Board of Forestry and Fire Protection

FINAL STATEMENT OF REASONS (FSOR), pursuant to GOV §11346.9(a)

“Emergency Notice Fuel Treatment and RPF Responsibility”

Board of Forestry and Fire Protection

**Title 14 of the California Code of Regulations**

**Division 1.5, Chapter 4,**

**Subchapter** **7, Article 2**

**Amend §§1052, 1052.4**

# UPDATE OF INFORMATION CONTAINED IN ISOR (pursuant to GOV §11346.9(a)(1))

The ISOR indicates that the lack of a regulatory requirement for notifying CALFIRE of the date where operations begin potentially leads to high fuel loads being present on the landscape for an extended period. While this is true, it is also true that the regulatory requirements for fuel treatment leads to confusion, makes it difficult to enforce existing regulation, and potentially adds to high fuel loads being present on the landscape for an extended period, as indicated elsewhere in the ISOR, such as within the description of the problem on page 3.

All material relied upon was identified in the ISOR and made available for public review prior to the close of the public comment period.

# SUMMARY OF BOARD’S MODIFICATIONS TO 45-DAY NOTICED RULE TEXT AND INFORMATION REQUIRED PURSUANT TO GOV §11346.2(b)(1)) (pursuant to GOV §11346.9(a)(1))

The rule text was adopted as noticed for 45-Days.

# MANDATE ON LOCAL AGENCIES AND SCHOOL DISTRICTS (pursuant to GOV §11346.9(a)(2)):

The adopted regulation does not impose a mandate on local agencies or school districts.

# COST TO ANY LOCAL AGENCY OR SCHOOL DISTRICT WHICH MUST BE REIMBURSED IN ACCORDANCE WITH THE APPLICABLE GOVERNMENT CODE SECTIONS COMMENCING WITH GOV §17500 (pursuant to GOV §11346.9(a)(2)):

The adopted regulation does not impose a reimbursable cost to any local agency or school district.

# ALTERNATIVE 3, BOARD’S ADOPTED ALTERNATIVE (update, pursuant to GOV §11346.9(a)(1)), of information pursuant to GOV §11346.2(b)(4)): Adopt Rulemaking Proposal as Modified Through Formal Public Review and Comment Process

The Board selected Alternative #3 as proposed and modified through the formal public review and comment process.

The proposed action 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.

ALTERNATIVES DETERMINATION (pursuant to GOV §11346.9(a)(4) and (5))

No other alternatives have been proposed or otherwise brought to the Board's attention, except as set forth in the ISOR and provided herein in the summary and responses to comments. Based upon the findings below and a review of alternatives the Board has determined the following:

* No alternative considered would be more effective in carrying out the purpose for which the regulation was intended.
* No alternative would be as effective and less burdensome to affected private persons than the adopted regulation.
* No alternative would be more cost effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.
* No alternative considered would lessen any adverse economic impact on small businesses.

**FINDINGS (BASED ON INFORMATION, FACTS, EVIDENCE AND EXPERT OPINION) TO SUPPORT THE ALTERNATIVES DETERMINATION**

* The Board finds that the adopted alternative improves the efficacy of existing regulations related to Emergency Notice timber operations.
* The Board finds that these regulations have the potential to provide evidence-based protection to watercourses during Emergency Notice timber operations.
* The Board finds that the modifications to the notice for fuels treatment timelines in Emergency Notice Fuel Hazard Reduction Emergency Notices will bring those requirements into conformity with the timelines set forth in 14 CCR § 1052.4(d)(5).
* The Board finds the adopted alternative strikes a balance between performance based and prescriptive standards.
* The Board finds that a minimum level of prescriptive standards were needed to implement the statute.
* The Board finds the adopted alternative fulfills the obligations of the Board, specified in statute, and represents a product based upon compromise and the greatest degree of consensus achievable at the time the Board authorized noticing of these amendments.
* The Board finds agency representatives reviewed and provided input into these amendments.

# BRIEF SYNOPSIS OF ADDITIONAL ALTERNATIVES CONSIDERED AND REJECTED (update, pursuant to GOV §11346.9(a)(1)), of information pursuant to GOV §11346.2(b)(4))

## Alternative 1: No Action Alternative

The Board considered taking no action, but this alternative was rejected because it would not address the problem.

## Alternative #2: Make regulation less prescriptive

This action would replace the prescriptive standards for RPF Responsibility in Emergency Notice Timber Operations with performance-based regulations. This action would create issues related to the preservation of environmental quality with regards to the ministerial permitting of certain timber harvesting operations and could lead to issues of clarity surrounding implementation and enforcement of the regulations. This alternative may reduce clarity and consistency with other portions of the rules which rely upon the existence of the current operational limitations in order to ensure that forest resources are preserved.

# SUMMARY AND RESPONSE TO COMMENTS (pursuant to GOV 11346.9(a)(3))

The comments below are identified in the following format: The letter S or W followed by a series of numbers separated by a hyphen, followed by the name and affiliation (if any) of the commenter (e.g. W1-8: John Doe, Healthy Forest Association).

S: Indicates the comment was received from a speaker during the Board hearing associated with the Notices of Proposed Action.

W: Indicates the comment was received in a written format.

1st number: Identifies the comments in the order in which it was received.

## WRITTEN COMMENTS AND RESPONSES RESULTING FROM 45-DAY NOTICE OF PROPOSED RULEMAKING PUBLISHED November 19, 2021

**Comment W1 (Matthias St. John, Executive Officer, North Coast Regional Water Quality Control Board):** Operational Provisions

Forest Practice Rules §1052 – Emergency Notice, states the following:

(b)Timber Operations pursuant to an emergency notice shall comply with the Rules and regulations of the Board. A person conducting Timber Operations under and Emergency Notice shall comply with all operational provisions of the Forest Practice Act and District Forest Practice Rules applicable to “Timber Harvest Plan”, “THP”, and “plan”.

Although the language in Forest Practice Rules §1052 appears to include all the same provisions that apply to a routine timber harvest plan, there are many different interpretations regarding which provisions apply, which do not, and which are considered “feasible” to implement. Other operational provisions required of a timber harvest plan, such as the identification of significant existing and potential erosion sites per FPR §923.1(e) could require certain activities that may fall outside of the non-discretionary arena of the expedited EM authorization process. As such, it remains unclear which “operational provisions” of the FPRs specifically apply to EMs, as these have not yet been defined.

The lack of clear definitions of which operational provisions apply leaves CAL FIRE, the review team agencies, RPFs, and licensed timber operators in an ambiguous, and at times disagreeable regulatory arena. Further, the lack of clarity significantly increases the risks for individual landowners and the environment.

We believe that clarification on which FPR operational provisions apply to EM projects would greatly improve regulatory oversight, project implementation, environmental protection, and reduce landowner liabilities.

Comment 1: The Board of Forestry and/or CAL FIRE should develop and distribute guidance regarding all operational provisions of the Forest Practice Rules that apply to Emergency Notices.

**Response:** The proposed action is the adoption of regulations to require the involvement of an RPF during Emergency Notice Timber Operations and to clarify a timing requirement in order to ensure the timely and appropriate treatment of hazardous fuels on the landscape. The proposed action is not intended to address existing regulations related to conditions of operations unrelated to these issues and the request to do so is outside the scope of the proposed action.

**Rule Text Change:** No

**Comment W2 (Matthias St. John, Executive Officer, North Coast Regional Water Quality Control Board):** Road and Watercourse Construction/Reconstruction

Roads and watercourse crossings can be one of the largest sources of pollution discharge, and therefore they are highly scrutinized and reviewed during normal timber harvest plan activities. The BOF and CAL FIRE 2019 Monitoring Report identified “improved oversight” of roads and watercourse crossings as one of the areas that has the greatest potential environmental lift as part of the EM process.

However, CAL FIRE management has recently clarified that post-fire timber salvage activities conducted through an authorized EM project are strictly “non-discretionary” (aka “ministerial”) and that road and watercourse crossing construction/reconstruction activities fall outside the realm of the EM authorization.

Forest Practice Rules §916.9(t)(4) – Emergency Notices, states that “no timber operations can occur within a watercourse and lake protection zone, equipment limitation zone, or equipment exclusion zone except for construction or reconstruction of ‘approved’ watercourse crossings.”

The “approval” of these watercourse crossings suggests a discretionary review/approval process exists to ensure that an EM is conforming with some regulatory requirements. In general, the Forest Practice Rules infer, and CAL FIRE inspectors concur, that the approval of watercourse crossing construction or reconstruction activities is delegated to the California Department of Fish and Wildlife (CDFW).

It should be noted that under Section 13260 of the California Water Code, and the State Water Resources Control Board’s Nonpoint Source Implementation and Enforcement Policy, the discharges of waste (e.g., sediment) to a water of the state requires authorization from the State or Regional Water Board through waste discharge requirements. As such, road or watercourse crossing construction or reconstruction activities necessary to conduct a CAL FIRE authorized EM project are not automatically “approved” as part of a regional water board permit.

Comment 2: The Board of Forestry and CAL FIRE should define what the “approval” process is for watercourse crossings that must be constructed or reconstructed to support an Emergency Notice.

**Response:** See response to comment W1. Review of whether watercourse crossing construction and reconstruction can occur during Emergency Notice timber operations is outside of the scope of the current rulemaking.

**Rule Text Change:** No

**Comment W3 (Matthias St. John, Executive Officer, North Coast Regional Water Quality Control Board):** The Board of Forestry should clarify whether CAL FIRE is expected to enforce conformance with Forest Practice Rules §916.9(t)(4), by ensuring that all watercourse crossing construction and reconstruction activities are indeed “approved”.

**Response:** See response to comment W1. Review of how watercourse crossing construction and reconstruction in conformity with 14 CCR §916.9(t)(4) is enforced under Emergency Notice timber operations is outside of the scope of the current rulemaking.

**Rule Text Change:** No

**Comment W4 (Alan Levine, Coast Action Group, Affiliate of Redwood Coast Watersheds Alliance):** There is a lack of definition and control of responsibilities of RPFs and operations procedures during Emergency and Salvage operations.This lack of operational controls and confusion in regards to the application of the FPRs and Water Code during these operations present a direct threat to water quality and productive forest resources which are to be protected under the Rules.

The streamlining of Emergency Fuel Treatment applications and Salvage applications has lead to confusion and a lack of appropriate application of the FPRs which the Board has in place for resource protection.

Review on a number of completed operations indicated that more than a significant number of completed operations were not compliant with the Rules.

I am assuming you recognize this as a problem.

Note: the field review of these operations were accomplished only in areas where the landowners were cooperative and invited review. There were many areas not reviewed for compliance.

If we are to attain resource protection for productive forests, increased carbon sequestration, species and water quality values (as mandated by FPRs, Water Code, CEQA, and other State Code); the Board must take action to clarify and assure imposition of the Rules.

**Response:** As stated in 14 CCR §1052(b), Timber Operations pursuant to an emergency notice shall comply with the Forest Practice Rules. Existing regulations are being changed based on observed improvements to watercourse protection on Emergency Notice timber operations that were under the observation of an RPF and to align timelines for fuels treatment in Fuel Hazard Reduction Emergency Notices. This rulemaking seeks to clarify RPF involvement and certain fuel treatment requirements during Emergency Notice Timber Operations, including salvage operations, in order to promote compliance with the Rules, as is suggested by the comment. No additional modifications to the rule text are necessary at this time to achieve this purpose.

**Rule Text Change:** No

**Comment W5 (Don McEnhill, Executive Director, Russian Riverkeeper):** As demonstrated in the 2019 joint report put forth by the State Board of Forestry and Fire Protection (the Board) and CalFire, emergency waivers for timber removal needed additional oversight and clarity to ensure compliance with applicable environmental laws and reduce resulting environmental degradation—especially in regards to preservation of waterways. In response to that report, the Board has been utilizing temporary emergency regulations to address some of the issues found throughout the Emergency Notices program. Now, the Board is moving to adopt these temporary regulations permanently, and we are in support of that action. While it is important to protect homes and lives from risk of fire, it cannot be done at the expense of vital water resources that provide life and well-being to our entire region. There must be a balance between the two, and unfortunately this balance will continue to be thrown off by climate change impacts. This is especially true as our reduced precipitation results in both drier landscapes (i.e. more fires) and the growing need to protect whatever precipitation we do get. Thus, taking steps such as this one, and any others, that help ensure adequate oversight and enforcement of fire risk reduction methods are in place is vital to the continued protection of our precious and ever-dwindling waterways.

**Response:** The Board appreciates the support of Russian Riverkeeper.

**Rule Text Change:** No

## VERBAL COMMENTS AND RESPONSES RESULTING FROM PUBLIC HEARING CONDUCTED January 19, 2022

**Comment S1 (Johnathan Warmerdam, NCRWQCB):** Read the above letter from the North Coast Regional Water Quality Control Board

**Response:** See responses to comments W1-3.

**Rule Text Change:** No

**Comment S-2 (Andrew Jensen – Division Manager, Lahontan Regional Water Quality Control Board):** The LRWQCB supports NCRWQCB letter as written.

**Response:** See responses to comments W1-3.

**Rule Text Change:** No

**Comment S3 (Elliot Chasin, CDFW):** CDFW supports NCRWQCB letter as written. CDFW is concerned about the impacts that sediment discharge could have on species, including listed fish. The board should continue to revise the Forest Practice Rules to improve clarity. 916.9(t)(4) is unclear regarding the approval process for watercourse crossings in the Emergency Notice process.

**Response:** For the Board Response to the NCRWQCB letter, see responses W1-3. The comments on sediment discharge and water crossings echo the concerns addressed by the rulemaking. Revision of the Forest Practice Rules to improve clarity of the approval process for watercourse crossings in the emergency notice process is outside of the scope of the current rulemaking.

**Rule Text Change:** No

**Comment S4 (Eric Huff, Staff Chief Forest Practice, CAL FIRE):** Chief Huff, CALFIRE – Appreciates the efforts of the Board in this matter. The Department has taken actions to improve education and outreach to LTOs and RPFs regarding the Emergency Notice process and the results of the 2019 monitoring report. This is a tremendous example of turning reports to regulatory action – an example of science becoming regulation through a transparent and public process. In this rulemaking, the board recognizes the need of greater oversight from RPFs, consistent with findings of report. It also closes an inconsistency in the lifespan of treatment in response to known enforcement issues. CALFIRE supports this rulemaking in response to EX/EM – and will be revisiting emergency notice sampling in the years ahead to see if this regulation is effective.

The importance of a plan is the skill and care of operators on the ground. “Operational rule” is a complex issue – there’s a potential strong need for guidance documents. We are in a different time, and to see the conditions and impacts to timberland owners. The board should not hold back on action for this rulemaking on a rule that ensures RPF action on postfire salvage that addresses these concerns – he looks forward to working with colleges at other agencies working to address new challenges of managing after a fire and with great sympathy for people working with limited infrastructure to address challenges of recovery. CALFIRE would like to see board act as noticed.

**Response:** The Board appreciates the support of the Department.

**Rule Text Change:** No

**Comment S5 (Alan Levine, Coast Action Group, Affiliate of Redwood Coast Watersheds Alliance):** There is a lack of definition and control of RPFs and operational procedures during salvage operations. A review of completed plans shows a large number of non-compliant situations. The Board should determine which rules to change to improve compliance. The Board should take action to ensure that people can get emergency notice operations completed under the framework of what is required under the forest practice rules.

**Response:** See response to comment W4.

**Rule Text Change:** No