

Board of Forestry and Fire Protection

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

“Protection of Habitable Structures Exemption, 2015”

Notice Date: May XX, 2015

The Board of Forestry and Fire Protection (hereafter “Board”) has adopted an emergency regulation to provide an exemption, from some or all of the provisions of the Forest Practice Act, to a person engaging in specified forest management activities, including, the cutting or removal of trees between 150 ft and 300 ft of an Approved and Legally Permitted Habitable Structure contingent upon several conditions. This action is being taken in accordance with GOV §§ 11346.1, 11346.5 (2)-(6) and 11349.6. The Board adopted the emergency regulation at their meeting scheduled on May XX, 2015. This regulation will be submitted to the Office of Administrative Law on **May XX, 2015**.

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 **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:

Thembi Borrás
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

This regulation will be submitted to the Office of Administrative Law on May XX, 2015. **The public comment period closes at 5:00 PM on May XX, 2015.**

OAL will confirm that the agency has received the comment. Pursuant to Title 1, California Code of Regulations, Section 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 Section 55].

Pursuant to **GOV § 11346.1(a)(2)(A)**, the specific language proposed to be adopted is provided below.

See FPC 1.0.

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.

PRC § 4584(i)(6) was chaptered on September 29, 2014.

PRC § 4584(i)(6)(D) specifies that the Board shall adopt regulations to implement PRC § 4584(i)(6) no later than January 1, 2016.

PRC § 4584(i)(6)(A) specifies that paragraphs PRC § 4584(i)(2)-(5) apply.

PRC § 4584(i)(5)(A) specifies that the Board shall adopt regulations, initially as emergency regulations in accordance with the Administrative Procedures Act, and shall be deemed to be an emergency and necessary for the immediate preservation of the public peace, health, safety or general welfare.

The timeline associated with regular rulemaking will not allow this exemption to be available prior to January 1, 2016, 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.

The Board was compelled to respond to the passage of this statute. Within several months of the law being signed on September 29, 2014, the Board, with its partners, started work on rulemaking.

In addition to the statutory allowance for emergency regulations, the Board found it necessary to pursue emergency regulations to provide, immediately, a person engaging in the cutting or removal of trees between 150 ft and 300 ft of an Approved and Legally Permitted Habitable Structure, contingent upon several conditions, the inevitable exemption, from some or all of the provisions of the Forest Practice Act, to address the fuel conditions being made worse by the drought and tree mortality as evidenced by the following:

One: From Governor issued 2015 Drought Proclamation (Executive Order B-29-15, signed 04/01/15):

The Governor proclaimed a State of Emergency to exist throughout the State of California due to severe drought conditions.

Two: From 2014 California Pest Conditions Report:

“During the 2014 water year (Oct. 1, 2013 – April 30, 2014), California experienced below-average precipitation (50% of average statewide). For many areas of the state this marked the third consecutive year of drier than average conditions. The May 1, 2014 snow water content average of 15% tied with 1990 for the second lowest snow water content level on record, exceeded only by that of 1977 (CA Dept. of Water Resources, <http://cdec.water.ca.gov/snow/bulletin120/b120may14.pdf>).

Several tree pests (e.g., bark beetles) are more prolific when host trees are stressed by drought, which resulted in 2014 having more than double the acres detected in 2013 with some level of bark beetle related tree mortality. Other drought responses observed during 2014 included desiccation and premature shedding of leaves by native oak species. Varying levels of drought-related tree mortality, premature defoliation, early foliage color change, and leaf drop were mapped over 227,000 acres via aerial survey in 2014.”

Three: From Forest Health Protection Survey, Aerial Detection Survey – April 15th-17th, 2015:

“**Background:** California is in its third year of drought. In 2014, a large increase in tree mortality was observed, especially in the Central Coast and Southern Sierra Ranges. Ground observations noted a continued increase in mortality after the 2014 surveys were flown in July. Early season aerial surveys were conducted in the spring of 2015 in response to the continuing drought and the resulting tree mortality. Another early survey over portions of Southern California was flown the week of April 6th. **Objective:** Detect and map extent and severity of tree mortality and damage which occurred after the 2014 aerial surveys in California Forests along the southern Sierras. ...**Details:**

- More than 4.1 million acres were surveyed; covering western portions of Stanislaus, Sierra and Sequoia National Forests and Yosemite and Sequoia-Kings Canyon National Parks. The Tehachapi Range and nearby private lands were also surveyed.
- In general mortality was quite severe in many pine species especially in ponderosa and pinyon at lower elevations and more southern areas.

- Along the foothills mortality was often widespread and severe especially in ponderosa but also gray pine and likely blue and live oak. It unknown if the oaks that were mapped were truly dead or had died back/defoliated due to the drought.
- On the Stanislaus, mortality was scattered in northern areas, but pockets of severe ponderosa and other pine mortality were seen in the southern low areas. Mortality roughly doubled since July 2014 in the areas of the Stanislaus that were resurveyed this spring. ...
- On the Sierra and Sequoia NF pine mortality, mostly from western pine beetle, was common and severe almost everywhere at lower elevations. Estimated number of trees killed on these two Forests together exceeded 5 million. Only about 300,000 trees were estimated killed last year in the same area. ...
- On the Tehachapi Range and on private lands along the foothills of the Sierras, extensive areas of pine mortality were common. Large areas of oak mortality was also suspect.”

Four: From CAL FIRE Letter to the Board regarding Forest Practice Regulatory Relief for Drought Mortality:

“Given the current level of infestation of bark beetles and drought related stressors, it is expected that the infestation and resulting mortality will accelerate dramatically in 2015 creating broad areas where dead and dying trees dominate the forest landscape.

The large number of dead trees creates a fire hazard in both the short and long term. In the short term, the dead pine needles create a receptive ignition bed for embers or any ignition source.... In the long term, trees which die today will begin to deteriorate and fall to the ground in significant numbers in approximately 7-10 years. These falling trees represent a potential hazard to any life or property within reach of the falling tree. ...

...Trees that die and are left to burn or rot will ultimately result in the release of carbon and other greenhouse gases during combustion, decomposition or both. This will result in an earlier than normal release of greenhouse gases. Utilizing logs to create long lasting wood products or utilizing logs to produce energy to offset the consumption of fossil fuels has direct benefits to the State, which will help meet the goals within Executive Order B-30-15. ...

...Recent large wildfires and insect outbreaks have dramatically increased the number of logs from dead and dying trees available to the log market. The decrease in milling capacity over the last decade has created a situation where log supply exceeds demand. This over supply has lowered the value of logs delivered to available mills or ports, creating a market condition that may prevent any possibility of economic return to landowners with dead or dying trees. These marginal economic conditions may prohibit landowners from pursuing tree removal,...

...it is in the interest of the state to encourage the removal of dead and dying trees to reduce the fire and falling hazard from dead and dying trees across the state. It is also in the interest of the state to encourage long term carbon sequestration by

retaining the carbon held in the tree in some form of value added product, or to offset the consumption of fossil fuels by utilizing the available carbon in trees for energy production. ...”

Five: On average more than 100 Habitable Structures are destroyed each year by wildfires

(http://www.fire.ca.gov/downloads/redbooks/2012Redbook/2012_Redbook_Graphics1-10.pdf). The legislature, in implementing another law, estimated up to 500 Habitable Structures per year are destroyed due to natural disaster.

Promulgation of these regulations is immediate and necessary to provide a person engaging in the cutting or removal of trees between 150 ft and 300 ft of an Approved and Legally Permitted Habitable Structure, contingent upon several conditions, the inevitable exemption, from some or all of the provisions of the Forest Practice Act, to address the fuel conditions being made worse by the drought and tree mortality as described above.

Appropriate fuel modification can:

- Reduce the risk of fire to timberlands.
- Reduce large, damaging wildfires.
- Decrease losses of homes and structures due to wildfire.
- Enhance firefighter safety.
- Increase public safety.
- Increase the efficiency of fire suppression operations relating to how, when, and where firefighting assets are deployed.
- Reduce the cost of fire suppression.
- Increase forest health.

The California State Board of Forestry and Fire Protection (Board) is proposing action to amend 14 CCR §§ 895.1, 1038 and 1038.2 to make specific the use of the “Protection of Habitable Structures Exemption”, pursuant to AB 1867, which was chaptered in PRC § 4584(i)(6). Specifically, PRC § 4584(i)(6) authorizes the Board to further exempt a person engaging in the cutting or removal of trees in compliance with existing law relating to defensible space that eliminates the vertical continuity of vegetative fuels and the horizontal continuity of tree crowns for the purpose of reducing flammable materials and maintaining a fuel break for a distance of no more than 300 feet on each side of an approved and legally permitted habitable structure as defined in PRC § 4584(i)(6)(B).

Promulgation of this emergency regulation is only intended to capture the persons that would use this exemption in 2015, where the conditions of this rulemaking are met. Simultaneously, regular rulemaking is being developed such that permanent rules are in place no later than January 1, 2016.

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 2015 Drought Proclamation (Executive Order B-29-15, signed 04/01/15)

2014 California Forest Pest Conditions

http://www.bof.fire.ca.gov/PDF/2014_california_forest_pest_conditions_report.pdf

Forest Health Protection Survey, Aerial Detection Survey – April 15th-17th, 2015

CAL FIRE Letter to the Board regarding Forest Practice Regulatory Relief for Drought Mortality.

Historical Wildfire Activity Statistics (Redbooks). 2012.

http://www.fire.ca.gov/downloads/redbooks/2012Redbook/2012_Redbook_Graphics1-10.pdf

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 § 895.1 Note: Authority cited: Sections 4551, 4551.5, 4553, 4561, 4561.5, 4561.6, 4562, 4562.5, 4562.7 and 4591.1, Public Resources Code.

Reference: Sections 4512, 4513, 4525.5, 4525.7, 4526, 4528, 4551, 4551.5, 4561, 4561.6, 4562, 4562.5, 4562.7, 4583.2, 4584, 4591.1, 21001(f), 21080.5, 21083.2 and 21084.1, Public Resources Code; CEQA Guidelines Appendix K (printed following Section 15387 of Title 14 Cal. Code of Regulations), *Laupheimer v. State* (1988) 200 Cal.App.3d 440; 246 Cal.Rptr. 82 and *Joy Road Area Forest and Watershed Association, v. California Department of Forestry & Fire Protection*, Sonoma County Superior Court No. SCV 229850.

14 CCR § 1038 Note: Authority cited: Sections 4551, 4553, 4584 and 4584.1, Public Resources Code. Reference: Sections 4516, 4527, and 4584, and 4584.1, Public Resources Code; and *EPIC v. California Department of Forestry and Fire Protection and Board of Forestry* (1996) 43 Cal. App.4th 1011.

14 CCR § 1038.2 Note: Authority cited: Sections 4551, 4553 and 4584, Public Resources Code. Reference: Sections 4527 and 4584, Public Resources Code.

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 **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 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.

Pursuant to PRC §4584, the Board, upon determining that the exemption is consistent with the purposes of CHAPTER 8. Z'berg-Nejedly Forest Practice Act of 1973 (FPA), may exempt from this FPA, or portions of this FPA, a person engaged in specific forest management activities.

Pursuant to this statutory authority and PRC § 4584(i)(6), which was chaptered by Assembly Bill 1867, the Board amended 14 CCR §§ 895.1, 1038 and 1038.2 in accordance with the provisions of the statute.

The Board took action to authorize emergency rulemaking based on the statutory allowance for emergency rulemaking in PRC § 4584(i)(5) and the findings provided pursuant to GOV § 11346.1(b)(2).

The effect of the proposed action is to provide an exemption, from some or all of the provisions of the Forest Practice Act, to a person engaging the cutting or removal of trees between 150 ft and 300 ft of an Approved and Legally Permitted Habitable Structure contingent upon several conditions for the purposes of reducing flammable materials and maintaining a fuel break.

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

The proposed regulation is not inconsistent or incompatible with existing state regulations; it amends it, providing an expansion on an existing exemption.

§895.1 provides

§1038 requires

§1038.2 requires

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)**. The costs or savings to any State agency are as follows. Otherwise no costs or savings to any State agency are expected.

Pursuant to 14 CCR §, 1038(c)(6)(G), the Department shall evaluate the effects of the exemption allowed under 14 CCR § 1038(c)(6) including frequency and state-wide distribution of use, acres treated, compliance, professional judgment regarding post-treatment stand conditions observed relative to moderating fire behavior, and actual performance in the event of a wildfire. The Department shall, annually, report its findings, based on this evaluation, to the Board. The cost to the Department to collect and report the information specified in 14 CCR §, 1038(c)(6)(G) is estimated at \$xxx,xxx.

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.

Certification that the Board Provided a Five Working Day Notice

The Board of Forestry and Fire Protection (Board) complied with the requirement to provide five working day notice, pursuant to GOV § 11346.1(a)(2) and 1 CCR §50(a)(5)(A)). The proposed action was posted on the Board's website and sent to the Board mailing list five working days prior to being submitted to the Office of Administrative Law.

Non Duplication Standard

The regulation repeats or rephrases in whole or in part a state statute, specifically PRC § 4584(i)(6) because it is necessary to satisfy the "clarity" standard of Government Code Section 11349.1(a)(3). Repeating and rephrasing the statute provides context for the expansion of the existing exemption. Additionally, it would be cumbersome to require a person to have to cross reference the statute.