Staff Overview: Significant Revisions to Proposed Rule Text for Public Agency and Utility Right of Way Maintenance Exemption

# Overview

At the May meeting, the Board’s Management Committee deferred initiation of the formal rulemaking process for the public agency and utility right of way exemption amendments in favor of continuing to work on the proposed rule text via the informal scoping process. As such, certain procedural deadlines have been relaxed and the proposed rulemaking will take effect no earlier than January 1, 2026.

By deferring the formal rulemaking process until next year, the Management Committee provided Board staff with a timely opportunity to reevaluate the proposed rule text in its entirety for both substantive and organizational improvements prior to the July meeting. The Management Committee directed staff to publish the revised rule text several weeks in advance of the July meeting to provide stakeholders with ample time to review the revised rule text and to provide comments and specific recommended edits prior to that meeting.

In addition to specific revisions discussed at the May meeting, the proposed rule text also reflects a few organizational revisions that improve the structure and clarity of the proposal. As a result, Board staff’s customary practice of identifying all changes to the prior draft in ~~strikeout~~ and underline and using a different color font was deemed impracticable. Such an approach was likely to foster confusion due to the amount of text being relocated within the draft – i.e. that some items in strikeout would appear to be removed from the proposed rule text entirely when they have simply been moved to another area of the draft and/or that some items in underline would incorrectly appear to be new language despite having been part of the proposed rulemaking for some time.

As a result, stakeholders should evaluate the draft being offered for consideration at the July meeting as if it is an initial draft being proposed for the first time. The ~~strikeouts~~ and underlines in this draft are limited to changes to the existing regulations and appear exclusively in red font. However, to aid Board members and stakeholders in reviewing the document, significant changes made since the last meeting are summarized in this document.[[1]](#footnote-1)

Board staff respectfully request that stakeholder comments and specific substantive edits be submitted by July 12, so that Board members and staff will have appropriate time to review, evaluate, and offer recommendations regarding comments and proposed revisions.

# Summary of Revisions

The following represents a summary of significant organizational and substantive revisions made to the rule text since the May meeting.

## Organizational separation of the utility and public agency exemptions

Due to differences in the scope and purpose of the statutory exemptions for utility and public agency right-of-way operations, 14 CCR §1114 (as proposed in preceding drafts) has evolved such that it imposes different requirements on those respective exemptions. Confusion about which requirements apply in which circumstances has been a consistent criticism of the draft.

To address these concerns, Board staff have fully separated the utility and public agency exemptions into entirely different code sections. This represents the most significant organizational change to the draft. Under the proposed draft, the less-than-three-acre conversion exemption remains in existing 14 CCR §1104.1, the utility exemption remains in proposed 14 CCR §1114, and the public agency exemption now occupies a new proposed 14 CCR §1114.5.

Although the new public agency exemption in 14 CCR §1114.5 appears to be new language, it reflects (with minor revisions) the same substantive requirements for public agency exemptions that applied under the preceding draft considered by the Management Committee. See Pages 42-46.

## Conforming changes made necessary by creating a new section for public agency exemptions

Establishing separate regulatory sections for the utility and public agency exemptions required conforming changes throughout the rule text that were numerous but nonsubstantive. A sampling of these types of changes include:

* All references to “public agency” had to be deleted from 14 CCR §1114 so that section now clearly applies only to utility exemptions. Deletions also include language in that section that was previously needed to differentiate between how and when the requirements applied differently to utility and public agency exemptions.
* The draft needed to establish separate and distinguishable names for the exemptions. General references to the “right-of-way exemption” are now more specific references to the “utility right-of-way exemption” or “public agency right-of-way-exemption” respectively.
* The preceding drafts made conforming changes to several regulatory sections at the beginning of the rule text document (Pages 2-8) that included cross-references to 14 CCR §1104.1 to also include a reference to the newly proposed 14 CCR §1114. The draft now also adds references to 14 CCR §1114.5 to each of those sections to address the separation of the utility and public agency exemptions.

## Organizational change regarding legal effect of the Table of Right-of-Way Widths

In response to concerns raised by RCRC, small timberland owners, and others, previous drafts of the rule text included language (formerly at 14 CCR §1114(h)) clarifying that the designated right-of-way widths confer no legal rights to a utility. Given the importance of these clarifying statements, Board staff recommends relocating those provisions to the beginning of the section for utility right-of-way exemptions. See Page 24:6-14.

## Board member requested change to identify type of utility and corresponding approved right-of-way width in the notice

A Board member suggested that it would be beneficial if the notices for the utility right-of-way exemption included information about which type of utility is submitting the notice, as well as the corresponding right-of-way width that applies to that type of utility lines and infrastructure. Board staff support this recommendation. This change has been made to 14 CCR §1114(b) which identifies the required information for the notice. See Page 24:19-21.

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## Change #1 requested at May meeting: timing of supplemental maps

To address concerns raised by utility stakeholders, preceding drafts authorized a utility to submit supplemental information on a rolling basis after the initial notice has been submitted and accepted. Specifically, two provisions pertaining to supplemental mapping requirements authorized utilities to submit maps with supplemental information not more than once per month per exemption notice. At the May meeting, a utility stakeholder instead requested that those supplemental maps be permitted to be filed not more than once every two weeks per notice, instead of once per month. This change has been accommodated. See Pages 26:22-24 and 35:11-13.

## Change #2 requested at May meeting: “Critical habitat” references

In connection with notice requirements associated with the removal of certain types of Danger Trees, the preceding draft made several related references to Danger Trees that constitute “critical habitat” for rare, threatened, or endangered species. CDFW commented that “critical habitat” has a specific legal meaning for purpose of the Federal Endangered Species Act and expressed concern that using such terminology may result in unintended interpretations and/or consequences. Committee members were receptive to this comment but also expressed concern that whatever terminology is used must be sensitive to the scope of its application. For instance, if the requirements applied to any suitable habitat for rare/threatened/endangered species, that would be overly broad for purposes of Danger Tree removal notifications required by the proposed rule text.

In the proposed draft, Board staff have eliminated the references to “critical habitat” in favor of existing language from 14 CCR §1104.1 (and proposed 14 CCR §1114) that prohibits Timber Operations under the exemption permits on “sites of rare, threatened, or endangered plants or animals.”

The change promotes internal consistency with terminology, though Board staff remain highly receptive to recommendations from CDFW and other stakeholders for alternative terminology that may be a better fit. See pages 26:5-9, 35:6-11, 35:18-23.

As a potential alternative for consideration, Board staff research identified some uses of the phrase “key habitat” in connection with rare/threatened/endangered species. However, OAL may view that phrase as lacking clarity, in which case it would be advisable to create a regulatory definition of that phrase. Board staff identified one such definition from an international jurisdiction that might be appropriate and sufficient for this proposed rulemaking: “A key habitat is an area in the forest where the probability of the occurrence of [rare, threatened, or endangered] species is high.” This approach may warrant further discussion at the July meeting as an alternative to the language currently in the proposed rule text.

## Change #3 requested at May meeting: Treatment standards for Woody Debris constituting “nuisance” or that “promotes the spread of wildfire”

Preceding drafts have grappled with the issue of articulating reasonable and appropriate standards for treatment of Slash and Woody Debris. In particular, Woody Debris poses some unique circumstances where it may be more appropriate for the Woody Debris to be left in place. The challenge is to describe with sufficient specificity instances where the risks posed by untreated Woody Debris reach a level where a utility should be obligated to treat the Woody Debris.

The preceding draft required treatment of Woody Debris “whose location or physical arrangement presents a public or private nuisance or promotes the spread of wildfire.” Committee members and stakeholders expressed some concern that “nuisance” and “promotes the spread of wildfire” were confusing and/or lacked sufficient descriptive detail.

Board staff were only marginally successful in finding improved alternative terminology. The proposed draft borrows language from the Forest Fire Prevention Exemption (14 CCR §1038.3) describing a “hazardous accumulation of flammable materials with enhanced risk of increased wildfire ignition, spread rate, duration, or intensity.” Board staff remain receptive to Board member or stakeholder recommendations for alternative terminology. See page 29:9-14.

## Change #4 requested at May meeting: Utility obligations to coordinate operations with landowners who wish to commercialize felled timber

The preceding draft imposed requirements on utilities to coordinate efforts with landowners who are interested in commercializing timber felled under a utility right-of-way exemption. Specifically, a utility generally would have been required to cut timber to commercial lengths and deck the logs on a landing. Based on concerns raised by a utility stakeholder, Management Committee members agreed to consider further modifications to narrow the scope of these provisions and improve flexibility, as reflected in the proposed draft. See Pages 39:25-40:1-5.

1. All prior drafts of the rule text remain available on the “Binder Materials” page of the Board’s website. Stakeholders may consult the draft for the May meeting if they wish to see how the rule text read prior to the current proposed draft. [↑](#footnote-ref-1)