

P.O. Box 944246  
SACRAMENTO, CA 94244-2460  
(916) 653-8007  
(916) 653-0989 FAX  
[BOF Website \(www.bof.fire.ca.gov\)](http://www.bof.fire.ca.gov)



## **GENERAL OVERVIEW OF REVISIONS TO BOTANICAL RESOURCES GUIDANCE MEMO**

### **Introduction**

The Forest Practice Committee (FPC) has been engaging with relevant state agencies and other interested stakeholders on the preparation of a guidance document for Registered Professional Foresters (RPFs) pertaining to the evaluation of special status plant species as part of the review process for THPs and other Plans regulated by the Forest Practice Act. In July, the FPC took advantage of the extended break between the FPC's July and September meetings to invite written public comment on the draft guidance memo by August 13, 2021. This provided stakeholders approximately a month to evaluate and comment on the draft guidance memo and provided Board staff approximately an additional month to evaluate and incorporate appropriate comments while preparing a revised draft guidance memo for FPC consideration at the September meeting.

Board staff received timely comments from the Department of Fish and Wildlife (CDFW), the California Native Plant Society (CNPS), and the California Licensed Foresters Association (CLFA). Board staff share the FPC's appreciation for the time, effort, and consideration that went into each letter, as well as the ongoing commitment to helping the FPC improve upon the draft guidance memo.

Board staff have prepared the updated draft guidance memo with further revisions reflected in "tracked changes." The revisions are numerous but predominantly technical and clarifying in nature. This staff report offers a general summary of the revisions proposed by Board staff. It also identifies general categories of comments and edits that Board staff omitted from the memo. The staff report is intended to serve as an aid in evaluating the most recent revisions and focusing discussion on items for which there continues to be lack of consensus. Board staff invite additional discussion on any of these issues or additional direction from the FPC on how to proceed.

### **Summary of proposed revisions**

#### **Introductory characterization of CEQA requirements and agency recommendations. (Page 1, Paragraph 2)**

The guidance memo's introductory section identifies one of its purposes as identifying portions of agency recommendations that reflect standards that may exceed what is necessary for CEQA compliance. The draft includes clarifying revisions in response to comments arguing that the CEQA does not impose "minimum" requirements and,

therefore, agency recommendations that seek maximum inclusion of information in a Plan should not be described as “enhanced” standards. While it is technically true that CEQA generally focuses on case-specific informational adequacy as opposed to bright-line prescriptive standards, the relevant point remains that some agency-recommended guidance standards reflect their preferred “best practices” as opposed to what CEQA requires. It is important that RPF’s are properly informed whether agency guidance reflects required legal standards or recommended “best practices” that are subject to an RPF’s professional discretion. This is consistent with prior direction and comments from the FPC regarding the desired scope and purpose of the memo. The updated draft includes technical changes intended to clarify this position while acknowledging stakeholders’ concerns about the terminology used to characterize CEQA requirements and agency-recommended standards.

Based on comments by the FPC members at the July meeting, the updated draft also removes from this paragraph a sentence and a portion of a sentence suggesting that compliance with these “best practice” standards might expedite or make more efficient the Plan review process.

### **Replacing the term “plant species of consequential status” (All references)**

Stakeholders have consistently raised concerns about the memo’s introduction of the new term “plant species of consequential status,” preferring instead the term “special status plant species.” Consistent with FPC direction at the July meeting, this revision has been applied to the memo in its entirety.

### **Defining “special status plant species” (Page 2)**

A key reason for proposing an alternative term to “special status plant species” was the lack of legal definition for the term and the corresponding lack of a uniformly accepted scope for the breadth of “special status” plant species that are evaluated as if they are rare, threatened, or endangered for purposes of CEQA. By reinstating the memo’s use of “special status plant species,” it is now necessary to propose a definition for that term to ensure a common understanding between RPF’s and review team agencies for purposes of the guidance memo. The proposed definition includes plants for which there can be no reasonable dispute as to the plant’s qualification as a special status plant species. For instance, as discussed in the memo, the California Rare Plant Ranks (CRPRs) are not a recognized legal standard for conclusively establishing the rarity of a species. As such, the CRPRs are a valuable informational resource for RPFs but its inclusion in the definition of “special status plant species” would render the term over-inclusive, thereby limiting its utility as guidance for RPFs.

### **Scope of Memo (Pages 1-2, and FNs 6, 8)**

Primary issues underlying the need for a new guidance memo include a lack of consensus regarding (1) which plant species are “special status” plant species that must be evaluated as if they are rare, threatened, or endangered and (2) what level of botanical resource

survey information must be included in Plans to comply with CEQA. Accordingly, the FPC's direction to staff at previous meetings has consistently been to draft a user-friendly guidance document targeted to RPFs that appraises them of the legal requirements for consideration of special status species in the botanical resource section of a Plan.

The updated draft guidance memo adds additional language clarifying this intended scope of the memo. The clarifications are in response to comments suggesting that the heavy focus on special status plant species could lead RPFs to infer that non-special status plant species are not subject to CEQA. The clarifications expressly specify that the memo is limited in scope to special status plant species and should not be construed as suggesting that non-special status species are exempt from CEQA.

With respect to other comments seeking to expand the scope of the memo (e.g., to include review team agencies or address sensitive natural communities), the revised memo does not incorporate those recommendations. Those recommended additions would unnecessarily add to the length of the memo, thereby making it less user-friendly for RPFs. Also, because Sensitive Natural Communities are an informal designation not recognized in statute or regulation, the FPC has no foundation upon which to develop or recommend guidance regarding what CEQA requires with respect to Sensitive Natural Communities. Insofar as the FPC has stated a preference for a user-friendly memo for RPFs that focuses on legal requirements for special status plant species, these proposed edits are omitted as inconsistent with the FPC's preferred scope for the Board's guidance memo.

### **Characterization of the California Rare Plant Rankings (CRPRs) (Pages 5-7)**

CNPS contends the memo inappropriately suggests that CNPS is "solely" responsible for managing the CRPRs. CNPS also objects to the memo's description of the CRPRs as a "nongovernmental" decision.

Board staff dispute the substance of the objections but have nonetheless incorporated revisions to omit any reference to CNPS's role with the CRPRs or use of the term "nongovernmental," insofar as the relevant concern about CRPRs can be articulated without them. Portions of this paragraph were revised to more clearly state the relevant concern: CRPRs are being relied upon as a de facto enforceable legal standard that conclusively confers "special status" on ranked plants for purposes for CEQA, absent any statutory or regulatory authority conferring authority to do so.

### **Clarify agency ratification of CRPRs (Page 6 FN15)**

Related to the preceding issue, the guidance memo acknowledges a viable solution for officially recognizing the CRPRs as an enforceable standard for conferring Guideline §15380(d) status on qualifying nonlisted species. The memo proposed that an interested state agency could adopt a regulation that essentially ratifies the CRPRs as demonstrating that those ranked plants "can be shown to meet the criteria" for rare, threatened, or endangered species as described in Guideline §15380(d). Such a ratifying regulation

would serve the dual purposes of giving the CRPRs recognized legal status while also resolving any dispute as to which plant species CDFW or other state agencies contend satisfy Guideline §15380(d) for purposes of drafting and reviewing Plans.

CDFW and CNPS both ask for this language to be removed from the memo. Board staff believe the statements are accurate and are beneficial as guidance for both RPFs as well as review team agencies. However, the updated memo does include a clarifying footnote in response to the CNPS comment letter, which appeared to misinterpret the memo's language as recommending that state agencies should attempt to have plants formally listed as rare, threatened, or endangered pursuant to the state and federal Endangered Species Acts. (An earlier draft of the guidance memo included a statement indicating that formal listing is the best indicia of a species' status as rare, threatened, or endangered, but that statement was removed prior to the July meeting.) The added footnote clarifies that the guidance memo is recommending a separate process that recognizes nonlisted plant species as satisfying Guideline §15380(d) for CEQA purposes.

### **Clarify position regarding "requirement" for floristic surveys (page 9)**

Some comment letters continue to advocate for full floristic surveys being necessary to ensure appropriate Plan review. As stated in the guidance memo, neither CEQA nor case law supports this as a bright-line rule. Thus, Board staff view this position as being a CDFW-recommended "best practice" but not a legal requirement that applies in all cases. Nonetheless, the updated guidance memo proposes additional clarifying compromise language. The new language acknowledges that a Plan should include site-specific information in order to satisfy CEQA's substantial evidence standard, but that CEQA does not require a full floristic survey to satisfy that requirement. The revision also includes an example from case law in which a judge rejected a claim that an EIR was invalid because it did not include a protocol survey. Although not cited in the memo, Board staff have also identified an Attorney General Opinion (No. 95-902) that similarly concluded that CAL FIRE could not impose a standard requirement for property owners to submit a "comprehensive flora and fauna survey" as a necessary condition for approval of all Plans.

### **Additional detail regarding botanical survey protocols and report content (Pages 9-12, new text)**

Stakeholders have expressed concern about the lack of detail in the portion of the memo addressing the protocols for botanical surveys and the content of the resulting reports. Board staff have added language to address these concerns, while remaining mindful of avoiding mandatory requirements that could be viewed as being regulatory in nature. Board staff believe these additions are largely consistent with CDFW guidance documents.

### **Technical and clarifying changes (All pages)**

Many of the remaining edits, though numerous, are technical and clarifying in nature and do not significantly alter the core substance of the guidance memo. CDFW is the only

stakeholder who provided specific “tracked changes” edits applied directly to draft guidance memo. Many of the technical and clarifying changes are drawn from those CDFW recommendations, though Board staff occasionally made modifications to the suggested edits to maintain consistency with the purpose, scope, and tone of the memo. Due to the number of these relatively minor revisions, Board staff do not intend to discuss each individual change. However, Board staff would be receptive to additional comments and discussion about any concerns about those changes from the FPC members or stakeholders.

## **General categories of comments not included in updated draft**

Board staff made a considerable effort to either incorporate or address comments and edits included in the stakeholder public comment letters, as well as comments of the FPC members and stakeholders arising from discussion of this Item at the July FPC meeting. This portion of the staff report will identify a few general categories of comments and edits that were not incorporated into the updated draft of the guidance memo. Stakeholders may advocate further for those changes during discussion of this Item at September meeting of the FPC. Similarly, Board staff are receptive to any further direction that FPC members would like to provide to Board staff on these issues.

### **Comments that statements in the guidance memo are regulatory in nature or constitute “underground regulations.”**

Stakeholder comments at the July meeting raised concerns that the guidance memo has evolved into more of a “regulatory” document than a “guidance” document. Board staff share general concerns about the risks of a guidance document incorporating regulatory standards subject to challenge as an underground regulation not adopted in compliance with the rulemaking provisions of the APA. In this regard, Board policy staff have consistently worked with the Board’s legal counsel throughout the drafting process for the guidance memo to ensure that the document serves its intended purpose as a guidance document, not a document suggesting or imposing regulatory standards and policies. The guidance memo goes to great lengths to defer to the informed discretion of RPFs and to identify facts and circumstances that may inform – but not control – the RPF’s analysis and decision making with respect to Plan preparation. Accordingly, Board staff are confident that the content of the draft guidance memo (including revisions made in advance of the September meeting) are appropriately categorized as guidance and are not reasonably construed as establishing enforceable standards of general applicability subject to the rulemaking provisions of the APA. If stakeholders identify any specific language of concern in the guidance memo, Board staff will be happy to reevaluate those concerns on a case by case basis.

## **Requests to establish specific standards or impose mandatory requirements for RPFs**

The original impetus for the guidance memo stems from a CDFW letter asking the Board to adopt regulatory standards for botanical resources to improve the quality and consistency of Plans. Early in the process, the FPC determined these issues are more appropriately addressed by a nonregulatory guidance document instead of a formal APA rulemaking proceeding. Yet some stakeholders continue to advocate for more specific standards, including requests to “mandate” or “require” RPFs to comply with various proposed standards. As indicated in the preceding paragraph, Board staff are omitting requested changes that propose mandatory language or overly detailed frameworks for decision making that could reasonably be construed as regulatory requirements that cannot be imposed without complying with the rulemaking provisions of the Administrative Procedure Act.

## **Objections to stated purpose and scope of the guidance memo**

As stated previously, the FPC has provided clear direction at prior meetings regarding the intended purpose and scope of the memo: it is primarily intended as user-friendly guide for RPFs to inform them about minimum legal requirements for analyzing special status plant species in Plans, as well as to help identify agency-recommended “best practices” that may exceed what is necessary for CEQA compliance. Recommended edits that are inconsistent or conflict with the stated purpose and scope are omitted. Examples include things like endorsing detailed standards or decision making criteria that operate at the expense of deference to the informed discretion of RPF’s as licensed professionals; endorsing standards that exceed what is necessary to comply with the law; or endorsing “one-size-fits-all” standards that do not adequately account for the number of variables unique to each individual Plan.

## **Timing for submission of botanical surveys (Pages 11-12)**

Another topic of considerable debate between opposing stakeholders involves the timing for the submission of botanical surveys, including providing notice to and, in some cases, opportunity for additional comment by review team agencies.

Comment from forestry industry stakeholders typically advocate for maximum flexibility for filing a botanical survey, arguing that existing rules under the Forest Practice Act already address when additional notice and recirculation of a Plan is necessary. Comment from environmental stakeholders advocate for requiring that botanical surveys be completed when the Plan is submitted and that review team agencies should be affirmatively notified when a survey is filed so that they have time to review it and make recommendations.

Board staff feel that the current language addressing the timing of botanical surveys is appropriate and sufficient. Insofar as the submitted comments represent opposing positions, Board staff are unable to reconcile the comments or propose additional edits

and, therefore, would appreciate further direction from the FPC following public comment and discussion at the next FPC meeting.

There is some indication that some of the concerns, particularly regarding notice of botanical surveys for review team agencies, can be resolved administratively through CalTrees. The FPC may wish to consider omitting or shortening the discussion of the timing issue and encourage CAL FIRE and CDFW to collaborate to see if this issue can be resolved without the need for addressing it in detail in the guidance memo.