

Memo



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Date: July 26, 2022

To: California Board of Forestry and Fire Protection

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Subject: Common Sense and Categorical Exemptions for California Environmental Quality Act Compliance in the Adoption of Amendments to State Minimum Fire Safe Regulations

The Board of Forestry and Fire Protection (Board) proposes adoption of amendments to the State Minimum Fire Safe Regulations (FSR) (Title 14 California Code of Regulations [CCR], Division 1.5, Chapter 7, Subchapter 2, Articles 1-5), as directed by SB 901 (Dodd, Statutes of 2018). Consistent with previous approvals of similar regulatory actions, the Board is considering application of the Common Sense Exemption or certain categorical exemptions for compliance with the California Environmental Quality Act (CEQA). The Common Sense Exemption is appropriate because the proposed regulatory amendments present no possibility that a significant effect on the environment may result from their adoption. Classes 7 and 8 categorical exemptions (Article 19 of the State CEQA Guidelines) are also appropriate to apply to the proposed regulatory amendments because these classes of exemptions are designed for use in the adoption of regulations that involve protection of the environment and natural resources.

The overarching purpose of the proposed regulatory amendments is to amend state minimum wildfire protection standards to include requirements for identification of ridgelines, greenbelts, and fuel breaks by local jurisdictions.

The contents of this memorandum include: (1) background information on the regulations, including their geographic applicability and a general summary of the proposed regulatory amendments; (2) CEQA considerations and determination; (3) the applicability of the Common Sense Exemption and Classes 7 and 8 categorical exemptions; (4) a determination as to whether any of the exceptions to use of a categorical exemption apply; and (5) a list of references cited herein.

BACKGROUND OF THE PROPOSED REGULATORY AMENDMENTS

Public Resources Code (PRC) Section 4290 directs the Board to promulgate wildfire protection standards for development in the State Responsibility Area (SRA) and in the Very High Fire Hazard Severity Zones (VHFHSZ), which is outside the SRA. Under the FSR, the Board is required to "...adopt regulations implementing minimum fire safety standards related to defensible space" applicable to "the perimeters and access to all residential, commercial, and industrial building construction." In response to the severe fire season conditions in 2017, SB 901 (Dodd, Statutes of 2018) expanded the applicability of the regulations promulgated under PRC Section 4290 to the VHFHSZ as of July 1,

2021; required the Board to more frequently update regulations relating to fuel breaks and greenbelts near communities; and directed the Board to adopt regulations to preserve undeveloped ridgelines to reduce fire risk and improve fire protection. The proposed regulatory amendments consist of measures to preserve undeveloped ridgelines, as identified by the responsible local jurisdiction; criteria to establish the need, location, and design for fuel breaks and greenbelts, when required by the responsible local jurisdictions in consultation with the fire authority; and other amendments to increase consistency and clarity within the regulations.

The objectives of the proposed regulatory amendments are to:

- ▶ establish standards for fuel breaks and greenbelts near communities;
- ▶ establish measures for the preservation of undeveloped ridgelines;
- ▶ improve clarity regarding the inspection and enforcement agencies; and
- ▶ promote local jurisdiction compliance with the FSR and to clarify the process for compliance.

Geographic Applicability

The proposed regulatory amendments apply to areas of the State designated as SRA or VHFHSZ.

Summary Description of the Proposed FSR Amendments

This memorandum addresses the proposed regulatory amendments to the current FSR, which include:

- ▶ consistency in terms within and between these regulations and relevant statutes,
- ▶ criteria for identification of ridgelines to be preserved, and
- ▶ standards for fuel breaks and greenbelts near communities.

Changes to the existing FSR, which are evaluated in this memorandum addressing the applicability of the Common Sense Exemption and Classes 7 and 8 categorical exemptions, consist of refinements to Articles 1 and 5, as follows.

Article 1 of the proposed FSR amendments is revised to include new and refined definitions of terms, the description of the purpose, and minor revisions to the exceptions to standards intended to provide greater specificity and clarity. The purpose of the regulations is to establish state minimum wildfire protection standards in conjunction with building, construction, and development in the SRA and VHFHSZs (Section 1270.02[a]), related to the future design and construction of structures, subdivisions, and developments for basic emergency access and perimeter wildfire protection measures (Section 1270.02[b]).

Article 5 of the FSR contains proposed regulatory amendments addressing ridgelines, fuel breaks, and greenbelts. Under the proposed regulatory amendments, responsible local jurisdictions must identify ridgelines for preservation, based on factors, such as topography, vegetation, and proximity to existing or proposed development. In addition, the proposed regulatory amendments direct responsible local jurisdictions, in consultation with the fire authority serving their jurisdiction, to identify fuel breaks, greenbelts, greenways, open spaces, and parks based on general guidance, including access and location.

CEQA CONSIDERATIONS AND DETERMINATION

With respect to the proposed regulatory amendments to the existing FSR, the Board is considering the applicability of the following CEQA exemptions:

- (1) Common Sense Exemption (State CEQA Guidelines Section 15061[b][3]), which states “The activity is covered by the Common Sense Exemption that applies only to projects which have the potential for causing a significant effect on the environment. Where it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment, the activity is not subject to CEQA.”
- (2) Class 7 Categorical Exemption (State CEQA Guidelines Section 15307), which “consists of actions taken by regulatory agencies as authorized by state law or local ordinance, to assure the maintenance, restoration, or enhancement of a natural resource where the regulatory process involves procedures for protection of the environment. Examples include wildlife preservation activities implemented by the California Department of Fish and Wildlife. Construction activities are not included in this exemption.”
- (3) Class 8 Categorical Exemption (State CEQA Guidelines Section 15308), which “consists of actions taken by regulatory agencies as authorized by state or local ordinance, to assure the maintenance, restoration, enhancement, or protection of the environment where the regulatory process involves procedures for protection of the environment. Construction activities and relaxation of standards allowing environmental degradation are not included in this exemption.”

The proposed regulatory amendments qualify under the Common Sense Exemption as well as the Classes 7 and 8 categories of exemption, pursuant to 14 CCR Section 1153, as described below.

Pursuant to State CEQA Guidelines 15300.4, “Each public agency shall, in the course of establishing its own procedures, list those specific activities which fall within each of the exempt classes, subject to the qualification that these lists must be consistent with both the letter and the intent expressed in the classes. Public agencies may omit from their implementing procedures classes and examples that do not apply to their activities, but they may not require EIRs for projects described in the classes and examples in this article except under the provisions of Section 15300.2.” The exceptions from 14 CFR 15300.2 are identified under the header “Exceptions to Reliance on Categorical Exemptions” and evaluated under the header “Analysis of Potential Exceptions to Use of Categorical Exemptions.”

The Board implements CEQA compliance consistent with its adopted regulations. Title 14 of the Code of California Regulations Section 1153, “Declaration of Categorical Exemptions,” states in relevant part:

Section 1153. Declaration of Exemptions

In accordance with Sections 15300-15329 of Title 14 of the California Code of Regulations, and subject to the limitations and qualifications on categorical exemptions set forth herein, the activities of the Board which are categorically exempt from Division 13 of the PRC include:

- (c) Classes 7 or 8: Actions by Regulatory Agencies for Protection of Natural Resources or Protection of the Environment. Class 7 consists of actions taken by regulatory agencies, as authorized by state law or local ordinance, to assure the maintenance, restoration, or enhancement of a natural resource where the regulatory process involves procedures for protection of the environment, excluding construction activities. Class 8 consists of actions taken by regulatory agencies, as authorized by state or local ordinance, to assure the maintenance, restoration, enhancement, or protection of the environment where the regulatory process involves procedures for protection of the environment, excluding construction activities and relaxation of standards allowing environmental degradation. Such actions may include, but are not limited to:
 - (1) Establishment, dissolution, modification, or regulation of hazardous fire areas in accordance with PRC Division 4, Part 2, Chapter 2 Hazardous Fire Areas (PRC Sections 4251- 4290.5).

The proposed regulatory amendments apply to hazardous fire areas in accordance with PRC Sections 4251-4290.5. Pursuant to 14 CCR 1153, the proposed regulations therefore fall within the Classes 7 and 8 exemption categories.

Facts Supporting Use of the Common Sense Exemption

The Common Sense Exemption applies if “it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment (State CEQA Guidelines Section 15061[b][3]).” The proposed FSR amendments require responsible local jurisdictions to determine where ridgelines should be identified (Section 1276.02 of the proposed FSR amendments), and direct that the local jurisdictions identify, in consultation with the fire authority serving their jurisdiction, fuel breaks, greenbelts, greenways, open spaces, and parks (Sections 1276.03 and 1276.04 of the proposed FSR amendments). While the proposed FSR amendments provide general guidance and criteria for identification of these features (e.g., topography, vegetation, proximity to developed land uses), the proposed FSR amendments would not require Board approval of any construction or other improvements needed to meet the FSR standards and would not necessitate or indirectly require any type of physical change to the environment.

Standards for designating strategic ridgelines and greenbelts would not displace or determine the location of development because the location would be determined by local jurisdictions as part of their land use planning and project review and approval processes. The parameters included in the standards, while generally suggested, are not specifically prescribed. As such, the location of identified ridgelines, greenbelts, and fuel breaks would be the result of local land use agency policies and approvals, including conditions of approval, not operation of the FSRs. Thus, there is no causal connection between the proposed FSR amendments and potential physical changes to the environment that could cause a significant environmental impact. Because they would not directly or indirectly cause any construction or new development to occur, the proposed regulatory amendments would not result in a physical change to the environment that could result in a significant effect to the environment. The Common Sense Exemption is therefore applicable to the proposed regulatory amendments.

Applicability of Classes 7 and 8 Categorical Exemptions to the Proposed Regulatory Amendments

This section describes how the proposed regulatory amendments qualify for the Classes 7 and 8 categorical exemptions. The purpose of the proposed regulatory amendments is consistent with the activities covered in these two classes of categorical exemptions.

The proposed regulatory amendments support the maintenance, restoration, enhancement and protection of natural resources and the environment as evidenced below:

- ▶ Establishment of fuel breaks create zones of vegetation removal and ongoing maintenance to help passively interrupt the path of a fire or slow its progress and to support fire suppression by providing responders with a staging area and access to remote locations for fire control actions (Omni 2015). Modeling efforts have indicated that they reduce total area burned, structure destruction, and fire intensity (Seto, et al., 2022). Because the proposed regulatory amendments would bolster firefighting capabilities that would enhance fire response outcomes, the proposed regulatory amendments would unequivocally support protection of the environment and natural resources.
- ▶ When designed as a fuel break, greenbelts that are part of community design within neighborhoods and subdivisions can increase wildfire resilience by slowing or stopping wildfires (Greenbelt Alliance 2021). Additionally, existing parks, open spaces, and preserves near communities are often used for firefighting and staging areas. These undeveloped lands provide space for firefighters to create fuel breaks, set backfires, and mount a defense to control or contain a wildfire before it reaches nearby homes and neighborhoods (National Park Service 2022, Ingalsbee 2005).

- ▶ Section 1270.02(d) of the proposed regulatory amendments describes that “prescribing these minimum Wildfire protection standards reduces the risk of Wildfires, which among other things protects the health, safety and welfare, and protects natural resources and the environment.” In other words, by directing local jurisdictions to identify strategic ridgelines and fuel breaks, the proposed amendments reduce the risk and spread of wildfires, which protects the health, safety, and welfare of residents, and protects natural resources and the environment, among other things.
- ▶ The proposed regulatory amendments are intended to minimize structure fires and wildfire that lead to environmental and natural resources impacts, including loss of vegetation and biodiversity (CDFW 2021); erosion, landslides, and debris flows (IECA 2021); adverse air quality, climate change, and water quality impacts (CARB 2021; EPA 2021); and contaminated and hazardous material disposal challenges (CalRecycle 2021). These environmental and natural resources effects can also lead to public health impacts (CDPH 2021).
- ▶ Furthermore, fires that occur in the built environment (i.e., structure fires) contribute to air contamination from the fire plume (whose deposition is likely to subsequently include land and water contamination), contamination from water runoff containing toxic products, and other environmental discharges or releases from burned materials (NFPA 2020).

In summary, the proposed FSR amendments would effectively reduce the risk and severity of wildfires in the state, which in turn would reduce the potential for environmental impacts related to wildfire (e.g., emissions of air contaminants, climate change, erosion, loss of biodiversity). Furthermore, while the proposed FSR amendments provide general direction on how to create parameters for identification of these features (e.g., topography, vegetation, proximity to developed land uses), the proposed FSR amendments would not require Board approval for construction or other improvements required to meet the FSR standards and do not necessitate any type of physical changes to the environment. Additionally, as described above in regard to the Common Sense Exemption, the location of identified ridgelines, greenbelts, and fuel breaks would be the result of local land use agency policies and approvals, including conditions of approval, not of action of the FSRs. Therefore, the proposed FSR amendments would assure the maintenance, restoration, or enhancement of a natural resource, consistent with the Classes 7 and 8 categorical exemptions under CEQA (State CEQA Guidelines Sections 15307 and 15307).

Exceptions to Reliance on Categorical Exemptions

State CEQA Guidelines Section 15300.2 identifies exceptions to the use of categorical exemptions, i.e., conditions under which a Categorical Exemption could not be applied, even though the proposed action would otherwise qualify for it. The exceptions relevant for consideration under the Classes 7 and 8 exemption categories are:

- ▶ Cumulative Impact. All exemptions for these classes are inapplicable when the cumulative impact of successive projects of the same type in the same place, over time is significant.
- ▶ Significant Effect Due to Unusual Circumstances. A categorical exemption shall not be used for an activity where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances.
- ▶ Scenic Highways. A categorical exemption shall not be used for a project which may result in damage to scenic resources, including but not limited to, trees, historic buildings, rock outcroppings, or similar resources, within a highway officially designated as a state scenic highway. This does not apply to improvements which are required as mitigation by an adopted negative declaration or certified EIR.
- ▶ Hazardous Waste Sites. A categorical exemption shall not be used for a project located on a site which is included on any list compiled pursuant to Section 65962.5 of the Government Code.
- ▶ Historical Resources. A categorical exemption shall not be used for a project which may cause a substantial adverse change in the significance of a historical resource.

Analysis of Potential Exceptions to Use of Classes 7 and 8 Categorical Exemptions for the Proposed Regulatory Amendments

Specified conditions that can result in exceptions to the applicability of categorical exemptions are analyzed below as they relate to use of Classes 7 and 8 for CEQA compliance in the adoption of the proposed regulatory amendments.

Cumulative Impact

A cumulative impact occurs when the incremental effect of an individual project is significant when viewed in connection with the effects of past, current, and probable future projects (State CEQA Guidelines Section 15065 [a][3]). Application of new standards for future development and identification of ridgelines, fuel breaks, and greenbelts would not result in successive projects (i.e., a physical change to the environment that could result in an environmental impact) of the same type in the same place over time. There would be no cumulative impacts.

Significant Effect Due to Unusual Circumstances

Under State CEQA Guidelines Section 15300.2 (c), categorical exemptions cannot be used if there is a reasonable possibility that the proposed FSR amendments would have a significant effect on the environment due to “unusual circumstances.” Unusual circumstances occur when “the project has some feature that distinguishes it from others in the exempt class, such as its size or location” and whether or not there is a “reasonable possibility” that an activity would have a significant effect on the environment (*Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086, 1105).

CEQA requires public agencies to identify specific activities that fall within each class of categorical exemption. As stated in 14 Cal. Code Regs. Section 15300.4:

Each public agency shall, in the course of establishing its own procedures, list those specific activities which fall within each of the exempt classes, subject to the qualification that these lists must be consistent with both the letter and the intent expressed in the classes. Public agencies may omit from their implementing procedures classes and examples that do not apply to their activities, but they may not require EIRs for projects described in the classes and examples in this article except under the provisions of Section 15300.2.

As stated above, the Board declared adoption of rules for the fire protection system to be covered under Classes 7 and 8 exemptions in accordance with State CEQA Guidelines Section 15300-15329. The Board has used exemptions in the past when approving FSR amendments, including:

- SRA FSR, 2020 amends the requirements for fire safe development in the SRA for consistency with related statutes and codes, to provide clearer lines of authority and implementation processes, and to create standards that reflect modern firefighting apparatus dimensions and fire prevention policy, with an effective date to be set concurrently with the triennial California Fire Code update.
- SRA FSR Update, 2014 provides more up to date standards for land use development in the SRA and to clarify inconsistencies in the regulations. This regulation will make new development in the Wildland Urban Interface (WUI) and SRA safer for civilians and first responders and help reduce the spread of fire from structure to structure.
- SRA FSR Update, 2011 makes specific administrative requirements of the statutory obligations provided by PRC Section 4290 and addresses residential subdivision development in areas with hazardous fuel and wildfire conditions.

Again, the objectives of the proposed FSR amendments are to amend state minimum wildfire protection standards to specifically:

- ▶ establish standards for fuel breaks and greenbelts near communities;
- ▶ establish measures for the preservation of undeveloped ridgelines;
- ▶ improve clarity regarding the inspection and enforcement agencies; and
- ▶ promote local jurisdiction compliance with the FSR and to clarify the process for compliance.

The proposed FSR amendments are substantially similar in character to the 2011, 2014, and 2020 amendments. That is, previous amendments that were approved using a categorical exemption addressed changes to improve public safety, provide guidance for appropriate locations for development, and clarity of the previous iteration of regulations. Thus, the proposed FSR amendments do not present unusual circumstances in terms of FSR amendments approved in the past.

Scenic Highways

Changes to identified ridgelines, greenbelts, and fuel breaks that would occur due to implementation of the proposed FSR amendments would be the result of local land use agency policies and approvals, including conditions of approval, not of action of the FSRs. The proposed regulatory amendments do not address treatment of scenic highways and would not result in a physical change to the environment such that scenic highways would be affected to a greater extent than under the existing regulations. There would be no significant effects on scenic highways associated with implementation of the proposed FSR amendments.

Hazardous Waste Sites

According to State CEQA Guidelines Section 15300.2(e), “[a] categorical exemption shall not be used for a project located on a site which is included on any list compiled pursuant to Section 65962.5 of the Government Code.” The proposed regulatory amendments would not change how hazardous waste sites are addressed during design and development of a future proposed development project. There would be no effects on hazardous waste sites above those under the existing regulations.

Historical Resources

The proposed regulatory amendments do not include changes to the treatment of historical resources. The proposed regulatory amendments would guide how future proposed development projects located within hazardous fire areas, per PRC Sections 4251-4290.5, would be designed to include maintenance, restoration, enhancement, and protection of natural resources and the environment as identified in the proposed regulatory amendments. Federal, state, and local regulations and policies related to the identification and protection of historical resources would not be affected by implementation of the proposed regulatory amendments.

CONCLUSIONS REGARDING CATEGORICAL EXEMPTIONS

The Board’s approval of the proposed regulatory amendments is exempt from environmental review and document preparation under CEQA pursuant to the Common Sense Exemption and Classes 7 and 8 categorical exemptions. The proposed regulatory amendments do not directly or indirectly cause any construction to occur, so there is no possibility of a significant effect on the environment, consistent with the Common Sense Exemption. The proposed amendments fall within the categories of actions identified as categorically exempt by the Board in 14 CCR Section 1153 and, in addition to 14 CCR Section 1153, the proposed amendments fall within the categories of activities described in the Classes 7 and 8 categorical exemptions. The proposed regulatory amendments are substantially similar in character to previous FSR amendments adopted by the Board under Classes 7 and Class 8 categorical exemptions. None of the exceptions to the use of categorical exemptions apply.

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