

State Board of Forestry and Fire Protection

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

“Listed Anadromous Salmonid Amendments, 2016”

**Title 14 of the California Code of Regulations (14 CCR),
Division 1.5, Chapter 4, Subchapter 1, Article 1; Subchapter 2, Article 2
Amend: § 895.1, § 898.2**

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

Since the Initial Statement of Reasons (ISOR) was published the history of the development of this regulation has grown to include:

- No changes have been made either significant or non-substantive since the publishing of the ISOR.

No information contained in the ISOR requires update, as published on June 03, 2016 as OAL File #Z-2016-0523-01. All material relied upon was identified in the ISOR and made available for public review prior to the close of 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 in its 45-Day noticed form.

REITERATION OF DISCLOSURES REGARDING THE ADOPTED REGULATION, RESULTS OF ECONOMIC IMPACT ANALYSIS, AND ANTICIPATED BENEFITS

The results of the economic impact assessment are provided below pursuant to **GOV § 11346.5(a)(10)** and prepared pursuant to **GOV § 11346.3(b)(1)(A)-(D)**. The adopted action:

- (A) will create jobs within California;
- (A) will not eliminate jobs within California;
- (B) will create new businesses;
- (B) will not eliminate existing businesses within California;
- (C) will beneficially affect the expansion of businesses currently doing business within California.
- (D) will have nonmonetary benefits. The primary benefit of the proposed action is to clarify the intent in the Forest Practice Rules regarding when the Anadromous Salmonid Protection Rules may or may not apply and to clarify when the Director may approve a timber harvest plan that may result in take of experimental populations of federally listed anadromous salmonids. Clarity in the definitions

will provide forestry practitioners and forest landowners with assurances that the more restrictive Anadromous Salmonid Protection rules will not necessarily apply to areas where experimental populations are reintroduced above permanent barriers to migration. Additionally, specific language regarding when the Director may approve a plan resulting in incidental take of anadromous salmonids will provide additional assurances to forestry practitioners and forest landowners that they will not be subject to varying interpretations regarding the intent of the rules. These modifications will help ensure forest management, in areas where reintroduction of experimental populations of anadromous salmonids, with an appropriate 4(d) take limit, are not subject to the same standards as areas where listed anadromous salmonids are present or where access to habitat could be restored without the need to remove large permanent barriers to upstream migration. These changes will likely alleviate forest landowner and forestry practitioner concerns over additional regulatory limits and liability concerns regarding to their forest management practices, thereby minimizing concerns over reintroduction efforts. Ultimately, this will help to promote the conservation and recovery of many populations of listed anadromous salmonids in California in areas subject to the FPRs.

Businesses will be beneficially impacted by the proposed regulation. Anytime experimental populations are introduced above permanent dams attenuating fish anadromy, there will be no expansion of the ASP rules. This will thereby impose no additional constraint of forestry activities governed by the FPRs above permanent barriers inhibiting downstream migration of the introduced salmonids, and incentivize landowners to support and assist with recovery efforts.

The Board has determined that adoption of the regulations identified herein 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, instead businesses will be beneficially impacted by this action (pursuant to **GOV §11346.3(a)(2)**).

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.

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

Except as set forth in the ISOR and provided in the summary, no other alternatives have been proposed or otherwise brought to the Board's attention. 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 effective as 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 business.

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

- 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 the proposed action.
- The Board finds that the public, including affected landowners and forestry professionals, and agency representatives, both Federal and State, reviewed and provided input to help the Board determine the best adopted alternative.
- The Board finds the adopted alternative strikes a balance between performance based and prescriptive standards.
- The Board finds that not instituting minimum prescriptive standards would lead to confusion, subjective enforcement, and exploitative interpretations of the regulation.
- The Board finds that the endangered Sacramento River winter-run Chinook salmon Evolutionary Significant Unit (ESU), and the threatened Central Valley steelhead Distinct Population Segment (DPS) need recovery efforts to help restore their populations and ecosystems.
- The Board finds that native Chinook salmon and steelhead have declined dramatically since European settlement of the Central Valley in the mid-1800's.
- The Board finds that habitat quantity and quality have declined in response to construction of levees and barriers to anadromy, and modification of natural hydrologic regimes by dams and water diversions.

- The Board finds that major population declines are most likely to occur when barriers to fish passage are constructed.
- The Board finds that efforts are underway by NMFS to introduce experimental salmonid populations above permanent fish barriers to help restore populations and ecosystems.
- The Board finds that the introduction of the listed species is essential for their long term survival and restoration.
- The Board finds that concerns have been raised that introduction efforts above permanent barriers would result in an expansion of the existing ASP rules under current regulations (14 CCR §916.9 [936.9, 956.9]). New language must be adopted to protect timber operations governed by the FPRs from the introduction of salmonids, while incentivizing landowners to assist in the restoration of these threatened and endangered populations.
- The Board finds that although current ASP regulations (14 CCR §916.9 [936.9, 956.9] “Geographic Scope”) does provide a stipulation exempting activities within upstream watersheds above permanent dams that attenuate sediment transport, it is not clear and explicit enough to satisfy the clarity standard.
- The Board finds a provision needs to be adopted to allow the Director to allow incidental take of listed population of salmonids that are designated experimental pursuant to section 10(j) of the Federal ESA.
- The Board proposes this regulatory language to address concerns regarding the introduction of salmonids affects upon forestry activities within the State.
- The Board finds that future rulemaking may be necessary to further define “Watersheds with Listed Anadromous Salmonids” when introduced, if and when these listed salmonid populations are designated by the NMFS as 4(d) experimental populations as defined in the Federal Endangered Species Act of 1973 as amended, to maintain future consistency and congruity with federal and state regulations. The Board will strive to increase its consultation and discussion with U.S. Federal wildlife agencies pursuing the introduction of these experimental populations to avoid redundancy and ensure effective implementation and compatibility of clear and concise regulatory language to protect the best interest of the State and its citizens within its realm of jurisdiction.

BOARD’S ADOPTED ALTERNATIVE (update, pursuant to GOV §11346.9(a)(1)), of information pursuant to GOV §11346.2(b)(4): Take Action as Proposed and Modified through the Formal Public Review and Comment Process (Alternative #4)

The Board chose to adopt the rule text as presented in the 45-Day Notice. No

modifications, through the formal public review and comment process, were made.

This alternative would result in an amendment to 14 CCR §895.1 “Definitions” to state that watersheds subject to the ASP rules would not apply upstream of barriers determined to be impassable and preclude fish passage and where their removal and/or fishway construction is not deemed feasible. Additionally, amendments to 14 CCR § 898.2 allows the Director to approve a plan where take of a listed species will occur under either of the following circumstances which include:

- (1) The taking of the listed species will be incidental and is authorized by a wildlife agency acting within its authority under the State or Federal ESA;
- (2) Or when an anadromous salmonid population is deemed Experimental under Section 10(j) of the Federal Endangered Species Act, and corresponding regulations under Section 4(d) of the Federal Endangered Species Act allows for the take of species through the duration of lawful forestry activities

This is the preferred alternative as it fulfills the obligations, specified in statute, of the Board and represents a product based upon compromise and the greatest degree of consensus achievable at the time the Board authorized noticing of the proposed action. Public and agency representatives have reviewed the action and provided input, which is reflected in the action. The Board struck a balance between performance based and prescriptive standards. The Board found that minimum levels of prescriptive standards were needed to implement the statute.

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

This alternative would result in not clarifying 14 CCR § 895.1 definition of a Watershed with Listed Anadromous Salmonids and the direction in 14 CCR § 898.2(d) which pertains to when the Director is required to disapprove a proposal project (THP, NTMP, Modified THP, etc.) that may result in a take of a listed species.

This alternative was rejected because maintaining the existing language in the FPRs would not address the need for required clarity in the rules and could act a disincentive to programs necessary for survival and recovery of listed anadromous salmonids and leave landowners responsible for adhering to prescriptive standards that were not intended for experimental populations.

Alternative #2: Take Action to Increase the Specificity of the Regulation Needed to Implement the Statute

This alternative would increase the specificity of the intent regarding the applicability of the ASP rules, including areas with reintroduced experimental populations of federally listed anadromous salmonids.

The Board rejected this alternative because it did not account for situations where individuals from reintroduced experimental populations may be subject to incidental take in situations when a 4(d) rule has been developed with take limits applicable to activities subject to the FPRs. The Board found that confusion regarding concerns over potential regulatory limits and liability would still occur in areas where experimental populations of salmonids were reintroduced, even if a 4(d) take limit was developed for activities subject to the FPRs.

Alternative #3: Take Action to Decrease the Specificity of the Regulation Needed to Implement the Statute

This alternative would increase the specificity pertaining to Director approval of timber harvest plans resulting in incidental take of experimental populations of listed anadromous salmonids.

The Board rejected this alternative because it did not account for situations where experimental populations of listed anadromous salmonids might be reintroduced into areas not subject to the ASP rules. The Board found that confusion regarding concerns over potential regulatory limits and liability would still occur in areas where experimental populations of salmonids were reintroduced, even if a 4(d) take limit was developed for activities subject to the California Forest Practice Rules.

Alternative #4: Take Action as Proposed and Modified through the Formal Public Review and Comment Process

This alternative would result in clarifying the existing 14 CCR § 895.1 definition of “Watersheds with Listed Anadromous Salmonid” by increasing the specificity of the definition and increasing the specificity of 14 CCR §898.2(d) pertaining to Director approval of timber harvest plans resulting in incidental take of experimental populations of listed anadromous salmonids.

The proposed action does not change the application of the FPRs, but clarifies the intent and includes new language regarding experimental populations of listed anadromous salmonids and the applicability of the Anadromous Salmonid Protection rules not previously considered by the Board.

This is the preferred alternative as it fulfills the obligations, specified in statute, of the Board and represents a product based upon compromise and the greatest degree of consensus achievable at the time the Board authorized noticing of the proposed action. Public and agency representatives have reviewed the proposed action and provided input, which is reflected in the proposed regulation. The Board found that the proposed action clarified the intent of the FPRs and would not result in application of the FPRs in terms of where the Board intended for them to apply.

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

**WRITTEN COMMENTS AND RESPONSES RESULTING FROM 45-DAY NOTICE OF
PROPOSED RULEMAKING PUBLISHED June 03, 2016**

No comments were received either via oral testimony before the board, written, or by other forms of media.

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