Board of Forestry and Fire Protection

Notice of Proposed Emergency Action (First Readoption), pursuant to GOV § 11346.1(b)

"Drought Mortality Amendments, 2015"

Notice Date: December 11, 2015

The Board of Forestry and Fire Protection (hereafter "Board") authorized submission on an Emergency Rule Package, entitled, "Drought Mortality Amendments, 2015" to provide an exemption, from the plan preparation and submission requirements (PRC § 4581) and from the completion report and stocking report requirements (PRC §§ 4585 and 4587) of the Forest Practice Act, to a person engaging in specified forest management activities, including, the cutting or removal of dead or dying trees of any size. This action is being taken in accordance with GOV §§ 11346.1, 11346.5 (2)-(6) and 11349.6. The Board took this action at their regularly meeting scheduled on June 17, 2015.

At their regularly meeting scheduled on December 9, 2015, the Board authorized readoption of the findings, with revisions to incorporate new information, and the rule text, with revisions to exclude the amendment to 14 CCR § 1052.1 which had already gone through permanent rulemaking.

Steps have been taken to make this regulation permanent, however more time is required to complete the regular rulemaking process, therefore, in order to delay expiration of the approved emergency regulation (2015-0701-02E), the proposed emergency readoption will be submitted to the Office of Administrative Law on **December 21, 2015**.

If you wish to comment on the proposed emergency readoption, you must submit the comment directly to the Office of Administrative Law (hereafter "OAL") within five **calendar** days of OAL's posting of the proposed emergency readoption on the OAL web site. You may submit comments on the proposed emergency readoption to:

Mail:
OAL Reference Attorney
300 Capitol Mall, Suite 1250
Sacramento, California 95814

Fax:
(916) 323-6826

E-mail:
staff@oal.ca.gov

OAL will accept all comments submitted by the specified deadline.

When you submit a comment to OAL, you must also submit a copy of your comment to the rulemaking agency's specified contact person provided below.

Mail:
Thembi Borras
Regulations Coordinator
Board of Forestry and Fire Protection
P.O. Box 944246
Sacramento, CA 94244-2460

Fax:
(916) 653-0989

E-mail:
public.comments@BOF.ca.gov

This proposed emergency readoption will be submitted to the Office of Administrative Law on December 21, 2015. **The public comment period closes at 5:00 PM on December 26, 2015.**

OAL will confirm that the agency has received the comment. Pursuant to Title 1, California Code of Regulations, Section 55(b)(1) through (4), the comment must state that it is about an emergency regulation and include the topic of the emergency.

Pursuant to 1 CCR § 55, the Board is not required and, in this instance, is not likely to respond to comments submitted. However, should the Board choose to respond, it must submit its response to OAL within eight (8) calendar days following the date of submission of the proposed emergency regulation to OAL, unless specific exceptions are applicable.

Pursuant to **GOV § 11346.1(a)(2)(A)**, the specific rule text associated with the proposed action immediately follows this notice.

Pursuant to **GOV § 11346.1(b)(2),** following is a description of the facts demonstrating the existence of an emergency and the need for immediate action, and demonstrating, by substantial evidence, the need for the proposed emergency readoption to effectuate the statute being implemented, interpreted, or made specific and to address only the demonstrated emergency.

> PRC § 4584(c) authorizes the Board to adopt regulation to provide an exemption, from the plan preparation and submission requirements (PRC § 4581) and from the completion report and stocking report requirements (PRC §§ 4585 and 4587) of the Forest Practice Act, to a person engaging in specified forest management activities, including, the cutting or removal of dead, dying, or diseased trees of any size.
>
> The Board finds it necessary to pursue emergency regulations to provide, immediately, a person engaging in the cutting or removal of dead or dying trees of any size an exemption, from the plan preparation and submission requirements (PRC § 4581) and from the completion report and stocking report requirements (PRC §§ 4585 and 4587) of the Forest Practice Act, to capture mortality and address the fuel conditions being made

worse by the drought and tree mortality. Following is a list of evidence of the drought and tree mortality:

One: From Governor issued 2015 Drought Proclamation (Executive Order B-29-15, signed 04/01/15):
The Governor proclaimed a State of Emergency to exist throughout the State of California due to severe drought conditions.

Two: From 2014 California Pest Conditions Report:
"During the 2014 water year (Oct. 1, 2013 – April 30, 2014), California experienced below-average precipitation (50% of average statewide). For many areas of the state this marked the third consecutive year of drier than average conditions. The May 1, 2014 snow water content average of 15% tied with 1990 for the second lowest snow water content level on record, exceeded only by that of 1977 (CA Dept. of Water Resources, http://cdec.water.ca.gov/snow/bulletin120/b120may14.pdf).

Several tree pests (e.g., bark beetles) are more prolific when host trees are stressed by drought, which resulted in 2014 having more than double the acres detected in 2013 with some level of bark beetle related tree mortality. Other drought responses observed during 2014 included desiccation and premature shedding of leaves by native oak species. Varying levels of drought-related tree mortality, premature defoliation, early foliage color change, and leaf drop were mapped over 227,000 acres via aerial survey in 2014."

Three: From Forest Health Protection Survey, Aerial Detection Survey – April 15th-17th, 2015**:**
"Background: California is in its third year of drought. In 2014, a large increase in tree mortality was observed, especially in the Central Coast and Southern Sierra Ranges. Ground observations noted a continued increase in mortality after the 2014 surveys were flown in July. Early season aerial surveys were conducted in the spring of 2015 in response to the continuing drought and the resulting tree mortality. Another early survey over portions of Southern California was flown the week of April 6th.
Objective: Detect and map extent and severity of tree mortality and damage which occurred after the 2014 aerial surveys in California Forests along the southern Sierras….
…Details:

- More than 4.1 million acres were surveyed; covering western portions of Stanislaus, Sierra and Sequoia National Forests and Yosemite and Sequoia-Kings Canyon National Parks. The Tehachapi Range and nearby private lands were also surveyed.
- In general mortality was quite severe in many pine species especially in ponderosa and pinyon at lower elevations and more southern areas.
- Along the foothills mortality was often widespread and severe especially in ponderosa but also gray pine and likely blue and live oak. It unknown if the oaks that were mapped were truly dead or had died back/defoliated due to the drought.

- On the Stanislaus, mortality was scattered in northern areas, but pockets of severe ponderosa and other pine mortality were seen in the southern low areas. Mortality roughly doubled since July 2014 in the areas of the Stanislaus that were resurveyed this spring. …
- On the Sierra and Sequoia NF pine mortality, mostly from western pine beetle, was common and severe almost everywhere at lower elevations. Estimated number of trees killed on these two Forests together exceeded 5 million. Only about 300,000 trees were estimated killed last year in the same area. …
- On the Tehachapi Range and on private lands along the foothills of the Sierras, extensive areas of pine mortality were common. Large areas of oak mortality was also suspect."

Four: From CAL FIRE Letter to the Board regarding Forest Practice Regulatory Relief for Drought Mortality dated 05/07/15:
"Given the current level of infestation of bark beetles and drought related stressors, it is expected that the infestation and resulting mortality will accelerate dramatically in 2015 creating broad areas where dead and dying trees dominate the forest landscape.

The large number of dead trees creates a fire hazard in both the short and long term. In the short term, the dead pine needles create a receptive ignition bed for embers or any ignition source…. In the long term, trees which die today will begin to deteriorate and fall to the ground in significant numbers in approximately 7-10 years. These falling trees represent a potential hazard to any life or property within reach of the falling tree. …

…Trees that die and are left to burn or rot will ultimately result in the release of carbon and other greenhouse gases during combustion, decomposition or both. This will result in an earlier than normal release of greenhouse gases. Utilizing logs to create long lasting wood products or utilizing logs to produce energy to offset the consumption of fossil fuels has direct benefits to the State, which will help meet the goals within Executive Order B-30-15. …

…Recent large wildfires and insect outbreaks have dramatically increased the number of logs from dead and dying trees available to the log market. The decrease in milling capacity over the last decade has created a situation where log supply exceeds demand. This over supply has lowered the value of logs delivered to available mills or ports, creating a market condition that may prevent any possibility of economic return to landowners with dead or dying trees. These marginal economic conditions may prohibit landowners from pursuing tree removal,…

…it is in the interest of the state to encourage the removal of dead and dying trees to reduce the fire and falling hazard from dead and dying trees across the state. It is also in the interest of the state to encourage long term carbon sequestration by retaining the carbon held in the tree in some form of value added product, or to offset the consumption of fossil fuels by utilizing the available carbon in trees for energy production. ..."

Five: On average more than 100 Habitable Structures are destroyed each year by wildfires (http://www.fire.ca.gov/downloads/redbooks/2012Redbook/2012_Redbook_Graphics1-10.pdf).

Six: From the Governor's Proclamation of a State of Emergency, regarding widespread tree mortality, issued on 10/30/15:
WHEREAS a lack of precipitation over the last four years has made trees in many regions of California susceptible to epidemic infestations of native bark beetles, which are constrained under normal circumstances by the defense mechanisms of healthy trees; and
WHEREAS these drought conditions and resulting bark beetle infestations across broad areas have caused vast tree mortality in several regions of the state, with the United States Forest Service estimating that over 22 million trees are dead and that tens of millions more are likely to die by the end of this year; and
WHEREAS recent scientific measurements suggest that the scale of this tree die-off is unprecedented in modern history; and
WHEREAS this die-off is of such scale that it worsens wildfire risk across large regions of the State, presents life safety risks from falling trees to Californians living in impacted rural, forested communities, and worsens the threat of erosion across watersheds; and
WHEREAS such wildfires will release thousands of tons of greenhouse gas emissions and other harmful air pollutants; and
WHEREAS the circumstances of the tree die-off, by reason of its magnitude, is or is likely to be beyond the control of the services, personnel, equipment and facilities of any single county, city and county, or city and require the combined forces of a mutual aid region or regions to combat; and
WHEREAS under the provisions of section 8558(b) of the California Government Code, I find that conditions of extreme peril to the safety of persons and property exist within the State of California due to these events; and
WHEREAS under the provisions of section 8571 of the California Government Code, I find that strict compliance with various statutes and regulations specified in this order would prevent, hinder, or delay the mitigation of the effects of the drought.

Seven: From CAL FIRE Letter to the Board regarding Drought Mortality Amendments, 2015 dated 12/07/15:

The California Department of Forestry and Fire Protection (CAL FIRE) has monitored the implementation of the Emergency Regulation as required by 14 CCR § 1038(k)(8), and finds that the rule has been effective in providing private timberland owners an efficient regulatory process for removal of drought stricken dead and dying trees, to reduce the potential for catastrophic damage from wildfires…..

…..Considering the Governor's Emergency Proclamation and Orders, and the continued increase of tree mortality; CAL FIRE supports the implementation of 14 CCR § 1038(k) and urges the Board to consider extending the emergency regulation.

CAL FIRE would also support Board action in adopting permanent rule language in regards to 14 CCR § 1038(k)…..

Eight: From Forest Health Protection Aerial Detection Survey Southern Sierra Nevada Range – July 6th-9th, August 31st-Sep 3rd, Oct 20th- 22nd 2015**:**
Background: Many of California's forests are overly dense with trees and experiencing four years of exceptional drought. Tree mortality continues to increase in most areas, sometimes dramatically with an estimated more than 10 million trees killed in this area. This portion of the 2015 regular survey was conducted primarily along the central to southern Sierra Nevada Range including most of the Inyo, Humboldt-Toiyabe, Sierra and Stanislaus Nationals Forests, Yosemite and Sequoia-Kings Canyon National Parks, portions of Eldorado and Sequoia NFs along with surrounding State and Private lands primarily along the western foothills. Surveys of this area had begun in early July 2015, but were delayed for months due to flight restrictions, smoke obscuration and safety concerns created by the Rough Fire. The far southern tip of the Sierra Nevada Range was flown earlier and those results were included in the report on Southern California. Additionally, the Sierra Nevada crest around Mount Whitney was not surveyed in 2015 due to lack of detected activity in the area, significant snow accumulations and because the high altitude requires crew to be on supplemental oxygen which was not available when the opportunity to fly finally presented itself. Drought conditions throughout most of this surveyed area are categorized as exceptional according to the National Drought Monitor.
Objective: Detect and map extent and severity of tree mortality and other damage including drought stress throughout the southern Sierra Nevada Range of CA, extending into portions of the Great Basin of Nevada and the White Mountain Range.
… Details:

- More than 8.5 million acres were surveyed; primarily on the Sierra, Inyo and Humboldt-Toiyabe NFs, Yosemite and Sequoia-Kings Canyon National Parks and western portions of the Stanislaus, Eldorado and Sequoia National Forests. Other areas of note include the western foothills of the southern Sierra Nevada range, mostly privately owned, the White Mountain Range to the southeast, interspersed BLM lands mostly in Nevada, and several State Parks.
- Pine mortality in particular was severe and widespread becoming progressively intense to the south. Ponderosa pine is the most common component of the lower elevation mixed conifer type and was also the most impacted pine species. However sugar pine and other conifers were heavily impacted here as well.
- In higher elevations, California red fir, Jeffrey, sugar and lodgepole pine also exhibited heightened rates of tree mortality.
- Scattered live oak and gray pine mortality was also common along the low elevation foothills.
- Severe drought-induced discoloration/defoliation in blue oak and other oak species was severe on a landscape scale primarily on private lands along the low elevation foothills.

- Mortality in high elevation 5 needle pine was spotty in more eastern areas of the Inyo but at higher levels than in previous years as was juniper and pinyon mortality on the Humboldt-Toiyabe NF and surrounding areas.
- Marssonina leaf blight was also common on quaking aspen and willow in many places to the east.

Pursuant to **GOV § 11342.545,** this situation calls for immediate action to avoid serious harm to the public peace, health, safety, or general welfare. The harm is dead trees that contribute to the scale of damage associated with wildfires and create a falling hazard as they deteriorate. The Board was compelled to respond to the evidence, as described above, of drought related tree mortality by proposing the action described in this Notice. These regulations are immediate and necessary to, in part, facilitate appropriate fuel modification and reduce the falling hazard associated with deteriorating trees. Appropriate fuel modification can:

- Reduce the risk of fire to timberlands.
- Reduce large, damaging wildfires.
- Decrease losses of homes and structures due to wildfire.
- Enhance firefighter safety.
- Increase public safety.
- Increase the efficiency of fire suppression operations relating to how, when, and where firefighting assets are deployed.
- Reduce the cost of fire suppression.
- Increase forest health.

The need for the proposed action is made more important by the timeline associated with regular rulemaking which would preclude this exemption from being available for ongoing use in 2016 pursuant to PRC § 4554.5, which specifies the Board's rules shall become effective on the next January 1 that is not less than 30 days from the date of approval of those rules or regulations by the Office of Administrative Law. This time lag is not congruent with making this exemption available for ongoing use in 2016.

The Board is proposing action to readopt 14 CCR § 1038(k).

Pursuant to **GOV § 11346.1(b)(2),** following are the list of each technical, theoretical and empirical study, report, or similar document, if any, upon which the Board relied to make the "emergency" finding:

Governor issued 2015 Drought Proclamation (Executive Order B-29-15, signed 04/01/15)

2014 California Forest Pest Conditions
http://www.bof.fire.ca.gov/PDF/2014_california_forest_pest_conditions_report.pdf

Forest Health Protection Survey, Aerial Detection Survey – April 15th-17th, 2015
http://www.fs.usda.gov/detail/r5/forest-grasslandhealth/?cid=stelprd3836640

CAL FIRE Letter to the Board regarding Forest Practice Regulatory Relief for Drought Mortality dated 05/07/15.

Historical Wildfire Activity Statistics (Redbooks). 2012. http://www.fire.ca.gov/downloads/redbooks/2012Redbook/2012_Redbook_Graphics1-10.pdf

Governor's Proclamation of a State of Emergency regarding widespread tree mortality, issued on 10/30/15 (https://www.gov.ca.gov/docs/10.30.15_Tree_Mortality_State_of_Emergency.pdf)

CAL FIRE Letter to the Board regarding "Drought Mortality Amendments, 2015" dated 12/07/15.

Forest Health Protection Aerial Detection Survey Southern Sierra Nevada Range – July 6th-9th, August 31st-Sep 3rd, Oct 20th- 22nd 2015 http://www.fs.usda.gov/detail/r5/forest-grasslandhealth/?cid=stelprd3836640

Pursuant to **GOV § 11346.1(b)(2)**, following is the information required by **GOV § 11346.5(a)(2),** which mandates the reference to the authority(s) under which the regulation is proposed and a reference(s) to the particular code sections or other provisions of law that are being implemented, interpreted, or made specific be provided.

14 CCR § 1038 Note: Authority cited: Sections 4551, 4553, 4584 and 4584.1, Public Resources Code. Reference: Sections 4516, 4527 and 4584, Public Resources Code; and *EPIC v. California Department of Forestry and Fire Protection and Board of Forestry* (1996) 43 Cal. App.4th 1011.

Pursuant to **1 CCR § 20(c)(1)**, no documents are incorporated by reference in these regulations.

The Board had available the entire rulemaking file, including all information considered as a basis for this regulation, available for public inspection and copying throughout the rulemaking process at its office in Sacramento, California.

Pursuant to **1 CCR § 48,** the Notice, required by Government Code section 11346.1(a), shall contain the following or substantially similar statement:
"Government Code section 11346.1(a)(2) requires that, at least five working days prior to submission of the proposed emergency action to the Office of Administrative Law, the adopting agency provide a notice of the proposed emergency action to every person who has filed a request for notice of regulatory action with the agency. After submission of the proposed emergency to the Office of Administrative Law, the Office of Administrative Law shall allow interested persons five calendar days to submit comments on the proposed emergency regulations as set forth in Government Code section 11349.6."

Pursuant to **1 CCR §50(a)(5)(A)** and **GOV § 11346.1(a)(2)** the Board provided a five working day notice. The proposed action was, at a minimum, posted on the Board's website (pursuant to **GOV § 11346.4(a)(6)**), sent to the Board mailing list (pursuant to **GOV § 11346.4(a)**) and widely distributed via email (pursuant to **GOV § 11340.85**) at least five working days prior to being submitted to the Office of Administrative Law.

Pursuant to **GOV § 11346.1(b)(2),** following is the information required by **GOV § 11346.5(a)(3)**

UPDATED INFORMATIVE DIGEST

Pursuant to the Z'berg-Nejedly Forest Practice Act of 1973, 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.

Pursuant to PRC §4584, which was chaptered in 1989, the Board is authorized, upon determining that the exemption is consistent with the purposes of CHAPTER 8. Z'berg-Nejedly Forest Practice Act of 1973 (FPA), to exempt from this FPA, or portions of this FPA, a person engaged in specific forest management activities.

Specifically, PRC § 4584(c), authorizes the Board to adopt regulation to provide an exemption, from the plan preparation and submission requirements (PRC § 4581) and from the completion report and stocking report requirements (PRC §§ 4585 and 4587) of the Forest Practice Act, to a person engaging in specified forest management activities, including, the cutting or removal of dead, dying, or diseased trees of any size.

Pursuant to this statutory authority, the Board amended 14 CCR §§ 1038, by adding a new subsection (k), in accordance with the provisions of the statute.

In the past, pursuant to PRC § 4584(c), the Board adopted 14 CCR § 1038(b) and (d), which limits, in subsection (b), the harvest volume of dead, dying and diseased trees to less than 10% of the volume per acre and, in subsection (d), harvesting dead trees which are unmerchantable as sawlog-size timber from substantially damaged timberlands. The proposed action, captured in new subsection (k), does not impose these limitations.

The <u>effect</u> of the proposed action is to provide a person engaging in the cutting or removal of dead or dying trees of any size an exemption, from the plan preparation and submission requirements (PRC § 4581) and from the completion report and stocking report requirements (PRC §§ 4585 and 4587) of the Forest Practice Act, to capture mortality, address the fuel conditions being made worse by the drought and tree mortality and reduce the falling hazard associated with deteriorating trees.

The primary <u>benefit</u> of the proposed action is to facilitate the reduction in risk to life, property and the environment posed by dead and dying trees by streamlining the harvest and removal of them, enabling landowners to address the fuel conditions being made worse by the drought and tree mortality and the falling tree hazard. Additional benefits may include a monetary return and improved aesthetics. It is likely that California will

continue to experience large and damaging wildfires that threaten people's lives and destroy homes. This exemption will incentivize landowners to harvest and remove dead and dying trees that will reduce the risk of loss of life and property damage and the negative impact that is associated with large and damaging wildfires that impact State's watershed, negatively impact fisheries and wildlife habitat, negatively impact public health and water supply and quality, increase GHG emissions and devastate local economies.

This emergency regulatory action became effective on 07/13/15 and is set to expire on 01/12/16. Pursuant to **GOV §§ 11346.1(e)** and **11346.1(h)** and **1 CCR § 52(b)(1)**, steps have been taken to make this regulation permanent, they include:

- The Board conducted a field tour in the Shaver Lake area to see first-hand the vast expanses of tree mortality.
- The Board is being kept informed of the increasing mortality through the monitoring that the Department pf Forestry and Fire Protection is doing.
- The Board is acting in response to the Governor's Proclamation of a State of Emergency regarding widespread tree mortality issued on 10/30/15. (https://www.gov.ca.gov/docs/10.30.15_Tree_Mortality_State_of_Emergency.pdf)
- The Board directed the Forest Practice Committee to further develop the plead, in the context of permanent rule making.
- The original emergency regulation also included the addition of drought as one of the conditions that constitute an emergency in order to enable a person to submit an Emergency Notice to harvest trees that are fallen, damaged, dead or dying as a result of this condition. However, this provision was excluded from the proposed emergency readoption because it was made permanent through regular rulemaking for which a certificate of compliance was approved on 11/23/15 (see OAL File No. 2015-1013-02).

However more time is required to further examine making this regulation permanent and to complete the regular rulemaking process due primarily to the scale of this evolving issue and the Board's desire to appropriately match the provisions, to facilitate the removal of dead and dying trees, with the scale of the issue, environmental protection and monitoring. Therefore, in order to delay expiration of the approved emergency regulation, this proposed emergency readoption, which is the same or substantially equivalent to the approved emergency regulation (pursuant to **GOV § 11346.1(h)**), with the exception of the exclusion of the amendment to 14 CCR § 1052.1 which has already gone through permanent rulemaking, will be submitted to the Office of Administrative Law on **December 21, 2015**.

The proposed action does not differ substantially from an existing comparable federal regulation or statute.

The proposed regulation is not inconsistent or incompatible with existing state regulations; it amends it, providing another exemption.

Pursuant to **GOV § 11346.1(b)(2),** following is the information required by **GOV § 1346.5(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.

Pursuant to **GOV § 11346.1(b)(2),** following is the information required by **GOV § 11346.5(a)(5**).

The Board finds that the proposed regulation does not impose a mandate on local agencies or school districts.

Pursuant to **GOV § 11346.1(b)(2),** following is the information required by **GOV § 1346.5(a)(6**).

The costs or savings to any State agency are as follows. Otherwise no costs or savings to any State agency are expected.

Pursuant to 14 CCR § 1038(k)(8), the Department shall monitor and report on the statewide use of the exemption, allowed under 14 CCR § 1038(k), including the number of harvest area acres, the areas of application and the degree of compliance. The Department shall, within 180 days of the date that these emergency regulations are filed with the Secretary of State, report its findings, to the Board. The cost to the Department to collect and report the information specified in 14 CCR § 1038(k)(8) is estimated in the fiscal impact portion of the standard form 399, which is part of the rulemaking file.

The proposed regulation does not impose a reimbursable cost to any local agency or school district (under Part 7 (commencing with Section 17500 of Division 4)). There are no other nondiscretionary costs or savings imposed on local agencies. There are no costs or savings in federal funding to the State.

Pursuant to **GOV § 11349(f)** and **1 CCR §12**, following is the information required by **1 CCR §12**, an Explanation for why the Proposed Action Duplicates and/or Rephrases Statute and Existing Rules.

The regulation repeats or rephrases in whole or in part statute and existing regulation because it is necessary to satisfy the “clarity” standard of Government Code Section 11349.1(a)(3). Repeating and rephrasing the statute provides context for the addition of the 14 CCR § 1038(k) exemption. Additionally, it would be cumbersome to wholly require a person to have to cross reference the statute and other portions of the Forest Practice Rules (14 CCR).

SPECIFIC PURPOSE OF EACH ADOPTION, AMENDMENT OR REPEAL (pursuant to GC § 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 GC §§ 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 problem that the Board has addressed in the proposed action is described in the findings provided pursuant to GOV § 11346.1(b)(2). The fundamental problem is trees are dying due to drought related stress and broad areas where dead and dying trees dominate the forest landscape have been reported and are expected to increase in size and number of areas. The large number of dead trees creates a fire hazard in both the short and long term. Additionally, dead trees represent a potential hazard to any life or property within reach of them because as they deteriorate they may fall in whole or in pieces.

The purpose of the proposed action is to provide a person engaging in the cutting or removal of dead or dying trees of any size an exemption, from the plan preparation and submission requirements (PRC § 4581) and from the completion report and stocking report requirements (PRC §§ 4585 and 4587) of the Forest Practice Act, to capture mortality, address the fuel conditions being made worse by the drought and tree mortality and reduce the falling hazard associated with deteriorating trees.

Explanation for why the Proposed Action Duplicates and/or Rephrases Statute and Existing Rules

In some instances the language contained within the proposed rule text, duplicates language within § 4584(c) of the Public Resources Code and §§ 895.1, 919.1, 1038(b)(9), 1038(c)(5)(A), 1038(e), 1038(h) and 1052.4(c) of Title 14 of the California Code of Regulations.

Duplication was used as tool to make it congruent with statute and to provide context and have all related information in one place so that the burden of having to reference both statue and other portions of the Forest Practice Rules (14 CCR) is not placed on the regulated public.

Also, duplication of relevant existing regulations in the proposed action was determined to be a prudent measure because they were developed and informed by experts in the field of forestry and through a collaborative effort between landowner, industry, agency and environmental representatives. These duplicated regulations were subsequently used to develop the provisions 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.

Adopt 14 CCR § 1038(k)
The purpose of the first sentence in this subsection is to establish the type of trees that qualify for harvest and removal under this exemption. It restates PRC § 4584(c) and was made more restrictive to exclude diseased trees and limit the cause of tree mortality of dead and dying trees, eligible for harvest and removal under this exemption, to drought related stress. It is necessary to provide context and clarity.

The purpose of the second sentence is to establish that the provisions of this exemption supersede the provisions of any other exemptions that are in the same harvest area footprint. This is necessary for enforcement so that the Department knows against which provisions to evaluate the project given that different exemptions carry different provisions.

Finally, the third sentence specifies that compliance with 14 CCR § 1038.1(the effective period is one year, all operational provisions of the Forest Practice Act and District Forest Practice Rules applicable to "Timber Harvest Plan", "THP", and "plan" must be followed and in-lieu practices for watercourse and lake protection zones, exceptions to rules, and alternative practices are not allowed) and the limitations listed in 1038(b)(1)-(10) are required and is necessary for clarity to establish the parameters of this exemption. It also includes a leading statement that informs persons considering the use of this exemption that in order to use it, in addition to compliance with 14 CCR § 1038.1, and the limitations listed in 1038(b)(1)-(10), several other conditions must be met.

Adopt 14 CCR § 1038(k)(1)
This paragraph lists information that must be provided in the Notice of Exemption. This is in addition to the items in 14 CCR § 1038.2(a)-(c). The Board deemed it necessary to require this information be provided to the Department to enable enforcement and to facilitate the collection of information required in 14 CCR § 1038(k)(8).The total acreage of the exemption harvest area (as defined in 14 CCR § 895.1 is necessary for the Department to verify if RPF involvement is required and is necessary to facilitate the monitoring required in 14 CCR § 1038(k)(8). An enlarged 7½ minute quadrangle map or its equivalent that is not less than one (1) inch equals 1,000 feet showing the location of the harvest area was deemed necessary to be provided to the Department to enable enforcement and is necessary to facilitate the monitoring required in 14 CCR § 1038(k)(8). The Board did consider requiring a 7½ minute quadrangle map as specified in 14 CCR § 1038.2(d) and another enlarged map, but ultimately decided to streamline the mapping requirement to one map with the intrinsic information of a 7½ minute quadrangle map, but enlarged to provide greater detail. For projects that require a RPF, pursuant to 14 CCR § 1038(k)(7), the location of timber operations and watercourses, including watercourse classification, must also be shown on this map. The capture of this additional information was deemed necessary, when the harvest area exceeds 20 acres, to facilitate authentication that the exemption is being conducted pursuant to its conditions and to facilitate verification of the certification that the RPF provides, pursuant to 14 CCR § 1038(k)(7)(B), that significant adverse impacts will not occur.

Adopt 14 CCR § 1038(k)(2)
A signature of the landowner certifying that they are the landowner is required in this paragraph and is necessary to provide official endorsement that they are the landowner and have the authority to propose the harvest and removal of trees in the area included in the exemption.

Adopt 14 CCR § 1038(k)(3)
This paragraph is a leading statement that informs a person that trees eligible for removal must meet one or more of the following conditions and is necessary for clarity.

Adopt 14 CCR § 1038(k)(3)(A)
This subparagraph lists trees that are dead as eligible for removal and is necessary for clarity. Removal of dead trees is being facilitated by this exemption to moderate the fire and falling hazard associated with dead trees.

Adopt 14 CCR § 1038(k)(3)(B)
This subparagraph lists trees that are dying as eligible for removal, pursuant to the definition provided in the subparagraph, and is necessary for clarity. The definition of dying trees is largely based on the definition of a dying trees found in 14 CCR § 895.1, but was made more restrictive to exclude the part of the definition related to wildlife damage because wildlife damage was deemed not to be associated with drought related stress. Tree experts say that the following conditions indicate a tree is likely to die and not recover:

- fifty percent or more of the foliage-bearing crown is dead or fading in color from a normal green to yellow, sorrel, or brown, excluding normal autumn coloration changes
- successful bark beetle attacks with indications of dead cambium and brood development distributed around the circumference of the bole

Removal of dying trees is being facilitated by this exemption to moderate the fire and falling hazard associated with dead trees.

Adopt 14 CCR § 1038(k)(3)(C)
This subparagraph is a leading statement that informs a person that trees as described in clauses 1.-3. are only eligible for removal if the RPF, in writing, in the Notice of Exemption, provides certification that the trees meet the descriptions provided in clauses 1.-3. and is necessary for clarity.

Adopt 14 CCR § 1038(k)(3)(C)1.
This clause lists trees that are designated by an RPF as likely to die due to drought related stress, within one year as eligible for removal and is necessary for clarity.

Adopt 14 CCR § 1038(k)(3)(C)2.
This clause lists trees that are marked in accordance with 14 CCR § 1038(b)(9) as eligible for removal and is necessary for clarity. Within the standard width of a watercourse or lake protection zone, trees to be harvested must be marked by, or under the supervision of, an RPF prior to timber operations and removal must be consistent with the provisions of this exemption and 14 CCR 916.4 [936.4,956.4] (b).

Adopt 14 CCR § 1038(k)(3)(C)3.
This clause lists trees that are marked in accordance with 14 CCR § 1038(h) as eligible for removal and is necessary for clarity. Harvesting of large old trees shall only occur pursuant to the provisions of this exemption and the provisions of 14 CCR § 1038(h). All trees to be harvested pursuant 14 CCR § 1038(h) shall be marked by an RPF prior to removal.

Adopt 14 CCR § 1038(k)(4)
This paragraph requires the retention of an average for the harvest area of not less than one decadent and deformed tree of value to wildlife (as defined in 14 CCR § 895.1), snag, or dying tree per acre that is greater than sixteen (16) inches DBH (diameter breast height) and twenty (20) feet tall. This is necessary for clarity because pursuant to 14 CCR § 919.1, which is one of the District Forest Practice Rules that must be followed, all snags must be retained except snags whose falling is required for insect or disease control. Because the cause of tree mortality is largely due to beetle attack of trees stressed by drought, it is plausible that all trees eligible for harvest and removal under this exemption may be snags (standing dead trees) whose falling is required for insect or disease control. This provision was added to further qualify 14 CCR § 919.1, through the lens of this exemption, to prevent all snags whose falling is required for insect or disease control from being cut. The retention level was informed by the Department of Fish and Wildlife. “Decadent and deformed tree of value to wildlife” was added , although, if living, would not qualify for removal under this exemption, so that they may be counted to meet the retention level as may dying trees.

The portion of the paragraph that refers to “an average for the harvest area” means that these wildlife structures may be clumped. For example, if the harvest area is fifteen acres, there can be three groupings of five wildlife structures. It does not mean that there has to be one wildlife structure per acre evenly distributed over the harvest area. The size of the wildlife structure (greater than sixteen (16) inches DBH (diameter breast height) and twenty (20) feet tall) was copied from Technical Rule Addendum No. 2, in which snags of greatest value are described as >16" DBH and 20 ft. in height.

Finally, the last sentence of the paragraph was copied from 14 CCR §§ 919.1 and 1052.4(c), to describe that within 100 feet of habitable structures, roads, fire suppression ridges, and infrastructure facilities such as transmission lines and towers, or water conveyance and storage facilities, the retention standard does not apply because it was deemed that the value of this infrastructure, that could be compromised by retention of wildlife structures that may fall or carry fire, outweighed the value that these structures provide wildlife in these areas. This provision is necessary for clarity.

Adopt 14 CCR § 1038(k)(5)
This paragraph requires that the exemption include the tentative commencement date of timber operations on the Notice of Exemption and within a 15 day period before beginning timber operations, the timber operator must notify the Department of the actual commencement date for the start of operations. This provision restates 14 CCR § 1038(c)(5)(A) and is necessary for the Department to track the progress of the exemption.

Adopt 14 CCR § 1038(k)(6)
This paragraph specifies that operations pursuant to this exemption may not commence for five working days from the date of the Director's receipt of the Notice of Exemption unless this delay is waived by the Director, after consultation with other state agencies. Further, it specifies that the Director shall determine whether the Notice of Exemption is complete, and if so, shall send a copy of a notice of acceptance to the submitter. Finally, it specifies if the Notice of Exemption is not complete and accurate, it shall be returned to the submitter and the timber operator may not proceed and that if the Director does not act within five days of receipt of the Notice of Exemption, timber operations may commence. This paragraph makes consistent 14 CCR § 1038(e) and is necessary to make specific the timeline and details between the Director's receipt of the Notice of Exemption and commencement of timber operations for enforcement purposes. It was necessary to duplicate 14 CCR § 1038(e) versus add (k) to the list of exemptions in 14 CCR § 1038(e) because this is an emergency regulation with a near term expiration date so it was deemed prudent to contain the provisions applicable to this exemption to one subsection, subsection (k).

Adopt 14 CCR § 1038(k)(7)
This paragraph is a leading statement that informs a person that in order for a Notice of Exemption, prepared pursuant to 14 CCR § 1038(k), to be accepted, when timber operations on a cumulative harvest area exceeds twenty (20) acres per total contiguous ownership, it must be submitted by an RPF and contain several additional pieces of information. A cumulative harvest area exceeding twenty (20) acres per total contiguous ownership was deemed the threshold, for activities allowed pursuant to this exemption, at which significant adverse effects had the potential to result if an RPF were not involved. This paragraph is necessary for clarity.

Adopt 14 CCR § 1038(k)(7)(A)
This subparagraph requires that the name, address, telephone and license number of the RPF that prepared and submitted the exemption notice be provided on the Notice of Exemption form provided by the Department. This information is necessary to enable the Department to facilitate communication with the RPF and reinforce RPF accountability.

Adopt 14 CCR § 1038(k)(7)(B)
This subparagraph establishes that the RPF is the entity responsible to certify that no conditions were identified where operations, conducted in compliance with the rules of the Board, would reasonably result in significant adverse effects. Assignment of this responsibility to the RPF is based on their professional capacity to make this determination. This certification is necessary to provide official endorsement that that no conditions were identified where operations, conducted in compliance with the rules of the Board, would reasonably result in significant adverse effects.

Adopt 14 CCR § 1038(k)(8)
This paragraph requires the Department monitor and report on the statewide use of the exemption, allowed under 14 CCR § 1038(k), through the collection of information including the number of harvest area acres, the areas of application and the degree of compliance. It also requires the Department, within 180 days of the date that these emergency regulations are filed with the Secretary of State, report its findings, to the Board. This information is necessary to enable the Board to make an informed decision as to whether or not to extend the life of the exemption through readoption or permanent rulemaking and if it should be modified to make it more effective for the purposes for which it was enacted.

FIRST READOPTION

Board of Forestry and Fire Protection

"Drought Mortality Amendments, 2015"

Title 14 of the California Code of Regulations (14 CCR):

Division 1.5, Chapter 4, Subchapter 7,

Article 2 – Timber Harvesting Plan

Amend:

§ 1038. Exemption.

Persons who conduct the following types of timber operations are exempt from the plan preparation and submission requirements (PRC § 4581) and from the completion report and stocking report requirements (PRC §§ 4585 and 4587) of the Act with the following exceptions and requirements:

(i) no tree that existed before 1800 A.D. and is greater than sixty (60) inches in diameter at stump height for Sierra or Coastal Redwoods, and forty-eight (48) inches in diameter at stump height for all other tree species shall be harvested unless done so under the conditions or criteria set forth in subsection 1038(h).

(ii) all timber operations conducted in the Lake Tahoe Region pursuant to 14 CCR § 1038 must have a valid Tahoe Basin Tree Removal Permit (as defined by the Tahoe Regional Planning Agency) or shall be conducted under a valid TRPA Memorandum of Understanding (MOU), when such a permit is required by TRPA.

***** **(k)** Harvesting dead or dying trees in response to drought related stress of any size, fuelwood or split products. The provisions of this exemption supersede the provisions of any other exemptions that are in the same harvest area footprint. In

addition to compliance with 14 CCR § 1038.1, and the limitations listed in 1038(b)(1)-(10), the following apply:

(1) The exemption shall include the requirements of 14 CCR § 1038.2(a)-(c), total acreage of the exemption harvest area (as defined in 14 CCR § 895.1), and an enlarged 7½ minute quadrangle map or its equivalent that is not less than one (1) inch equals 1,000 feet showing the location of the harvest area. For projects that require a Registered Professional Forester (RPF), pursuant to 14 CCR § 1038(k)(7), the location of timber operations and watercourses, including watercourse classification, shall also be shown on this map.

(2) The exemption shall include a signature of the landowner certifying that they are the landowner.

(3) Trees eligible for removal shall meet one or more of the following conditions:

(A) Trees that are dead, or,

(B) Trees with fifty (50%) percent or more of the foliage-bearing crown that is dead or fading in color from a normal green to yellow, sorrel, or brown, excluding normal autumn coloration changes, or with evidence of successful bark beetle attacks, through indications of dead cambium and brood development distributed around the circumference of the bole, or;

(C) The RPF, in writing, in the Notice of Exemption, certifies the following:

1. Trees designated by an RPF as likely to die due to drought related stress, within one year, or,

2. Trees marked in accordance with 14 CCR § 1038(b)(9), or,

3. Trees marked by an RPF in accordance 14 CCR § 1038(h).

(4) Retain an average for the harvest area of not less than one (1) decadent and deformed tree of value to wildlife (as defined in 14 CCR § 895.1) , snag, or dying tree

per acre that is greater than sixteen (16) inches DBH (diameter breast height) and twenty (20) feet tall. This provision does not apply within one hundred (100) feet of habitable structures, roads, fire suppression ridges, and infrastructure facilities such as transmission lines and towers, or water conveyance and storage facilities.

(5) The exemption shall include the tentative commencement date of timber operations on the notice required in 14 CCR § 1038.2. Within a 15 day period before beginning timber operations, the timber operator shall notify the Department of the actual commencement date for the start of operations.

(6) Operations pursuant to this exemption may not commence for five (5) working days from the date of the Director's receipt of the Notice of Exemption unless this delay is waived by the Director, after consultation with other state agencies. The Director shall determine whether the Notice of Exemption is complete, and if so, shall send a copy of a notice of acceptance to the submitter. If the Notice of Exemption is not complete and accurate, it shall be returned to the submitter and the timber operator may not proceed. If the Director does not act within five days of receipt of the Notice of Exemption, timber operations may commence.

(7) The exemption shall be submitted by an RPF, and include the following, when timber operations on a cumulative harvest area exceeds twenty (20) acres per total contiguous ownership.

(A) Name, address, telephone and license number of the RPF that prepared and submitted the Notice of Exemption.

(B) RPF certification that no conditions were identified where operations, conducted in compliance with the rules of the Board, would reasonably result in significant adverse effects.

(8) The Department shall monitor and report on the statewide use of the

exemption, allowed under 14 CCR § 1038(k), including the number of harvest area acres, the areas of application and the degree of compliance. The Department shall, within 180 days of the date that these emergency regulations are filed with the Secretary of State, report its findings, to the Board.

Note: Authority cited: Sections 4551, 4553, 4584 and 4584.1, Public Resources Code. Reference: Sections 4516, 4527 and 4584, Public Resources Code; and *EPIC v. California Department of Forestry and Fire Protection and Board of Forestry* (1996) 43 Cal. App.4th 1011. *****

#####