

Board of Forestry and Fire Protection

Finding of Emergency and Notice of Proposed Emergency Action, (pursuant to GOV § 11346.1(b))

“Emergency Rulemaking to Facilitate Post-Fire Recovery Efforts within Counties of Lake, Siskiyou, Mendocino, Shasta, Trinity and Napa”

Notice Date: March 8, 2019

The Board of Forestry and Fire Protection (hereafter “Board”) has adopted an emergency 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 person(s) engaging in specified forest management activities, including the cutting or removal of dead or dying trees when within 300 feet of an Approved and Legally Permitted Structure that was damaged or destroyed by wildfire during the 2018 northern California wildfires in the counties of Lake, Siskiyou, Mendocino, Shasta, Trinity, and Napa counties. This action is being taken in accordance with Government Code (GOV) §§ 11346.1, 11346.5 (2) through (6) inclusive, and 11349.6. The Board adopted the emergency regulation at their regular meeting scheduled on September 27, 2018.

At their regularly scheduled meeting on March 6, 2019, the Board authorized re-adoption of the findings and rule text. Emergency circumstances are unchanged since the initial adoption of the regulations.

Pursuant to GOV § 11346.1(h), the Board has taken steps to make the emergency regulation permanent, however more time is required to complete the regular rulemaking process. At the March 5, 2019 meeting of the Forest Practice Committee, permanent regulatory text was considered, however the Board is still gathering information related to the development of the regulatory text and the rulemaking documents necessary to comply with GOV §§ 11346.2 to 11347.3, inclusive. The Board will consider the adoption of permanent regulatory text at its next Board meeting on April 10, 2019. The Board continues to proceed with diligence to comply with GOV § 11346.1(e).

If you wish to comment on the adopted emergency regulations, you must submit the comment directly to the Office of Administrative Law (hereafter “OAL”) within **five (5) calendar days** of OAL’s posting of the proposed emergency regulations on the OAL web site. You may submit comments on the adopted emergency regulations 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:
Eric Hedge
Regulations Coordinator
Board of Forestry and Fire Protection
P.O. Box 944246
Sacramento, CA 944244-2460

Fax:
(916) 653-0989

E-mail:
publiccomments@BOF.ca.gov

GOV § 11346.1(a)(2) requires that, at least five working days prior to submission of the proposed emergency action to OAL, the adopting agency provide a notice of the proposed emergency action with the agency. After submission of the proposed emergency to the OAL, OAL shall allow interested persons five calendar days to submit comments on the proposed emergency regulations as set forth in GOV § 11349.6

These regulations will likely be submitted to the Office of Administrative Law on or after March 18, 2019. **If the regulation is submitted to OAL on that date, the public comment period closes on March 25, 2019.**

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

The Board is not required and, in this instance, 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. [Title 1 CCR § 55].

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 regulation to effectuate the statute being implemented, interpreted, or made specific and to address only the demonstrated emergency.

Beginning on June 23rd, 2018, a series of wildfires started to burn in Lake, Siskiyou, Mendocino, Shasta, Trinity, and Napa counties. These fires have become some of the deadliest and costliest wildfires in California history, and include the current (as of September 2018) largest wildfire event in recorded state history. On June 25th, 2018, the Governor proclaimed a state of emergency initially for Lake County, and then added several additional counties to address the size and severity of loss associated with these catastrophic wildfires.

On August 9th, 2018, the Governor issued executive order B-53-18, with the intent to streamline recovery efforts in communities impacted by devastating wildfires across portions of California, including the counties of Lake, Siskiyou, Mendocino, Shasta and Napa. The document orders "State statutes, rules, regulations and requirements are hereby suspended to the extent they apply to the following activities: (a) removal, storage, transportation, and disposal of hazardous and non-hazardous solid waste and debris resulting from the wildfires that have burned and continue to burn in areas that are subject to the jurisdiction of agencies within the California Environmental Protection Agency and the California Natural Resources Agency; and (b) necessary restoration and rehabilitation of timberland, streams, rivers, and other waterways. Such statutes, rules, regulations and requirements are hereby suspended only to the extent necessary for expediting the removal and cleanup of debris from the wildfires, and for implementing any restoration plan. Individuals who desire to conduct activities under this suspension of statutes, rules, regulations, and requirements shall first request that the appropriate Agency Secretary, or his delegate, make a determination that the proposed activities are eligible to be conducted under this suspension. The Secretary for the California Environmental Protection Agency and the Secretary for the California Natural Resources Agency shall use sound discretion in applying this Executive Order to ensure that the suspension serves the purpose of accelerating cleanup and recovery, while at the same time protecting public health and the environment. This order shall apply to but is not necessarily limited to: solid waste facility permits; waste discharge requirements for storage and disposal; emergency timber harvesting; emergency construction activities; and waste discharge requirements and/or Water Quality Certification for discharges of fill material or pollutants. To the extent it is within their administrative authority, the boards, departments and offices within the California Environmental Protection Agency and the California Natural Resources Agency shall expedite the granting of other authorizations, waivers or permits necessary for the removal, storage, transportation, and disposal of hazardous and non-hazardous debris resulting from the wildfires, and for other actions necessary for the protection of public health and the environment."

Pursuant to PRC § 4551.5, the rules and regulations that the Board is authorized to adopt include measures for fire prevention, recovery and control and for prevention and control of damage by wildfire, forest insects, pests, and disease.

Additionally, 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.

Promulgation of these regulations is immediate and necessary to provide a person engaging in the cutting or removal of dead or dying trees 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 facilitate the removal of hazardous materials and the re-building and recovery from the catastrophic 2018 northern California wildfires in Lake, Siskiyou, Mendocino, Shasta, Trinity, and Napa counties when specific requirements are met. The following is a list of evidences of the immediate and necessary need for emergency regulations to address the 2018 northern California wildfires:

One: The Governor issued Proclamations of States of Emergencies for Lake (signed 06/25/18 and again 07/28/18), Siskiyou (07/26/18), Mendocino (07/28/18), Shasta (07/26/18) and Napa Counties (signed 07/28/18):

The Governor proclaimed States of Emergencies to exist in certain areas severely affected by the 2018 northern California wildfires, including throughout the counties of Lake, Siskiyou, Mendocino, Shasta and Napa. The rapid fire spread, in addition to extraordinary weather events, destroyed critical infrastructure, homes and residential areas. This action was considered prudent by the Governor's office to help the affected areas stabilize, recover and rebuild with the assistance of emergency expenditures, streamlining of regulations to assist in the timely recovery of these wildfire affected areas, and for the allowance of FEMA assistance. Though Trinity county is not specifically identified within these proclamations, the fire which prompted the declarations within Shasta county (the Carr fire) extended into Trinity county with similarly devastating effect.

Two: Data from the California Department of Forestry and Fire Protection (CAL FIRE):

According to figures published by CAL FIRE, the Carr Fire burned 229,651 acres in Shasta and Trinity counties, the Ranch and River fires (Mendocino Complex) burned 459,123 acres in Colusa, Glenn, Lake, and Mendocino counties, the Pawnee Fire burned 15,185 acres in Lake County, and the County fire burned 90,288 acres in Napa and Yolo counties.

CAL FIRE also estimates (with preliminary data) the following figures for structure loss and damage associated with each fire event:

INCIDENT	DESTROYED	DAMAGED	TOTAL
County (Napa and	29	4	33

Yolo Counties)			
Pawnee (Lake and Napa Counties)	22	6	28
Klamathon (Siskiyou County)	83	12	95
Carr (Shasta and Trinity Counties)	1614	279	1893
Mendocino Complex (Lake and Mendocino Counties)	280	38	318
Total Structures	2,028	339	2367

Three: Public outreach to the board for assistance with this emergency issue:

The Board has been contacted via telephone by affected landowners requesting regulatory relief to facilitate reconstruction efforts. Promulgation of these regulations is immediate and necessary in order to expeditiously remove hazards to life and safety presented by dead and dying trees so that landowners are able to mitigate the significant affects that the 2018 northern California wildfires have had on their lives.

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 situation presents a significant challenge to the construction and reconstruction of many Approved and Legally Permitted Structures as thousands of dead and dying trees must be removed to facilitate re-building and revitalization of these areas, as well as to alleviate falling hazards of structurally weakened trees that have contributed to the scale of damage associated with these wildfires. The Board was compelled to respond to the evidence, as described above, from fire damaged and weakened trees. These regulations are immediate and necessary to, in part, facilitate appropriate tree removal for commercial and residential construction and reduce the falling hazard associated with deteriorating trees. Appropriate dead and dying tree harvesting can:

- Reduce the risk of fire to timberlands.
- Reduce large, damaging wildfires.
- Decrease losses of homes and structures that have survived the wildfires or have salvageable properties due to these wildfire events, or decrease losses of new construction or recovery efforts.
- Enhance worker or citizen safety.
- Increase public safety.
- Increase forest vigor and vitality of surviving stands of trees through the reduction of insect populations colonizing wildfire-stricken trees, stands of trees, or forest conditions.

The Board has not yet determined if they are going to pursue permanent rulemaking. However, the timeline associated with regular rulemaking would not allow this exemption to be available during the 2019 calendar year, 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 regulation effective as soon as possible.

The Board is proposing action to adopt 14 CCR § 1038(n).

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 Proclamation of State of Emergency issued on 06/25/18.

Governor issued Proclamation of State of Emergency issued on 07/26/18.

Governor issued Proclamation of State of Emergency issued on 07/28/18.

Governor issued Executive Order "B-53-18" issued 9/9/18.

CAL FIRE, California Geologic Survey, US Forest Service, "Carr Fire: Watershed Emergency Response Team Report, CA-SHU-007808", September 27, 2018.

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

14 CCR § 1038 Note: Authority cited: Sections 4551, 4553, and 4584 Public Resources Code. Reference: Sections 4290, 4291, 4516, 4527, 4584, and 4597, 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 proposed 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)**

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

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 FPA, to a person engaging in specified forest management activities, including, the cutting or removal of dead, dying, or diseased trees of any size.

Additionally, pursuant to PRC § 4551.5, the rules and regulations that the Board is authorized to adopt includes measures for fire prevention and control and for prevention and control of damage by forest insects, pests, and disease.

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

The effect of the proposed action is to provide an exemption from portions of FPA to allow the harvesting of dead or dying trees around damaged or destroyed Approved and Legally Permitted Structures in order to facilitate the removal of hazardous materials from and assist in the reconstruction and revitalization of areas directly affected by the 2018 northern California wildfires in in Lake, Siskiyou, Mendocino, Shasta, Trinity, and Napa counties. The proposed action will provide 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 when specific requirements are met.

The primary benefit of the proposed action is the reduction in risk to life, property and the environment posed by dead and dying trees through streamlining their harvest and removal, therefore enabling landowners to successfully recover from the destructive wildfire events in the summer of 2018.

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

The Board performed a search of existing regulations and concluded that the proposed regulation is not inconsistent or incompatible with existing state regulations.

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)**. No costs or savings to any State agency are expected.

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.

The Board took action to authorize emergency rulemaking based on the findings provided pursuant to GOV § 11346.1(b)(2). 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 that the northern California wildfires caused unprecedented damage and destruction throughout the counties of in Lake, Siskiyou, Mendocino, Shasta, Trinity, and Napa. The large number of trees that have been damaged and weakened as a result of these fires will hamper rebuilding and reconstruction of these areas. Additionally, dead and dying trees represent a potential hazard to life or property as they deteriorate and ultimately collapse.

The purpose of the proposed action is to provide a person engaging in the cutting or removal of dead or dying trees 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, when specific requirements are met.

Amend 14 CCR § 1038.5(2)

The purpose of this amendment is to eliminate this sub-provision which identifies requirements for Timber Operations conducted within the Lake Tahoe Region pursuant to this section. Subsection (a) of this section geographically restricts the use of this subsection to the counties of Lake,

Siskiyou, Mendocino, Shasta, Trinity, and Napa, none of which exist within the Lake Tahoe Region. The elimination of this provision is necessary to clarify that the requirements do not apply to this section due to the geographic limitations.

Amend 14 CCR § 1038.5(b)(2)

The purpose of this amendment is to clarify that timber operations conducted pursuant to this section must comply with the operational provisions of the Rules, as defined by 14 CCR § 895.1. Previously, the term “District Forest Rules” had been used, however this term is not defined within 14 CCR § 895.1 and may cause confusion. The term “District Forest Rules” refers to rules and regulations, adopted by the Board, which are applicable to Districts, pursuant to 14 CCR § 895.1 and Article 1 of Subchapter 3 of Chapter 14 of Title 14 of the California Code of Regulations. These terms “District Forest Rules” and “Rules” are synonymous here and this amendment is necessary to clarify the applicability of these regulations.

Additionally, “Timber Harvest Plan” has been revised to “Timber Harvesting Plan” to reflect the correct usage of the term as defined within 14 CCR § 895.1. This is necessary to clarify the applicability of provisions related to Timber Harvesting Plans.

Amend 14 CCR § 1038.5(d)(2)

The purpose of this amendment is to clarify that only one criteria or condition of 14 CCR § 1038.5(d)(2)(A)-(C) must be met to satisfy the requirements of 14 CCR § 1038.5(d)(2). This is necessary to correct this previous error of omission. The portion of the sentence immediately preceding this amendment makes clear that one or more of the criteria must be met, and this amendment clarifies this requirement.

Non-substantive Amendments

Terms which are defined pursuant to 14 CCR § 895.1 have been capitalized throughout.