

Board of Forestry and Fire Protection

INITIAL STATEMENT OF REASONS

“RPF AND LTO RESPONSIBILITIES AMENDMENTS, 2017”

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

INTRODUCTION INCLUDING PUBLIC PROBLEM, ADMINISTRATIVE REQUIREMENT, OR OTHER CONDITION OR CIRCUMSTANCE THE REGULATION IS INTENDED TO ADDRESS (pursuant to GC § 11346.2(b)(1))...NECESSITY (pursuant to GC § 11346.2(b)(1) and 11349(a))....BENEFITS (pursuant to GC § 11346.2(b)(1))

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

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

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

“Issues arise when RPFs do not complete their field work correctly and thoroughly, putting the LTO in a position to be cited by CALFIRE (the Department) for violating the Forest Practice Rules (FPRs). In some cases, LTOs

are being issued violations for following incomplete or inaccurate field work that was performed by a RPF. The RPF should be responsible for their work, along with any ramifications that occur if their work is not performed correctly.”

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

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

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

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

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

is determined to be inaccurate or inadequate.

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

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

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

The **benefit** of the proposed action is to address the concerns of the LTO community, which through the past few years of development, have been informed by the RPF community and by the Department. The LTO and the RPF are interdependent. Flagging, tree marking and on-site meetings are essential ways the RPF communicates to the LTO regarding how to comply with the Plan and the Board rules. When an RPF provides easily visible and accurately placed operational flagging and marking in the Logging Area, the LTO can conduct Timber Operations with improved efficiency and remain in compliance with the Plan and the Board rules more effectively. Given that the Board rules are intended to minimize the environmental effects of Timber Operations per 14 CCR §896(a), these improvements in efficiency and compliance will likely result in improvements in environmental quality pertaining to Timber Operations. Additionally, the proposed action sheds light on RPF and LTO interdependence, which can be taken into consideration by the Department when it investigates the basis of a violation, resulting in improvements in equitable treatment of both parties and promoting fairness within the penalty process.

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 amend 14 CCR §§ 1035.1, 1035.2 and 1035.3.

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

The **purpose** of the proposed action is to minimize the perceived inequity in the assignment of Notices of Violations of the FPR, specific to Timber Operations, that may result from inaccurate or inadequate preparatory work, that is required to be performed by an RPF.

The **effect** of the proposed action is the following:

- Require additional RPF responsibility to facilitate LTO compliance with the Board rules;
- increase the number of conditions that trigger an onsite meeting, between the RPF and LTO and;
- provide direction to the Department that an LTO will not be held responsible for FPR violations that result from work required of an RPF that is determined to be inaccurate or inadequate.

Aggregated Explanation

The proposed amendments to these sections do the following:

- Capitalize the term “Plan”, “Special Treatment Area”, “Timber Operations”, “Supervised Designee”, “Logging Area”, “Licensed Timber Operator” to reflect that they are defined terms.
- Abbreviate “watercourse and lake protection zones”, to reflect a defined acronym.
- Changed “the rules of the Board” to “Board rules” for efficiency.
- Replaced the word “Section” with the symbol for section for consistency and efficiency.
- Corrected grammar.
- Reordered the provisions based on the addition of a provision and the ordering of an existing rule that had not been previously ordered for ease of reference.

Amend 14 CCR § 1035.1 Registered Professional Forester Responsibility

Amended provision (f) to require the RPF retained by the plan submitter to ensure the accuracy of operational flagging and timber marking is in accordance with Board rules and Plan constraints, prior to the commencement of operations annually. This is necessary to communicate with the LTO, to enable the LTO to comply with the FPR

during Timber Operations, without confusion from timeworn operational flagging and timber marking that is poorly visible, or that is no longer relevant.

Amend 14 CCR § 1035.2 Interaction Between RPF and LTO

Reorganized the section for readability and amended the rules to increase the number of conditions that trigger an onsite meeting, between the RPF and LTO. This is necessary to facilitate communication and understanding, which is essential to LTO compliance with the FPR during Timber Operations.

Amend 14 CCR § 1035.3 Licensed Timber Operator Responsibility

The effect of the existing rule in provision (e) is now captured in 1035.2 (a)(4) and no longer provides the flexibility to an LTO to be absent during the on-site meeting when there are Archaeological resources in the Site Survey Area. This removal of flexibility is necessary to avoid incongruence in the Board rules.

Subsequently, provision (e) became direction to the Department regarding LTO responsibility. Specifically, that an LTO shall not be held responsible for FPR violations that result from work required of an RPF, under Board rules, that is determined to be inaccurate or inadequate. This is necessary to minimize the perceived inequity in the assignment of Notices of Violations of the FPR, specific to Timber Operations, that may result from inaccurate or inadequate preparatory work, that is required to be performed by an RPF.

Finally, PRC §§ 4524, 4526.5, 4527, 4570 and 4581 were added to the References to provide a comprehensive list of statutes that were referenced to inform the proposed amendment to this section.

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 the following:

- Require additional RPF responsibility to facilitate LTO compliance with the Board rules;
- increase the number of conditions that trigger an onsite meeting, between the RPF and LTO and;
- provide direction to the Department that an LTO will not be held responsible for FPR violations that result from work required of an RPF that is determined to be inaccurate or inadequate.

The proposed action:

- (A) will not create jobs within California;
- (A) will not eliminate jobs within California;
- (B) will not create new businesses,
- (B) will not eliminate existing businesses within California
- (C) will not affect the expansion or contraction of businesses currently doing business within California.

(D) will yield nonmonetary benefits. For additional information on the benefits of the proposed regulation, please see anticipated benefits found under the Introduction Including Public Problem, Administrative Requirement, or Other Condition or Circumstance the Regulation is Intended to Address.

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

Businesses and individuals will be adversely impacted, economically, depending on the variables described below. This proposed action is expected to increase costs in the following ways:

- § 1035.1(f) requires the RPF to annually revisit the Logging Area, and refresh the accuracy and adequacy of operational flagging and timber marking that was required prior to the initial commencement of timber operations. Depending on the size, complexity, number of years operations will take place on a Plan, accessibility and topography of the Logging Area and the District in which the Plan is located, the time required will vary from a few hours of work, to a week of work. The RPF may either absorb the cost, or bill the timberland owner for their services and businesses that own timberland, that have staff RPFs, must absorb the cost.
- § 1035.2 increases the number of conditions that trigger an on-site meeting, between the RPF and LTO. Depending on the size and complexity of the Plan and/or amendment(s) and, accessibility and topography of the Plan area, the meeting time required will vary from a few hours to a couple of days. The RPF may either absorb the cost, or bill the timberland owner for their services and businesses that own timberland, that have staff RPFs, must absorb the cost. The LTO may either absorb the cost or incorporate it into their bid effectively transferring the cost to the timberland owner.

Based on the following parameters, that represents the **upper bound** of the costs of the proposed action, were quantified:

- The cost of RPF consulting services is between \$50 and \$100 per hour.
- The average number of days to ensure operational marking and flagging is accurate and adequate per Plan per year is ½ day to 3 days, which represents (using \$90 per hour) \$360 to \$2,160.
- The proposed action is expected to be fully implemented as of January 1, 2018 and the time until it becomes status quo is commensurate with the effective period of a THP; seven (7) years.
- There were 238 THPs approved in 2016.
- The average cost for additional on-site RPF/LTO meetings was estimated at \$1,000 per THP per year.

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

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

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

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

The number of businesses impacted, including small business, is unknown. Small businesses means independently owned and operated, not dominant in their field of operations and having annual gross receipts less than \$1,000,000. No businesses are expected to be created or eliminated.

The geographic extent is Statewide.

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

There are no reporting requirements associated with the proposed action.

The proposed action does not afford the incentive for innovation in products, materials or processes.

The proposed action will have a neutral effect on health, welfare, and worker safety, but will benefit the State's environment. Flagging, tree marking and on-site meetings are essential ways the RPF communicates to the LTO regarding how to comply with the Plan and the Board rules. When an RPF provides easily visible and accurately placed operational flagging and marking in the Logging Area, the LTO can execute Timber Operations in a more efficient manner and remain in compliance with the Plan and the Board rules more effectively. Consequently, the State's environment will be benefited through increased compliance with the FPRs during Timber Operations.

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. Hall, D. California Department of Forestry & Fire Protection. *Letter to: J. Keith Gillless, Chair, Ph.D. California Board of Forestry & Fire Protection; Subject: Forest Practice Enforcement Summary.* March 02, 2017. TS.
2. Gillless, J. Keith. California Board of Forestry & Fire Protection. *Letter to: Ken Pimlott, Director, California Department of Forestry & Fire Protection; Subject: RPF/LTO Responsibilities for Preparation and Implementation of Timber Operations and Compliance with the California Forest Practice Rules.* March 03, 2016. TS.
3. Author Unknown. California Department of Forestry & Fire Protection. *Policy #1085 et seq.: "Department Policy and Procedures for Citizen Complaints."* Revised: October 1998. <http://calfireweb/library/handbooks/1000/1085.pdf>.
4. Japp, C. California Department of Forestry & Fire Protection. *Memo to: Dennis Hall, Assistant Deputy Director, California Department of Forestry & Fire Protection; Subject: RPF/LTO Responsibility Issue, Violation Analysis.* June 09, 2016. TS.
5. Fazio, J.; Hardie, T. California Licensed Foresters Association (CLFA) and Associated California Loggers (ACL). *Letter to: J. Keith Gillless, Chair, Ph.D. California Board of Forestry & Fire Protection; Subject: RPF and LTO Responsibilities Amendments, 2017.* March 01, 2017. TS.
6. State of California Public Resources Code (PRC) §§ 4524, 4526.5, 4527, 4528.5, 4551, 4552, 4570, 4571, 4581, 4582, 4583.2, 4583.5
7. State of California Code of Regulations Title 14 (14 CCR) §§ 1035.1, 1035.2, 1035.3.

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

Pursuant to **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, 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.

Alternative 1: No Action Alternative

The Board considered taking no action, but the no action alternative was rejected because it would not address the problem.

Alternative 2: Policy and Education (in lieu of regulation) Alternative

Policy and education were considered in lieu of the proposed action, and although policy and education are being pursued, the LTO community did not have confidence that they went far enough to address the problem. Therefore, the policy and education (in lieu of regulation) alternative was rejected.

Moreover, pursuant to Government Code section 11342.600, every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure. Therefore, to avoid underground regulation through the general application of a policy, this alternative was rejected.

Alternative 3: Proposed Action Alternative

The Board accepted the proposed action alternative to address the problem and because it was informed by the RPF and LTO communities, and the Department.

Additionally, the proposed action is the most cost-efficient, equally or more effective, and less burdensome alternative.

Alternatives 1 and 2 would not be more effective or equally effective while being less burdensome or impact fewer small businesses 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 is only as prescriptive as necessary to address the problem. Additionally, the proposed action is performance based. Moreover, the proposed action is a mix of performance based and prescriptive standards as is the entire FPRs. However, the substitution of more performance based standards relative to prescriptive standards was not reasonably expected to be as effective and less burdensome.

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)**, the abovementioned alternatives were considered and ultimately rejected by the Board in favor of the proposed action. The proposed action does not mandate the use of specific technologies or equipment, but does prescribe specific actions or procedures. Alternatives 1 and 2 considered by the Board require fewer specific actions or procedures but would result in a less effective 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 have a statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states as discussed in the ECONOMIC IMPACT ANALYSIS, but it is not considered to be significant. Please see page 5 for the discussion within the ECONOMIC IMPACT ANALYSIS.

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 review, 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.

POSSIBLE SIGNIFICANT ADVERSE ENVIRONMENTAL EFFECTS AND MITIGATIONS

The Board has considered whether there will be any potentially significant adverse environmental effects from the proposed action. Such consideration was conducted to meet California Environmental Quality Act (CEQA) requirements for a project by using the functional equivalent certification to an EIR granted to the Board for its rulemaking process pursuant to PRC § 21080.5.

The proposed action would be an added element to the State's comprehensive Forest Practice Program under which all commercial timber management is regulated. The Board's FPRs along with the Department oversight of rule compliance functions

expressly to prevent adverse environmental effects.

Harvesting Plans contain a mix of avoidance and mitigation measures that are required by the FPRs or are specifically designed by a licensed RPF to reduce the risk for potential adverse effects. They also contain a comprehensive cumulative effects analysis utilized in part to identify potential risks and effects to aid in RPFs in avoidance and mitigation measure development.

State representatives review every harvesting plan prior to a decision as to approval or denial. Local and federal agency representatives are also involved in the review process. State representatives continue with compliance inspections of approved plans until the conclusion of the plan's lifespan. Where FPRs standards or approved plan provisions 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 any significant or potentially significant adverse environmental effects. The proposed action is an added element to an existing comprehensive avoidance, safety abatement and mitigation program for commercial timber harvesting activities. However, the proposed action is not a mitigation, pursuant to the CEQA definition.