Staff Report: Stakeholder Comment Assessment – Public Agency and Utility Right of Way Maintenance Exemption

# Overview

This rulemaking will increase organizational clarity by separating the regulatory provisions pertaining to right of way construction and maintenance from those pertaining to less-than-three-acre conversions, placing each in a stand-alone section. The rulemaking also improves consistency among the various ministerial exemptions by conforming the public agency and utility right of way requirements to reflect requirements that the Board applied to other ministerial exemptions under 14 CCR 1038 et seq. as part of a significant rulemaking a few years ago. Other than a proposed de minimis exception and minor revisions, the requirements imposed by the proposed rulemaking all have an existing foundation in the Forest Practice Rules and are appropriately applied to public agency and utility right of way maintenance operations.

The Board’s priorities are clarifying in nature and do not reflect any change in the Board’s view of the scope or applicability of the public agency and utility right of way exemption. However, as part of the scoping process for this rulemaking, the Board is amenable to considering proposals for reasonable solutions to stakeholder concerns about requirements for right of way maintenance operations.

This staff report provides an assessment of the main issues raised by stakeholder comments at the January meeting, as well comments raised during the Board’s prior scoping meetings in 2021.

# Background

The Forest Practice Act regulates Timber Operations that occur on Timberland, as those terms are defined in the Act. Timber Operations generally require preparation and approval of a Timber Harvest Plan (THP).[[1]](#footnote-1) The Act identifies specific forestry activities that the Board is authorized to exempt from all or portions of the Act, including the THP requirements.[[2]](#footnote-2) The Board has exercised this authority by adopting regulations to establish streamlined ministerial permitting for most of these authorized activities. Most of the “exemption” regulations are grouped together at 14 CCR §1038 et seq.. Regulations pertaining to less-than-three-acre conversions and public agency and utility right of way operations, however, were grouped together within another regulation – 14 CCR §1104.1 (“Section 1104.1”) – that is located within provisions pertaining to conversions.

Section 1104.1 is a longstanding regulation that has been amended dozens of times since its initial adoption. The cumulative impact of these amendments has made Section 1104.1 unwieldy and difficult to navigate for enforcement authorities and the regulated public alike. Yet, efforts to “clean up” the regulation often encounter obstacles due to the underlying complexity of the operations addressed by Section 1104.1.

The State’s unprecedented experience with recent catastrophic wildfires has renewed interest in addressing these issues. Utility lines have been tied to several wildfire ignitions in recent years. Although providing utility services involves certain inherent risks of wildfire, several recent wildfires has been attributed to deficient utility line maintenance, including vegetation management practices. As a result, many utility providers have increased efforts to address the vegetation growth adjacent to their facilities and utility line right of ways that increases wildfire risk.

In the aftermath of these fires, PG&E has drawn particular public attention for embarking upon an aggressive campaign of vegetation management on and adjacent to its utility line right of ways. Landowner complaints at prior committee meetings, as well as anecdotal stories in media coverage, include allegations of excessive tree removal, failure to remove felled trees and treat slash, and other forms of environmental consequences occurring as a direct result of PG&E’s vegetation management practices. There are also concerns that while removing trees in the rights of way reduce the possibility of wildfire ignitions caused by the utility, the remaining untreated slash and felled trees increase the wildfire hazard of the landowner.

PG&E contends that the Forest Practice Act and implementing Rules are categorically inapplicable to its vegetation management operations. By contrast, the historical view of the Board, CAL FIRE, and the Legislature is that many utility right of way maintenance operations – particularly those involving the cutting and removal of trees – are indeed subject to the requirements of the Forest Practice Act and Rules.

This rulemaking offers the Board an opportunity to improve the organizational clarity of the existing Section 1104.1 exemptions. It also provides an opportunity, to the extent the Board deems it necessary, to consider additional revisions to the substantive requirements for right of way maintenance practices to obtain an appropriate balance between flexibility for utilities to carry out minor routine maintenance operations and ensuring that those operations are carried out responsibly with respect for forest resources, as well as the rights of timberland owners.

# Utility line right of way maintenance is not categorically exempt from the Forest Practice Act

During stakeholder input, PG&E’s overarching argument has been that utility right of way maintenance operations are categorically beyond the scope of the Forest Practice Act based on their interpretation of the definitions of Timberland and Timber Operations. PG&E argues that once a utility right of way is constructed (i.e. removing all trees and installing utility lines) the area no longer constitutes “Timberland” and subsequent maintenance operations do not constitute “Timber Operations.”[[3]](#footnote-3) Board staff disagrees with PG&E’s interpretation; the Board need look no further than the statute authorizing the utility right of way exemption to rebut PG&E’s claim. PRC §4584 reads as follows:

4584. Upon determining that this exemption is consistent with the purposes of this chapter, the board may exempt from this chapter, or portions of this chapter, a person engaged in forest management whose activities are limited to any of the following:

(a) The cutting or removal of trees for the purpose of constructing *or maintaining* a right-of-way for utility lines.

The fatal flaw in PG&E’s argument is that it ignores the Legislature’s express identification of constructing *or maintaining* utility right of ways as being eligible for potential exemption from the Act. This language confirms the Legislature’s own belief that utility line maintenance occurs on Timberland and can constitute Timber Operations. PG&E’s interpretation would render the statutory reference to maintenance meaningless and entirely unnecessary: it would make no sense for the Legislature to authorize the Board to exempt utility right of way maintenance operations from the Act if those operations were not subject to the Act to begin with.

Board staff do not dispute the possibility that *some* maintenance operations might be exempt from the Act because they do not satisfy the definitions of Timberland and Timber Operations. But those situations would be fact-specific isolated instances that would have to be evaluated on a case-by-case basis. Attempting to identify and address such situations in the rulemaking is an appropriate issue for Board discussion. However, PG&E’s position that their maintenance operations are never subject to the Forest Practice Act is without merit and the Board may disregard it.

It is also appropriate for the Board to consider PG&E’s inflexibility on this overarching position when evaluating their proposed revisions to the rule plead itself. PG&E seeks to relax environmental protection measures for utility right of way maintenance operations while holding firm that even their own recommended changes would not apply to or be enforceable against them. Board staff take little comfort in PG&E’s commitment to comply with the Rules after they are amended to meet their satisfaction *on an unenforceable purely voluntary basis*.

# The Board is authorized to adopt regulatory interpretations of statutory definitions in certain circumstances.

The rule plead proposes modifications to the regulatory definitions of “Timberland” and “Timber Operations.” Some stakeholders object to these amendments, contending that that the Board lacks authority to modify statutory definitions. It is true *as a general rule* that regulatory bodies cannot adopt regulations to define a term differently from its statutory definition. In this case, though, Board staff worked closely with Board legal counsel to ensure that the rule plead does nothing to enlarge or impair the scope and effect of the statutory definitions.

The Board has authority to adopt regulatory interpretations of vague and ambiguous words in the statutes it administers, including unclear terminology used in statutory definitions. A key provision of the “Timberland” definition is that the land “is available for, and capable of, growing a crop of trees.” Committee discussions have already demonstrated that the Board and utility stakeholders interpret that phrase differently. If both interpretations are reasonable, then it is the Board’s prerogative to formally adopt its preferred interpretation in regulation.

The Board’s authority to clarify the scope of “commercial purposes” as that term is used within the statutory definition of “Timber Operations” is on even stronger ground. The Legislature did not adopt an *exclusive* definition of commercial purposes. The statutory definition does not say what commercial purposes “means” but rather what it “includes.” This means that the Legislature intended to identify some activities – other than commercializing timber – that are commercial in nature, while leaving open the possibility that other activities might also qualify. The Board clearly has the regulatory authority to identify additional activities – including utility right of way maintenance – that serve a commercial purpose that triggers the requirements for being a Timber Operation.

Board staff view the proposed amendments to the regulatory definitions of Timberland and Timber Operations as doing nothing to change the core statutory definition of those terms. But, as long as PG&E remains adamant that the Act does not apply to them, Board staff question whether the proposed amendments to the definitions Timberland and Timber Operations will have any meaningful impact on their activities. The Board should consider whether the proposed changes to these two definitions have value other than addressing the questionable interpretation of a single stakeholder. If not, the Board may wish to simplify the draft rule plead by removing those proposed revisions from the rule plead. This would allow the Board to simplify the rule plead without any adverse impact on the Board’s authority or existing interpretation of the Act.

As an alternative to improving clarity by amending the regulatory definitions, the Board should consider whether the administrative civil penalty process offers a more direct and effective opportunity to resolve the Act’s applicability to utility right of way maintenance operations. Future administrative enforcement actions against PG&E appear all but certain if they continue to ignore the Act and Rules entirely for utility line maintenance operations. As the adjudicator of administrative enforcement actions under the Act, the Board will likely be responsible for resolving the jurisdictional dispute with PG&E as part of an administrative ruling in an enforcement proceeding at some point in the future. This may be a more direct and effective option than amending the definitions of Timberland and Timber Operations.

# Utility maintenance operations occur on Timberland

PG&E argues that its maintenance operations do not occur on Timberland because the physical existence of utility lines on the right of way means that it is not “available” for growing a crop of trees, as described in the statutory definition of Timberland.[[4]](#footnote-4) There is some common sense appeal to this position but it suffers from “tunnel vision” by focusing exclusively on the land immediately *under* the utility lines at the expense of the *adjacent* land, which is undeniably Timberland in many circumstances.

For instance, the fact that a utility has constructed a right of way and has obligations to prune or remove trees that threaten utility lines located upon the right of way does not affect the landowner’s own right to commercially harvest any trees that regenerate on the right of way. During the January committee meeting, stakeholder comment indicated that areas currently exist where mature stands of trees have been allowed to grow for decades on PG&E utility right of ways. Those trees are certainly “available for” commercial harvest by the landowner (unless the terms of a legally binding easement specifically provides otherwise). It is unreasonable for PG&E to contend that, if they allow a crop of trees to grow to commercial maturity on their right of way, the mere physical existence of a utility line on the right of way precludes the area from being characterized as Timberland.

Along similar lines, PG&E cannot reasonably contend that their right of way maintenance operations occur exclusively within the purported non-Timberland right of way directly under the utility lines. In addition to anecdotal reports of PG&E removing trees far beyond any enforceable easement or regulatory right of way, the cutting and removal of individual danger trees presumably occurs on Timberland outside the designated utility right of way widths. Similarly, it is unlikely that operations incidental to cutting and removing trees for utility line maintenance – such as road work, watercourse crossings, landings, and skid trails – occur exclusively within the relatively narrow right of ways. These areas can unquestionably be characterized as Timberland subject to the Act. At a minimum, this undercuts PG&E’s argument that utility line maintenance *never* occurs on Timberland.

# Utility maintenance operations constitute Timber Operations

PG&E also argues that utility maintenance operations are not Timber Operations because the trees are not cut or removed for “commercial purposes” as described in the statutory definition.[[5]](#footnote-5) Specifically, PG&E says that because it’s only purpose for cutting trees is to ensure utility line safety – and it does not commercialize the timber – that those activities are definitively not Timber Operations that can be regulated by the Act. At the January meeting, PG&E also represented that an appellate court case ruling confirms their interpretation.[[6]](#footnote-6) Board staff believe that PG&E’s position misinterprets the Act’s definitions of “Timber Operations” and “Commercial Purposes” and misrepresents the case law they cite.

Without question, the sale, barter, trade, or exchange of timber has historically been the primary “commercial purpose” for which trees are harvested pursuant to the Act. Nonetheless, in 1990, the Legislature enacted a statutory definition of “commercial purposes” to expressly recognize that harvesting trees can serve commercial purposes *other than commercializing the logs*. The definition clarified that commercial purposes “includes” both commercialization of the timber and timberland conversion that does not commercialize the timber.

There is no dispute that the initial construction of a utility right of way constitutes a conversion, as described in the statutory definition. But because “commercial purposes” is defined inclusively rather than exclusively, the Legislature clearly intends that additional activities not expressly listed in the definition can still be commercial in nature. In other words, the Legislature’s intended takeaway is not the enumerated list of activities included in the definition but rather the larger point: the Forest Practice Act applies to any commercial purpose – not just commercialization of the harvested timber.

Ironically, the case that PG&E cited to this committee makes this very point. That case addressed a situation in 1989 where a ski resort harvested 1,700 trees without a harvest permit to construct a new ski run; but they never commercialized the timber. Legislative history documents confirm that the Legislature’s enactment of PRC §4527’s definition of “commercial purposes” was a direct response to the ski resort’s activities. In fact, the Legislature’s swift response predated resolution of the cited case by several years.

The timing is important because the judge in that case was required to apply the law as it existed *at the time the trees were harvested*, which predated the Legislature’s clarifying definition of “commercial purpose.”[[7]](#footnote-7) Even still, the judge made a point of noting that it was the parties to the litigation – not the court – who limited the scope of their argument to the issue of whether timber operations require an actual sale of timber or if the mere intent to commercialize the timber is sufficient. Although the case did not decide the scope of “commercial purpose,” the judge observed:

“Nothing in the statute [as it read prior to adding the ‘commercial purpose’ definition] limits a cutting of timber for commercial purposes to the sale (or intent to sell) of the lumber alone. That is, the clearing of forest land for any commercial venture might properly be characterized as cutting for commercial purposes.”[[8]](#footnote-8)

In other words, it is entirely within the Board’s regulatory authority to determine that utility right of way maintenance operations are a business-related function that serves a commercial purpose, as defined in PRC §4527. These operations are performed to limit damage and costly repair to existing utility lines, to ensure reliability for the provision of utility services to its customers, and to limit financial liability resulting from wildfires ignited by utility lines.

In any event, the Board may disregard the court case referenced by PG&E as having any relevance to the current rulemaking because it applied to statutory language that was superseded more than 30 years ago. The Board may also disregard comments suggesting that the definition of Timber Operations applies exclusively to the commercialization of timber and the initial construction of utility right of ways. That position conflicts with the plain language of the statute, as well as the legislative history documents that reflect the Legislature’s intent.

# Guardrail protections for the “de minimis” exemption

The draft rule plead includes an exemption for “de minimis” maintenance operations within the designated width of the utility right of way. As proposed in January 2024 draft rule plead, operations exclusively within the right of way would be totally exempt from the requirements of the Act. The Board has not expressed a strong opinion favoring or opposing the proposal; it is included in the draft as topic for discussion to gauge stakeholder interest and determine whether reasonable parameters for such an exemption can be crafted as part of this rulemaking.

Agency stakeholders at the January committee meeting (CAL FIRE, CDFW, and NCRWQCB) as well as some industry representatives were unanimous in expressing concern about the de minimis option. Generally speaking, these stakeholders are uncomfortable with the lack of detail regarding what constitutes a de minimis activity, as well as the lack of appropriate “guardrail” protections to ensure that qualifying activities will not exceed de minimis impacts on the environment.

Because the January 2024 draft rule plead exempted de minimis operations entirely from the Act and Rules, there was also general concern about whether utility operations will create or exacerbate unreasonable burdens for the landowner. A common landowner complaint about utility vegetation management practices is that the utilities leave felled trees and slash on the property for the landowner to deal with at their own expense. This concern may be offset by the fact that the proposed de minimis exception applies only within the established right of way widths, where utilities presumably share a compelling common interest in minimizing fire risk in the immediate vicinity of their utility lines. In any event, it is accurate that a utility is under no legal obligation to remove trees or treat slash if those activities are conducted under the de minimis exception, as proposed in the January 2024 draft rule plead.

Board staff are sympathetic to all of these concerns raised by stakeholders. Board staff also agree that the January 2024 draft rule plead lacks sufficient detail and likely would not meet the APA standards for approval in that form. Although Board staff is still working on crafting an appropriate definition of “de minimis” in this context, discussion at the January committee meeting was very productive in identifying potential criteria that may be appropriate for a de minimis exception. Options that may warrant further consideration by the Board, include:

* Allowing de minimis activities to include only fuels reduction activities, including pruning but excluding tree removal.
* Allowing de minimis activities to include removal of noncommercial tree species.
* Setting a maximum dbh limit, such as 12” dbh, for commercial species trees that are eligible for removal under the de minimis exception.
* Setting a limit on the number of commercial species trees per acre that may be removed under the de minimis exception.
* Identifying areas/situations that are categorically ineligible for the de minimis exception based on potential risk of environmental impact, such as WLPZ areas; archeological sites; sites where rare, threatened, or endangered species have been identified; or operations during the winter period.

Some of these proposals have been incorporated into the revised draft rule plead prepared for the March 2024 meeting. Board staff recommend that committee discussions and stakeholder input continue to evaluate whether these or other criteria – separately or in combination – might sufficiently allay concerns about allowing utilities to engage in unpermitted and supervised utility right of way maintenance operations.

PG&E raised concerns regarding the requirement limiting de minimis activities to lands that are subject to a legally recorded easement. In drafting the de minimis provisions, Board staff are sensitive to the fact that the policy contemplates utilities entering someone else’s lands without supervision or regulation to cut trees that the utility does not own, potentially leaving the felled trees and untreated slash on the landscape for the landowner to deal with at their own expense. Hence, Board staff are striving to balance the legitimate property interests of the Landowner against the utility’s desire to engage in timely, low impact, routine vegetation management near its utility lines. But this is purely a policy decision for the Board and the Board may modify or discard these requirements at its discretion. For instance, if the utilities’ concern is that their easements typically are not formally recorded with the county, a reasonable modification might be for utilities to provide (or be prepared to provide upon request) evidence of an enforceable easement – regardless of whether it is officially recorded – that contemplates the utility’s right to remove trees within the easement.

# Expanding regulatory widths for right of ways

Utility stakeholders have expressed an interest in increasing the current utility right of way widths, which currently mirror the existing table of widths from Section 1104.1. The right of way widths are entirely creatures of regulation. These widths are not derived from or constrained by statute, which means the Board has discretion to modify these widths.

A few items that the Board may wish to consider as it evaluates potential changes to the right of way widths include:

* As previously mentioned, expanding the existing width of the utility right of ways should be done in consideration of the landowner’s property rights. The regulatory right of way establishes a limit on the land area eligible for a ministerial permit and does not confer any property-rights in the same way as a utility easement (i.e. where a landowner agrees to, and has been compensated for, sharing their property rights with the utility).
* Utilities should provide appropriate data and information to the Board supporting and justifying any proposed changes to the right of way widths. The Board has obligations to demonstrate to OAL’s satisfaction that the changes satisfy APA requirements such as necessity and consistency. It is reasonable to ask utilities to assist the Board with supporting documentation for inclusion in the rulemaking file.
* Expanding the width of the regulatory right of way also should be evaluated in conjunction with other proposed changes to the utility right of way exemption requirements. For instance, a significant expansion of right of way widths may reduce support for the de minimis exception because it increases the amount of land upon which maintenance will occur without a permit or having to comply with any regulatory requirements. Increasing the right of way widths could also potentially affect support for utility stakeholder requests for increased flexibility with respect to certain existing requirements, such as limitations on activities in the WLPZ or on archeological sites.

# Modifying existing environmental protection measures under the ministerial permit that pose obstacles to efficient utility line maintenance operations

At the January meeting, PG&E identified specific existing requirements under the ministerial permit that it claims prevent utilities from being able to complete necessary maintenance. PG&E is proposing that these requirements be removed or, at a minimum, revised to increase flexibility. Specific areas of concern include:

* Ability to operate in the WLPZ.
* Ability to operate on or near archeological sites.
* Ability to operate on sites with rare, threatened, or endangered species.
* Ability to operate during the Winter Period.
* Mapping requirements.
* RPF requirements for things like Danger Tree identification/marking, flagging harvest area and WLPZ boundaries, etc.

Typically, exemption permits for activities described in PRC §4584 reflect a balancing of interests where the applicant accepts certain “guardrail” requirements for environmental protection in exchange for the opportunity to operate under a ministerial permit that can be issued on an expedited basis. Likewise, requirements that work be performed by Registered Professional Foresters (RPF) or Licensed Timber Operators (LTO) ensures professional competence because licensees are subject to professional discipline by the Board and CAL FIRE. Any inconveniences associated with requirements for a ministerial exemption permit are generally minor in comparison to the process for securing approval of a full THP or other discretionary harvest document.

Nonetheless, these requirements reflect policy choices that are within the Board’s authority to remove or modify if the Board deems such changes appropriate and consistent with the purposes of the Act. If the Board agrees with utility stakeholders that the purposes of utility right of way maintenance operations are characteristically different from timber operations under other exemption permits, or that there are differences in the degree or likelihood of environmental impacts for such permits, the Board may entertain removing or modifying these requirements. However, any such changes should be given thorough consideration. Board staff have had internal discussions about potential minor revisions but staff lacks confidence that utility stakeholders would find these concessions sufficient. Accordingly, Board staff recommends that that the utilities be asked to offer specific revisions for consideration and to provide information to enable the Board to evaluate both the existence of a problem and the reasonableness of the proposed revision to the Rules.

As noted previously, PG&E is requesting these changes without any corresponding recognition that utilities are compelled to comply with the Act and Rules. This is a relevant factor that the Boad may consider in evaluating the need for and reasonableness of the requested policy changes.

As an alternative, if the Board has concerns about the level of flexibility that utilities are seeking under a ministerial permit, the Board can defer to the Legislature to resolve these issues by statute. After all, the Board’s mandate is for prudent and responsible forest resource management and enhancing timberland productivity – not ensuring utility line safety.[[9]](#footnote-9) It may be more appropriate for the Legislature to make the broader policy determinations regarding if, and under what circumstances, vegetation management activities for utility line safety should prevail over requirements designed to protect and ensure the productivity of the forest resource.

# The Board and the California Public Utilities Commission (CPUC) share concurrent jurisdiction over regulation of utility line maintenance operations.

In support of its argument that utility line maintenance operations are not subject to the Forest Practice Act, PG&E has previously suggested that the CPUC’s regulatory authority of utility operations is so extensive as to provide the CPUC with exclusive regulatory jurisdiction over PG&E’s vegetation management activities; or at the very least that Board regulations should defer to standards and requirements set by the CPUC. Board staff have conferred with Board legal counsel and determined that the Board may disregard this argument because the Board and the CPUC share concurrent overlapping jurisdiction with respect to the issues addressed by the draft rule plead.

Board legal counsel confirms that ample authority exists, both in statute and case law, to support the Board’s regulatory authority for this rulemaking. There is nothing incongruous in the Legislature’s decision to assign two different governmental agencies with regulatory authority that can overlap with respect to a single party or a single activity. If the Legislature intends for one entity’s jurisdiction to prevail over another, it knows how to articulate that clearly in statute. Because PRC §4584(a) authorizes (as opposed to requiring) the Board to exempt construction and maintenance of utility line right of ways from the Act, the Legislature clearly intends for the Board to have a regulatory role over utility line maintenance activities on Timberland that applies concurrently with the CPUC’s general regulatory authority over the utility industry.

# Alleged conflicts between Forest Practice Act requirements and vegetation management requirements imposed by other laws

Similar to the preceding issue, PG&E has previously suggested that the standards imposed by the Act and Rules “conflict” with other laws and regulatory requirements that apply to them. Board staff generally dispute this contention as relying on an overly narrow view of what constitutes a “conflict.” The degree to which any indirect conflicts jeopardize utility maintenance operations are also somewhat overstated, but can be resolved if utility stakeholders are amenable to compromise.

## CPUC General Order 95/Rule 35

The CPUC’s main vegetation management standards are included in General Order (GO) 95/Rule 35. These documents designate *minimum* clearance standards that utilities must maintain between vegetation and utility lines. The standards also incorporate modifications to ensure consistency with minimum clearance requirements imposed by PRC §§ 4292 and 4293.[[10]](#footnote-10) There are no maximum clearance standards – appropriate clearance beyond the minimum standard is done at the utility’s discretion.

Nothing in the Act or Rules establish minimum or maximum vegetation clearance standards that conflict with these requirements. To the extent that a utility must obtain a ministerial permit for utility right of way maintenance that is subject to the Act, those administrative hurdles may pose a minor inconvenience for utilities but it does not constitute a prohibitive “conflict.”

## Public Utilities Code § 8386 – Wildfire Mitigation Plans

PUC § 8386 imposes a generic requirement for utilities to “maintain … electrical lines and equipment in a manner that will minimize the risk of catastrophic wildfire.” Utilities satisfy this obligation by preparing and obtaining government approval of a wildfire mitigation plan, as outlined in the statute. Part of the plan must address “[p]lans for vegetation management.”

PUC §8386 does not, however, impose any specific standards on utilities comparable to the minimum clearance requirements imposed by GO 95/Rule 35 or PRC §§4292-4293. To the extent that any wildfire mitigation plans include specific vegetation management standards, those are purely creations of the utility itself. Thus, there are no conflicts between the Act and PUC §8386.

Based on the lack of specific standards, Board staff view PUC §8386 and utility-drafted wildfire mitigation plans as being materially different from other legal vegetation management requirements such as GO 95/Rule 35 and PRC §§4292-4293. Accordingly, Board staff disagree with any PG&E requests to add references to PUC §8386 or wildfire management plans to the draft rule plead as activities that are exempted from certain provisions of the draft rule plead, such as the regulatory definition of Timberland or requirements for Danger Tree removal beyond the width of the right of way.

## Indirect conflicts associated with ministerial permits under the Forest Practice Rules

PG&E’s conflict claims have some merit with respect to certain default provisions that apply to ministerial permits for activities exempted pursuant to PRC §4584. To some extent, the concerns are overstated because they are limited to very specific circumstances, such as operations in the WLPZ, on archeological sites, on sites with endangered species, or tractor operations during the winter period. Thus, the potential for indirect conflict exists only where utility lines are constructed on or near these unique areas and situations.

As noted in Section IX, the Board has authority to modify or eliminate potentially conflicting requirements that are imposed as conditions for a ministerial utility right of way maintenance exemption permit. It is reasonable for utilities to request a path forward under a ministerial permit, but the Board is under no obligation to clear that path of all obstacles designed to protect vulnerable aspects of the forest resource. The Board should consider reasonable modifications to allow utilities to comply with vegetation management requirements *responsibly* – i.e., without exposing these areas to undue risk of environmental damage. Again, requiring utilities to comply with minor administrative hurdles, such as application and notice requirements, as a condition for performing utility line maintenance does not amount to a prohibitive conflict.

Board staff reiterate the recommendations from Section IX that utilities should be primarily responsible for proposing specific solutions that are appropriately tailored to allow them to comply with utility line maintenance obligations while respecting the need to limit environmental impacts of those operations in unique areas and situations. If utilities are amenable to compromise these issues likely can be resolved. Otherwise, it may be necessary for utilities to direct their advocacy efforts to the Legislature to secure a statutory solution that they find more favorable.

# Need for statutory fixes.

At the January meeting, PG&E commented that some issues will require legislative action to amend statutes. Board staff are not aware of any such statutory fixes that would warrant postponing this rulemaking effort. If the Board is interested in collaborating with PG&E on proposed legislation, those efforts can proceed simultaneously with the rulemaking.

1. PRC § 4581. [↑](#footnote-ref-1)
2. PRC § 4584. [↑](#footnote-ref-2)
3. Board staff will specifically address the definitions in greater detail later in this staff report. [↑](#footnote-ref-3)
4. PRC §4526: “Timberland” means land, other than land owned by the federal government and land designated by the board as experimental forest land, which is available for, and capable of, growing a crop of trees of a commercial species used to produce lumber and other forest products, including Christmas trees. Commercial species shall be determined by the board on a district basis. [↑](#footnote-ref-4)
5. PRC §4527: (a) (1) “Timber operations” means the cutting or removal, or both, of timber … from timberlands for commercial purposes, together with all the incidental work, including, but not limited to, construction and maintenance of roads, fuelbreaks, firebreaks, stream crossings, landings, skid trails, and beds for the falling of trees, fire hazard abatement, and site preparation that involves disturbance of soil or burning of vegetation following timber harvesting activities, but excluding preparatory work such as treemarking, surveying, or roadflagging.

   (2) “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. [↑](#footnote-ref-5)
6. *Hewlett v. Squaw Valley Ski Corp.* (1997) 54 Cal.App.4th 499. [↑](#footnote-ref-6)
7. *Hewlett v. Squaw Valley Ski Corp.* (1997) 54 Cal.App.4th 499, 523. [↑](#footnote-ref-7)
8. *Hewlett v. Squaw Valley Ski Corp.* (1997) 54 Cal.App.4th 499, 525 fn 15. [↑](#footnote-ref-8)
9. PRC §§ 740, 4512, 4513, 4551, 4551.5. [↑](#footnote-ref-9)
10. PRC §§ 4292 and 4293 are not part of the Forest Practice Act. They are separate defensible space requirements that apply to owners of electrical transmission or distribution lines located upon lands that are mountainous, forest-covered, brush-covered, or grass-covered. [↑](#footnote-ref-10)