

**Board of Forestry and Fire Protection**

**INITIAL STATEMENT OF REASONS**

**“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**

**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 California 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 and private timberlands.

*According to PRC § 4551 (a) The board shall adopt district forest practice rules and regulations for each district in accordance with the policies set forth in Article 1 (commencing with §4511) of this chapter and pursuant to Chapter 3.5 (commencing with §11340) of Part 1 of Division 3 of Title 2 of the Government Code to ensure the continuous growing and harvesting of commercial forest tree species and to protect the soil, air, fish, wildlife, and water resources, including, but not limited to, streams, lakes and estuaries.*

Additionally, under PRC§ 4584, the Board, upon determining that the modifications to existing definitions are necessary, and criterion by which the Director may approve a timber harvest plan that may result in incidental take of experimental populations of federally listed anadromous salmonids are consistent with the purposes of the Z'Berg-Nejedly Forest Practice Act of 1973 (FPA, PRC § 4511, *et seq.*), may exempt from this FPA, or portions of this FPA, a person engaged in lawful timber harvest methods.

The basis for the proposed action is based upon a request to the Board received from the National Oceanic and Atmospheric Administration's (NOAA) National Marine Fisheries Service (NMFS).

It was the intent of the NMFS to (1) clarify an existing definition in the FPRs and (2) include the concept of federal Endangered Species Act (ESA; 16 U.S.C. § 1531 *et seq.*) section 10(j) "Experimental Populations" for consideration by the Director when determining whether to approve a timber harvest plan that may incidentally take federally listed anadromous salmonids. The NMFS is the agency in charge with the responsibility of administering and implementing the Federal Endangered Species Act

of 1973, as amended, for 10 Evolutionarily Significant Unit/Distinct Population Segments of salmon and steelhead in California.

Pursuant to its authority outlined in PRC §4553 the Board amended 14 CCR §895.1 and §898.2 to ensure the protection of productive timberlands from the experimental stocking of water bodies with listed anadromous salmonids, as approved by NMFS (in conjunction with the California Department of Fish & Wildlife (DFW)) when introduced above permanent barriers. In addition protection from the required disapproval of THPs by the CAL FIRE Director when any experimental salmonids are present, even when there are no barriers precluding fish passage, as it is currently stated in § 898.2 of the FPRs.

Currently FPRs do provide an exception in §916.9 [936.9, 956.9] from watersheds with listed anadromous salmonids, stating, “These requirements do not apply to upstream watersheds where permanent dams attenuate the transport of fine sediment to downstream watercourses with listed anadromous salmonids.” This language does not provide prescriptive standards for salmonid protection above permanent dams or artificial introduction of experimental salmonid populations into waterbodies nor does it substantiate when exemptions from the Anadromous Salmonid Protection (ASP) regulations may be granted by the Director. Revising these specific sections of the FPRs pertaining to these issues will escalate productive recovery benefits for California salmonids while allowing landowners to continue to manage timberlands under the applicable for purposes of fire resilience, ecological benefits and production of high quality timber products.

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

- The Board received an official request dated July 6<sup>th</sup>, 2015 from Ms. Maria Rea, Assistant Regional Administrator of the California Central Valley Office, of the United States National Oceanic and Atmospheric Administration’s (NOAA) National Marine Fisheries Service (NMFS). Ms. Rea requested that the Board revise provisions of the California Forest Practice Rules related to the protection of anadromous salmonids listed under the federal Endangered Species Act of 1973, intending to address potential impediments to proposed recovery actions involving reintroduction of listed experimental populations of salmonids (ESA; 16 U.S.C. § 1531 et seq.), as amended. The purpose of this request was to ensure the “conservation and recovery of anadromous salmonids in California”, while safeguarding landowner rights for activities governed by the FPRs from the introduction of experimental salmonid populations.
- This regulatory request received concurrence and support from the DFW with a letter received by the Board on July 14, 2015, authored by DFW Director Charlton H. Bonham.

The purpose of the proposed action is to make permanent, through regular rulemaking, these amendments.

The effect of the proposed action is to provide a person engaging in the harvesting of timber a reprieve, from the FPRs (14 CCR, §916 (a) et seq.), currently forbidding landowner(s) and their designees from such harvesting in planning watersheds where listed anadromous salmonid species are found, when either of the two following situations exist. First, this amended regulatory language will apply when listed experimental populations of anadromous salmonids are introduced into watersheds associated with activities regulated by the FPRs or in situations where historical but unoccupied habitats can be restored to host experimental listed salmonid populations, but man-made or natural structures inhibiting anadromy are in place and their removal or remediation is deemed impractical<sup>1</sup> or not economically feasible. Second, this exemption seeks to restrict the Director from the immediate disapproval of timber harvest plans (currently required by 14 CCR §898.2), in watersheds where listed anadromous salmonids are present and affected by lawful activities governed by the California Forest Practice Rules, when populations are designated as “Experimental” under Section 10(j) with corresponding regulations within section 4(d) of the Federal Endangered Species Act of 1973 as amended, providing an exception from “take” prohibitions, even if no permanent barrier precluding fish passage exists.

The primary benefit of the proposed action is to protect the right of landowners to legally harvest timber without further restriction from the introduction of experimental populations of listed salmonids within watersheds previously approved for logging activities. Under existing Board rules, 14 CCR § 898.2 requires the Director to disapprove a plan as not conforming to the rules of the Board if... “(d) Implementation of the plan as proposed would result in either taking or finding of jeopardy of wildlife species as rare, threatened or endangered, by the Fish & Game Commission, the National Marine Fisheries Service, or Fish & Wildlife Service, or would cause significant, long term damage to listed species.” Since these experimental and introduced salmonid populations will be listed as “Threatened” according to the Endangered Species Act, certain exceptions can be made, pursuant to section 4(d), to the “take”<sup>2</sup> prohibitions as appropriate for unintentional taking of individuals of an experimental population. The National Marine Fisheries Service has recommended, in circumstances where a 4(d) rule exempts otherwise lawful activities (i.e. approved forest management) as part of an experimental population designation, additional forest management restrictions need not apply. This will ensure that the artificial introduction, subsequent existence, and ongoing population restoration actions of these listed salmonid populations will not compromise the economic benefits to landowners from timber harvest activities.

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<sup>1</sup> The determination of whether barriers to fish passage are deemed immovable, impractical, or not economically feasible to remove will lie jointly under the jurisdiction of the California Department of Fish & Wildlife and NOAA’s National Marine Fisheries Service.

<sup>2</sup> Under ESA; 16 U.S.C. § 1531 et seq., §3 (19) states, “The term “take” means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”

**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.***

The Board is proposing action to make permanent, through regular rulemaking, amendments to Title 14 CCR §§ 895.1 and 898.2(d) to make specific where the ASP (14 CCR §916.9 et seq.) rules would apply and circumstances when the Director may approve a plan that may result in take of federally listed experimental populations of anadromous salmonids. The NMFS has proposed to designate some populations of listed anadromous salmonids as experimental populations pursuant to section 10(j) of the Federal Endangered Species Act ((ESA; 16 U.S.C. § 1531 et seq.)). The amended language would allow the Director to approve a timber harvest plan when listed anadromous salmonids exist, if they are designated as an experimental population under ESA section 10(j) and an accompanying ESA section 4(d) rule is developed for that experimental population that includes incidental take authorizations. The amended language would also clarify criterion used to determine whether an area should be considered a watershed with listed anadromous salmonids by expanding the definition of a barrier in regard to the upstream migration for anadromous salmonids. These two revisions will ensure that landowners wishing to legally harvest timber will not be restricted following the introduction of listed anadromous salmonids designated as an experimental population within those watersheds discussed above, or when their passage is confirmed (by either DFW or NMFS) to be precluded by natural and/or artificial barriers.

The problem is that the FPRs do not account for the potential reintroduction of federally listed anadromous salmonids designated as experimental populations. Under existing Board regulations, areas where timber harvest activities occur when experimental salmonid populations are present, would result in proposed projects being regulated under the ASP rules (§916.9 et seq.) of the FPRs. NMFS is seeking to reintroduce listed anadromous salmonids into historical, but currently unoccupied, habitats above several large barrier dams. Furthermore, under NMFS's proposed program, introduced experimental populations of listed anadromous populations will be listed as "Threatened" under the Endangered Species Act (ESA; 16 U.S.C. § 1531 et seq.), subject to section 7 and critical habitat consultation if determined to be an essential population. This has concerned landowners who currently, or may participate in timber harvest activities or will in the future, as existing Board rules have elevated prescriptive standards for watersheds with listed anadromous salmonids, and when such activities would potentially cause either "take" or significant long term impacts to the species. These amendments are proposed to establish two precedents. First, legal timber harvest activities will be allowed to occur under the standard non-ASP FPRs when

experimental salmonid populations have been introduced and are present in the watershed. This is due to Federal ESA Section 4(d) language exempting legal timber harvest activities where an introduction of experimental listed anadromous salmonid populations has occurred. Secondly, these amendments will also enhance clarity, by specifying the physical circumstances that prevent upstream migration of listed anadromous salmonids as a result of natural or man-made upstream barriers where volitional passage, barrier removal and/or fishway construction has been determined to not be physically or economically feasible.

- NMFS is requesting the Board of Forestry & Fire Protection (Board) consider rulemaking to revise certain provisions of the FPRs related to the protection of the listed anadromous salmonids under the Federal Endangered Species Act of 1973.
- NMFS is seeking to reintroduce five distinct population segments of federally listed salmonids, including steelhead (*Oncorhynchus mykiss*), two evolutionary significant units (ESUs) of coho salmon (*Oncorhynchus kisutch*), and three ESUs of Chinook salmon (*Oncorhynchus tshawytscha*). These species will be released into historically occupied and currently suitable habitats which have been determined to be necessary to ensure population survival and recovery. The majority of these habitats where experimental populations are proposed for designation will be above large rim dams in California's Central Valley, where over 80% of historical spawning and rearing habitats occurred but are not long accessible to migrating anadromous salmonids.
- The issue involving these introductions is that some of these historical spawning and rearing habitats where experimental populations of listed anadromous salmonids are proposed to be introduced are located on privately owned land zoned for timber production.
- From Ms. Maria Rea, Assistant Regional Administrator, California Central Valley Office, of the NOAA's National Marine Fisheries Service on July 13, 2016: "Concerns have been raised that reintroduction efforts above permanent barriers, (such as large dams) would result in an expansion of the Board's FPRs for ASP to areas with reintroduced populations. Currently the ASP rules do not apply to areas above permanent barriers. To address concerns over reintroductions, NMFS is requesting the Board revise FPR language to clarify that the ASP rules do not apply to areas above these barriers and to include a provision that specifically excludes listed populations of salmonids which are designated as "experimental" pursuant to section 10(j) of the ESA and for which a rule, under section 4(d), has been promulgated for populations introduced into areas above permanent barriers."
- From Mr. Charlton Bonham, Director, California Department of Fish & Wildlife on July 13, 2015: "CDFW supports NMFS's proposed changes to the FPRs as they would help ensure successful implementation of actions necessary to conserve and promote recovery of selected Central Valley salmon and steelhead listed pursuant to ESA and/or the California Endangered Species Act (CESA). These actions include the reintroduction to historic spawning and rearing habitats above rim dams of populations of these native species that NMFS has designated as

experimental pursuant to ESA Section 10(j). Some of these habitats are on private timberlands. One proposed change to the FPRs appears likely to address concerns reportedly expressed by some forest landowners that the Anadromous Salmonid Protection (ASP) rules would extend to watersheds where the experimental salmonid populations would be reintroduced. The ASP rules were established to help protect listed anadromous salmonids in “watersheds with listed salmonids” as defined in the FPRs, from the effects of timber operations and they are more restrictive than the FPRs applied to timber operations in watersheds without listed salmonids. The proposed change to FPRs would clarify that the ASP rules do not apply to reaches above large dams and natural barriers that preclude anadromous fish passage. Through this proposed change to the FPRs, the experimental salmonid populations would be reintroduced above large rim dams, where the ASP rules would not apply. Aside from clarifying that the ASP rules would not apply where the experimental populations would be reintroduced, the proposed plea also includes a change to subsection (d) of FPR Section 898.2, “Special Conditions Requiring Disapproval of Plans.” This FPR section states the Director of the California Department of Forestry & Fire Protection (CAL FIRE) shall disapprove a timber harvesting plan (THP) whose implementation would result in a “taking” or finding of jeopardy of a species listed pursuant to ESA or CESA but includes an exception when the taking is incidental and authorized by a wildlife agency. Again, certain forest landowners are reportedly concerned that CAL FIRE would not approve THP’s resulting in unauthorized incidental take of listed anadromous salmonids reintroduced as experimental populations within watersheds that include lands they manage. This proposed change would provide the director of CAL FIRE an additional exception, allowing approval of THP’s resulting in incidental take of one or more individuals of an anadromous salmonid species in an Experimental Population under section 10(j) of ESA and corresponding regulations under section 4(d) of ESA. This change would appear to address forest landowner’s concerns.”

The purpose of this proposed action is to provide clarity to the FPRs to serve as a means of incentivizing landowners to cooperate with federal recovery efforts, particularly when experimental populations are used for reintroduction, and not oppose these efforts in areas that are currently not subject to the ASP regulations.

Amendments to the existing definitions can:

- Encourage landowners to work cooperatively on recovery of listed anadromous salmonids in areas upstream of permanent barriers.
- Reduce confusion regarding where the ASP rules do and do not apply, including in circumstances where experimental populations are reintroduced in areas currently above permanent anthropogenic barriers that preclude upstream migration.
- Reduce confusion as to when the Director may or may not approve a timber harvest plan when incidental take of individuals from an experimental population of federally listed anadromous salmonids may occur.

- Increase forest health by facilitating the introduction of marine derived nutrients following reintroduction of wild anadromous salmonids into areas above permanent barrier.

*Need for Clarification of Existing Definitions.* Concerns have been raised that reintroduction efforts above permanent barriers (such as large dams) would result in an expansion of the existing ASP rules. Currently, the Anadromous Salmonid Protection rules do not apply to areas above permanent barriers. To address concerns over increased regulatory constraints to forestry activities following reintroductions, the NMFS requested the Board revise rule language. The purpose of the request is to (1) clarify that the ASP rules do not apply to areas above these barriers and (2) include a provision that allows the Director to approve a Timber Harvest Plan that may result in incidental take of individual(s) from a listed population of salmonids that are designated as “experimental” pursuant to section 10(j) of the Federal ESA *and* for which a rule, under Federal ESA section 4(d), has been promulgated.

*Experimental Populations.* In response to concerns over potential restrictions and liability resulting from reintroduction of threatened and endangered species, particularly on private property, Congress added section 10(j) to the Endangered Species Act of 1973 as amended (ESA; 16 U.S.C. § 1531 et seq.) in 1982 to encourage recovery of species through population re-establishment, in cooperation with state and local entities, while providing federal agencies with more flexibility and discretion in managing reintroduced populations. The legislative history indicates that a rule issued for a designated experimental population “should be viewed as an agreement among the federal agencies, the state fish and wildlife agencies, and any landowners involved.”

Once established by regulation, an experimental population is treated as a separate threatened species regardless of the ESA status (threatened or endangered) of the donor species from which it was derived. If the experimental population is determined to be essential, it is treated as a threatened species for purposes of section 7 consultation and critical habitat can be designated for the population. In contrast, if the experimental population is determined to be non-essential, then it is treated as a species proposed to be listed for purposes of section 7 consultation and critical habitat cannot be designated for the population. Because an experimental population is treated as a threatened species for all other purposes, the Secretaries of Commerce or Interior may promulgate protective regulations under section 4(d) of the ESA for the population regardless of whether or not it is determined to be essential or non-essential. Such regulations may allow persons to take members of the listed species without violating the take prohibition contained in section 9 of the ESA.

*Reintroduction:* In the NMFS’s 2014 Central Valley Chinook salmon and steelhead recovery plan, one of the primary recovery strategies includes

reintroduction of salmonids into historical, but currently unoccupied, habitats above large barrier dams. The NMFS believes it may be difficult to gain support for some recovery efforts, particularly reintroduction of listed salmonids above large dams, due to landowner concerns over increased regulatory burdens and liability. However, as provided under section 10(j), individuals of an experimental population shall be treated as threatened species, and the NMFS may establish protective regulations under section 4(d) of the ESA with respect to such populations. The NMFS can tailor these regulations to provide exceptions to take prohibitions under the ESA as appropriate for unintentional taking of individuals of an experimental population as a result of otherwise lawful activities. By addressing these issues on a case-by-case basis, the NMFS believes they will overcome a major hurdle in recovery implementation.

### **Explanation for Why the Proposed Action Re phrases Statute and Existing Rules**

Pursuant to §4511 et seq. and §4553 et al. the Board is authorized to duplicate, amend and/or rephrase statute and existing rules to satisfy the clarity standard. In this rulemaking effort, the Board exercised its authority to simply amend current regulations set forth under the FPRs, and did not rephrase, amend or duplicate statute. Amending current rules was used as a tool to provide context and have all related information in one place so that the burden of understanding the issues regarding reintroduced populations designated as “experimental” under section 10(j) of the Federal ESA and, consequently, whether or not the ASP rules apply to management activities, is not placed on the regulated public. In the 2016 California Forest Practice Rules, the board does provide an exemption, stating in Title 14 CCR §916.9 [936.9, 956.9] that “These requirements do not apply to watersheds where permanent dams attenuate the transport of fine sediment to downstream watercourses with listed anadromous salmonids.” Although it affords exemption from respective timber activities that lie upstream from watercourses with permanent dams restricting passage by listed anadromous salmonids below, its breadth does not encompass harvest activities with listed anadromous salmonids within the immediate watershed above the permanent dam, nor does it incorporate exemptions for introduced salmonid species within the immediate watershed. For the reasons explained above, the Board seeks to amend the FPRs §895.1 and §898.2.

The language contained within the proposed amendments or language proposed for adoption clarifies the intent of the rules while accommodating efforts to reintroduce listed anadromous salmonids into areas that are currently outside of areas subject to the ASP rules.

Also, rephrasing revising the existing definition in the proposed action was determined to be a prudent measure because it was developed and informed by experts in the field of forestry and through a collaborative effort between landowner, industry, and resource agency representatives. This rephrased definition was subsequently used to develop the conditions described in the proposed action.

Where the statute is made specific or interpreted, an explanation regarding why the proposed rule is reasonably necessary to carry out the purpose and to address the problem for which it is proposed is provided.

In addition to the above, the Board recognizes 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.

#### **Additional Aggregated Explanation(s)**

Many of the provisions of the proposed action are based on the necessity to make it congruent with the existing statutory provisions. Where the definition is made specific or interpreted, an explanation regarding why the proposed definition is reasonably necessary to carry out the purpose and to address the problem for which it is proposed is provided.

#### **Amend 14 CCR § 895.1**

The proposed amendment to this section includes an expanded definition of “Watersheds with Listed Anadromous Salmonids” and is necessary to provide greater clarity. This is accomplished by including a more expansive definition of what is considered to be a barrier to the upstream migration of anadromous salmonid and by including language to address the potential consequences following reintroduction of experimental populations into areas currently inaccessible to anadromous salmonids. This is necessary because the existing definition is more limited and does not specify the definition of a barrier to anadromy and does not account for actions where permanent barriers will remain in place but reintroduction of federally designated experimental populations is planned and will likely occur in the foreseeable future.

#### **Amend 14 CCR § 898.2(d)**

The proposed amendment to this section provides greater clarity and understanding of how experimental salmonid populations would be treated under the FPRs. This section explains that timber harvest activities can still be able to receive Director approval when experimental salmonid populations are within the watershed area, and incidental take has the possibility of occurring during the course of the lawful timber harvest operations. This section was rephrased to include circumstances allowing the Director to approve a timber harvest plan where federally listed experimental populations of anadromous salmonids have been reintroduced, and an ESA section 4(d) rule has been promulgated

for activities subject to the FPRs and where no further take authorizations are necessary under federal or state endangered species acts.

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

The effect of the proposed action is to clarify the intent behind existing definitions in the rules while also taking into account provisions in the federal ESA that may be used as part of a reintroduction effort for listed anadromous salmonids. The proposed action will not change the application of the existing forest practices rules following clarification.

The proposed 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) Nonmonetary benefits may result. 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 CA FPRs.

(E) No jobs are expected to be eliminated.

**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. National Marine Fisheries Service. 2014. Recovery Plan for Evolutionarily Significant Units of Sacramento River Winter-run Chinook Salmon and Central Valley Spring-run Chinook Salmon and the Distinct Population Segment of California Central Valley Steelhead. California Central Valley Area Office. July 2014.  
[http://www.westcoast.fisheries.noaa.gov/publications/recovery\\_planning/salmon\\_steelhead/domains/california\\_central\\_valley/final\\_recovery\\_plan\\_07-11-2014.pdf](http://www.westcoast.fisheries.noaa.gov/publications/recovery_planning/salmon_steelhead/domains/california_central_valley/final_recovery_plan_07-11-2014.pdf)
2. U.S. NOAA: National Marine Fisheries Service. 2014. Appendix B: Threats Assessment for the Evolutionary Significant Units of Winter-run Chinook Salmon (*Oncorhynchus tshawytscha*) and Central Valley Spring-run Chinook Salmon (*O. tshawytscha*), and the Distinct Population Segment of Central Valley Steelhead (*O. mykiss*). July 2014.  
[http://www.westcoast.fisheries.noaa.gov/publications/recovery\\_planning/salmon\\_steelhead/domains/california\\_central\\_valley/appendix\\_b\\_-\\_threats\\_assessment\\_7-10-2014.pdf](http://www.westcoast.fisheries.noaa.gov/publications/recovery_planning/salmon_steelhead/domains/california_central_valley/appendix_b_-_threats_assessment_7-10-2014.pdf).
3. Federal Endangered Species Act of 1973 as amended; 16 United States Code § 1531 et seq.; § 10 (j) [[http://www.nmfs.noaa.gov/pr/pdfs/laws/esa\\_section10.pdf](http://www.nmfs.noaa.gov/pr/pdfs/laws/esa_section10.pdf)]
4. Rea, M. US National Oceanic and Atmospheric Administration: National Marine Fisheries Service. July 6, 2015. *Letter to: Dr. J. Keith Gillless, Chair, California State Board of Forestry & Fire Protection*. July 6, 2015. TS.
5. Bonham, C. State of California Natural Resources Agency: Department of Fish & Wildlife. *Letter to Chair J. Keith Gillless, Ph.D. California Board of Forestry & Fire Protection; Subject: NATIONAL MARINE FISHERIES SERVICE PROPOSED RULE PLEAD TO FACILITATE APPLICATION OF ENDANGERED SPECIES ACT SECTION 10(j) IN WATERSHEDS ABOVE RIM DAMS*. July 13, 2015. TS.

**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 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 definition; “Watersheds with Listed Anadromous Salmonids Watersheds” (14 CCR §895.1) while not taking action on 14 CCR §898.2(d).**

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 No Action to Increase the Specificity of the definition; “Watersheds with Listed Anadromous Salmonids Watersheds” (14 CCR §895.1) While Taking Action to Increase the Specificity allowing the Director to Approve Timber Harvest Plans Resulting in Take (14 CCR §898.2(d)).**

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.

#### **Board Findings Regarding Alternatives**

The Board finds that none of the following 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 proposed action does not mandate the use of specific technologies or equipment; it simply provides greater clarification to an existing definition and brings forth the concept of Federal ESA designated experimental populations for consideration when the Director determines whether or not a Timber Harvest Plan is in compliance with the FPRs. Alternative #4 is preferred for the reasons described above.

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 to be used in lieu of prescriptive standards. After deliberating on whether performance based standards could be utilized in this rulemaking matter, it was determined that using performance based standards in lieu of prescriptive standards would not be beneficial, as an exemption to the ASP rules is only limited to 4(d) experimental populations, or salmonid populations above permanent structures attenuating sediment as determined by NMFS in conjunction with DFW. Not implementing minimum prescriptive standards would lead to confusion, subjective enforcement, and exploitative interpretations of the regulation.

**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 not be adversely 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:

The Board relied on their own expertise and thorough working knowledge of forestry practices and regulations as experienced forestry and environmental professionals. Furthermore, the Board received concurrence from the National Marine Fisheries Service (NMFS) and the California Department of Fish & Wildlife (CDFW) that this would not have a significant adverse impact directly affecting businesses both statewide and regionally. Additionally, oral testimony before the Board in July 2015 also supported the proposed action.

**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, and 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 clarify 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 clarifies existing language. The clarifications provide greater certainty as to where the ASP rules apply and circumstances allowing Director approval of plans resulting in take of Federally listed anadromous salmonids when designated as an experimental population pursuant to section 10(j) of the ESA.

However, it does not relieve persons from complying with the ASP rules when harvesting timber in areas currently accessible to anadromous salmonids. It does not relieve persons from the ESA section 9 take prohibitions if a 4(d) take limit for an experimental population has not been promulgated for the FPRs. Additionally, it does not relieve persons from the ESA section 9 take prohibitions if conducting timber harvest outside of a 4(d) limit, if so designated, for the standard FPRs.

Finally, where FPRs have been violated, specified corrective and/or punitive enforcement measures including, but not limited to, financial penalties, are imposed upon the identified offender(s).

In summary, the proposed action will not result in significant adverse environmental effects because the standards that are required constrain activities to a level where significant impacts will be avoided. The proposed action is an element of a comprehensive avoidance, conformance and mitigation program for timber operations on timberland.