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March 31, 2021

Clerk of the Board
Board of Forestry and Fire Protection
P.O. Box 944246
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E-mail: publiccomments@bof.ca.gov

Re: California Municipal Utilities Association's Comments on Board of Forestry and Fire Protection Draft Utility and Public Agency Right-of-Way Exemption Rule Plead

Clerk of the Board,

The California Municipal Utilities Association (CMUA) appreciates the opportunity to submit these comments on the Board of Forestry and Fire Protection's (CalFire or Board) Draft Utility and Public Agency Right-of-Way Exemption Rule Plead, dated March 2, 2021 (Draft Rule).

CMUA is a statewide organization of local public agencies in California that provide electricity and water service to California consumers. CMUA membership includes publicly-owned electric utilities (POUs) that operate electric distribution and transmission systems. In total, CMUA members provide approximately 25 percent of the electric load in California. California's POUs are committed to, and have a strong track record of, providing safe, reliable, affordable and sustainable electric service.

In June, 2020, the Board's Joint Committee began to revise its regulations that provide an exemption from portions of the Z'berg-Nejedly Forest Practice Act of 1973¹ enabling the cutting or removal of trees for the purpose of constructing or maintaining a

¹ Public Resources Code (PRC) § 4584(a).

right-of-way for utility lines.² On October 20, 2020, CalFire hosted a workshop focused on utility or public agency right-of-way exemption at which CalFire indicated that the goal of these revisions is to provide greater clarity in the regulations by establishing standardized regulatory methods for disclosure of these specific exempt operations.³ These proposed changes are reflected in the Draft Rule.

CMUA appreciates the Board’s intent to provide clear regulations. However, we remain concerned that, as written, the Draft Rule could hinder a POU’s ability to maintain its distribution or transmission systems to promote safety and reduce the likelihood of wildfire. In order to address these concerns, CMUA provides the following comments on the proposed changes:

- The proposed definition of Danger Trees should recognize the need to prune or remove trees that present a risk to utility infrastructure.
- Utilities must be able to immediately remove trees or other vegetation that is a risk to utility infrastructure.
- Maintaining existing rights-of-way does not constitute commercial timber activities.
- CalFire should consider defining a de minimis value if it continues to characterize infrastructure maintenance as a commercial timber operation.
- California’s POUs consider community service and community outreach to be fundamental responsibilities in running a community owned utility.

Utility Right-of-Way Maintenance and Danger Trees

The current regulations provide that “Danger Tree means any tree located on or adjacent to a utility right of way that could damage utility facilities should it fall where (1) the tree leans toward the right of way, or (2) the tree is defective because of any cause,.,.”⁴

The Draft Rule revises this definition to stipulate that a Danger Tree must be classified as

² See 14 California Code Regulations (CCR) §§ 1104.1 (b) and (c).

³ Board Update Report: Utility and Public Agency Right-Of-Way Exemption Workshop, October 20, 2020. (<https://bof.fire.ca.gov/media/10202/october-2020-workshop-update-ada.pdf>)

⁴ 14 CCR § 895.1.

such by a Registered Professional Forester (RPF) or their Supervised Designee, or by a professionally certified arborist (PCA). The Draft Rule proposes to require the RPF or PCA certify that the tree satisfies both of the following criteria:

(a) The tree has one or more structural defects that make the tree susceptible to a risk of failure and that warrants hazard abatement, as deemed appropriate by the RPF or their Supervised Designee or arborist. Structural defects of concern include any observable tree condition that, in the RPF's or Supervised Designee's or arborist's professional estimation, presents an unreasonable risk of failure in the near future.

(b) Tree failure due to the structural defect, may cause contact with, damage to, or disruption of service provided by, the facility or infrastructure located in the utility or public agency right-of-way.⁵

This proposed modification presumes that the risk that vegetation may impose on utility infrastructure arises solely due to defects or the failing health of a tree. As written, the Draft Rule fails to recognize the potential danger that otherwise healthy trees, if left uncontrolled, could impose on the safety of utility infrastructure. Further, by failing to acknowledge the role of Wildfire Mitigation Plans (WMPs) that are developed by the POU, the Draft Rule ignores valuable risk assessment and planning that has been performed in the development of the WMPs.⁶ To mitigate the added risk that could result from application of this language, CMUA proposes the following amendments to the Draft Rule:⁷

§ 895.1. Definitions

~~Danger Tree means any tree located on or adjacent to a utility right-of-way or facility that could damage utility facilities should it fall where (1) the tree leans toward the right-of-way, or (2) the tree is defective because of any cause, such as: heart or root rot, shallow roots, excavation, bad crotch, dead or with dead top, deformity, cracks or splits, or any other reason that could result in the tree or main lateral of the tree falling. See chapter VII, Hazardous Tree Identification, Powerline Fire Prevention Field Guide 1977,~~

⁵ *Ibid.*

⁶ WMPs are developed pursuant to Public Utilities Code (PUC) § 8386. WMPs developed by POUs are subject to evaluation and approval by local Governing Boards or City Councils. WMPs are also evaluated by the California Wildfire Safety Advisory Board (WSAB).

⁷ Throughout these comments, CMUA's suggested changes are in **bold**, with removed text marked with ~~double strikethrough~~ and added text marked with a double underline.

*A joint Publication of the California Department of Forestry, U.S. Forest Service, and U.S. Bureau of Land Management. right-of-way for a utility or public agency facility or infrastructure, if the tree has been identified by an RPF **or their Supervised Designee**, or by a professionally certified arborist using a ~~generally recognized risk assessment tool~~ or ~~professional guidelines which have been approved, certified, or otherwise recognized by a public agency or professional organization, such as those outlined in the Power Line Fire Prevention Field Guide, CAL FIRE/OSFM (2020) and the Hazard Tree Guidelines For Forest Service Facilities and Roads in the Pacific Southwest Region, USDA, Forest Service (2012), but excluding Wildfire Mitigation Plans as described by Public Utilities Code § 8386, as satisfying one or both of the following criteria:~~*

- (a) The tree has one or more structural defects that make the tree susceptible to a risk of failure **prior to the next regularly scheduled inspection prior to the next regularly scheduled inspection** and that warrants hazard abatement, as deemed appropriate by the RPF **or their Supervised Designee**, or arborist. Structural defects of concern include any observable tree condition that, in the RPF's, **their Supervised Designee's**, or arborist's professional estimation, presents an unreasonable risk of failure in the near future.*
- (b) Due to current proximity to utility infrastructure, or proximity which can be **reasonably anticipated within three years, or ~~Tree tree~~ failure due to the structural defect may cause contact with, damage to, or disruption of service provided by, the facility or infrastructure located in the utility or public agency right-of-way.**⁸*

CMUA also appreciates the change in the Draft Rule to authorize a Supervised Designee to assess the potential risk or health of a tree. Danger Trees are typically identified during regularly scheduled utility maintenance and evaluation being performed by utility maintenance professionals who are trained and experienced in identifying risks to line safety, including Danger Trees, that either due to common local wind patterns, or disease, rot, or other failure could pose a hazard to the utility infrastructure. While most of California's POUs employ CPFs and arborists, a CPF or PCA is not generally a member of every professional crew dispatched to evaluate and maintain the utility's transmission and distribution infrastructure. Nonetheless, these crewmembers are keenly aware of utility infrastructure, the local terrain, wind, and water patterns. They generally have extensive

⁸ Source: Draft Rule. Language with a single strikethrough or single underline reflects the changes CalFire proposed in October 2020. Language marked in red ink reflects CalFire's most recent changes to the Draft Rule.

experience working in forested areas and can effectively identify and address the risks imposed by Danger Trees. CMUA requests that CalFire clarify that these crews, working under supervision of the local community-owned utility, ultimately under the authority of an elected or appointed Governing Board, and typically working in collaboration with an RPF or PCA, shall be considered Supervised Designees.

Utilities Must Be Afforded an Opportunity to Immediately Remove Danger Trees

The Draft Rule would establish a process in which a PCA or RPF would identify a Danger Tree and submit a request to the Board for exemption in order for the Danger Tree to be removed. In addition to the delay imposed by requiring that a PCA or RPF make such a determination, requiring Board approval could impose a dangerous delay in safely maintaining utility infrastructure. In 2020, California experienced unprecedented wildfires. The state's POUs continue to be committed to maintaining their infrastructure to protect against all risks. The Draft Rule would impose unnecessary risks of delays to this critical maintenance of utility infrastructure. California cannot afford to impose rules that increase the risk of future wildfires. In addition to the added safety risks that would result from the increased administrative requirements, the Draft Rule would add to customer costs. CMUA also remains concerned that CalFire would need to develop and publicize a staffing plan that would ensure timely approval of such requests.

CMUA encourages the Board to introduce a mechanism similar to those allowed by the United States Forest Service (USFS) and the Bureau of Land Management (BLM) in which a utility is permitted to remove Danger Trees that the utility determines to be a hazard. Because of the immediate nature of such risks, both the USFS and BLM authorize such removal so long as the utility informs the agencies within 24 hours of tree removal. In

these circumstances, the arborist does not need to be a CPF. CMUA similarly suggests that regulation be revised so that this notification can be made by a Supervised Designee. This process would allow the utility that is responsible for maintaining the safe operation of its infrastructure to identify and act on any risks imposed in order to decrease risk of infrastructure damage or wildfire.

Maintaining a POU's Right-of-Way is Not a Commercial Timber Activity

The Z'berg-Nejedly Forest Practice Act of 1973 defines Commercial Purposes as follows:

*“Commercial purposes” includes (A) the cutting or removal of trees that are processed into logs, lumber, or other wood products and offered for sale, barter, exchange, or trade, or (B) the cutting or removal of trees or other forest products during the **conversion** of timberlands to land uses other than the growing of timber that are subject to Section 4621, including, but not limited to, residential or commercial developments, production of other agricultural crops, recreational developments, ski developments, water development projects, and transportation projects.”⁹*

The Draft Rule proposes to expand the statutory definition to characterize maintenance of utility rights-of-way as timber operations asserting a “reasonable nexus to a commercial activity”.¹⁰ However, maintaining existing utility rights-of-way is not a **conversion** of existing timberland. Defining this as a commercial activity, justified by the assertion that there is a reasonable nexus to a commercial activity, ignores the express language of the statute as well as its clear and reasonable intent. California’s POU’s exist as a result of their local communities’ interest in having a local, community owned utility. California’s POU’s do not operate commercial timber activities. In order to remain consistent with statute, and

⁹ PRC § 4527(a)(2). **Emphasis added.**

¹⁰ Draft Rule, page 3, lines 5 through 11.

recognize the nature of utility system maintenance, CMUA suggests the following change to the Draft Rule:

Timber Operations see PRC § 4527, provided that “commercial purposes,” as inclusively described in that section, also includes the construction ~~or maintenance~~ of a right-of-way, as described in 14 CCR § 1114, ~~insofar as the cutting or removal of trees for those purposes has a reasonable nexus to a commercial activity, such as providing safe and reliable utility service or ensuring safe travel for commercial traffic along transportation corridors.~~¹¹

CalFire Should Identify a De Minimis Volume When Considering Regulatory Changes

As indicated herein, CMUA believes that the Z’berg-Nejedly Forest Practice Act of 1973 clearly defines timberland **conversion** as a commercial activity as opposed to maintaining **existing** rights-of-way.¹² However, if CalFire chooses to pursue expanding the definition as provided in the Draft Rule, it should recognize a de minimis level of tree removal that would not be classified as a commercial timber activity.

California’s POUs pursue a carefully designed plan to maintain the safety of their electric infrastructure in which rights-of-way are evaluated on regular cycles. By following regular maintenance cycles, POUs minimize any safety risks by keeping local vegetation trimmed and identifying dead or dying trees, without conditions getting ‘out of control’. While trees must be trimmed or sometimes removed, we work to remove the fewest trees possible.

By identifying a de minimis volume of tree removal under the definition, CalFire could allow California’s community owned utilities to continue to pursue regular, planned

¹¹ Draft Rule, page 3, lines 6 through 11.

¹² PRC § 4527(a)(2).

cycles of maintenance while recognizing more significant clearing actions due to unplanned events or expansive tree removal activities.

California's POU's Exist to Serve Their Communities

California's POU's are partners with their communities. This partnership is not a marketing campaign; it is fundamental to every POU's purpose and mission. Communities served by a POU or public water agency have made the decision to develop a utility that serves the public interest. As a result of this, and like any other state or local government agency, California's POU's are public agencies that are accountable to the public.

Community owned utilities are governed by elected and appointed boards whose goal is to serve the needs of their local communities. These Governing Boards hold open meetings where public access and communication is a driving principle. These public meetings, which may occur as frequently as once a week, provide the communities the opportunity to speak directly to Board members about any interests or concerns they may have regarding POU activities.

These public meetings also establish a standard of community relations that is demonstrated throughout utility operations, including in vegetation management. In order to maintain the safe and reliable operation of their transmission and distribution infrastructure, California's community owned utilities must maintain or remove vegetation growing on private land. When a POU needs to enter private land to prune or remove a tree that is at risk of coming in contact with utility infrastructure, the local community owned utility will contact the land owner to explain the vegetation management action and its purpose, and to answer any questions the land owner may have. This outreach may be initiated directly by utility general staff or it may be initiated by local maintenance crews who often have a

familiarity with the land owner. When doing this work, it is typical for the POU to remove the material or leave it on property, based on the property owner's stated preference.

Appendix I provides a sample Tree Work Authorization form that is used to ensure that the property owner clearly understands what work will be done and who will be doing it.

Conclusion

CMUA appreciates the opportunity to comment on the Draft Rule and is eager to continue to work collaboratively with CalFire on this important regulation.

Respectfully submitted,

/s/

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CC: Matt Días, Executive Officer, Board of Forestry

Appendix I

TREE WORK AUTHORIZATION

Dear Property Owner:

Your utility's contractor, _____ has been engaged to remove trees interfering with the _____ kV high voltage line.

The removal of _____ (number and species) trees at _____ (location of trees) is necessary for safety and service reliability.

THERE IS NO COST TO YOU FOR THIS SERVICE

Authorized By: _____ Negotiated By: _____

(Customer-Print Name) *(Tree Contractor Representative-Print Name)*

Address: _____ Company: _____

City: _____ Date: _____

Comments/Work Specification:

Your signature indicates that you have a legal interest in the property, are authorized to grant permission for and are in acceptance of the work to be performed. Thank you!

Customer's Name (please print): _____

Customer's Signature: _____ Date: _____

Tree Trimmer's Completion Comments:

Tree Trimmer's Name (please print): _____

Trimmer's Signature: _____ Date: _____