

## **Board of Forestry and Fire Protection**

### **NOTICE OF PROPOSED ACTION**

#### **“Class II-L Determination Amendments, 2022”**

#### **Board of Forestry and Fire Protection Title 14 of the California Code of Regulations Division 1.5, Chapter 4, Subchapters 4, 5, and 6**

#### **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 June 8, 2022, at its regularly scheduled meeting commencing at 9:00 a.m., at the Auditorium on the first floor, RM 1-302, of the Natural Resources Building, 715 P Street, Sacramento, CA. 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.

Attendees may also participate via GoToWebinar online meeting platform or telephone conferencing. To participate via GoToWebinar online meeting platform please email [PublicComments@bof.ca.gov](mailto:PublicComments@bof.ca.gov) by 4:30 p.m. on June 6, 2022, to request a link to the meeting. A link to the meeting will also be posted under the “Webinar Information” heading on the front page of the Board website, no later than 8:00 a.m. the morning of the hearing.

#### **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 on at the conclusion of the public hearing on June 8, 2022.

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: Eric Hedge  
Regulations Program Manager  
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  
715 P 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)**

Authority cited: Sections 4551, 4551.5, 4552, and 4553, Public Resources Code

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

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

PRC § 4551 requires the Board to "...adopt district forest practice rules... to ensure the continuous growing and harvesting of commercial forest tree species and to protect the soil, air, fish, wildlife, and water resources..." of the state and PRC § 4553 requires the Board to continuously review the rules in consultation with other interests and make appropriate revisions.

In September 2009, the Board adopted new regulations for "Anadromous Salmonid Protection Rules, 2009" (ASP Rules). The purpose of the ASP Rules, which replaced the existing "Threatened and Impaired Rules" are to protect and restore habitat conditions for coho salmon and other anadromous salmonids in California river systems, increase fish population abundance and so improve the conservation status of threatened salmonid species.

**Class II-Large Determination Regulations**

Among other elements of the new Rules was a new watercourse classification and protection system for Class II-Large watercourses (Class II-L). As a result of the Board's 2009 rule adoption, watercourses classified as Class II-L receive distinct protection measures than those applied to Class II-standard (Class II-S) watercourses through wider protection zones and additional

operational restrictions. The Class II-L distinction was created in acknowledgement that Class II-L watercourses can have greater individual effects on receiving Class I watercourse temperature, sediment, nutrient, and large wood loading than Class II standard (Class II-S) watercourses and that the protection, restoration, and enhancement of those values and functions is key to the protection and restoration of the beneficial functions of the riparian zone in watersheds with listed anadromous salmonids (14 CCR §§ 916.9, 936.9, 956.9). The practical effect of the Class II-L protections is that commercial timber management in proximity to Class II-L watercourses is significantly limited or completely excluded.

Included within the 2009 rules package were no less than six regulatory methods provided for determining the status of a Class-II watercourse (*i.e.*, Large or Standard). During the initial implementation phase of the Board's adopted regulations, members of the public expressed concern and raised issues of clarity regarding the Department's interpretation and enforcement of the Class II-L identification and minimum protection distance provisions. Specifically, it was contended that the Department's interpretation of the Class II-L regulations did not conform to the plain-English reading of the Rules.

In 2013, the Board adopted amendments, entitled "CLASS II-L IDENTIFICATION AND PROTECTION AMENDMENTS, 2013" to 14 CCR §§ 916.9, 936.9, and 956.9 to both clarify the methods used to make determinations of Class II watercourse types and to ensure that Class II-L protection measures were achieving the desired results of restoration. The revised regulations provided two methods for determining Class II watercourse classification, which are, generally: the measurement of a contributing drainage area of a certain size draining to a Class I watercourse, and an average active channel width of five feet or greater near the confluence of a Class I watercourse<sup>1</sup>. The drainage area minimums developed in this rulemaking were "...estimates based upon two Board staff field visits and standards employed by timber companies operating under federal aquatic habitat conservation plans."<sup>2</sup> The channel width determination method regulations were "...developed through discussions between private sector and state agency hydrologists, biologists, and foresters. In addition, a Board Member, Board staff, and a number of private company and public agency representatives conducted two, one-day field visits to watercourses located in the Coast and Northern Forest Districts, respectively."<sup>3</sup>

During development of these regulations, the Board identified "... some question as to whether or not the proposal as written would be an improvement over the existing Class II-L regulations."<sup>4</sup> In order to address these questions, these revised determination methods included a five-year evaluation period punctuated by sunset (January 1, 2019) of the regulations. To aid in determining efficacy, the amendments also included a requirement that the Department report to the Board at least annually on the use and effectiveness of the Class II-L protection measures. In 2018, the Board extended this sunset period to January 1, 2023, to allow for additional time to determine efficacy, and repealed the annual reporting requirement by the Department in acknowledgement of the efforts of the Effectiveness Monitoring Committee.

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<sup>1</sup> 14 CCR §§ 916.9(g)(1)(A), 936.9(g)(1)(A), 956.9(g)(1)(A)

<sup>2</sup> Board of Forestry and Fire Protection Rulemaking File 336, page 209.

<sup>3</sup> Board of Forestry and Fire Protection Rulemaking File 336, page 210

<sup>4</sup> Board of Forestry and Fire Protection Rulemaking File 336, page 211

## **Effectiveness Monitoring Committee**

In 2013 the Effectiveness Monitoring Committee (EMC) was established following the legislative approval of Assembly Bill 1492 (chapter 289, 2012). AB 1492, among other items, established the need for evaluation of and reporting on the “ecological performance” of the state Forest Practice Rules, and the EMC was established with the intent of providing the Board of Forestry and Fire Protection and the Natural Resource Agencies with a science based committee whose charter was developed to better understand if specific requirements of the California Forest Practice Rules and other laws and regulations related to forest resources are effective in achieving resource objectives.

Since approval of AB 1492, the EMC has been promoting scientific research, facilitating monitoring practices, and recommending monitoring practices aimed at evaluating how well current practices restore, enhance, and maintain aquatic and terrestrial habitat on private and state forest land. Since its creation, the EMC has received proposals, and recommended Board funding, for several studies designed to yield results which may aid in determining the efficacy of Class II-L protection measures. One of these studies, project EMC-2015-001, received initial funding in 2018 and was intended to aid in the evaluation of the efficacy of the Class II-L determination and protection measures, as required by 14 CCR 916.9(g)(1)(C), 936.9(g)(1)(C), and 956.9(g)(1)(C).

### **EMC-2015-001**

The proposal EMC-2015-001 was intended to:

- a. Investigate the variability of the relationship between drainage area, active channel width, and perennial flow extent across the Anadromous Salmonid Protection (ASP) area
- b. Compare the relationships derived in (a) to the rule criteria for Class II-L identification in terms of both drainage area and average active channel width; determine if these criteria are effective in identifying perennial Class II-L watercourses in different lithologies, or if rule modifications are needed; and
- c. Conduct a pilot study to investigate the downstream propagation of water temperature from Class II-L systems in sites with contrasting lithology.

These goals were addressed through a two-part approach which included a broad scale study on flow permanence and network connectivity<sup>5</sup>, and a focused field-based analysis of the thermal influence of Class II-L on Class I systems<sup>6</sup>.

These studies and analysis were completed and presented to the Board in 2021. In general, the proposal identified that drainage area was a much better predictor of certain watercourse values promoted by the Board’s Class II-Large designation than average active channel width. Additionally, the proposal revealed that average active channel width was, in fact, a poor predictor of certain watercourse values promoted by the Class II-L designation.

Specifically, findings from the broad scale study on flow permanence and network connectivity indicate that the drainage area criteria in 14 CCR § 916.9(g)(1)(a)(1), 936.9(g)(1)(a)(1), and 956.9(g)(1)(a)(1) is a better predictor of perennial and/or connected flow than the width criteria. Those findings also indicate that that the width criteria in 14 CCR § 916.9 [936.9, 956.9]

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<sup>5</sup> Pate *et al.*, 2020

<sup>6</sup> Wissler *et al.*, 2022

(g)(1)(a)(2) does not adequately predict watercourses that are perennial and/or connected versus ones that are dry and/or disconnected.

Furthermore, findings from the broad scale study generally validated the regulatory drainage area values for determination of Class II-L watercourses. The geometric mean of drainage area for perennial watercourses in the Coast Forest District was 103 acres, as compared to the drainage area criteria of greater than equal to 100 acres. The geometric mean of drainage area for perennial watercourse in the Northern Forest District was 150 acres, as compared to drainage area criteria of greater than equal to 150 acres. Similarly, the geometric means of connected watercourses were very similar to the drainage area criteria across both Forest Practice Districts. Altogether, this suggests that the drainage area criteria do a reasonable job of predicting desirable characteristics of Class II-L watercourses (flow permanence and watercourse connectivity).

Finally, larger drainage areas will have a higher likelihood of transporting sediment, nutrients, and large woody debris due to the increase in transport capacity and are therefore more suitable in achieving the goals of this section, identified in 14 CCR §§ 916.9(a), 936.9(a), and 956.9(a), than watercourses which merely satisfy the current active channel width requirements.

The **problem** is that the current regulatory methods for determining Class II-L watercourse status will expire on January 23, 2023, resulting in significant issues of clarity and consistency within the Rules. This expiration date was put in place to allow further evaluation of the efficacy of Class II WLPZ widths and operational requirements in relationship to Watercourse characteristics and achievement of the goals specified in 14 CCR §§ 916.9, 936.9, and 956.9 subsection (a).

The **purpose** of the proposed action is to eliminate the regulatory method of Class II-L determination based on average active channel width, as evaluation of the provision indicates that that it is not particularly effective in identifying watercourse characteristics intended to promote the goals specified in 14 CCR §§ 916.9, 936.9, and 956.9 subsection (a). Furthermore, the proposed action will eliminate the regulatory sunset period for methods to determine Class II watercourse type in order to avoid future issues of regulatory clarity or inconsistency. It should be noted here that the proposed action does not, in any way, affect the Board's or the EMC's ability to continue evaluating this, or other related, regulatory schemes in order to determine efficacy, nor does the proposed action limit the Board's future authority in amending these regulations in order to better interpret, implement, or effectuate the Act.

The **effect** of the proposed action is to eliminate a Class II-Large determination method which is not effective at achieving the intended goals of the regulations, while maintain one which does, and eliminate a regulatorily imposed sunset date on those and related provisions.

The **benefit** of the proposed action is a more efficient and effective regulatory scheme for the determination of Class II-L watercourses. The reliance upon drainage area metrics provides a more objective and repeatable criteria than field measurements of active channel width, and the utilization of this method will improve and streamline both the implementation and enforcement of the regulations by reducing the time and resources needed to determine watercourse type. The resources necessary to calculate drainage area (*i.e.*, geospatial tools, analog maps) are readily

available to field practitioners. Finally, the proposed action provides improved regulatory certainty to the public through the elimination of the sunset provisions.

There is no comparable Federal regulation or statute.

Board staff conducted an evaluation on whether 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 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 watercourse protection during timber operations within 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.

Statute to which the proposed action was compared: Chapter 8, Part 2, Division 4, Public Resources Code.

Regulations to which the proposed action was compared: Article 4, Subchapters 4, 5, & 6, Chapter 4, Division 1.5, Title 14, California Code of Regulations.

#### **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 management plans for the non-industrial harvesting of timber. No existing Federal regulations meeting 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.

A local agency or school district has the authority to levy service charges, fees, or assessments sufficient to pay for the program or level of service mandated by the act, within the meaning of Section 17556 of the Government Code.

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.

The proposed action will not result in costs to any State agency. The proposed action represents a continuation of existing forest practice regulations related to the conduct of timber operations and will not result in any direct or indirect costs or savings to any state agency.

**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 (by making it costlier to produce goods or services in California).

**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) and GOV § 11346.5(a)(8))**

Contemplation by the Board of the economic impact of the provisions of the proposed action through the lens of the decades of contemplating forest practice in California that the Board brings to bear on regulatory development.

**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:

- Will not create jobs within California (GOV § 11346.3(b)(1)(A));
- Will not eliminate jobs within California (GOV § 11346.3(b)(1)(A));
- Will not create new businesses (GOV § 11346.3(b)(1)(B));
- Will not eliminate existing businesses within California (GOV § 11346.3(b)(1)(B));
- Will not affect the expansion or contraction of businesses currently doing business within California (GOV § 11346.3(b)(1)(C));
- Will yield nonmonetary benefits (GOV § 11346.3(b)(1)(D)). The proposed action will result in a more efficient and effective regulatory scheme for the determination of Class II-L watercourses and improved regulatory certainty to the public through the elimination of certain regulatory sunset provisions. The proposed action will not affect the health and welfare of California residents or worker safety.

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

The agency is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action. No adverse impacts are to be expected.

**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 (defined in GOV 11342.610)**

The proposed regulation may affect small business, though small businesses, within the meaning of GOV § 11342.610, are not expected to be significantly affected by the proposed action.

Small business, pursuant to 1 CCR § 4(a):

- (1) Is legally required to comply with the regulation;
- (2) Is not legally required to enforce the regulation;
- (3) Does not derive a benefit from the enforcement of the regulation;
- (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: Eric Hedge  
Regulations Program Manager  
P.O. Box 944246  
Sacramento, CA 94244-2460  
Telephone: (916) 619-9796

The designated backup person in the event Mr. Hedge is not available is Jane Van Susteren, Regulations Coordinator for the Board of Forestry and Fire Protection. Ms. Van Susteren may be contacted at the above address or phone.

**AVAILABILITY STATEMENTS (pursuant to GOV § 11346.5(a) (16), (18))**

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)**).
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:

<https://bof.fire.ca.gov/regulations/proposed-rule-packages/>