

Chapter 638: Uniting to Fight Fire with Fire by Addressing California Forest Health in a Time of Catastrophic Wildfire

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Code Sections Affected

Public Resources Code §§ 4497, 71365 (new); §§ 4795 and 4796 (amended).
AB 2551 (Wood); 2018 Stat. Ch. 638.

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I. INTRODUCTION

Last summer, Luana Cobb woke to the sound of chaos outside her home and fled to the street, just in time to watch her home and her small community of mobile homes ignite in flames.¹ A year later, the Camp Fire in Paradise, California burned through forests and homes before it was finally declared 100% contained.² The Camp Fire is now the deadliest fire in California history; in 13 days it burned 153,000 acres, destroyed over 18,000 structures, and claimed at least 85 lives.³ Today, smoke from the devastating 2018 wildfire season casts a toxic hazy cloud on California as it drifts all the way to East Coast.⁴ As communities evacuate their homes, and the state battles another fire season, the California Legislature has reignited with a new drive to address wildfire as a serious land management and public safety concern.⁵

The 2017 and 2018 California wildfires were some of the largest and most destructive on record.⁶ The Thomas fire in Ventura and Santa Barbara counties burned 281,893 acres and was the largest in California's history.⁷ This destruction occurred despite California's investment of between approximately \$200 million and \$500 million in emergency fire suppression over the last five years.⁸

1. Rebecca Ruiz, 'We're Just Existing': What It Was Like to Survive the Deadly Northern California Wildfires, MASHABLE (Oct. 14, 2017), <https://mashable.com/2017/10/14/northern-california-fires-wildfire-survival-stories/#Ydv3Y1IL6qq1> (on file with *The University of the Pacific Law Review*).

2. Elliott C. McLaughlin, *3 More Bodies Found as Camp Fire Declared 100% Contained*, CNN (Nov. 25, 2018), <https://www.cnn.com/2018/11/25/us/california-fires/index.html> (on file with the *University of the Pacific Law Review*).

3. *Id.* (at the time of this publication, the search for missing people is ongoing).

4. Michael McGough, *How Bad Was Thursday's Air Quality? Region's Second-Worst Day Recorded Under Modern Index*, SAC. BEE (Nov. 16, 2018), <https://www.sacbee.com/news/state/california/fires/article221761760.html> (on file with *The University of the Pacific Law Review*); Jessica Campisi & Haley Brink, *Smoke from the California Wildfires Is Spreading 3,000 Miles to New York City*, CNN (Aug. 10, 2018), <https://www.cnn.com/2018/08/10/us/smoke-california-wildfire-reaches-nyc-wxc-trnd/index.html> (on file with *The University of the Pacific Law Review*).

5. *See Senate Passes Legislative Package in Response to Wildfire Danger*, CAL. ST. SENATE (June 1, 2018), <http://sd39.senate.ca.gov/news/20180601-senate-passes-legislative-package-response-wildfire-danger> (on file with *The University of the Pacific Law Review*) (highlighting a number of bills passed during a one-week period to address wildfire danger).

6. Lauren Tierney, *The Grim Scope of 2017's California Wildfire Season Is Now Clear. The Danger's Not Over.*, WASH. POST (Jan. 4, 2018), https://www.washingtonpost.com/graphics/2017/national/california-wildfires-comparison/?utm_term=.b23d4be17303 (on file with *The University of the Pacific Law Review*). The Tubbs fire in Sonoma burned 5,643 structures and was responsible for 22 deaths. CAL. FIRE, TOP 20 MOST DESTRUCTIVE CALIFORNIA WILDFIRES, available at http://www.fire.ca.gov/communications/downloads/fact_sheets/Top20_Destruction.pdf (on file with *The University of the Pacific Law Review*).

7. TOP 20 MOST DESTRUCTIVE CALIFORNIA WILDFIRES, *supra* note 6.

8. CAL. DEP'T OF FORESTRY AND FIRE PROT., EMERGENCY FUND FIRE SUPPRESSION EXPENDITURES, available at http://www.fire.ca.gov/fire_protection/downloads/SuppressionCostsOnepage.pdf (on file with *The*

Chapter 638 addresses this problem by targeting the underlying deficiencies with California's past fire management practices.⁹ Historically, the policy has been to prevent all forest fires.¹⁰ The practice of complete fire suppression, however, is at odds with the natural ecology of forests, which requires fire to maintain forest health.¹¹ Fire suppression has led to densely overgrown forests, with trees that are less resilient to drought, fire, and parasites.¹² The 2017 and 2018 fires demonstrated the devastating loss that can occur when forests are unhealthy.¹³

Chapter 638 attempts to fight fire with fire by implementing a new forest health program and removing some of the barriers preventing landowners from using prescribed burns to maintain forest health.¹⁴ Chapter 638 is part of an important move away from complete forest fire suppression, and towards using prescribed burns and other tools to maintain forest health.¹⁵ Assemblymember Jim Wood introduced Chapter 638 to improve forest health and resiliency, and provide a mechanism for the Department of Forestry and Fire Protection (Cal Fire) to coordinate with landowners who want to participate.¹⁶

II. LEGAL BACKGROUND

In December 2017, Governor Jerry Brown declared states of emergency in Los Angeles, Ventura, Santa Barbara, and San Diego Counties.¹⁷ These proclamations were a result of the wildfires that spread from the forest and

University of the Pacific Law Review).

9. See AB 2551, 2017 Leg., 2017–2018 Sess. (Cal. 2018) (as amended on May 25, 2018, but not enacted) (establishing and implementing a plan “intended to promote forest and wildland health restoration, and resilience, and improve fire prevention and preparedness throughout the state”).

10. LITTLE HOOVER COMM’N, FIRE ON THE MOUNTAIN: RETHINKING FOREST MANAGEMENT IN THE SIERRA NEVADA 12 (2018), available at <https://lhc.ca.gov/sites/lhc.ca.gov/files/Reports/242/Report242.pdf> (on file with *The University of the Pacific Law Review*).

11. *Id.* at 13.

12. *Id.*

13. Debbie Arrington, *Future Forest Health Needs Fire to Fight Fire*, SAC. BEE (Feb. 5, 2018), <http://www.sacbee.com/news/local/article198385099.html> (on file with *The University of the Pacific Law Review*).

14. AB 2551, 2017 Leg., 2017–2018 Sess. (Cal. 2018) (as amended on May 25, 2018, but not enacted).

15. See LITTLE HOOVER COMM’N, *supra* note 10, at 12–16. (advocating for prescribed burns and other tools to maintain forest health).

16. Assemb. Jim Wood, *2017–2018 Legislation*, CAL. ST. ASSEMBLY DEMOCRATIC CAUCUS, <https://a02.asmdc.org/article/2017-2018-legislation> (last visited June 20, 2018) (on file with *The University of the Pacific Law Review*).

17. Press Release, Office of Governor Edmond G. Brown Jr., Governor Brown Declares State of Emergency in Santa Barbara County, Requests Presidential Emergency Declaration for Southern California Fires (Dec. 7, 2017), available at <https://www.gov.ca.gov/2017/12/07/news20090/> (on file with *The University of the Pacific Law Review*); Press Release, Office of Governor Edmond G. Brown Jr., Governor Brown Declares State of Emergency in Los Angeles County Due to Creek and Rye Fires (Dec. 5, 2017), available at <https://www.gov.ca.gov/2017/12/05/news20085/> (on file with *The University of the Pacific Law Review*).

brushlands throughout the state and into the urban environment.¹⁸ The circumstances that caused these wildfires result from a combination of factors including current and past forest management practices, development trends, and climate change.¹⁹ Section A describes the historical context that gave rise to the current regulatory regime.²⁰ Section B discusses the impacts of fire suppression on California forests.²¹ Section C outlines the current regulatory framework surrounding prescribed burns.²²

A. A Brief History of Fire Regulation in California

Fire management has a long and varied history in California.²³ Perceptions of fire have changed from Native Americans viewing it as a useful tool and a way to attract game and manage vegetation, to European settlers perceiving it as a dangerous nuisance.²⁴ The change in perspective has led to a cultural understanding of fire as a dangerous and destructive force.²⁵ This has, in turn, pushed land managers to an ever-increasing trend towards complete suppression of wildfire.²⁶

The approach to fire regulation has changed drastically over the last century.²⁷ Over one hundred years ago, the federal government began funding fire suppression efforts in response to a series of deadly fires that killed more than 1,600 people and burned millions of acres.²⁸ By the 1930s, the policy of aggressive fire suppression was well-established and had drastically reduced the number of acres that burned annually in California.²⁹ However, the practice of complete wildfire suppression has backfired and led to some devastating results, including increasingly intense and destructive fires.³⁰

18. *Id.*

19. LITTLE HOOVER COMM’N, *supra* note 10, at 12, 34, 49.

20. *Infra* Part II.A.

21. *Infra* Part II.B.

22. *Infra* Parts II.B–C.

23. See CAL. DEP’T OF FORESTRY AND FIRE PROT., LEARNING TO LIVE WITH FIRE (1999), available at http://calfire.ca.gov/communications/downloads/fact_sheets/live_w_fire.pdf (on file with *The University of the Pacific Law Review*) (discussing the history of fire management in California).

24. LITTLE HOOVER COMM’N, *supra* note 10, at 12.

25. Reda M. Dennis-Parks, *Healthy Forests Restoration Act—Will It Really Protect Homes and Communities*, 31 *ECOLOGY L. Q.*, no. 3, 2004, at 639, 642 (noting the use of “Smoky the Bear” as a nation-wide tool used to promote the suppression of wildfire).

26. LEARNING TO LIVE WITH FIRE, *supra* note 23.

27. LITTLE HOOVER COMM’N, *supra* note 10.

28. *Id.* at 13 (discussing the Preshtigo Fire in Wisconsin and Michigan, which killed 1,500 people; the Yacolt Fire in Washington and Oregon, which killed 38 people; and the Big Burn in Washington, Idaho, and Montana, which killed 86 people).

29. *Id.* at 13–14.

30. *Id.* at 12.

B. The Impact of Fire Suppression on California Ecology

Recently, the consequences of increased fire suppression have become clear.³¹ Scientists report that wildfire suppression has led to increases in forest land density, tree mortality, and subsequently, extreme wildfires.³² Two recent phenomena have drastically increased the negative effects of fire suppression on forest health: the historic drought of 2012–2016 and the pine beetle epidemic that resulted in over 129 million dead trees.³³ The unprecedented number of dead and weakened trees has left California forests even more vulnerable to wildfire.³⁴

C. The Current State of Fire Regulation and Prescribed Burns

Research into the effects of fire suppression clearly shows a problem with the past practice of restricting all wildfire activity.³⁵ Regulatory agencies have responded with a series of programs that attempt to address the increasing danger of catastrophic wildfire.³⁶ Cal Fire administers both state and federal forestry assistance programs, including the Forest Stewardship Program, the California Forest Improvement Program, the Forest Health Management Program and more.³⁷ Existing law also establishes the Timber Regulation and Forest Restoration Fund which is funded by the timber industry.³⁸

1. Federal Programs and Regulations

The Healthy Forests Restoration Act of 2003 (HFRA) addresses the risk of wildfire on public lands by encouraging active forest management and limiting the previously required environmental analysis for fuel reduction activities.³⁹ Critics of this initiative claim that it allowed the forest service to log and sell trees for lumber to fund vegetation management activities that did not have any guarantee of reducing wildfire risk.⁴⁰ While the HFRA provides for the use of prescribed fire in fuel reduction treatments, this method is generally underutilized.⁴¹

31. Arrington, *supra* note 13.

32. LITTLE HOOVER COMM'N, *supra* note 10, at 32.

33. *Id.* at 14.

34. *Id.* at 12.

35. See *infra* Part II.C (discussing the impacts of fire suppression on California ecology).

36. *Forestry/Landowner Assistance*, CALFIRE, http://www.calfire.ca.gov/resource_mgt/resource_mgt_forestryassistance (last visited Aug. 10, 2018) (on file with *The University of the Pacific Law Review*).

37. *Id.*

38. *Id.*

39. *Healthy Forests Initiative*, SIERRA FOREST LEGACY, https://www.sierraforestlegacy.org/FC_Laws_PolicyRegulations/KFSP_HealthyForests.php (last visited June 20, 2018) (on file with *The University of the Pacific Law Review*).

40. *Id.*

41. ALEXANDER EVANS & GEORGE MCKINLEY, AN EVALUATION OF FUEL REDUCTION PROJECTS AND

Air quality concerns often conflict with the need to re-introduce wildfire onto the California landscape.⁴² The Clean Air Act (CAA) sometimes forbids prescribed burns due to the short-term effects of smoke on air quality.⁴³ The CAA requires the Environmental Protection Agency (EPA) to protect the nation from air pollution.⁴⁴ Smoke from wildfires falls under the CAA's purview because it contains particulate matter that is harmful to human health.⁴⁵ Historically, air quality regulators have promoted wildfire suppression and the heavy restriction of prescribed burns so that the fires do not negatively impact the district's air quality.⁴⁶ Recent years have shown an increased awareness that prescribed fire and managed fire may be beneficial to air quality standards in the long-term, but regulatory agencies are still negotiating this complicated problem, which has both short and long term health consequences for humans and the environment.⁴⁷

Additionally, the EPA has restricted prescribed burns in areas where they may affect endangered species.⁴⁸ Litigation arising from concerns about agencies failing to conform vegetation treatment to environmental regulation requirements appears more prevalent in projects with commercial logging interests or projects that lack community involvement in the decision-making processes.⁴⁹

The Good Neighbor Authority (GNA) is also part of the federal framework that burn managers will need to consider.⁵⁰ This act was authorized in the federal Agricultural Act of 2014.⁵¹ The GNA permits state agencies to perform certain activities, including watershed restoration and forest management, on U.S. Forest Service Land.⁵²

2. State Regulations and California's Unique Position in the Wildfire Scene

The state and federal regulatory frameworks mirror each other in many

THE HEALTHY FOREST INITIATIVE 26 (2007), available at http://www.forestguild.org/publications/research/2007/Evaluating_HFI.pdf (on file with *The University of the Pacific Law Review*).

42. LITTLE HOOVER COMM'N, *supra* note 10, at 42.

43. Eric Bieber, *Air Quality and Wildfire*, LEGAL PLANET (Oct. 16, 2016), <http://legal-planet.org/2015/10/16/air-quality-and-wildfire/> (on file with *The University of the Pacific Law Review*).

44. Public Health and Welfare Act, 42 U.S.C.A. § 7401 (West 2018).

45. D.W. Schweizer & R. Cisneros, *Forest Fire Policy: Change Conventional Thinking of Smoke Management to Prioritize Long-Term Air Quality and Public Health*, 10 AIR QUALITY, ATMOSPHERE & HEALTH 33, 34 (2017).

46. *Id.*

47. See LITTLE HOOVER COMM'N, *supra* note 10, at 42 (highlighting air quality concerns associated with the smoke from prescribed burning).

48. Bieber, *supra* note 43.

49. See EVANS & MCKINLEY, *supra* note 41, at 4 (noting that projects involving a commercial logging interest are more likely to be appealed than other projects).

50. *Good Neighbor Authority*, U.S. FOREST SERV., <https://www.fs.fed.us/managing-land/farm-bill/gna> (last visited Aug. 6, 2018) (on file with *The University of the Pacific Law Review*).

51. *Id.*

52. *Id.*

ways.⁵³ The California Air Resources Board Regional Air Quality Management District has the difficult task of protecting citizens from California's notoriously polluted air.⁵⁴ This often "[pits] the air quality management district against fire managers" and can lead to complications in permitting prescribed burns.⁵⁵ Projects that receive funding from Cal Fire are required to comply with the California Environmental Quality Act (CEQA).⁵⁶ The destructive effects of fire on endangered species habitat has put CEQA and the California Endangered Species Act in conflict with permitting prescribed burns.⁵⁷

a. Existing Programs for Private Landowners

Private landowners in California currently have access to several state programs that offer assistance with projects meant to reduce fuel load and therefore help reduce the risk of catastrophic wildfires.⁵⁸

In the 1940s, a Cal Fire program focused on rangeland improvement actively burned over 141,000 acres a year.⁵⁹ The official Cal Fire Vegetation Management Program (VMP) was initiated in the 1980s and allowed Cal Fire to contract with landowners to conduct prescribed burns.⁶⁰ This program facilitated the treatment of approximately 30,000 acres a year from the 1980s to the mid-1990s.⁶¹ Since 1999, the number of acres burned declined to approximately 13,000.⁶² The California Forest Improvement Program (CFIP) is another cost sharing program funded through the California Forest Resources Improvement Fund (FRIF), which allows private landowners to work with a Registered Forest Professional to conduct fuel reduction activities on their land.⁶³ Cal Fire pays up to ninety

53. See *About: California Air Resources Board*, ST. OF CAL., available at <https://ww2.arb.ca.gov/about> (last visited Aug. 8, 2018) (on file with *The University of the Pacific Law Review*) (describing California's air quality requirements); ALLEN S. ROBERTSON & DANIEL G. FOSTER, PROCEDURES FOR COMPLIANCE WITH THE CALIFORNIA ENVIRONMENTAL QUALITY ACT ON CAL FIRE PROJECTS (2010), available at http://www.fire.ca.gov/resource_mgt/archaeology/downloads/6.pdf (on file with *The University of the Pacific Law Review*) (indicating the need to comply with CEQA when conducting Cal Fire projects).

54. *About: California Air Resources Board*, *supra* note 53; see also CAL. CODE REGS. tit. 17, § 80160 (West 2018) (demonstrating the requirements to comply with district smoke management programs).

55. Klamathmedia, *Catching Fire: Prescribed Burning in Northern California*, YOUTUBE (Nov. 30, 2012), <https://www.youtube.com/watch?v=LWriDpfZnXQ> (on file with *The University of the Pacific Law Review*).

56. ROBERTSON & FOSTER, *supra* note 53.

57. LITTLE HOOVER COMM'N, *supra* note 10, at 26, 37.

58. *Forestry/Landowner Assistance*, *supra* note 36.

59. *Vegetation Management Program*, CALFIRE, http://calfire.ca.gov/resource_mgt/resource_mgt_vegetation (last visited Aug. 9, 2018) (on file with *The University of the Pacific Law Review*).

60. CAL. DEP'T OF FORESTRY AND FIRE PROT., VEGETATION MANAGEMENT PROGRAM (2005), available at http://calfire.ca.gov/resource_mgt/downloads/VMP2.pdf (on file with *The University of the Pacific Law Review*).

61. *Id.*

62. *Id.*

63. CAL. DEP'T OF FORESTRY AND FIRE PROT., CALIFORNIA FOREST IMPROVEMENT PROGRAM (CFIP): USER'S GUIDE (2018), available at https://www.fire.ca.gov/resource_mgt/downloads/CFIP/CFIP%20User-

percent of the costs of these projects.⁶⁴

3. Liability for Potential Damages from Prescribed Burns

While prescribed fires rarely “escape,” there have been instances when prescribed burns get out of control.⁶⁵ Uncertainty around the liability for those escaped fires is one of the reasons landowners are hesitant to participate in prescribed burns.⁶⁶ In California, liability differs depending on whether the prescribed burn is conducted through a Cal Fire directed program like the VMPs, or through an independent permit.⁶⁷ The California Public Resources Code states that “[t]he issuance of a permit by the department does not relieve the permit holder from the duty of exercising due diligence to avoid damage to property of others.”⁶⁸

Several other states have liability standards linked to training programs that ensure when land managers burn responsibly, they do not have to fear liability for damages resulting from those burns.⁶⁹ In mid-summer 2012, 1.6 million acres were burned in the United States; 1.3 million of these acres were in the Southeast while only 42,000 were in California.⁷⁰ This is partially because states in the northeast provide liability insurance to burn managers who have completed certain training requirements.⁷¹

Prescribed burns that are conducted through the Cal Fire’s VMP address this problem by assigning liability for escaped fires to the state.⁷² There are limitations to the VMP program though, and liability becomes less clear for non-VMP burns.⁷³ While there are many other factors involved in the decision to burn, fear of liability for damage may be a motivating factor for private landowners.⁷⁴

While these attempts to address the need for more effective forest management programs are starting to encourage prescribed burns, significant

s%20Guide.pdf (on file with *The University of the Pacific Law Review*).

64. *Id.*

65. LITTLE HOOVER COMM’N, *supra* note 10, at 39.

66. Carissa L. Wonkka, William E. Rogers & Ura P. Krueter, *Legal Barriers to Effective Ecosystem Management: Exploring Linkages Between Liability, Regulations, and Prescribed Fire*, 25 *ECOLOGICAL APPLICATIONS*, no. 8, Dec. 2015, at 2383.

67. LITTLE HOOVER COMM’N, *supra* note 10, at 38.

68. CAL. PUB. RES. CODE § 4494 (West 2018).

69. Wonkka, Rogers, & Krueter, *supra* note 66, at 2383, 2391.

70. Klamathmedia, *supra* note 55.

71. *Id.*

72. CAL. DEP’T OF FORESTRY AND FIRE PROT., *VEGETATION MANAGEMENT PROGRAM* (2004), available at http://www.fire.ca.gov/resource_mgt/downloads/VMP2004.pdf (on file with *The University of the Pacific Law Review*).

73. LITTLE HOOVER COMM’N, *supra* note 10, at 38.

74. Wonkka, Rogers, & Krueter, *supra* note 66, at 2383.

barriers exist to the use of this forest management technique.⁷⁵ These barriers make it difficult to utilize on a large enough scale to effectively begin to restore the natural fire regime.⁷⁶

III. CHAPTER 638

Chapter 638 authorizes Cal Fire to enter into agreements to conduct prescribed burns cooperatively with property owners if the burn serves the public interest and is beneficial to the state.⁷⁷ Chapter 638 describes the requirements for a project agreement, and lists the purposes that may qualify as “for the public interest and beneficial to the state.”⁷⁸ Chapter 638 states that the Legislature intends to achieve state “climate, water, public safety, and wildlife goals” through coordination of policies, actions, and investments; increase prescribed burning; and create a year-round vegetation management and fire prevention program.⁷⁹

Chapter 638 requires Cal Fire to collaborate with the Department of Corrections and Rehabilitation to implement projects to the extent feasible.⁸⁰ Chapter 638 also states that the director of Cal Fire may provide funds for vegetation management in advance of a project, so long as the landowner agrees to do the “forest resource improvement work” and that any uncompleted work will result in a lien on the property.⁸¹ The inclusion of these advance funds, or loans, is reflected in the amendments of sections 4629.5 and 4796 to include the word “loan” in addition to “grant.”⁸²

The final section of Chapter 63 adds part 4.7, Forest and Watershed Restoration, to the Environmental Protection Division of the Public Resources Code.⁸³ This section allows the Natural Resources Agency and the California Environmental Protection Agency to develop a pilot project that addresses “forest and watershed restoration investments” in the Trinity, Oroville, and Shasta Reservoir watersheds.⁸⁴

The final round of amendments eliminated a requirement for Cal Fire to “establish, implement, and administer the Forest and Wildland Health

75. See *infra* Part IV.B (discussing the barriers of use of prescribed burns as a forest management technique).

76. Bieber, *supra* note 43; CAL. PUB. RES. CODE §§ 4475–4494 (West 2018).

77. CAL. PUB. RES. CODE § 4497 (enacted by Chapter 638).

78. *Id.* (requiring that the agreement list all participants, describe the joint prescribed burn plan, display the project costs, and summarize the benefits to be received by each participant).

79. 2018 Cal. Stat. ch. 638, § 1.

80. *Id.*

81. CAL. PUB. RES. CODE § 4795(a)–(e) (amended by Chapter 638).

82. *Id.* §§ 4629.5, 4796.

83. *Id.* at § 71365 (enacted by Chapter 638).

84. *Id.*

Improvement and Fire Prevention Program.”⁸⁵ Prior versions of the bill required Cal Fire to take action to identify funding for projects, analyze statewide fire suppression goals, evaluate the use of managed burns, and develop training programs that use prescribed burns as both a training and forest management tool.⁸⁶ It also required Cal Fire to consider the potential spread of nonnative plants and implement “projects to restore forest health and resilience.”⁸⁷ These projects include climate-related goals as well as general forest health goals.⁸⁸ Funding for these projects was going to be allocated to vegetation management, conservation easements, “[c]ommunity wildfire protection efforts,” and public education and outreach.⁸⁹

IV. ANALYSIS

Prolonged drought and poor forest management have led to catastrophic wildfire events and a prolonged wildfire season.⁹⁰ This costs the state millions of dollars and puts the health of the environment and human lives at risk.⁹¹ Section A discusses Chapter 638 and its place in the movement towards increasing the use of prescribed burns as a forest management tool.⁹² Section B analyzes the efforts to reduce the barriers to prescribed burns.⁹³ Section C evaluates the program for forest and wildland health that was amended out of the bill.⁹⁴ Finally, Section D analyzes the efforts to coordinate agencies and why these efforts may not be enough to develop the aggressive forest management regime needed to protect human life and forest resources.⁹⁵

A. Addressing Long-Term Forest Management Goals in a Time of Crisis

The 2016–2017 fire season was alarming for the Legislature as fire crews battled several wildfires that grew out of control and entered urban centers in Santa Rosa.⁹⁶ The 2018 fires have been even more devastating with at least 84 known deaths, and many more people still unaccounted for.⁹⁷ Scientific evidence shows that California forests are especially vulnerable to widespread catastrophic

85. AB 2551, 2017 Leg., 2017–2018 Sess. (Cal. 2018) (as amended on July 3, 2018, but not enacted).

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *See supra* Part II.B (discussing the impact of the drought and previous forest management decisions).

91. *See supra* Part I (discussing the impact of the Santa Rosa fires in fall of 2017).

92. *Infra* Part IV.A.

93. *Infra* Part IV.B.

94. *Infra* Part IV.C.

95. *Infra* Part IV.D.

96. Tierney, *supra* note 6.

97. McLaughlin, *supra* note 2.

wildfire.⁹⁸ This is partially due to the suppression of natural wildfire, as well as a regulatory system that heavily restricts the use of managed fire.⁹⁹ Chapter 638 addresses the problems with forest management by reducing the barriers to using prescribed burns on private land and by encouraging the NRA and the CEPA to create a plan to direct investments for forest and watershed improvement in three watersheds.¹⁰⁰ By directing funding towards forest health and reducing barriers to prescribed burns, Chapter 638 takes a step towards remedying the damage caused by several decades of fire suppression.¹⁰¹ It is possible, however, that these steps are too late.¹⁰² As fires burn across California, destroying buildings and taking lives, it has become clear that a more comprehensive forest fire strategy is needed.¹⁰³

B. Reducing the Barriers to the Use of Prescribed Burns on Private Land

“Private landowners own approximately 39 percent of California’s forests.”¹⁰⁴ Previously, landowners who wanted to manage their property through prescribed burns were required to apply to Cal Fire through the VMP or CFIP.¹⁰⁵ It is unclear exactly how Chapter 638 will affect the existing vegetation management programs.¹⁰⁶ Subsection 1 discusses some of the changes to the existing laws.¹⁰⁷ Subsection 2 analyzes the continuing problem of how to assign liability for prescribed burns.¹⁰⁸

1. Burning with Cooperators

Chapter 638 allows the director of Cal Fire to “enter into an agreement . . . to conduct joint prescribed burning operations.”¹⁰⁹ Previously, landowners could apply for a variety of cost-sharing programs that support landowners’ efforts to reduce the risk of catastrophic fire on their properties.¹¹⁰ These programs include

98. LITTLE HOOVER COMM’N, *supra* note 10, at 14.

99. *Id.* at 42.

100. CAL. PUB. RES. CODE §§ 4497, 71365 (amended by Chapter 638).

101. Arrington, *supra* note 13.

102. See LITTLE HOOVER COMM’N, *supra* note 10, at 18 (noting the convergence of bad luck and bad policy that created the current wildfire crisis).

103. Arrington, *supra* note 13.

104. LITTLE HOOVER COMM’N, *supra* note 10, at 22.

105. See *supra* Part II.C.2 (describing the programs currently available to landowners in California); *Vegetation Management Program*, CALFIRE http://calfire.ca.gov/resource_mgt/resource_mgt_vegetation (last visited June 20, 2018) (on file with *The University of the Pacific Law Review*).

106. See CAL. PUB. RES. CODE § 4497 (enacted by Chapter 638) (setting out the requirements for burning with cooperators).

107. *Infra* Part IV.B.1.

108. *Infra* Part IV.B.2.

109. CAL. PUB. RES. CODE § 4497 (enacted by Chapter 638).

110. See *supra* Part II.C (highlighting forest management programs available to private landowners).

the VMP and CFIP programs, which provided various methods for landowners to work with Cal Fire to improve forest health and reduce the likelihood of catastrophic fire.¹¹¹

Chapter 638 leaves the existing programs in place and gives broader discretion to Cal Fire to work cooperatively with landowners.¹¹² It eliminates the previous requirement that loans made to “smaller nonindustrial” landowners conform to specific standards, and instead requires that “the director . . . establish reasonable terms” for the joint burning operation.¹¹³ Reducing the strict requirements on the types of funding that Cal Fire can utilize encourages the implementation of agreements that “serve the public interest and are beneficial to the state.”¹¹⁴

Another important change implemented by Chapter 638 is the ability for Cal Fire to provide funds to landowners before they start working on a forest management project.¹¹⁵ One of the barriers that prevented small forest landowners from participating in programs like CFIP was the requirement that they rely on reimbursement for the work they completed.¹¹⁶ Chapter 638 addresses this problem by allowing Cal Fire to provide funds in advance, provided the landowner agree to certain terms and conditions regarding repayment.¹¹⁷

Chapter 638 allows Cal Fire to determine the best way to enter joint burn agreements with landowners.¹¹⁸ Chapter 638 also broadens the scope of those who qualify as potential burn cooperators to “the owner or any other person who has legal control of any property” including agencies with regulatory authority over wildland property and nonprofit organizations.¹¹⁹ By using broad language to dictate who Cal Fire may conduct these joint burns with and focusing on benefits to the state, Chapter 638 leaves room for cooperation with most landowners who are willing to participate.¹²⁰

111. VEGETATION MANAGEMENT PROGRAM, *supra* note 60.

112. CAL. PUB. RES. CODE § 4796 (amended by Chapter 638).

113. *Id.*

114. CAL. PUB. RES. CODE § 4497 (enacted by Chapter 638).

115. CAL. PUB. RES. CODE § 4495(b)(1) (amended by Chapter 638).

116. CAL. DEP’T OF FORESTRY AND FIRE PROT., CALIFORNIA FOREST IMPROVEMENT PROGRAM (CFIP): USER’S GUIDE (2018), available at https://www.fire.ca.gov/resource_mgt/downloads/CFIP/CFIP%20User-s%20Guide.pdf (on file with *The University of the Pacific Law Review*).

117. CAL. PUB. RES. CODE §§ 4495(b)(1)–(4) (amended by Chapter 638) (requiring a lien to be placed on the property and dictating that, in the case of a default, the funds from a sale should be deposited into a specified fund).

118. CAL. PUB. RES. CODE § 4497 (enacted by Chapter 638) (allowing Cal Fire to enter into an agreement “to conduct joint prescribed burning operations that serve the public interest and are beneficial to the state”).

119. *Id.*

120. *Id.*

2. Liability for Prescribed Burns

While the scientific community has accepted that prescribed fire is an essential management tool in the forests of the Western states, one issue with the current regulatory scheme is the public perception of fire and a fear of prescribed burns causing more harm than good.¹²¹ These are legitimate concerns as prescribed burns do sometimes escape the control of the prescribed fire team.¹²² It is not clear from the text of Chapter 638 whether the state will assume liability for escaped fires conducted under the joint prescribed burning operations.¹²³ Previous Cal Fire programs required the state to assume management and liability for escaped burns and it is likely that these joint burn operations will follow that trend; however, the level of liability should be explicit in the agreement.¹²⁴

As the population in wilderness areas grows, that risk of escaped fires becomes more relevant, and concerns about liability for those fires will be important to address.¹²⁵ There will need to be significant public education and coordination between agencies to encourage voluntary participation in the Chapter 638 joint prescribed burn operations.¹²⁶

C. The Forest and Wildland Health Improvement and Fire Prevention Program

Prior to the final amendments, Chapter 638 contained a section that created a new program, the Forest and Wildland Health Improvement and Fire Prevention Program (Program), which set out some ambitious goals for Cal Fire.¹²⁷ Previous attempts to implement forest management programs have had various levels of success, but lack of funding, liability concerns, lack of resources, and complex environmental and permitting restrictions limited the programs' efficacy.¹²⁸ The Program would have explicitly required Cal Fire to invest in certain forest health initiatives, including training programs for prescribed burns.¹²⁹

The Healthy Forest Act of 2003 (HFA) demonstrated that some programs implemented to restore forests can actually have negative consequences.¹³⁰ The lack of direct funding and streamlined environmental review process combined

121. Rachael Salcido, *The Tension Between Transparency and Public Appeasement in the Formulation of Wildfire Management Strategies and the Use of Wildfire as a Restoration Tool*, 1 TEX. WESSLEYAN. J. REAL PROP. 69, 75 (2012).

122. LITTLE HOOVER COMM'N, *supra* note 10, at 39.

123. CAL. PUB. RES. CODE § 4497 (enacted by Chapter 638).

124. *Id.*

125. Salcido, *supra* note 121, at 69, 81.

126. LITTLE HOOVER COMM'N, *supra* note 10, at 56.

127. AB 2551, 2017 Leg., 2017–2018 Sess. (Cal. 2018) (as amended on July 3, 2018, but not enacted).

128. See *supra* Part II (detailing issues with existing federal and state programs); LITTLE HOOVER COMM'N, *supra* note 10, at 37.

129. AB 2551, 2017 Leg., 2017–2018 Sess. (Cal. 2018) (as amended on July 3, 2018, but not enacted).

130. *Healthy Forests Initiative*, *supra* note 39.

with the “logging loophole” meant that in some instances, the HFA reduced the forest wildfire resiliency.¹³¹ The Program’s language focused on the evaluation of existing programs and the development of new methods to increase forest resilience and advance the state’s goals.¹³² These goals included those that “rely on resilient natural landscapes, . . . public safety, healthy watersheds, carbon-rich forests, . . . and habitat conditions that facilitate wildlife adaptation.”¹³³

Even though these goals were not included in the final version of the bill, it is interesting to see how they laid out the steps needed to facilitate the state’s transition towards a healthier forest.¹³⁴ One issue with this section was that it did not identify where the funding for the projects needed to achieve these goals would come from, apart from that provided by the Timber Regulation and Forest Restoration Fund.¹³⁵ By imposing new obligations on Cal Fire without an identified funding source to support those activities, this section may have led to only small-scale success rather than the large-scale policy shift that is needed to correct a century of poor forest management.¹³⁶

The Program would have provided a series of steps for Cal Fire that were “intended to promote forest and wildland health, restoration, and resilience and improve fire outcomes, prevention, and preparedness throughout the state.”¹³⁷ Cal Fire would have needed to “[i]dentify funding sources that can be used to cover the cost of program activities.”¹³⁸ With fire suppression and prevention costs rising, funding would have been a critical barrier to the successful implementation of the Program.¹³⁹

D. Agency Coordination and Environmental Regulations

Chapter 638 allows the Natural Resources Agency and the California Environmental Protection Agency to work together to propose a pilot project to the California legislature.¹⁴⁰ This provision points to an understanding that without interagency cooperation, the efforts to implement forest health objectives, especially prescribed burns, cannot be successful.¹⁴¹ Without knowing the details of these project proposals, it is difficult to know whether the efforts to

131. Dennis-Parks, *supra* note 25, at 639, 649.

132. AB 2551, 2017 Leg., 2017–2018 Sess. (Cal. 2018) (as amended on June 19, 2018, but not enacted).

133. *Id.*

134. *See id.* (describing the objectives of the Forest and Wildland Health Improvement and Fire Prevention Program).

135. *Id.*

136. LITTLE HOOVER COMM’N, *supra* note 10, at 61.

137. AB 2551, 2017 Leg., 2017–2018 Sess. (Cal. 2018) (as amended on June 19, 2018, but not enacted).

138. *Id.*

139. EMERGENCY FUND FIRE SUPPRESSION EXPENDITURES (2018), *supra* note 8.

140. CAL. PUB. RES. CODE § 71365(a)–(b) (enacted by Chapter 638).

141. LITTLE HOOVER COMM’N, *supra* note 10, at 8.

overcome the conflicting agency objectives will be successful.¹⁴² Previous experience with forest health programs seems to point to a lack of widespread participation when the barriers to funding include navigating the environmental permitting system.¹⁴³ However, eliminating or aggressively streamlining environmental regulations to facilitate prescribed burns could set a dangerous precedent and Chapter 638 is right to avoid that path.¹⁴⁴

V. CONCLUSION

Chapter 638 demonstrates a strong effort by the Legislature to move towards a more comprehensive forest management system.¹⁴⁵ Its emphasis on cooperation between landowners and agencies is critical to the effective implementation of the recommended forest management strategies.¹⁴⁶ Chapter 638 emphasizes the value of healthy forests and prescribed fire as a critical management tool.¹⁴⁷ The emphasis on interagency coordination will be a useful step towards creating a workable framework for Cal Fire and private landowners to establish the joint burning agreements.¹⁴⁸

Chapter 638 takes an important step towards a forest management program that focuses on science-based ecosystem goals.¹⁴⁹ However, it fails to account for some of the reasons that landowners have not conducted prescribed burns in the past.¹⁵⁰ Until those issues are resolved, Chapter 638 will be another forest management program that looks good on paper, but does not lead to the type of forest-wide changes that are needed to prevent another hundred years of fire suppression and catastrophic wildfires.¹⁵¹

142. *Id.* at 35.

143. Andrew C. Revkin, *Will California Ever Let Sierra Nevada Forests Burn?*, N.Y. TIMES BLOG (Dec. 4, 2016), <https://dotearth.blogs.nytimes.com/2016/12/04/will-california-ever-let-sierra-nevada-forests-burn/> (on file with *The University of the Pacific Law Review*).

144. *Id.*

145. 2018 Cal. Stat. ch. 638, § 1(a)(1)–(5).

146. Arrington, *supra* note 13.

147. 2018 Cal. Stat. ch. 638, § 1(a)(1)–(5).

148. CAL. PUB. RES. CODE § 4796 (amended by Chapter 638).

149. *Id.*

150. Revkin, *supra* note 143.

151. *Id.*

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