

BOARD OF FORESTRY AND FIRE PROTECTION



Forest Practice Committee Insect and Disease Related Emergency May 11, 2015

- IDENTIFY THE PROBLEM.

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.”

“Millions of trees are dying due to California drought (LA Times)”:

<http://www.latimes.com/local/lanow/la-me-ln-trees-dying-california-drought-20150505-story.html>

- GATHERING RELEVANT LEGAL INFORMATION.

Authority: **ARTICLE 7. Timber Harvesting [4581 - 4592]**

(Article 7 added by Stats. 1973, Ch. 880.)

4584.

Upon determining that the exemption is consistent with the purposes of this chapter, the board may exempt from this chapter, or portions of this chapter, a person engaged in forest management whose activities are limited to any of the following:

(c) The cutting or removal of dead, dying, or diseased trees of any size.

Reference: **ARTICLE 4. Rules and Regulations [4551 - 4555]**

(Article 4 added by Stats. 1973, Ch. 880.)

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4551.5.

Rules and regulations shall apply to the conduct of timber operations and shall include, but shall not be limited to, measures for fire prevention and control, for soil erosion control, for site preparation that involves disturbance of soil or burning of vegetation following timber harvesting activities, for water quality and watershed control, for flood control, for stocking, for protection against timber operations that unnecessarily destroy young timber growth or timber productivity of the soil, for prevention and **control of damage by forest insects, pests, and disease**, for the protection of natural and scenic qualities in special treatment areas identified pursuant to subdivision (b) of Section 30417, and for the preparation of timber harvesting plans. In developing these rules, the board shall solicit and consider recommendations from the department, recommendations from the Department of Fish and Game relating to the protection of fish and wildlife, recommendations from the State Water Resources Control Board and the California regional water quality control boards relating to water quality, recommendations from the State Air Resources Board and local air pollution control districts relating to air pollution control, and recommendations of the California Coastal Commission relating to the protection of natural and scenic coastal zone resources in special treatment areas.

Consistency: Identifying other statutes, court decisions or other provisions of law, including regulations, that may apply to the matters covered by the proposed regulations.

- GATHERING RELEVANT FACTUAL INFORMATION.

Existing Exemption for Dead, Dying Diseased

1038 Exemption

Persons who conduct the following types of timber operations are exempt from the plan preparation and submission requirements (PRC § 4581) and from the completion report and stocking report requirements (PRC §§ 4585 and 4587) of the Act with the following exceptions and requirements:

(i) no tree that existed before 1800 A.D and is greater than sixty (60) inches in diameter at stump height for Sierra or Coastal Redwoods, and forty-eight (48) inches in diameter at stump height for all other tree species shall be harvested unless done so under the conditions or criteria set forth in subsection 1038(h).

(ii) all timber operations conducted in the Lake Tahoe Region pursuant to 14 CCR § 1038 must have a valid Tahoe Basin Tree Removal Permit (as defined by the Tahoe Regional Planning Agency) or shall be conducted under a valid TRPA Memorandum of Understanding (MOU), when such a permit is required by TRPA.

(a) Harvesting Christmas trees.

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(b) Harvesting dead, dying or diseased trees of any size, fuelwood or split products in amounts less than 10% of the average volume per acre when the following conditions are met:

- (1) No tractor or heavy equipment operations on slopes greater than 50%.
- (2) No construction of new tractor roads on slopes greater than 40%.
- (3) Timber operations within any Special Treatment Area, as defined in 14 CCR 895.1, shall comply with the rules associated with that Special Treatment Area.
- (4) No tractor or heavy equipment operations on known slides or unstable areas.
- (5) No new road construction or reconstruction, as defined in 14 CCR 895.1.
- (6) No heavy equipment operations within the standard width of a watercourse or lake protection zone, as defined in 14 CCR 916.4 [936.4, 956.4](b), except for maintenance of roads and drainage facilities or structures.
- (7) No known sites of rare, threatened or endangered plants or animals will be disturbed, threatened or damaged.
- (8) No timber operations within the buffer zone of a sensitive species, as defined in 14 CCR 895.1.
- (9) No timber harvesting within the standard width of a watercourse or lake protection zone, as defined in 14 CCR 916.4 [936.4, 956.4](b), except sanitation-salvage harvesting, as defined in 14 CCR 913.3 [933.3,953.3], where immediately after completion of operations, the area shall meet the stocking standards of 14 CCR 912.7 [932.7,952.7](b)(2), or, except the removal of dead or dying trees where consistent with 14 CCR 916.4 [936.4,956.4] (b). Trees to be harvested shall be marked by, or under the supervision of, an RPF prior to timber operations.
- (10) No timber operations on any site that satisfies the criteria listed in 895.1 for a significant archaeological or historical site. Information on some of these sites may be available from the Information Centers of the California Historical Resources Information System within the Department of Parks and Recreation.

- DRAFT THE PROPOSED TEXT OF THE REGULATION.

- ALTERNATIVES.

A. Adopt a new exemption without the 10% reference:

Harvesting dead, dying or diseased trees of any size, fuelwood or split products in amounts less than xx% of the average volume per acre when the following conditions are met:

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B. Adopt as above, but place additional restrictions for area:

...in areas designated by the Board resolution...

...in the following counties.....

...where the Board has declared an emergency condition exists...

Adopt as an emergency rule, followed by regular rulemaking to allow for immediate action

Performance Standard v. Prescriptive Standard: "In the case of a regulation that would mandate the use of specific technologies or equipment or prescribe specific actions or procedures, the imposition of performance standards shall be considered as an alternative." (Gov. Code, § 11346.2, subds. (b)¶ & (b)(4)(A))

"Prescriptive standard" means a regulation that specifies the sole means of compliance with a performance standard by specific actions, measurements, or other quantifiable means. (Gov. Code, § 11342.590)

"Performance standard" means a regulation that describes an objective with the criteria stated for achieving the objective. (Gov. Code, § 11342.570)

You must explain the reason for rejecting the performance standard.

Select the Preferred Alternative: Once you have identified and evaluated any alternatives, select the preferred alternative from the reasonable alternatives, if any, that have been proposed and/or considered, and for each of the reasonable alternatives not selected, draft an explanation of the reasons for rejecting that alternative. The description of each proposed/considered alternative and the explanation for rejecting each one will be used in drafting the ISOR. (Gov. Code, § 11346.2, subd. (b)(4))

- DETERMINE PURPOSE AND DEMONSTRATE THE NECESSITY FOR THE DRAFTED REGULATIONS.

Purpose: The purpose of the proposed regulations should reflect the intent of the statute(s) being implemented, interpreted, or made specific in the rulemaking. How do the proposed regulations address the problem identified by the agency? To find the purpose of a statute, look first to the words of the pertinent statute(s). Sometimes the purpose is set out at the beginning of the chapter or article, or maybe in un-codified statutory provisions. If the purpose is not set out in the language of the statute, purpose may be gleaned from legislative history materials. If you can't identify the purpose from either the words or the legislative history, sometimes the purpose is obvious from what the statute addresses. You may sometimes find the purpose of a statute stated in a court decision.

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Describe the benefits of the regulation. The purpose of the statute may be to achieve some benefit or goal. (For example, the purposes of the APA are to provide a meaningful opportunity for public participation and to create a record for judicial review.) So, think about and state the benefits and goals of the statute you are planning to implement, interpret, or make specific.

Necessity: An agency must be able to demonstrate why each provision of the regulation is reasonably necessary to effectuate the purposes of the statute(s) or other provisions of law the regulation implements, interprets or makes specific, AND is reasonably necessary to address the problem the agency intends to address. In other words, explain why the agency is addressing the problem and effectuating the purpose of the statute in this particular way.

Documents Relied Upon: Identify each technical, theoretical, empirical study, report, or similar document, if any, the agency is relying upon to support the necessity for the regulation. Sometimes an explanatory statement will itself be adequate. Other times the statement or one or more of its parts will have to be demonstrated by the use of studies, reports, documents or other material relied upon by the agency. The bottom line is that the rulemaking record must contain substantial evidence to demonstrate that the regulation is reasonably necessary to effectuate the purposes of the statute(s) or other provisions of law the regulation implements, interprets or makes specific, AND address the problem the agency intends to address.

- **ANALYZE THE FISCAL /ECONOMIC EFFECTS OF THE REGULATION.**

Economic Impact Assessment (EIA): Except for major regulations (discussed above), the agency must prepare an Economic Impact Analysis/Assessment (EIA) that analyzes whether and to what extent the regulation will affect:

- the creation or elimination of jobs within the State of California,
- the creation of new businesses or the elimination of existing businesses within the State of California,
- the expansion of businesses currently doing business within the State of California, and
- the benefits of the regulation to the health and welfare of California residents, worker safety, and the state's environment.

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This assessment must be based upon adequate information concerning the consequences of the proposed regulation. (See Gov. Code, § 11346.3, subd. (e)). In other words, the BIA must contain sufficient information to explain how the agency reached the stated results.

Cost Impacts On Representative Person or Business: Describe the cost impacts known to the agency that a representative private person or business would incur to comply with the proposed regulation. This is "the amount of reasonable range of direct costs, or a description of the type and extent of direct costs, that a representative private person or business necessarily incurs in reasonable compliance with the proposed action." (Gov. Code, §

Reporting Requirement: Determine whether the proposed regulation establishes a reporting requirement that applies to business. If a reporting requirement created by the regulation does apply to business, your agency must include a finding the NOPA that the requirement "is necessary for the health, safety, or welfare of the people of the state that the regulation apply to businesses."

Warning: If you do not include this finding, the reporting requirement does not apply to business. (Gov. Code, § 11346.3 subd. (d))

Effects on Small Business: Determine whether the selected alternative affects small business using the definition of "small business" in the APA at section Government Code section 11342.610. If you decide the selected alternative does not affect small business, prepare a brief explanation of the reasons for that decision. (1CCR 4)

- **ADDITIONAL CONSIDERATIONS.**

Consistency With Existing State Regulations: The agency must evaluate whether the proposed regulation is inconsistent or incompatible with existing state regulations. (Gov. Code, § 11346.5, subd. (a)(3)(D))

Federal Conformity: Determine whether the proposed regulation differs substantially from an existing comparable federal regulation or statute. If it does, draft a brief description of the significant differences and identify the full citation of the federal regulations or statutes. This information will be used when drafting the NOPA. (Gov. Code, § 11346.5, subd. (a)(3)(B))

Identical to Existing Federal Regulation: Determine whether the proposed regulation is identical to previously adopted /amended federal regulation. If so, then include a statement to that effect in the NOPA along with a citation to where

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an explanation of the provisions of the regulation can be found. If applicable, this is sufficient to satisfy the ISOR and FSOR requirements. (Gov. Code §§ 11346.2, subd. (c) and 11346.9, subd. (c))

Efforts to Avoid Duplication or Conflict with Federal Regulations: This evaluation applies only to a department, board, or commission within the Environmental Protection Agency, the Natural Resources Agency, or the Office of the State Fire Marshal. Draft a description of your efforts to avoid unnecessary duplication or conflict with federal regulations addressing the same issues. You may adopt differing regulations "upon a finding of one or more of the following justifications:

a) The differing state regulations are authorized by law; or b) The cost of differing state regulations is justified by the benefit to human health, public safety, public welfare, or the environment. This evaluation must be made available to the public. (Gov. Code, § 11346.2, subd. (b)(6))