

BOARD OF FORESTRY AND FIRE PROTECTION

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February 22, 2017

Rob DiPerna
California Forest and Wildlife Advocate
Environmental Protection Information Center
145 G Street, Suite A
Arcata, CA 95521

Mr. DiPerna,

This is the California State Board of Forestry and Fire Protection's (Board) response to your "Petition for Administrative Rulemaking (Gov. Code §§ 11340.6, 11340.7, 11346.1, 11346.4), California Code of Regulations section 1052, 'Emergency Timber Operations,' and Revisions to Title 14 California Code of Regulations section 895.1, 'Definitions'" (Petition), which the Board received on January 25, 2016. (Gov. Code, § 11340.7, subd. (a).)

Pursuant to Government Code section 11340.6, a petition for the adoption, amendment, or repeal of a regulation, such as the Petition, must state all of the following "clearly and concisely:"

- (a) The substance or nature of the regulation, amendment, or repeal requested;
- (b) The reason for the request; and
- (c) Reference to the authority of the state agency to take the action requested.

After careful review, the Board hereby denies your Petition on two grounds: (1) it does not clearly and concisely state the substance or nature of the action requested; and (2) it does not reference authority that would enable the Board to take the action it requests. (Gov. Code, § 11340.6, subds. (a), (c).)

As to the first ground, the Petition fails to clearly and concisely state the takings language it wants the Board to adopt within Title 14, California Code of Regulation (CCR) section 1052 (Rule 1052).

Instead, the Petition vaguely states that Rule 1052 does not "explicitly prohibit 'take' of threatened or endangered species listed under either the federal Endangered Species Act [ESA], or the California Endangered Species Act ('CESA')." (Petition, p. 6.) It is unclear whether that language is intended to request the Board to amend Rule 1052 to include an express, absolute ban on any "take" during an emergency (i.e., even a take that could be authorized under ESA or CESA during an emergency), or whether the language seeks an express statement requiring compliance with or "under either...[ESA], or [CESA]...." (*Id.*) To add to the confusion, the Petition goes on to refer to (but not clearly advocate for the adoption of) the ESA/CESA compliance language in 14 CCR § 898.2, subdivision (d), before arguing that the "prohibitions

against unauthorized 'take' of listed species found in [ESA and CESA]...are insufficient...." (*Id.*) Without more clarity, the Board is unable to understand the requested action and, therefore, denies the Petition. (Gov. Code, § 11340.6, subds. (a).)

As for the second ground, to the extent the Petition seeks an express, absolute ban on any "take" (i.e., even a take that could be authorized under ESA or CESA during an emergency), it fails to provide authority that would enable the Board to set more stringent take standards than those found in ESA and CESA. Both ESA and CESA allow for emergency consultation and permitting or agreements that may authorize a take during an emergency. (See e.g., 50 C.F.R. § 402.05; Fish & G. Code, § 2081.) The Petition fails to identify authority that would enable the Board to set more stringent take standards than those already found in ESA and CESA. And, thus, the Board denies the Petition on that ground as well. (Gov. Code, § 11340.6, subd. (c).)

While the Petition is denied for the above reasons, the Board offers you an alternative approach that may allow you to pursue the regulatory actions you seek. The Board invites you to prepare all documents necessary to satisfy the notice requirements under Article 5 of the Administrative Procedures Act (commencing with Gov. Code, § 11346) for the Board to consider the issues raised in your Petition, except for the vague proposal regarding a takings amendment to 14 CCR § 1052 discussed above. (Petition p. 6.) Should you decide to pursue this alternative approach, your prepared noticing documents will be promptly brought forth before the Board or one of its standing committees for consideration of commencing a rulemaking effort.

The Board appreciates your continued participation and interest in the policy and regulatory development as they pertain to forestry and fire protection within the State of California.

Best Regards,



Matt Dias
Executive Officer
Board of Forestry and Fire Protection