

# Procedures Handbook for Emergency Actions

State Board of Forestry and Fire Protection

DRAFT – September 29, 2015 - DRAFT



## **Summary:**

On September 14, 2014 at approximately 1:38 p.m., the Boles Fire was ignited. The Boles fire was a fierce wind driven event located within the wildland urban interface of Weed, California. Within hours of the fire start, it was reported that the wildfire had ravaged 350 acres and damaged or destroyed over 100 structures within the town of Weed, but the destruction of the Boles Fire was truly even greater.

Within a 24 hour period the Boles fire had consumed 516 acres and destroyed 157 single family residences and 8 commercial structures. An additional 4 single family residences and 3 commercial structures were also damaged.

Clean up efforts were initiated within days of the Boles Fire. Cal Recycle, assisted by the Department of Toxic Substance Control and affected homeowners, rapidly responded to debris and ash removal within the affected area. This resulted in thousands of tons of material being excavated, loaded and transported to recycle yards or stable storage areas.

Hundreds of trees experienced significant damage or mortality as a result of the Boles Fire. Given that Weed is located within the wildland urban interface, many of the damaged or dead trees were "Commercial species", as defined in 14 CCR § 895.1. As is typical with a residential development, the lot sizes of the parcels affected by the fire are .25 - .3 acre lots. This presented a challenging situation, where there were very few trees on any individual lot that required removal, but in totality there were hundreds of trees needed to be removed.

Under existing Board of Forestry and Fire Protection (Board) regulations, a landowner can remove the dead and significantly damaged timber by retaining a Registered Professional Forester (RPF) and have that professional prepare an Emergency Hazard Removal pursuant to 14 CCR § 1052.1. The challenge for landowners or RPFs in crisis or emergency situations is trying to effectively communicate and interact with one another on the issue of removal of dead and dying trees where the affected landowners no longer have a permanent residence, phone service is interrupted and U.S. mail service is interrupted. The preparation of individual permits becomes overly burdensome and costly, particularly for parcel sizes that are generally less than .5 acres. Additionally, actual removal of the timber becomes inefficient due to the fact that the individual permits create a piece-meal affect where licensed timber operators are forced to move from parcel to parcel as permits are approved by CAL FIRE, rather than having a more fluid and efficient approach to emergency timber operations.

The above described limitations resulted in the removal of the dead and substantially damaged trees from the Boles Fire being a hindrance during the clean-up efforts associated with the Boles Fire. The unfortunate incident associated with the Boles Fire could occur in other communities within the State. The Board recognizes that the existing regulatory structure may not support the removal of dead or substantially damaged timber that occur as a result of natural disaster when communities are affected. Therefore, the Board has developed this procedures handbook that will aid

both the Board and Board staff in rapidly assisting affected landowners when natural disasters occur and affect timber resources.

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

Emergency actions by a state body, including the Board, are intended to provide relief from standard regulatory requirements in instances of disaster or threats to public health and safety. "Emergency" is defined under Government Code (Gov. Code) § 11342.545 as "a situation that calls for immediate action to avoid serious harm to the public peace, health, safety or general welfare." Actions taken by a body under these conditions are generally focused upon regulatory relief so that the regulated public can respond with necessary actions to address the emergency conditions. Emergency actions taken by a state body generally consists of repealing and/or amending existing regulatory standards.

It is important to note that actions by the Administration, in the form of an Executive Order (s) and/or Emergency Proclamation(s) may completely suspend or potentially narrow any perceived Emergency Action by a state body. For instance, during the 2015 fire season the state experienced extreme wildfire activity. The associated damage to resources from this fire siege prompted gubernatorial action in the form of Executive Order B-33-15 (Appendix A). Among other actions of regulatory relief B-33-15 stated the following:

*"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 fires, 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."*

Subsequently the fire activity in the state worsened with the onset of the Valley Fires in Lake and Napa Counties, resulting in significant resource damage, loss of over 1,000 structures and loss of civilian life. Again, gubernatorial action was taken in a Proclamation of a State of Emergency (Appendix A), which clarified that the relief provided in Executive Order B-33-15 was specifically extended to areas affected by the Valley Fire in Lake and Napa Counties.

In this instance the Board necessity for contemplating emergency action to provide relief to private and/or state landowners to remove dead or significantly damaged timber may not exist given that the Administration prompted regulatory relief through both an Executive Order and Emergency Proclamation. This deviates significantly from the issues faced by landowners affected by the Boles Fire, where no gubernatorial action was taken on the remediation of wildfire impacts, which may have included the removal of dead and dying timber. It may be appropriate for the Board to discuss or take emergency action in instances similar to Boles given that the landowners in Weed did not receive aid in the form of action from the Governor.

It is important to note that action by the Governor may not alleviate the need for emergency action by a state body in all instances. Although it is common that actions by the Governor are often broad and all encompassing, it is possible that either Executive Orders or Emergency Proclamations do not contemplate all potential necessities of the affect public during time of emergency. A state body could be faced with issues of expiring gubernatorial actions where additional remediation actions are necessary or where relief offered by the Governor may be narrow or unintentionally vague and therefore not cover all needs of the regulated public during emergencies. It is in these situations where it may become the responsibility of a state body to respond with additional emergency actions.

## **SECTION 1.0:**

### **EMERGENCY MEETINGS:**

The following portions of Section 1.0 are intended to provide the Board with a clear interpretation of the relevant regulatory standards of the Administrative Procedures Act (APA) as it pertains to the conduct of an Emergency Meeting. The APA is subject to revision by the Office of Administrative Law (OAL) and therefore it is important to always cross reference the current regulatory standards of the APA for Emergency Regulations with this content and guidance provided herein to assure consistency. It is necessary that the Board review this Procedures Handbook on a periodic basis to assure that the content is current and provides the most contemporary guidance possible when compared to the regulatory standards of the APA. In addition, the Executive Officer of the Board is responsible to assure that the actions of the Board are conducted in a manner that is consistent with all relevant regulatory standards, inclusive of the APA,

and therefore he or she is responsible for assuring that a thorough review of the standards set forth in the APA are reviewed and followed should the Board consider holding an Emergency Meeting.

### **1.1 Emergency Meeting**

Currently the Board meets for ten annual meetings, which are separated by five or six week intervals. While this schedule may be sufficient for standard Board matters, critical and necessary Board action in response to natural disasters may need to be expedited. The State has contemplated the need of a public body, such as the Board, to meet in an expedited manner in response to urgent and/or disastrous situations.

Government Code § 11125.5 authorizes a state body to conduct an emergency meeting without having to comply with the 10-day noticing requirements for a normal meeting (Gov. Code § 11125) or the 48-hour noticing requirement of a special meeting (Gov. Code § 11125.4). The pretext for a state body to hold an emergency meeting are specific and are limited to:

- Work stoppage or other activity that severely impairs public health or safety, or both.
- Crippling disaster that severely impairs public health or safety, or both.

In analyzing the Boles Fire and the associated impacts upon the residents and infrastructure of Weed, California, the Board could have reasonably justified the necessity of an emergency meeting should the Board have identified the need following the disaster. It is recommended that the presiding officer (Executive Officer) consult Board counsel if an emergency meeting is being contemplated to assure that the Board is acting in compliance with Gov. Code § 11125.5.

### **1.2 Noticing of an Emergency Meeting**

Although Gov. Code § 11125.5 exempts a state body of the Noticing requirement for standard or special meetings, it does mandate some limited Noticing standards. It is required that the Executive Officer of the Board, or his/her designee, notify by telephone any newspapers of general circulation or television stations that have requested notice of meetings of the Board. The required notification by phone must occur one hour prior to the emergency meeting. If phone services are not functioning then this requirement is lifted and it becomes incumbent upon the Executive Officer, or his/her designee, to contact the media outlets with information pertaining to fact that the meeting was held, the purpose of the meeting, and any action that the Board authorized as soon as possible after the conclusion of the meeting. Identification of the media outlets that have requested notification of Board meetings can be found on the "Agenda List" which is maintained by Executive Assistant in the Board office.

Additionally, a Notice shall be posted on the Board's website as soon as practicable after the decision to call the emergency meeting has been made. Again, if phone services are not functioning then this requirement is lifted.

### **1.3 Minutes of an Emergency Meeting**

Minutes of an emergency meeting shall be captured and made available for a minimum of 10 days in a public location. The Board's office would likely suffice in this situation. In addition, the minutes shall be posted on the Board's website as soon as practicable after the conclusion of the meeting. This online posting of the minutes shall occur for a minimum of 10 days. It is recommended, although not required, that copies of the posted minutes will be made available via email, to anyone who requests them. The information captured within the minutes shall include at a minimum:

- A list of persons who the Executive Officer, or his/her designee, attempted to notify of the meeting;
- A copy of the roll call vote;
- Any action taken by the Board.

## **SECTION 2**

### **EMERGENCY REGULATIONS:**

The following portions of Section 2.0 are intended to provide the Board with a clear interpretation of the relevant regulatory standards of the APA as it pertains to the conduct of an Emergency Meeting. The APA is subject to revision by the Office of Administrative Law (OAL) and therefore it is important to always cross reference the current regulatory standards of the APA for Emergency Regulations with this content and guidance provided herein to assure consistency. It is necessary that the Board review this Procedures Handbook on a periodic basis to assure that the content is current and provides the most contemporary guidance possible when compared to the regulatory standards of the APA. In addition, the Executive Officer of the Board is responsible to assure that the actions of the Board are conducted in a manner that is consistent with all relevant regulatory standards, inclusive of the APA, and therefore he or she is responsible for assuring that a thorough review of the standards set forth in the APA are reviewed and followed should the Board consider adoption of Emergency Regulations.

### **2.1 Hearings Associated with Emergency Regulations**

Public Resources Code (PRC) § 4554 exempts the Board from the requirement of holding a public hearing in regards to the adoption of emergency regulations.

## **2.2 Board Action on Emergency Regulations**

The Board routinely adopts regulations that are implemented under Z'Berg-Nejedly Forest Practices Act (FPA). Emergency regulations adopted under the Z'Bery-Nejedly forest practice have the same procedural requirements to be adopted by the Board. Final adoption of emergency regulations that are implemented under the authority provided by the FPA required five (5) affirmative votes from Board members, not a simple majority of a quorum as in other regulatory matters.

## **2.3 Contents of a Emergency Regulation Submitted to OAL**

Review 11349.1: NOTE TO BOARD STAFF, also refer to Appendix B (Example of EM. REG).

- Necessity
- Authority
- Clarity
- Consistency
- Reference
- Nonduplication

## **2.3 Timelines associated with OAL review**

The review and timelines for the review period of an Emergency Regulation are provided for in Gov. Code 11349.6. Given that the action taken by the state body is in response to perceived emergency conditions, the timelines for review are expedited when compared to a standard review of a rulemaking package. Table 1 below is provided to concisely provide the associated timelines for review of a proposed Emergency Regulation.

<b>Gov. Code §</b>	<b>Timeline</b>	<b>Function</b>
<b>11346.1(a)(1)</b>	5 working days*	Prior to submittal of adopted language to OAL the agency is required to notify persons who has filed request for notice of regulatory action.
<b>11349.6</b>	10 calendar days	Timeline available to OAL to review after submittal of adopted regulation.
<b>11349.6</b>	5 calendar days*	After posting adopted regulation to OAL website interested parties can submit comment to OAL on the adopted regulation.

\*This timeline can be waived if the emergency situation is so great that delay in action would result immediate and serious harm to public health and welfare.

## **2.4 Effective Period of Emergency Regulations**

**REFER TO 11346.1(a)(1): NOTE TO BOARD STAFF**

# Management Committee

September 29, 2015

## Items of consideration to be included within a Procedures Manual for Emergency Actions

### ADMINISTRATIVE PROCEDURE ACT; PART 1 OF DIVISION 3 OF TITLE 2 OF THE GOVERNMENT CODE

**GOV § 11346.1.** (a) (1) The adoption, amendment, or repeal of an emergency regulation is not subject to any provision of this article or Article 6 (commencing with Section 11349), except this section and Sections 11349.5 and 11349.6.

(2) At least five working days before submitting an emergency regulation to the office, the adopting agency shall, except as provided in paragraph (3), send a notice of the proposed emergency action to every person who has filed a request for notice of regulatory action with the agency. The notice shall include both of the following:

- (A) The specific language proposed to be adopted.
- (B) The finding of emergency required by subdivision (b).

(3) An agency is not required to provide notice pursuant to paragraph (2) if the emergency situation clearly poses such an immediate, serious harm that delaying action to allow public comment would be inconsistent with the public interest.

(b) (1) Except as provided in subdivision (c), if a state agency makes a finding that the adoption of a regulation or order of repeal is necessary to address an emergency, the regulation or order of repeal may be adopted as an emergency regulation or order of repeal.

(2) Any finding of an emergency shall include a written statement that contains the information required by paragraphs (2) to (6), inclusive, of subdivision (a) of Section 11346.5 and a description of the specific 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. The finding of emergency shall also identify each technical, theoretical, and empirical study, report, or similar document, if any, upon which the agency relies. The enactment of an urgency statute shall not, in and of itself, constitute a need for immediate action. A finding of emergency based only upon expediency, convenience, best interest, general public need, or speculation, shall not be adequate to demonstrate the existence of an emergency. If the situation identified in the finding of emergency existed and was known by the agency adopting the emergency regulation in sufficient time to have been addressed through nonemergency regulations adopted in accordance with the provisions of Article 5 (commencing with Section 11346), the finding of emergency shall include facts explaining the failure to address the situation through nonemergency regulations.

(3) The statement and the regulation or order of repeal shall be filed immediately with the office.

(c) Notwithstanding any other provision of law, no emergency regulation that is a building standard shall be filed, nor shall the building standard be effective, unless the building standard is submitted to the California Building Standards Commission, and is approved and filed pursuant to Sections 18937 and 18938 of the Health and Safety Code.

(d) The emergency regulation or order of repeal shall become effective upon filing or upon any later date specified by the state agency in a written instrument filed with, or as a part of, the regulation or order of repeal.

(e) No regulation, amendment, or order of repeal initially adopted as an emergency regulatory action shall remain in effect more than 180 days unless the adopting agency has complied with Sections 11346.2 to 11347.3, inclusive, either before adopting an emergency regulation or within the 180-day period. The adopting agency, prior to the expiration of the 180-day period, shall transmit to the office for filing with the Secretary of State the adopted regulation, amendment, or order of repeal, the rulemaking file, and a certification that Sections 11346.2 to 11347.3, inclusive, were complied with either before the emergency regulation was adopted or within the 180-day period.

(f) If an emergency amendment or order of repeal is filed and the adopting agency fails to comply with subdivision (e), the regulation as it existed prior to the emergency amendment or order of repeal shall thereupon become effective and after notice to the adopting agency by the office shall be reprinted in the California Code of Regulations.

(g) If a regulation is originally adopted and filed as an emergency and the adopting agency fails to comply with subdivision (e), this failure shall constitute a repeal of the regulation and after notice to the adopting agency by the office, shall be deleted.

(h) The office may approve not more than two readoptions, each for a period not to exceed 90 days, of an emergency regulation that is the same as or substantially equivalent to an emergency regulation previously adopted by that agency. Readoption shall be permitted only if the agency has made substantial progress and proceeded with diligence to comply with subdivision (e).

**GOV § 11346.5.** (a) The notice of proposed adoption, amendment, or repeal of a regulation shall include the following:

(1) A statement of the time, place, and nature of proceedings for adoption, amendment, or repeal of the regulation.

(2) Reference to the authority under which the regulation is proposed and a reference to the particular code sections or other provisions of law that are being implemented, interpreted, or made specific.

(3) An informative digest drafted in plain English in a format similar to the Legislative Counsel's digest on legislative bills. The informative digest shall include the following:

(A) A concise and clear summary of existing laws and regulations, if any, related directly to the proposed action and of the effect of the proposed action.

(B) If the proposed action differs substantially from an existing comparable federal regulation or statute, a brief description of the significant differences and the full citation of the federal regulations or statutes.

(C) A policy statement overview explaining the broad objectives of the regulation and the specific benefits anticipated by the proposed adoption, amendment, or repeal of a regulation, including, to the extent applicable, nonmonetary benefits such as the protection of public health and safety, worker safety, or the environment, the prevention of discrimination, the promotion of fairness or social equity, and the increase in openness and transparency in business and government, among other things.

(D) An evaluation of whether the proposed regulation is inconsistent or incompatible with existing state regulations.

(4) Any other matters as are prescribed by statute applicable to the specific state agency or to any specific regulation or class of regulations.

(5) A determination as to whether the regulation imposes a mandate on local agencies or school districts and, if so, whether the mandate requires state reimbursement pursuant to Part 7 (commencing with Section 17500) of Division 4.

(6) An estimate, prepared in accordance with instructions adopted by the Department of Finance, of the cost or savings to any state agency, the cost to any local agency or school district that is required to be reimbursed under Part 7 (commencing with Section 17500) of Division 4, other nondiscretionary cost or savings imposed on local agencies, and the cost or savings in federal funding to the state.

For purposes of this paragraph, "cost or savings" means additional costs or savings, both direct and indirect, that a public agency necessarily incurs in reasonable compliance with regulations.

**GOV. § 11349.6 (a)** If the adopting agency has complied with Sections 11346.2 to 11347.3, inclusive, prior to the adoption of the regulation as an emergency, the office shall approve or disapprove the regulation in accordance with this article.

(b) Emergency regulations adopted pursuant to subdivision (b) of Section 11346.1 shall be reviewed by the office within 10 calendar days after their submittal to the office. After posting a notice of the filing of a proposed emergency regulation on its Internet Web site, the office shall allow interested persons five calendar days to submit comments on the proposed emergency regulations unless the emergency situation clearly poses such an immediate serious harm that delaying action to allow public comment would be inconsistent with the public interest. The office shall disapprove the emergency regulations if it determines that the situation addressed by the regulations is not an emergency, or if it determines that the regulation fails to meet the standards set forth in Section 11349.1, or if it determines the agency failed to comply with Section 11346.1.

(c) If the office considers any information not submitted to it by the rulemaking agency when determining whether to file emergency regulations, the office shall provide the rulemaking agency with an opportunity to rebut or comment upon that information.

(d) Within 30 working days of the filing of a certificate of compliance, the office shall review the regulation and hearing record and approve or order the repeal of an emergency regulation if it determines that the regulation fails to meet the standards set forth in Section 11349.1, or if it determines that the agency failed to comply with this chapter.

#### **PUBLIC RESOURCES CODES AFFECTING EMERGENCY ACTIONS OF THE BOARD**

**PRC § 4592. Emergency notice; contents.** Notwithstanding any other provisions of this chapter, a registered professional forester may in an emergency, on behalf of a timber owner or operator, file an "emergency notice" with the department that shall allow immediate commencement of timber operations. The emergency notice shall include a declaration, under penalty of perjury, that a bona fide emergency exists which requires immediate harvest activities, and that any applicable timber yield taxes will be paid pursuant to Section 38115 of the Revenue and Taxation Code. Those emergencies shall be defined by the board and may include, but are not limited to, the necessity to harvest to remove fire-killed or damaged timber or insect or disease-infested timber, or to undertake emergency repairs to roads.

#### **Board Voting on Emergency Regulations:**

Final adoption of Emergency Regulations that may be implemented under the authority provided by the Z'Berg Nedjedly Forest Practice Act would require five (5) affirmative votes from Board Members.