

Board of Forestry and Fire Protection

INITIAL STATEMENT OF REASONS

“Less Than 3 Acre Conversion Amendments, 2016”

**Title 14 of the California Code of Regulations (14 CCR):
Division 1.5, Chapter 4,
Subchapter 7, Article 7
Amend: § 1104.1 (I).**

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 (FPA, PRC § 4511, *et seq.*), the Board is authorized to construct a system of forest practice regulations applicable to timber management on non-federal timberlands.

PRC § 4551 requires the Board to adopt district forest practice rules to assure the continuous growing and harvesting of commercial forest trees and to protect the soil, air, fish, and wildlife... PRC § 4553 requires the Board to continuously review and revise the rules in consultation with other interests. PRC § 4584 specifies that the Board may adopt regulations exempting the onetime less than (3) three acre conversion from the Forest Practice Act (“this chapter”). PRC § 4628 provides the Board authority to exempt the removal of trees for subdivision development where a tentative subdivision map has been filed with the appropriate authority and a subdivision use permit has been granted.

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

The problem the proposed regulatory amendment addresses is an inability to use the Board onetime less than three (3) acre conversion exemption (Conversion Exemption) rule in 14 CCR § 1104.1 where a significant archeological resource exist. The Board used a case study example as a base in discussing this problem. A family owns a 0.29 acre residential lot in the golf resort town of Gray Eagle, Plumas County, California. The lot and entire subdivision is zoned 7R (Single Family Residential 1/7 acre), and is part of a large subdivision created in 1959.

In order to construct a detached garage on their parcel, the family sought a Registered Professional Forester (RPF) to prepare a Conversion Exemption to facilitate removal of 7 trees within the proposed building footprint.

Upon the RPF's site inspection, basalt flakes were noted on the surface of the lot, and the RPF required that the site be formally surveyed by an Archaeologist prior to any additional work being done regarding the use of a Conversion Exemption. During May and June 2013, an Archeologist conducted a formal site evaluation including excavation. The Archeologist's report indicates the site is considered significant as per 14 CCR § 895.1, and likely extends throughout the subdivision. The presence of the significant archaeological resource negates the family property's eligibility for a Conversion Exemption. Discussions with the Department during the summer of 2013 indicated a full Timber Harvesting Plan (THP) would be necessary to legally remove the 7 trees from the residential lot.

Since the exemption is disallowed, a Timberland Conversion Permit (TCP) must also be prepared and submitted, as well as a California Environmental Quality Act (CEQA) document to support the TCP.

According to Plumas County Planning Department, a Mitigated Negative Declaration (MND) would be compulsory for CEQA mandates due to the presence of the significant archaeological site. An MND, if prepared by the County, or by a Consultant on behalf of the County, would cost a flat rate of \$2695 to \$5152 (including Environmental Health, Public Works, and Engineering costs) PLUS \$101.00 per hour of time in document preparation. If the MND were prepared by the State, the costs would very likely be higher.

The county does not typically prepare MNDs for a timberland conversion. Since the proposed construction/land use is in accordance with the zoning of the lot, a timberland conversion exemption would be considered ministerial in nature, and they have never conducted an MND for such purposes.

Including the initial cost of the archaeological survey and report, plus the anticipated costs of the THP, TCP, and MND, the family is faced with potentially paying upwards of \$25,000-40,000 in permitting fees in order to build a garage next to their existing home.

The family has made the decision to not proceed with their planned construction at this time.

The Archeologist's suggested mitigation for the archaeological resource was that the garage construction site be overlain with geotextile fabric and "capped" with fill prior to construction. The family has no issue with carrying out the suggested mitigation measures.

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.*

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 non-federal timberlands.

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The purpose of the proposed action is to enable landowners to proceed with a Conversion Exemption where a significant archeological site (14 CCR § 895.1) exist. The proposal limits the enablement to situations where putting protection over an existing site would avoid harm to the site.

The problem is current regulations (14 CCR § 1104.1(a)(2)(I)) strictly prohibits the use of a Conversion Exemption where timber operations take place on a significant archeological site as defined in 14 CCR § 895.1. Discussions with Department of Forestry and Fire Protection (Department) Archeologists show that often there are actions that can be taken before timber operations are conducted that will avoid harm to historical or archeological resources that exist where timber operations will take place. The Archeologist reports, in this case example, acknowledged that the trees in the proposed area of conversion could be removed and still preserve the integrity of the archeological site. To accomplish this would require a specific mitigation to avoid the potential harm.

The action recommended by the landowner Archeologist was to cover the site with engineering cloth and a layer of soil before timber operations took place. This action is referred to as "capping" the site. The Department Archeologist agreed this action would be effective. In discussion with Department Archeologist it was confirmed that this action (mitigation) is an often used approach for the protection of historical or archeological resources. This mitigation is also approved specifically in the California Environmental Quality Act (CEQA) in PRC § 21083.2(b)(3) for the protection of unique

archeological resources.

Over the last five years there have been between 160 and 300 Conversion Exemptions submitted each year. During the last five year period this was the only occurrence of a significant archeological site being identified on the area of a Conversion Exemption, thus the problem occurs infrequently. However, when it does occur it is a significant problem for a residential landowner and can prevent them from making property improvements. As development continues to increase in rural timberland, the number of times this type of problem occurs can be expected to increase.

The language contained in the proposed rule text does not duplication and/or rephrase language within Title 14 California Code of Regulations.

Adopt 14 CCR § 1104.1(I)

The purpose of this subsection is to allow landowners to proceed with a Conversion Exemption where a significant archeological or historical resource has been located on the site. The site must be capped with soil and a Department Archeologist must agree the site will not be damaged if the conversion is completed. This is consistent with protections that would be provided if a Timber Harvesting Plan (THP) were prepared for the same project. This approach is also consistent with specific practices provided for in the CEQA (PRC§ 2180.2 (b)(3)).

The proposed action is necessary to provide relief for landowners who wish to complete small projects where a CEQA process has been completed but a cultural or historical resource issue was either missed originally or became protected in statutes adopted after the original CEQA process was completed.

Adopt 14 CCR § 1104.1(I)(1)

This paragraph is necessary to describe the basic protection to be provided for protection of the significant archeological resource located on the proposed project. The protection chosen is capping the site with soil before the timber is harvested from the site. This protection is the same as CEQA provides for a “unique” archeological in PRC § 21080.2(b)(3). The definition of a “unique” archeological site provided in CEQA (PRC § 21083.2(g) is effectively the same as the definition of “significant archeological site” provided in the Forest Practice Rules (14 CCR §895.1).

Adopt 14 CCR § 1104.1(I)(1)(a)

This paragraph is necessary to provide the concurrence of a professional archeologist that capping the proposed project with soil will prevent harm to the significant archeological resource. The concurrence of a Department Archeologist is required in writing to ensure the protection becomes an enforceable part of the Conversion Exemption.

Adopt 14 CCR § 1104.1(I)(1)(b)

This paragraph requires that the written concurrence of no harm prepared by the Department Archeologist is submitted with the Conversion Exemption. This is necessary to ensure that the finding of no harm to the significant archeological site is part of the official record.

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

The effect of this proposed action is to provide landowners a regulatory pathway to complete a Conversion Exemption where a significant archeological resource has been found on the proposed project site. Current regulations, as interpreted by the Department would require the landowner to obtain an approved Timber Harvesting Plan and Timberland Conversion Permit (TCP). The Timberland Conversion Permit would have to be supported with a Mitigated Negative Declaration (MND) to be in compliance with CEQA. Together the estimated permitting cost for the THP, TCP, and MND is approximately \$25,000-40,000. The proposed action would require an RPF preparing a conversion exemption report based on an independent site visit and a joint site visit with a Department Archeologist to concur capping the significant archeological site would result in no harm to the site. This is estimated by staff to cost the landowner in the range of \$2,000 to \$4,000. Thus; the proposal cost impacts for these regulatory changes are negative.

Creation or Elimination of Jobs within the State of California

The proposed action simply creates an expedited regulatory pathway to complete a less than 3 acre conversion exemption (Conversion Exemption) when a significant archeological site is found upon the site. The creation of these amendments reduces the time and regulatory burden upon the landowner, and diminishes consultation and administrative times for the lead regulatory agency (CAL FIRE), the CEQA reviewing agencies (responsible agencies) and the RPF submitting the conversion exemption. Given the small scale of Conversion Exemptions attempted with significant archeological sites present, and less than 3 acres being a small area to convert from timberland, no jobs are expected to be created or eliminated. These amendments serve to aid landowners in being able to carry out a Conversion Exemption when significant archeological sites exist, and will not sustain changes within the state's job market.

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

The proposed action simply creates an avenue for landowners to use anytime there is a significant archeological site upon an area where they would like to conduct a less than 3 acre conversion. Due to current regulatory language Conversion Exemptions where significant archeological sites exist are not completed, as the permitting costs are too expensive as previously explained. It is expected that this proposed regulatory action for Conversion Exemptions where significant archeological sites exist will be conducted more often, as the process will be more expeditious and inexpensive compared to existing regulatory language, creating extra business opportunities for established

companies. Although, the business opportunities generated from this rulemaking effort is not expected to be enough to stimulate the creation of new businesses.

Expansion of Businesses Currently Doing Business within the State of California

The proposed action simply creates an expedited avenue for landowners to use anytime there is a significant archeological site upon an area where they would like to conduct a Conversion Exemption. Business is expected to be beneficially affected, as landowners will be more likely to execute a conversion when a significant archeological site exists due to a reduction in time, monetary and procedural constraints. Although existing business will have more opportunities for business, it is not expected to be enough to substantially expand related businesses currently operating within the state.

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

The proposed regulatory action will benefit the welfare of California residents, as significant archeological sites will be adequately protected when Conversion Exemptions are executed. CAL FIRE archeologists will be given the opportunity to recommend and consult with landowners, on what mitigation and preservation methods would be most beneficial for the protection of significant archeological sites. The protection for the significant archeological site will result in no disturbance of the existing site, thus no harm will occur to the site. These safeguards will help protect these archeological sites well into the future, preserving them for current and future generation's enjoyment and our society's cultural enrichment.

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 of businesses currently doing business within California.
- (D) will have nonmonetary benefits.

The types of businesses that will be impacted are industrial and nonindustrial forest landowners, forestry consulting, logging firms, lumber mills, and private construction contractors. Therefore, both large and small businesses may have positive economic impacts. Significant archeological sites will remain protected.

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

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

1. Board of Forestry and Fire Protection, 2013 Case Study: Rasmussen Property
2. Archaeological Review Procedures for CAL FIRE Projects, Revised: April 26, 2010

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**

The Board has considered the following alternatives and rejected all but alternative #4.

Alternative #1: No Action

This alternative would not provide landowners an affordable pathway to expand the building footprint on their property. Nor would it protect or leave undisturbed a significant archeological site not originally located when an initial subdivision was approved and building permits issued by local government.

The Board rejected this alternative due to the failure to allow the landowner to complete residential building expansion on their property. The landowner had showed intent to change the use of this timberland to a non-timber growing use by obtaining the original building permit for the residence. Adding a garage is a continuance of the original conversion. PRC § 4628 does not require a TCP where local government has approved a subdivision through the CEQA process and issued a subsequent building permit.

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

The Board committee reviewed the current regulations for areas where specifics could be adopted to address permitting <3 acre conversions where significant archeological resources are at risk. It was found that currently the rules and CEQA are not completely consistent in the treatment of significant or unique archeological sites. CEQA (PRC 21083.2(b)) provides that impacts to significant or unique archeological sites are adequately addressed if the site is left preserved in place or undisturbed. The current

rules specifically state that no timber operations will take place on a significant archeological site. The Board committee noted that the CEQA process provided a specific action of capping the significant (“unique”) site with soil to meet the “preserved in place or left undisturbed standard” of CEQA. Adding this CEQA language as an exception where timber operations could take place on a significant archeological site was considered.

The alternative was rejected as it did not provide a process of professional review to assure that there would be no harm to an existing significant archeological site.

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

This alternative would decrease the specificity of the regulation needed to implement the statute. This alternative would provide maximum flexibility for participants allowing them to develop performance based standards to implement the statute.

Under this alternative the Board could choose to amend its regulations as they pertain to timberland conversion to recognize that land zoned for residential purposes has already received local approval and review, and that a Conversion Exemption would apply in such instances. This would be a broad exemption and relies on the work that has often been done many years in the past. In the case of the Rasmussen example the subdivision was actually approved by local government in 1959. At that time there was little interest for the protection of significant archeological resources at the local government level. In more recent times archeological surveys are done far more frequently in local government review processes, yet a chance exists that some significant archaeological sites are missed during these surveys. The risk of this occurring is greater where large areas of rural timberland are subdivided and developed at a later time.

This alternative is rejected due to the increased risk of harm to significant archeological sites. There would also be an increased risk of harm occurring to other resources, such as water quality, if a broad exemption from the rules of the Board is provided.

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

This alternative provides a pathway for landowners to utilize the Conversion Exemption while providing a “no harm” outcome for the protection of significant archeological sites.

Under the current rules a landowner would not be able to use a Conversion Exemption where a significant archeological site is found. The landowner would need to obtain an approved THP, TCP, and MND to remove trees and complete construction on their property. It is estimated that this would place the burden of \$25,000 in permitting fees on the landowner and may make the project infeasible.

This alternative would relieve the burden of excessive permitting fees for the landowner and still provide “no harm” to an existing significant archeological site.

Board Findings Regarding Alternatives

The Board finds that none of the above-mentioned alternatives:

- would have any adverse impact on small business.
- would 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.
- would be more effective in carrying out the purpose for which the action is proposed and would be as effective as 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 than the proposed action.

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 regulation does not mandate the use of specific technologies or equipment, but does prescribe specific actions or procedures. The proposed action is, in fact, a mix of performance based and prescriptive standards as is the entire Forest Practice Rules. Alternative #3 considered decreasing the specificity of regulatory standards, but was rejected for the reasons described above. Increasing the reliance on performance based standards was not reasonably expected to be as effective. Alternative #4 is preferred for the reasons described above and serves as the explanation for why prescriptive standards are required.

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)**, performance standards were considered in Alternative #3 given that the proposed action prescribes specific actions or procedures. Alternative #3 considered increasing performance based standards relative to prescriptive standards, but was rejected for the reasons described above. Increasing the reliance on performance based standards was not reasonably expected to be as effective. The preferred alternative contains prescriptive standards for 1) preserving significant archeological site and, 2) providing the process to include the professional judgement of an RPF and Department Archeologist

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))

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. Businesses will be beneficially impacted by the proposed action.

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.
- Staff report prepared to examine the example of the Rasmussen's effort to obtain a Conversion Exemption.
- Discussions with Department staff on implementation of the current conversion exemption.

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 research, 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. No existing Federal regulations that met the same purpose as the proposed action were identified.

POSSIBLE SIGNIFICANT ADVERSE ENVIRONMENTAL EFFECTS AND MITIGATIONS

The California Environmental Quality Act (CEQA) requires review, evaluation and environmental documentation of potential significant environmental impacts from a qualified project. The Board's rulemaking process has been certified by the Secretary of Resources as meeting the requirements of PRC § 21080.5.

The proposed action would be an added element to the State's comprehensive Forest Practice Program under which timber operations on timberland is regulated. The Board's Forest Practice Rules along with the Department oversight of rule compliance function expressly to prevent significant adverse environmental effects.

The proposed action has the purpose of reducing an inadvertent significant impact resulting from timber operations conducted on an area that contains a significant archeological site.

Current forest practice rules state that no timber operations will be conducted on a significant archeological site. That rule does not incorporate options provided in CEQA (PRC 21083(b)) which would result in the same “no harm” outcome for unique (significant – 14CCR 895.1) archeological sites. The referenced section of CEQA provides that if it can be demonstrated that a project will cause damage to a unique (significant – 14 CCR 895.1) archaeological resource, the lead agency may require reasonable efforts to be made to permit any or all of these resources to be preserved in place or left in an undisturbed state. Examples of that treatment, in no order of preference, may include, but are not limited to, any of the following:

- (1) Planning construction to avoid archaeological sites.
- (2) Deeding archaeological sites into permanent conservation easements.
- (3) Capping or covering archaeological sites with a layer of soil before building on the sites.
- (4) Planning parks, greenspace, or other open space to incorporate archaeological sites.

This proposal allows timber operations where a significant archeological site exists only if the site is capped with a layer of soil. CEQA considers this action to preserve the site in place or leave it in an undisturbed condition, thus eliminating potential significant site impacts. This proposal goes a step further by specifying how “no harm” will result to the significant archeological site. The proposal requires the RPF preparing the <3 acre conversion exemption to concur with a Department Archeologist in writing that the significant site will not be damaged if the soil capping is in place when timber operation occur.