

Board of Forestry and Fire Protection

NOTICE OF PROPOSED ACTION

“RPF AND LTO RESPONSIBILITIES AMENDMENTS, 2017”

**Title 14 of the California Code of Regulations (14 CCR),
Division 1.5, Chapter 4:
Subchapter 7, Article 2
Amend: §§ 1035.1, 1035.2, 1035.3**

[Notice Published May 26, 2017]

NATURE OF PROCEEDING

Notice is hereby given that the California State Board of Forestry and Fire Protection (Board) is proposing to take the action described in the Informative Digest.

PUBLIC HEARING

The Board will hold a public hearing on Thursday, July 20th, 2017, at its regularly scheduled meeting commencing at 9:00 a.m., at the Angeles National Forest Headquarters, 701 North Santa Anita Avenue, Arcadia, CA 91006. At the hearing, any person may present statements or arguments, orally or in writing, relevant to the proposed action. The Board requests, but does not require, that persons who make oral comments at the hearing also submit a written summary of their statements. Additionally, pursuant to **Government Code (GOV) § 11125.1(b)**, writings that are public records pursuant to **GOV § 11125.1(a)** and that are distributed to members of the state body prior to or during a meeting, pertaining to any item to be considered during the meeting, shall be made available for public inspection at the meeting if prepared by the state body or a member of the state body, or after the meeting if prepared by some other person.

WRITTEN COMMENT PERIOD

Any person, or authorized representative, may submit written comments relevant to the proposed regulatory action to the Board. The written comment period ends at 5:00 P.M. on Monday, July 10, 2017.

The Board will consider only written comments received at the Board office by that time and those written comments received at the public hearing, including written comments submitted in connection with oral testimony at the public hearing. The Board requests, but does not require, that persons who submit written comments to the Board reference the title of the rulemaking proposal in their comments to facilitate review.

Written comments shall be submitted to the following address:

Board of Forestry and Fire Protection
Attn: Matt Dias
Executive Officer
P.O. Box 944246
Sacramento, CA 94244-2460

Written comments can also be hand delivered to the contact person listed in this notice at the following address:

Board of Forestry and Fire Protection
Room 1506-14
1416 9th Street
Sacramento, CA 95814

Written comments may also be sent to the Board via facsimile at the following phone number:

(916) 653-0989

Written comments may also be delivered via e-mail at the following address:

publiccomments@BOF.ca.gov

AUTHORITY AND REFERENCE (pursuant to GOV § 11346.5(a)(2) and 1 CCR § 14)

14 CCR §§ 1035.1 Note: Authority cited: Sections 4551 and 4552, Public Resources Code. Reference: Sections 4583.2 and 4583.5, Public Resources Code. **14 CCR §**

1035.2 Note: Authority cited: Sections 4551 and 4552, Public Resources Code.

Reference: Sections 4581 and 4582, Public Resources Code. **14 CCR §1035.3** Note:

Authority cited: Sections 4551, 4552 and 4571, Public Resources Code. Reference:

Sections 4524, 4526.5, 4527, 4528.5, and 4570, 4571, and 4581 Public Resources Code.

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW (pursuant to GOV 11346.5(a)(3)(A)-(D))

Pursuant to the Z'berg-Nejedly Forest Practice Act of 1973 (FPA, PRC § 4511, *et seq.*), the Board is authorized to construct a system of forest practice regulations applicable to timber management on state, municipal and private timberlands; and through PRC § 740 the Board shall determine, establish, and maintain an adequate forest policy. Additionally, general policies for guidance of the Department of Forestry and Fire Protection (Department) shall be determined by the Board.

The proposed action was developed in response to a request received by the Board

from the Associated California Loggers (ACL) in 2013. Specifically, the ACL requested that the Board consider promulgation of certain regulations to remedy issues regarding Registered Professional Forester (RPF) and Licensed Timber Operator (LTO) responsibilities. Reasons cited by the ACL included the perceived inequitable treatment of LTOs by the Department in the issuances of Notices of Violations of the Forest Practice Rules (FPR). Of concern was the issuance of Notices of Violations to LTOs when the RPFs inadequately performed their professional duties as required, under Board rules, which may have resulted in individual LTOs performing Timber Operations in a manner that were not compliant with Board rules. Public testimony has made it clear that the ACL, and LTO community in general, take Notice of Violations very seriously as they can affect reputation, working relationships, and ultimately the bottom line of LTO businesses.

After the ACL's request was received by the Board, this issue was prioritized by the Board's Forest Practice Committee and subsequently delegated to the Professional Forester's Examining Committee (PFEC) for review and recommendation. As a result, the PFEC developed the following **problem** statement:

"Issues arise when RPFs do not complete their field work correctly and thoroughly, putting the LTO in a position to be cited by CALFIRE (the Department) for violating the Forest Practice Rules (FPRs). In some cases, LTOs are being issued violations for following incomplete or inaccurate field work that was performed by a RPF. The RPF should be responsible for their work, along with any ramifications that occur if their work is not performed correctly."

PFEC recommendations included integration of LTOs and private practicing RPFs into Departmental Forest Practice trainings, which has and continues to occur, and collaboration between the ACL, the California Licensed Foresters Association (CLFA), and CAL FIRE in review of regulation relevant to this issue, which has also occurred and is manifested in the proposed action.

Data was pulled by the Department to decide whether this issue was perceived, or had strong evidentiary backing. From the date January 1, 2010 to December 31, 2015 there were a total of 23,970 inspections completed by the Department (C.Japp 2016)¹. Out of those 23,970 inspections, specifically regarding timber harvesting plans (THPs), RPFs received 64 notice of violations, with LTOs being given 320 (C. Japp 2016). It is important to note that this subset of data does not capture violations issued to the LTO based on improper or incorrect data conveyed by the RPF. Nor does it capture judgement exercised by the Department in its issuance of violations. Cumulatively, the Board only intends these amendments to address a small subset of this data, where the LTO was misdirected in their operation by the RPF.

1. ¹ Japp, C. California Department of Forestry & Fire Protection. *Memo to: Dennis Hall, Assistant Deputy Director, California Department of Forestry & Fire Protection; Subject: RPF/LTO Responsibility Issue, Violation Analysis*. June 09, 2016. TS.

Subsequently, the Department did a Violation Analysis that demonstrated that data is not available to either support or refute the contention that LTOs are being treated unequally in terms of being issued a violation and that they are being issued violations that result from the action of RPFs. Additionally, in 2017, the Department also provided a summary of information provided to Forest Practice Inspectors for determining whether a violation of the FPRs has been committed and for choosing an enforcement option, in which documenting violations in the form of a “Notices of Violation” is emphasized if all the elements of the “who”, “what”, “where”, “when”, “how” and “why” can be answered. A “Notice of Violation” is the lowest level of enforcement action and is administrative as compared to higher levels of enforcement action that are criminal and civil.

The **purpose** of the proposed action is to minimize the perceived inequity in the assignment of Notices of Violations of the FPR, specific to Timber Operations, that may result from inaccurate or inadequate preparatory work, that is required to be performed by an RPF. Additionally, the purpose is to strengthen the interaction between the RPF and LTO, which is essential to both entities to fulfill their respective responsibilities and work interdependently. Specifically, the responsibilities of the RPF were made more specific and interpreted, the interaction between the RPF and the LTO was made more specific and interpreted and direction was provided to the Department that an LTO will not be held responsible for FPR violations that result from work required of an RPF that is determined to be inaccurate or inadequate.

The **effect** of the proposed action is to require additional RPF responsibility to facilitate LTO compliance with the Board rules. Specifically, an RPF retained by the plan submitter to provide professional advice throughout Timber Operations, or the RPF’s Supervised Designee, must inspect the Logging Area prior to the commencement of operations each year to verify that operational flagging and timber marking required of an RPF, under Board rules, is adequate and in conformance with Board rules and the approved Plan.

Additionally, the increase in the number of conditions that trigger an onsite meeting, between the RPF and LTO, will facilitate communication and understanding, which is essential to the quality and efficiency of Timber Operations.

Moreover, direction is provided to the Department that an LTO will not be held responsible for FPR violations that result from work required of an RPF that is determined to be inaccurate or inadequate.

The **benefit** of the proposed action is to address the concerns of the LTO community, which through the past few years of development, have been informed by the RPF community and by the Department. The LTO and the RPF are interdependent. Flagging, tree marking and on-site meetings are essential ways the RPF communicates to the LTO regarding how to comply with the Plan and the Board rules. When an RPF

provides easily visible and accurately placed operational flagging and marking in the Logging Area, the LTO can conduct Timber Operations with improved efficiency and remain in compliance with the Plan and the Board rules more effectively. Given that the Board rules are intended to minimize the environmental effects of Timber Operations per 14 CCR §896(a), these improvements in efficiency and compliance will likely result in improvements in environmental quality pertaining to Timber Operations. Additionally, the proposed action sheds light on RPF and LTO interdependence, which can be taken into consideration by the Department when it investigates the basis of a violation, resulting in improvements in equitable treatment of both parties and promoting fairness within the penalty process.

There is no comparable federal regulation or statute.

Board staff conducted an evaluation on whether or not the proposed action is inconsistent or incompatible with existing State regulations pursuant to **GOV § 11346.5(a)(3)(D)**. State regulations related to the proposed action were, in fact, relied upon in the development of the proposed action (including 14 CCR §§ 1035.1, 1035.2 and 1035.3) to ensure the consistency and compatibility of the proposed action with existing State regulations. Otherwise, Board staff evaluated the balance of existing State regulations related to the system of forest practice applicable to timber management on state and private timberlands developed pursuant to the FPA, licensing, and oversight of foresters and found no existing State regulations that met the same purpose as the proposed action. Based on this evaluation and effort, the Board has determined that the proposed regulations are neither inconsistent nor incompatible with existing State regulations. The proposed regulation is entirely consistent and compatible with existing Board rules; it simply amends current regulatory language.

No documents are incorporated by reference.

MANDATED BY FEDERAL LAW OR REGULATIONS

The proposed action is not mandated by federal law or regulations.

The proposed action neither conflicts with, nor duplicates Federal regulations.

There are no comparable Federal regulations on State or private lands.

OTHER STATUTORY REQUIREMENTS (pursuant to GOV § 11346.5(a)(4))

There are no other matters as are prescribed by statute applicable to the specific State agency or to any specific regulation or class of regulations.

LOCAL MANDATE (pursuant to GOV § 11346.5(a)(5)).

The proposed action does not impose a mandate on local agencies or school districts.

FISCAL IMPACT (pursuant to GOV § 11346.5(a)(6))

The proposed action will not have a fiscal impact. Specifically, there is no cost to any local agency or school district that is required to be reimbursed under Part 7

(commencing with Section 17500) of Division 4 of the Government Code; the proposed action will not result in costs or savings to any state agency; the proposed action will not result in the imposition of other non-discretionary costs or savings to local agencies; and the proposed action will not result in costs or savings in federal funding to the State.

HOUSING COSTS (pursuant to GOV § 11346.5(a)(12))

The proposed action will not significantly affect housing costs.

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. This action is estimated to cost the regulated public an additional \$5.3 million dollars over a 7-year period for full implementation. These costs will be created from the additional situations where the RPF and LTO are required to have on-site meetings. This is considered to be the upper bound of economic cost to the citizens of California.

The proposed action will adversely affect the ability of California business to compete with other States by making it costlier to produce goods and services in California and it will make managing forestland more expensive in California as compared to other States, so it follows that it may decrease investment in the state.

Pursuant to **GOV §11346.5(a)(8)**, the agency shall provide in the record facts, evidence, documents, testimony, or other evidence upon which the agency relies to support this initial determination: 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.

STATEMENTS OF THE RESULTS OF THE ECONOMIC IMPACT ASSESSMENT (EIA)

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 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 not 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 Informative Digest/Policy Statement Overview.

The types of businesses that will be impacted are businesses that own timberland, forestry consulting businesses, and logging businesses.

COST IMPACTS ON REPRESENTATIVE PERSON OR BUSINESS (pursuant to GOV § 11346.5(a)(9))

The agency is aware of cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action. It is expected to increase costs to the landowner for RPF services of an additional \$360-\$2,160, and an additional \$1,000 per year for LTO services each year that the plan is operated on.

Therefore, 238 THPs per year multiplied by \$2,160 (the high average number of days to ensure operational marking and flagging is accurate and adequate per THP per year) equals approximately \$514,000 multiplied by seven years (the effective period of a plan) equals approximately \$3.6 million dollars.

Additionally, 238 THPs per year multiplied by \$1,000 per THP per year (average cost for additional on-site RPF/LTO meetings) equals \$238,000 multiplied by seven years (the effective period of a plan) equals \$1.7 million dollars.

Thus, the adverse economic impact is \$5.3 million dollars.

Businesses and individuals will be subject to this cost. However, business are not expected to expand or contract as a result of these amendments. Although, the proposed action does increase costs to RPFs, LTOs, businesses that own timberland and individuals that own timberland, depending on the variables described above, it is not expected that the proposed action will be so economically expensive it would result in contraction of businesses or so time consuming that it would result in an expansion of businesses.

BUSINESS REPORT (pursuant to GOV §§ 11346.5(a)(11) and 11346.3(d))

The proposed action does not impose a business reporting requirement.

SMALL BUSINESS (defined in GOV 11342.610)

Small business, pursuant to 1 CCR 4(a):

- (1) Is legally required to comply with the regulation;
- (2) Is not legally required to enforce the regulation;
- (3) May derive a benefit from the enforcement of the regulation;
- (4) May incur a detriment from the enforcement of the regulation if they do not comply with the regulation.

The proposed action is to make explicit individual legal responsibilities of the RPF, LTO and the totality of their interaction when engaged in timber management operations. It simply requires more thorough discourse between the RPF and LTO, and ensures annual review of the management area by the RPF to ensure that indications to the LTO are in place and adequately marked. It may increase cost for both the RPF and

LTO, due to the requirement for more on site meetings under certain situations. Although, it is not expected to create or eliminate small businesses.

CONSIDERATION OF ALTERNATIVES

In accordance with **GOV § 11346.5(a)(13)**, the Board must determine that no reasonable alternative it considers, or that has otherwise been identified and brought to the attention of the Board, would be more effective in carrying out the purpose for which the action is proposed, or would be as effective and less burdensome to affected private persons than the proposed action, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

CONTACT PERSON

Requests for copies of the proposed text of the regulations, the Initial Statement of Reasons, modified text of the regulations and any questions regarding the substance of the proposed action may be directed to:

Board of Forestry and Fire Protection
Attn: Matt Dias
Executive Officer
P.O. Box 944246
Sacramento, CA 94244-2460
Telephone: (916) 653-8007

The designated backup person in the event Mr. Matt Dias is not available is Eric Hedge, Regulations Coordinator for the Board of Forestry and Fire Protection. Mr. Hedge may be contacted at the above address or by phone at (916) 653-8007.

AVAILABILITY STATEMENTS (pursuant to GOV § 11346.5(a) (16), (18))

All of the following are available from the contact person:

1. Express terms of the proposed action using UNDERLINE to indicate an addition to the California Code of Regulations and ~~STRIKETHROUGH~~ to indicate a deletion.
2. Initial Statement of Reasons, which includes a statement of the specific purpose of each adoption, amendment, or repeal, the problem the Board is addressing, and the rationale for the determination by the Board that each adoption, amendment, or repeal is reasonably necessary to carry out the purpose and address the problem for which it is proposed.
3. The information upon which the proposed action is based (pursuant to **GOV § 11346.5(b)**).
4. Changed or modified text. After holding the hearing and considering all timely and relevant comments received, the Board may adopt the proposed regulations substantially as described in this notice. If the Board makes modifications which are sufficiently related to the originally proposed text, it will make the modified text—with the changes clearly indicated—available to the public for at least 15 days before the Board adopts the regulations as revised. Notice of the comment

period on changed regulations, and the full text as modified, will be sent to any person who testified at the hearings, submitted comments during the public comment period, including written and oral comments received at the public hearing, or requested notification of the availability of such changes from the Board of Forestry and Fire Protection. The Board will accept written comments on the modified regulations for 15 days after the date on which they are made available.

FINAL STATEMENT OF REASONS

When the Final Statement of Reasons (FSOR) has been prepared, the FSOR will be available from the contact person on request.

INTERNET ACCESS

All of the material referenced in the Availability Statements is also available on the Board web site at:

http://bofdata.fire.ca.gov/regulations/proposed_rule_packages/