number of Unit Inspector evaluations of public safety and fisheries concerns seems likely.

These are just a few examples of the challenges the Department encounters in managing a ministerial notice process that includes elements for which CAL FIRE discretion is required or implied. While the Department is not proposing rule amendments at this time, we would appreciate the Board's consideration of an opportunity for further discussion of this topic in a committee setting.

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