

Board of Forestry and Fire Protection

NOTICE OF PROPOSED ACTION

“DROUGHT MORTALITY AMENDMENTS, 2015”

**Title 14 of the California Code of Regulations (14 CCR),
Division 1.5, Chapter 4, Subchapter 7, Article 2
Amend: § 1038**

[Notice Published February 12, 2016]

NATURE OF PROCEEDING

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

PUBLIC HEARING

The Board will hold a public hearing on Wednesday, April 6, 2016, at its regularly scheduled meeting commencing at 9:00 a.m., at the Resources Building Auditorium, 1st Floor, 1416 Ninth Street, Sacramento, California. At the hearing, any person may present statements or arguments, orally or in writing, relevant to the proposed action. The Board requests, but does not require, that persons who make oral comments at the hearing also submit a written summary of their statements. Additionally, pursuant to **Government Code (GOV) § 11125.1(b)**, writings that are public records pursuant to **GOV § 11125.1(a)** and that are distributed to members of the state body prior to or during a meeting, pertaining to any item to be considered during the meeting, shall be made available for public inspection at the meeting if prepared by the state body or a member of the state body, or after the meeting if prepared by some other person.

WRITTEN COMMENT PERIOD

Any person, or authorized representative, may submit written comments relevant to the proposed regulatory action to the Board. The written comment period ends at 5:00 P.M. on Monday, March 28, 2016.

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

Written comments shall be submitted to the following address:

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

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

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

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

(916) 653-0989

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

publiccomments@BOF.ca.gov

AUTHORITY AND REFERENCE (pursuant to GOV § 11346.5(a)(2) and 1 CCR § 14) 14 CCR § 1038 Note: Authority cited: Sections 4551, 4553, 4584, ~~4584.1~~ and 4584.1, Public Resources Code. Reference: Sections 4290, 4291, 4516, 4527, 4584 and 4584.1, Public Resources Code; and *EPIC v. California Department of Forestry and Fire Protection and Board of Forestry* (1996) 43 Cal. App.4th 1011.

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

Pursuant to the Z'berg-Nejedly Forest Practice Act of 1973 (FPA, PRC § 4511, *et seq.*), the Board is authorized to construct a system of forest practice regulations applicable to timber management on state and private timberlands.

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 FPA, 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 authority, the Board amended 14 CCR §1038 in accordance with the provisions of the statute to enable landowners to capture mortality and address the fuel conditions being made worse by the drought and tree mortality.

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

- The Board authorized submission of regulation entitled, "Drought Mortality Amendments, 2015", by the use of Emergency rulemaking (in accordance with GOV §§ 11346.1, 11346.5 (2)-(6) and 11349.6) at their regularly meeting scheduled on June 17, 2015.
- This regulatory action (OAL FILE NO. 2015-0701-02E) became effective on July 13, 2015 and was set to expire on January 12, 2016.
- To avoid a lapse in the effective period, 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.
- The Board completed the readoption process documented in file OAL FILE NO. 2015-1221-01EE, which became effective on January 12, 2016 and is set to expire on April 12, 2016.

The purpose of the proposed action is to make permanent, until December 31, 2018, through regular rulemaking, this exemption, with modifications.

The effect 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 FPA, 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 benefit 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. However, in most cases, the monetary benefit will be negligible, in large part due to the poor quality (due to beetle damage) of material being removed and the lack of accessible markets. Additionally, given that it is likely that California will continue to experience large and damaging wildfires that threaten people's lives and destroy homes, this exemption (by incentivizing landowners to harvest and remove dead and dying trees) will also reduce the negative impact to the environment and social infrastructure, associated with these wildfires, specifically the negative impacts to watersheds, fisheries, wildlife habitat, public health, water supply, water quality, the atmosphere (from GHG emissions) and local economies.

There is no comparable federal regulation or statute.

Board staff conducted an evaluation on whether or not the proposed action is inconsistent or incompatible with existing State regulations pursuant to **GOV § 11346.5(a)(3)(D)**. State regulations related to the proposed action were, in fact, relied upon in the development of the proposed action (including portions of §§ 895.1, 912.7 [932.7, 952.7] (b)(2), the Biological Resources Section of The Board Of Forestry Technical Rule Addendum No. 2 Cumulative Impacts Assessment, 913.3 [933.3, 953.3], 916.4 [936.4,956.4] (b), 917.2 [937.2, 957.2], 957.4, 919.1 [939.1, 959.1] , 1038, 1038.1, 1038.2, 1052.1, 1052.2, 1052.3 and 1052.4 of Title 14 of the California Code of Regulations) to ensure the consistency and compatibility of the proposed action with existing State regulations. Otherwise, Board staff evaluated the balance of existing State regulations related to the system of forest practice applicable to timber management on state and private timberlands developed pursuant to the FPA and related to the Prevention and Control of Forest Fires and found no existing State regulations that met the same purpose as the proposed action. Based on this evaluation and effort, the Board has determined that the proposed regulations are neither inconsistent nor incompatible with existing State regulations. The proposed regulation is entirely consistent and compatible with existing Board rules; it amends them, providing another exemption.

The entirety of the associated emergency files are incorporated by reference, by their OAL file numbers which are listed below, otherwise, no documents are incorporated by reference:

- EMERGENCY (OAL FILE NO. 2015-0701-02E)
- EMERGENCY READOPTION 1 (OAL FILE NO. 2015-1221-01EE)

MANDATED BY FEDERAL LAW OR REGULATIONS

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

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

There are no comparable Federal regulations related to the system of forest practice applicable to timber management on state and private timberlands developed pursuant to the FPA and regarding the existing system of regulation related to the Prevention and

Control of Forest Fires. No existing Federal regulations that met the same purpose as the proposed action were identified.

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

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

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

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

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

There is no cost to any local agency or school district that is required to be reimbursed under Part 7 (commencing with Section 17500) of Division 4 of the Government Code.

Regarding costs or savings to any State agency, the anticipated fiscal impact of the 1038(c)(6) exemption, prior to the inclusion of the evaluation component, was expected to be less than \$50,000. The anticipated fiscal impact of the 1038(k) exemption is expected to be similar. Also, like the 1038(c)(6) exemption, the 1038(k) exemption includes an unbudgeted monitoring and reporting component. Specifically, the Department must monitor and report on the statewide use of the exemption, including the number of harvest area acres, the areas of application and the degree of compliance. Additionally, the Department must, at a minimum, annually report its findings to the Board. The estimated cost to the Department to complete this monitoring and reporting, in particular gauging the degree of compliance, is \$85,000. This is based on an estimated cost of \$138/ exemption (~2 hours of a Forester I time per exemption) multiplied by 77% (as of 12/06/15: number of inspections/ number of exemptions) of the 800 exemptions expected to be submitted to CAL FIRE during the effective period (01/01/17 to 12/31/18) of the regulation. Therefore, the maximum total estimated fiscal impact is \$135,000. The Department would not require additional Timber Regulation and Restoration Funds for the implementation of the requirements described because the \$135,000 is absorbable within the existing budget. In general, the cost to administer the Forest Practice Program, which includes review and inspection of the 1038(k) exemption, is covered by the Timber Regulation and Restoration Fund.

The proposed action will not result in the imposition of other non-discretionary costs or savings to local agencies.

The proposed action will not result in costs or savings in federal funding to the State.

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

The proposed action will not significantly affect housing costs.

SIGNIFICANT STATEWIDE ADVERSE ECONOMIC IMPACT DIRECTLY AFFECTING BUSINESS, INCLUDING ABILITY TO COMPETE (pursuant to GOV §§ 11346.3(a), 11346.5(a)(7) and 11346.5(a)(8))

The proposed action will not have a significant statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states. Businesses will be beneficially impacted by the proposed action.

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

- Contemplation by the Board of the economic impact of the provisions of the proposed action through the lens of the decades of experience practicing forestry in California that the Board brings to bear on regulatory development.
- Research done in May 2015 to develop the fiscal and economic analysis for another exemption, the Protection of Habitable Structures Exemption (otherwise known as the 1038(c)(6) exemption), which involved extensive outreach, including a compilation of responses from seven (7) Registered Professional Foresters (RPF(s))/ Licensed Timber Operators (LTO(s)) working throughout the State.
- Information provided by the Department, for the last half of 2015, regarding the number of 1038(k) exemptions, the number of acres per exemption, the number of inspections and the number of violations.
- Additional outreach done in February 2016 specific to how the 1038(k) exemption benefits landowners.

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

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

- (A) will create jobs within California;
- (A) will not eliminate jobs within California;
- (B) will create new businesses;
- (B) will not eliminate existing businesses within California;
- (C) will beneficially affect the expansion of businesses currently doing business within California.
- (D) will have nonmonetary benefits.

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

The Board is aware of cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action. This initial determination is based on the same record facts, evidence, documents, testimony, or other evidence as listed as the basis for the Significant Statewide Adverse Economic Impact.

- 800 exemptions are expected to be submitted to CAL FIRE during the effective period (01/01/17 to 12/31/18) of the regulation.
- Preparation costs are estimated to be between \$50 and \$5,000 depending on many factors including the size of the harvest area, RPF involvement, topography, brush, size of trees and number of trees.
- Similarly, implementation costs depend heavily on many factors including harvest area, topography, brush, size of trees, number of trees, delivered log price and infrastructure constraints. The following two scenarios are provided in an attempt to convey the cost of implementation.
 Scenario 1: The estimated cost per exemption would be \$15,000 if the harvest area was 20 acres and the implementation cost per acre was \$750 (for the harvest and removal of dead and dying trees in compliance with the operational provisions of the Forest Practice Rules).
 Scenario 2: The estimated cost per exemption would be \$15,000 if there was 50 thousand board feet (MBF) in dead and dying trees to be harvested and removed (in compliance with the operational provisions of the Forest Practice Rules) on 20 acres and the implementation cost per MBF was \$300.
- Therefore, the combined cost of preparation and implementation ranges from \$550 to \$20,500 per exemption and may be higher in some instances.

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

The proposed action does not impose a business reporting requirement.

SMALL BUSINESS (pursuant to 1 CCR 4(a) and (b))

Small business, within the meaning of GOV § 11342.610, is expected to be effected by the proposed action. The types of small businesses that will be beneficially impacted by the proposed action are industrial and nonindustrial forest landowners, forestry consulting, logging, tree removal, landscapers, lumber mills, biogenic energy producers and shavings plants.

Small business:

- (1) Is legally required to comply with the regulation to the extent that a representative private person hires a small business for implementation;
- (2) Is not legally required to enforce the regulation;
- (3) Does derive a benefit from the enforcement of the regulation by being hired for implementation;
- (4) May incur a detriment from the enforcement of the regulation if they do not comply with the regulation.

ALTERNATIVES INFORMATION

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

persons and equally effective in implementing the statutory policy or other provision of law.

CONTACT PERSON

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

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

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

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

All of the following are available from the contact person:

1. Express terms of the proposed action using UNDERLINE to indicate an addition to the California Code of Regulations and ~~STRIKETHROUGH~~ to indicate a deletion.
2. Initial Statement of Reasons, which includes a statement of the specific purpose of each adoption, amendment, or repeal, the problem the Board is addressing, and the rationale for the determination by the Board that each adoption, amendment, or repeal is reasonably necessary to carry out the purpose and address the problem for which it is proposed.
3. The information upon which the proposed action is based (pursuant to **GOV § 11346.5(b)** and **GOV § 11346.2(a)**).
4. Changed or modified text. After holding the hearing and considering all timely and relevant comments received, the Board may adopt the proposed regulations substantially as described in this notice. If the Board makes modifications which are sufficiently related to the originally proposed text, it will make the modified text—with the changes clearly indicated—available to the public for at least 15 days before the Board adopts the regulations as revised. Notice of the comment period on changed regulations, and the full text as modified, will be sent to any person who testified at the hearings, submitted comments during the public comment period, including written and oral comments received at the public hearing, or requested notification of the availability of such changes from the Board of Forestry and Fire Protection. The Board will accept written comments on the modified regulations for 15 days after the date on which they are made available.

FINAL STATEMENT OF REASONS

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

INTERNET ACCESS

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

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