

Board of Forestry and Fire Protection

INITIAL STATEMENT OF REASONS

“Post-Fire Recovery Exemption, 2019”

**Title 14 of the California Code of Regulations (14 CCR),
Division 1.5, Chapter 4
Subchapters 7, Article 2
Amend: §§ 1038, 1038.1, and 1038.2**

INTRODUCTION INCLUDING PUBLIC PROBLEM, ADMINISTRATIVE REQUIREMENT, OR OTHER CONDITION OR CIRCUMSTANCE THE REGULATION IS INTENDED TO ADDRESS (pursuant to GC § 11346.2(b)(1))...NECESSITY (pursuant to GC § 11346.2(b)(1) and 11349(a))....BENEFITS (pursuant to GC § 11346.2(b)(1))

Pursuant to the Z'berg-Nejedly Forest Practice Act of 1973, PRC § 4511, et seq. the Board is authorized to construct a system of forest practice regulations applicable to timber management on state and private timberlands.

Pursuant to PRC §4584 the Board is authorized to exempt a person engaged in specific forest management activities, upon determining that the exemption is consistent with the purposes Z'berg-Nejedly Forest Practice Act of 1973 (FPA), from the FPA, or portions of the FPA.

PRC § 4584 authorizes the Board to adopt regulation to provide an exemption, from all or portions of the FPA, to a person engaging in certain forest management activities specified by the statute, including, the cutting or removal of dead, dying, or diseased trees of any size.

Additionally, pursuant to PRC § 4551.5, the rules and regulations that the Board is authorized to adopt includes measures for fire prevention and control and for prevention and control of damage by forest insects, pests, and disease.

The history of the development of this regulation is as follows:

- The Board adopted and authorized for submission to the Office of Administrative Law (OAL) the regulatory action entitled “Emergency Rulemaking to Facilitate Post-Fire Recovery Efforts within Counties of Lake, Siskiyou, Mendocino, Shasta, Trinity, and Napa” as emergency regulations in accordance with Government Code (GOV) §§ 11346.1, 11346.5 (2)-(6) and 11349.6 at their regularly scheduled meeting on September 27, 2018.
- This regulatory action (OAL File No. 2018-10-19-01E) became effective October 29, 2018 and was set to expire on April 30, 2019.
- On January 23, 2019, the Board adopted emergency regulations (OAL Matter 2019-0207-02E) which necessitated a non-substantive re-numbering and re-ordering of the regulations adopted on September 27, 2018.

- To avoid a lapse in the effective period, at their regularly scheduled meeting on March 6, 2019, the Board authorized re-adoption of the findings of emergency, with minor revisions to the rule text.
- The Board completed the re-adoption process documented in OAL File No. 2019-0319-02EE, which became effective on March 29, 2019 and is set to expire on June 29, 2019.

The purpose of the proposed action is to make permanent, through regular rulemaking, this exemption, with modifications.

The effect of the proposed action is to provide an exemption from portions of FPA to allow the harvesting of dead or dying trees around damaged or destroyed Approved and Legally Permitted Structures in order to facilitate the removal of hazardous materials from and assist in the reconstruction and revitalization of areas directly affected by wildfires when those activities are consistent with, and within the geographic scope of, an existing valid and effective gubernatorial executive order or declaration of emergency. The proposed action will provide exemption from the plan preparation and submission requirements (PRC § 4581) and from the completion report and stocking report requirements (PRC §§ 4585 and 4587) of the FPA when specific requirements are met.

The primary benefit of the proposed action is the reduction in risk to life, property and the environment posed by dead and dying trees through streamlining their harvest and removal, therefore enabling landowners to successfully recover from destructive wildfire events.

SPECIFIC PURPOSE OF EACH ADOPTION, AMENDMENT OR REPEAL (pursuant to GOV § 11346.2(b)(1)) AND THE RATIONALE FOR THE AGENCY'S DETERMINATION THAT EACH ADOPTION, AMENDMENT OR REPEAL IS REASONABLY NECESSARY TO CARRY OUT THE PURPOSE(S) OF THE STATUTE(S) OR OTHER PROVISIONS OF LAW THAT THE ACTION IS IMPLEMENTING, INTERPRETING OR MAKING SPECIFIC AND TO ADDRESS THE PROBLEM FOR WHICH IT IS PROPOSED (pursuant to GOV §§ 11346.2(b)(1) and 11349(a) and 1 CCR § 10(b)). *Note: For each adoption, amendment, or repeal provide the problem, purpose and necessity.*

The Board is proposing action to make permanent, through regular rulemaking, amendments to 14 CCR §§ 1038 and 1038.1.

Modern California wildfire activity represents a significant public risk and hazard. In 2018, over 8,500 fires burned nearly 2 million acres throughout the state, resulting in over \$3.5 billion in damages, the destruction of over 18,000 structures, and the deaths of at least 98 people. The problem that the proposed action seeks to address is that the large number of trees which are damaged and weakened as a result of these fires can hamper rebuilding and reconstruction efforts. Additionally, trees which are dead and dying as a result of wildfires represent a potential hazard to life or property as they deteriorate and ultimately collapse.

Additionally, there currently exists an issue of consistency within the FPRs in which the term “Approved and Legally Permitted Structures” is used throughout the regulations in its defined capacity, but the regulatory definition is limited to one specific provision.

The purpose of the proposed action is to provide a person engaging in the cutting or removal of dead or dying trees an exemption, from the plan preparation and submission requirements (PRC § 4581) and from the completion report and stocking report requirements (PRC §§ 4585 and 4587) of the Forest Practice Act, when specific requirements are met, as well as to address the existing issue of consistency.

SUBSTANTIVE AMENDMENTS

§895.1

The purpose of this amendments is to make the existing definition of “Approved and Legally Permitted Structure” applicable throughout the Forest Practice Rules (FPRs), rather than exclusive to 14 CCR § 1038(c)(1)-(5). Since the initial adoption of this regulatory definition in 1997, the Board has used this defined term in multiple provisions throughout FPRs with the intent of conveying the same information as the defined term, but outside of the provisions of 14 CCR § 1038(c)(1)-(5). This amendment is necessary to clarify that the definition is applicable and appropriate when used within the FPRs, including within the amendments to 14 CCR § 1038(g).

§1038(g)

The purpose of this subsection is to provide the conditions, requirements, and exceptions related to a notice of exemption prepared, or timber operations conducted, pursuant to this subsection, which is intended to provide an exemption from portions of the forest practice rules to landowners who have been affected by wildfires when the timber operations which will be conducted are consistent with, and within the geographic scope of, an existing valid and effective declaration of emergency or gubernatorial executive order. The subsection also allows for the provisions of this exemption to supersede the provisions of any other notices of exemptions within the same area as to provide landowners immediate relief from the hardships created by specific catastrophic wildfires. This is necessary to facilitate future large-scale emergency recovery activities which may be necessary as a result of future wildfires. This amendment is necessary to clarify the condition in which the exemption pursuant to 14 CCR § 1038(g) will be applicable.

§1038(g)(1)

The aim of this exemption is to assist in the rebuilding of Approved and Legally Permitted Structure that existed prior to the given wildfire event and, to that end, this provision limits the harvest activities allowable under the exemption to areas within 300 feet of Approved and Legally Permitted Structures that have been damaged or destroyed by wildfires. The distance of 300 feet, as a threshold for harvest surrounding Approved and Legally Permitted Structures and certain forms of infrastructure, was selected by the Board based upon input from representatives from Cal Fire, California Department of Fish and Wildlife, and Board of Forestry and Fire Protection technical staff. The board determined that 300 feet was an appropriate regulatory distance to strike a balance between public safety and

limiting harvest areas to only what is necessary for construction and reconstruction. This provision is necessary to provide clarity for the geographic and spatial limitations of this exemption.

§1038(g)(2)

The purpose of this amendment is to require the applicant to submit a copy of the valid declaration of emergency or gubernatorial executive order with which the proposed timber operations are consistent with and within the geographic scope. This is necessary in order to both clarify this disclosure requirement, as well as to provide CAL FIRE the information necessary in order to determine the applicability of the exemption for the proposed activities, as well as to determine accuracy of the application.

§1038(g)(3)

This provision is intended to ensure that landowners utilizing this exemption are operating under all appropriate regulatory standards, including county and city requirements, and is necessary so that congruency of standards may be achieved.

§ 1038(g)(4)

This provision states that certain types of slash and woody debris generated by use of this exemption must be treated and is necessary for clarity. Similar requirements for the treatment of Slash and Woody Debris greater than one inch but less than eight inches in diameter exist within 14 CCR § 917.2 [937.2, 957.2], and the Board has concluded that these requirements have been successful in achieving the goals of reduction in risk to life, property and the environment in 14 CCR § 917.2 [937.2, 957.2] and that it would be suitable and appropriate to apply these requirements to accomplish the similar goals of this provision. This provision varies from 100 feet treatment distance within 14 CCR § 917.2 [937.2, 957.2] to 150 feet of treatment distance within the proposed action as the Board determined that construction and reconstruction activities addressed by 14 CCR § 1038(g) will require an increased footprint in order to accommodate the safety of workers who may be adjacent to structures. This applicable distance and treatment level was informed by Cal Fire and the Department of Fish and Wildlife.

Additionally, the adopted provision does not allow the lopping of slash (which is allowable under 14 CCR § 917.2 [937.2, 957.2]), as the Board determined that lopping may not accommodate the safety of the public and workers who may be adjacent to Approved and Legally Permitted Structures during construction or reconstruction activities.

§ 1038(g)(5)

This provision states that certain types of slash and woody debris generated by use of this exemption must be treated. This provision also mandates deadlines for when this slash must be treated and is necessary for clarity. Similar requirements for the treatment of Slash and Woody Debris and the timing of those requirements exist within 14 CCR § 917.2 [937.2, 957.2], and the Board has concluded that these requirements have been successful in achieving the goals of reduction in risk to life, property and the environment in 14 CCR § 917.2 [937.2, 957.2] and that it would be suitable and appropriate to apply these requirements to accomplish the similar goals of this provision.

Additionally, the proposed provision of 14 CCR § 1038(g)(5) requires a treatment requirement distance of between 150 and 300 feet as the Board determined that this distance was appropriate in order to reduce the risk to life, property and the safety of workers posed by slash surrounding Legally Approved and Permitted Structures during construction or reconstruction activities. This applicable distance and treatment level was informed by Cal Fire and the Department of Fish and Wildlife.

§ 1038.1(c) Table 1

The purpose of these amendments are to make the existing requirements of 14 CCR § 1038.1(c)(5) through (15) applicable to exemptions pursuant to 14 CCR § 1038(g). These currently extant provisions are appropriate and suitable here to clarify the restrictions on timber operations that are necessary to preserve environmental integrity and to limit the scope of operations for use when removing trees within three-hundred feet of an approved and legally permitted structure.

§ 1038.2 Table 1

The purpose of this amendment is to require a submitted notice of exemption pursuant to 14 CCR § 1038(g) to include a map of a specified scale, which includes the boundaries of the harvest area, which is defined pursuant to 14 CCR § 895.1. Similar mapping requirements exist and are applicable to 14 CCR §§ 1038 (a) and (c) and are appropriate and necessary here to provide sufficient detail to CAL FIRE to enable enforcement of these regulations without requiring excessive detail to create a burden on the applicant.

Note Regarding § 1038.5

Given the statutorily mandated effective date of regulations adopted pursuant to the Forest Practice Act of January 1 per PRC § 4554.5, the Board does not intent to repeal or otherwise withdraw the provision of 1038.5 within the proposed action. The maximum effective period, assuming an additional re-adoption of the regulatory text, of § 1038.5 will expire on October 29, 2019, and the earliest possible effective period for the proposed action in January 1, 2019. These two regulatory schemes, though similar, will not overlap in effectiveness and do not represent any issues with duplication.

ECONOMIC IMPACT ANALYSIS (pursuant to GOV § 11346.3(b)(1)(A)-(D) and provided pursuant to 11346.3(a)(3))

The effect of the proposed action is to provide an exemption from portions of FPA to allow the harvesting of dead or dying trees around damaged or destroyed Approved and Legally Permitted Structures in order to facilitate the removal of hazardous materials from and assist in the reconstruction and revitalization of areas directly affected by wildfires when those activities are consistent with, and within the geographic scope of, an existing valid and effective gubernatorial executive order or declaration of emergency..

Creation or Elimination of Jobs within the State of California

The proposed action does not require any additional obligations required from the

regulated public than were previously in place. No creation or elimination of jobs will occur.

Creation of New or Elimination of Businesses within the State of California

The regulatory amendments as proposed represent a continuation of existing forest practice regulations and are intended to guarantee certainty in their application as long as the problem exists. Given that the businesses which would capture the work required by these amendments are already extant, it is expected that proposed regulation will neither create new businesses nor eliminate existing businesses in the State of California.

Expansion of Businesses Currently Doing Business within the State of California

The regulatory amendments as proposed represent a continuation of existing forest practice regulations and are only intended to guarantee certainty in their application as long as the problem exists. The proposed regulation will not result in the expansion of businesses currently doing business within the State.

Benefits of the Regulations to the Health and Welfare of California Residents, Worker Safety, and the State's Environment

The primary benefit of the proposed action is to facilitate the reduction in risk to life, property and the environment posed by dead and dying trees by streamlining the process to harvest and remove them. Specifically, the proposed action will promote construction and reconstruction activities following wildfire, and allow landowners to address the falling tree hazard associated with deteriorating dead trees. Additional benefits may include a monetary return and improved aesthetics.

Business Reporting Requirement (pursuant to GOV § 11346.5(a)(11) and GOV § 11346.3(d))

The proposed regulation does not require a business reporting requirement.

Summary

In summary, the proposed action:

- (A) Will not create jobs within California;
- (A) will not eliminate jobs within California;
- (B) will not create new businesses,
- (B) will not eliminate existing businesses within California
- (C) will beneficially affect the expansion or contraction of businesses currently doing business within California.
- (D) will yield nonmonetary benefits. For additional information on the benefits of the proposed regulation, please see anticipated benefits found under the "Introduction Including Public Problem, Administrative Requirement, or Other Condition or Circumstance the Regulation is Intended to Address".

SIGNIFICANT STATEWIDE ADVERSE ECONOMIC IMPACT DIRECTLY AFFECTING BUSINESS, INCLUDING ABILITY TO COMPETE (pursuant to GOV §§ 11346.3(a), 11346.5(a)(7) and 11346.5(a)(8))

The proposed action will not have a significant statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states, by making it costlier to produce goods or services in California.

FACTS, EVIDENCE, DOCUMENTS, TESTIMONY, OR OTHER EVIDENCE RELIED UPON TO SUPPORT INITIAL DETERMINATION IN THE NOTICE THAT THE PROPOSED ACTION WILL NOT HAVE A SIGNIFICANT ADVERSE ECONOMIC IMPACT ON BUSINESS (pursuant to GOV § 11346.2(b)(5) and GOV § 11346.5(a)(8))

The fiscal and economic impact analysis for these Exemption Amendments relies upon contemplation, by the Board, of the economic impact of the provisions of the proposed action through the lens of the decades of experience practicing forestry in California that the Board brings to bear on regulatory development.

TECHNICAL, THEORETICAL, AND/OR EMPIRICAL STUDY, REPORT, OR SIMILAR DOCUMENT RELIED UPON (pursuant to GOV SECTION 11346.2(b)(3))

The Board relied on the following list of technical, theoretical, and/or empirical studies, reports or similar documents to develop the proposed action:

1. PRC §§ 4584, 4584.1, & 4584.2.

REASONABLE ALTERNATIVES TO THE PROPOSED ACTION CONSIDERED BY THE BOARD, IF ANY, INCLUDING THE FOLLOWING AND THE BOARD'S REASONS FOR REJECTING THOSE ALTERNATIVES (pursuant to GOV § 11346.2(b)(4)(A) and (B)):

- **ALTERNATIVES THAT WOULD LESSEN ANY ADVERSE IMPACTS ON SMALL BUSINESS AND/OR**
- **ALTERNATIVES THAT ARE LESS BURDENSOME AND EQUALLY EFFECTIVE IN ACHIEVING THE PURPOSES OF THE REGULATION IN A MANNER THAT ENSURES FULL COMPLIANCE WITH THE AUTHORIZING STATUTE OR OTHER LAW BEING IMPLEMENTED OR MADE SPECIFIC BY THE PROPOSED REGULATION**

Pursuant to 14 CCR § 15252 (a)(2)(B), alternatives are not required because these regulations will not have any significant or potentially significant effects on the environment. Additionally, pursuant to 14 CCR § 1142(c), the discussion (of alternatives) may be limited to alternatives which would avoid the significant adverse environmental effects of the proposal. Consequently, the alternatives provided herein are provided pursuant to the APA (**GOV § 11346.2(b)(4)**) exclusively.

The Board has considered the following alternatives and rejected all but the “Proposed Action” alternative.

Alternative 1: No Action

The Board considered taking no action, but the “No Action” alternative was rejected because it would not address the problem.

The Board rejected this alternative as it does not address the existing issue of dead and dying trees impeding construction and reconstruction efforts and creating safety hazards within areas which are affected by significant wildfire events.

Alternative 2: Take Action to Make Existing Regulation Less Prescriptive

This alternative would eliminate the prescriptive requirements and restrictions of paragraphs (1) through (5) of subsection § 1038 (g).

The Board rejected this alternative as it would create issues of clarity, enforceability, and implementation as well as potentially increasing fuel hazard within already hazardous areas. The prescriptive fuel treatment requirements are necessary to facilitate the construction, reconstruction, and the removal of hazardous materials, as well as to reduce future fuel loading and ensure that constructed or reconstructed structures are not immediately exposed to hazardous fuel conditions.

Alternative 3: Proposed Action

The Board accepted the “Proposed Action” alternative to address the problem as it is the most cost-efficient, equally or more effective, and least burdensome alternative. Alternatives 1 and 2 would not be more effective or equally effective while being less burdensome or impact fewer small businesses than the proposed action. Specifically, alternatives 1 and 2 would not be less burdensome and equally effective in achieving the purposes of the regulation in a manner that ensures full compliance with the authorizing statute or other law being implemented or made specific by the proposed regulation than the proposed action.

Additionally, alternatives 1 and 2 would not be more effective in carrying out the purpose for which the action is proposed and would not be as effective and less burdensome to affected private persons than the proposed action or would not be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law than the proposed action. Further, none of the alternatives would have any adverse impact on small business. Small business means independently owned and operated, not dominant in their field of operations and having annual gross receipts less than \$1,000,000.

Prescriptive Standards versus Performance Based Standards (pursuant to GOV §§11340.1(a), 11346.2(b)(1) and 11346.2(b)(4)(A)):

Pursuant to **GOV §11340.1(a)**, agencies shall actively seek to reduce the unnecessary regulatory burden on private individuals and entities by substituting performance standards for prescriptive standards wherever performance standards can be reasonably expected to be as effective and less burdensome, and that this substitution shall be considered during the course of the agency rulemaking process.

The proposed action does not introduce additional prescriptive or performance based standards, it only seeks to extend an existing mix of performance and prescriptive based standards. Alternative #3 is preferred for the reasons described above and the rationales for individual provisions serves as the explanation for why a standard, if required to be prescriptive, is prescriptive.

Pursuant to **GOV § 11346.2(b)(1)**, the proposed action does not mandate the use of specific technologies or equipment.

Pursuant to **GOV § 11346.2(b)(4)(A)**, Alternatives 1 and 2 were considered and ultimately rejected by the Board in favor of the proposed action. The proposed action does not mandate the use of specific technologies or equipment, but does prescribe specific actions or procedures. Alternatives 1 and 2 considered by the Board require fewer specific actions or procedures but would result in a less effective regulation.

DESCRIPTION OF EFFORTS TO AVOID UNNECESSARY DUPLICATION OR CONFLICT WITH THE CODE OF FEDERAL REGULATION (pursuant to GOV § 11346.2(b)(6))

The Code of Federal Regulations has been reviewed and based on this review, the Board found that the proposed action neither conflicts with, nor duplicates Federal regulations. There are no comparable Federal regulations for timber harvesting on State or private lands.

POSSIBLE SIGNIFICANT ADVERSE ENVIRONMENTAL EFFECTS AND MITIGATIONS

The Board has considered whether there will be any potentially significant adverse environmental effects from the proposed action. Such consideration was conducted to meet California Environmental Quality Act (CEQA) requirements for a project by using the functional equivalent certification to an EIR granted to the Board for its rulemaking process pursuant to PRC § 21080.5.

The proposed action would be an added element to the State's comprehensive Forest Practice Program under which all commercial timber management is regulated. The Board's FPRs along with the Department oversight of rule compliance functions expressly to prevent adverse environmental effects.

Harvesting Plans and situation-specific exemptions from the FPA contain a mix of avoidance and mitigation measures that are required by the FPRs or are specifically designed by a licensed RPF to reduce the risk for potential adverse effects. They also require a comprehensive cumulative effects analysis utilized in part to identify potential risks and effects to aid in RPFs in avoidance and mitigation measure development.

State representatives review every harvesting plan (if specific measures are met and prepared by an RPF) prior to a decision as to acceptance or denial. Local and federal agency representatives are also involved in the review process. Although exemptions are accepted by CAL FIRE ministerially if complete, they are required to meet the

specific mandates included in the proposed rule text, the existing FPRs and requires an RPF to attest to specific onsite conditions before and after timber operations take place to address potential impacts to wildlife, archaeological, or other resources. Where FPRs regulatory standards have been violated, specified corrective and/or punitive enforcement measures, including but not limited to financial penalties, are imposed upon the identified offender(s).

In summary, the proposed action amends or supplements standards to an existing regulatory scheme and is not a mitigation as defined by CEQA. The Board concludes that the proposed action will not result in any significant or potentially significant adverse environmental effects and therefore no alternative or mitigations measures are proposed to avoid or reduce any significant effects on the environment (14 CCR § 15252(a)(2)(B)).