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Analysis of Potential Application of California Environmental Quality Act (CEQA) Exemptions to Investor-Owned Utility Wildfire Mitigation Plans to Accelerate Fire Prevention and Mitigation Efforts

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Analysis of Potential Application of California Environmental Quality Act (CEQA) Exemptions to Investor-Owned Utility Wildfire Mitigation Plans to Accelerate Fire Prevention and Mitigation Efforts

Research Report 2022-01

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CAL POLY, SAN LUIS OBISPO

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DECLARATION OF INTEREST STATEMENT

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Executive Summary

Wildfire poses an existential threat for California. Five of the six largest wildfires in California's history occurred in 2020 and 2021 including the first fire to ever impact over 1 million acres. Between 2014-2018, the California Department of Forestry and Fire Protection (CAL FIRE) identified electrical power generation as igniting more fires than lightning strikes. In response to electrical utility assets igniting wildfires, the State of California has mandated that investor-owned utilities (IOU) develop Wildfire Mitigation Plans (WMP) that include a spectrum of mitigation and prevention efforts including undergrounding of utilities, hardening of electrical assets (e.g., converting wooden poles to steel or other-non flammable materials) and vegetation management.

The California Environmental Quality Act (CEQA) provides mechanisms for accelerating regulatory approval in implementation of critical emergency prevention in response to wildfires. Relying on regulatory texts, legislative history and case law, this report reviews the creation and use of the CEQA statutory emergency exemption and several categorical exemptions (existing facilities, replacement and reconstruction, and minor alterations to land use). This report concludes that, depending on the nature and location of the wildfire risk mitigation, all of these exemptions are available to accelerate WMP prevention and mitigation work and should be employed by agencies with jurisdiction to ensure that existing risks posed by utility hardware and lines are promptly addressed to avoid loss or damage from IOU-ignited wildfires. This report further concludes that it would be advisable for the legislature to adopt a new specific CEQA statutory exemption to ensure rapid implementation of existing WMPs where there are identified known IOU ignition risks.

I. Increasing Fire Vulnerability in California Due to Electrical Infrastructure

In the past five years, California has experienced numerous catastrophic wildfires causing substantial unexpected losses to society and the larger environment ranging from air quality emergencies to water contamination from post-fire erosion. Individual families and businesses have lost property and lives. The ignition cause of some of these wildfires has been the equipment of the private investor-owned utilities (IOU). Figure 1 shows the territories of California's main IOUs.

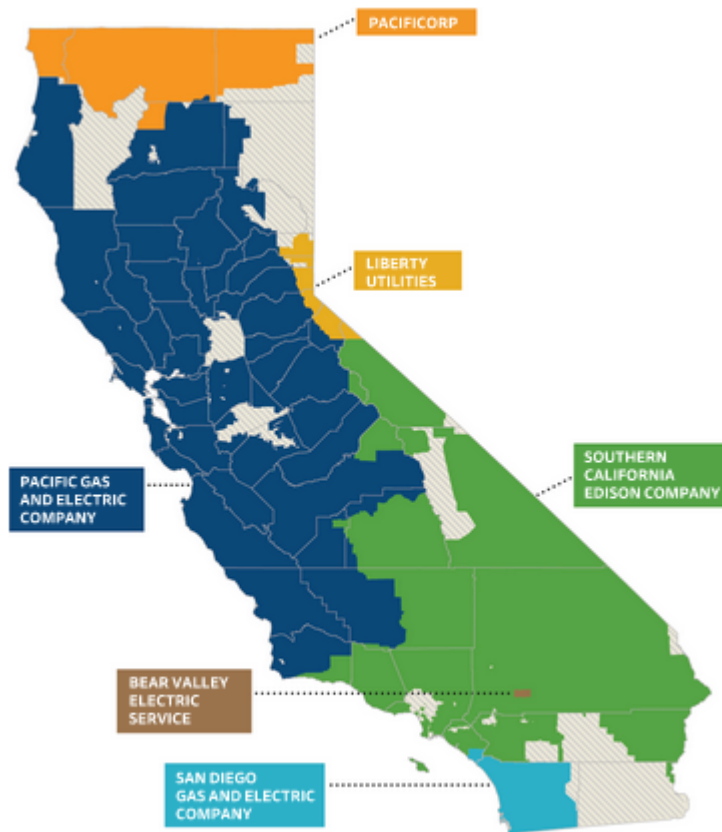


Figure 1: Investor-Owned Utilities in California.

Source: Auditor, State of California. Electrical System Safety. *California's Oversight of the Efforts by Investor-Owned Utilities to Mitigate the Risk of Wildfires Needs Improvement*. 2022.

Given the exposure of California to wildfire risk, there is a need for utilities and other industries to accelerate their wildfire mitigation and prevention efforts. The research question for this report is whether there are appropriate State law regulatory pathways to accelerate the implementation

of wildfire mitigation and prevention efforts in California. This report by the California Polytechnic State University (Cal Poly) Wildland Urban Interface (WUI) Fire Institute offers a brief background of the degree of fire vulnerability in California due to utilities based on existing literature, an analysis of several California Environmental Quality Act (CEQA)¹ exemptions including, (1) the categorical exemption for existing facilities, replacement and reconstruction, and minor alterations to land and, 2) the statutory exemption for emergencies that would apply to IOU Wildfire Mitigation Plans, and a brief conclusion about potential pathways for IOUs to accelerate wildfire mitigation work in known fire prone areas.

While California's woodland, chaparral, and grassland ecosystems have evolved to co-exist with fire, the numerous decades of both fire suppression mixed with some intentional fire setting to protect timber forests and grazing land has created vulnerabilities. (CCST, 12). For mixed-conifer Ponderosa pine forests that had previously experienced frequent but low severity fires, larger fuel loads have become increasingly dangerous. In other habitats such as chaparral shrubland and woodland, frequent large-scale ignitions over the last century have decreased the resilience of these lands for regeneration after fires leading to conversion to grasslands. (Id., 13). What this means for the landscape is that California's ecosystems are increasingly prone to ignition leading to fire seasons dominated by loss of habitat, property, and lives (both human and non-human). (WSD, 2020). Five of the six largest wildfires in California's history occurred in 2020 and 2021, all in PG&E's service territory, including the first fire to ever impact over 1 million acres. (CAL FIRE).

The California State Auditor expressed concern that IOUs have a large number of exposed overhead lines. In a 2022 report, the auditor reported that 27% (74,000 miles) of the 277,000 miles of power lines belonging to California IOUs are located in high-fire threat areas. Within these high-fire threat areas, it was particularly concerning to the Auditor that 80% of PG&E's power lines in high fire-threat areas (33,000 out of 40,000 miles) are bare (lacking protective covering). (State Auditor, 2022).

An independent 2020 report on the costs of wildfire in California observes "There is broad consensus in the scientific community that wildfire behavior is changing across the American West in general, and in California in particular." (WSD, 17). Seven of California's ten largest fires were ignited between 2017-2020 burning millions of acres. Given the increasing fragility of the California landscape to intense wildfires that have impacted ecosystem resilience, the summer fire season has become increasingly dangerous with, for example, potentially more intense fires in forests in some counties and extensive fires in grasslands in other counties. Predictions are hard to make "due to complex feedbacks among humans, vegetation, and climate." (Id., 26). In the 2020 report the authors note, however, that "to successfully reduce the cost of wildland fire, agencies should embrace a strategy of contextually appropriate fire management, rather than relying on exclusion or suppression in all cases." (Id., 22). Such a

¹ California Public Resources Code (Pub. Res. Code) §§ 21000-21189 and 14 CCR §§ 15000-15387 (CEQA Guidelines).

strategy must include lowering ignition risk from anthropogenic and environmental factors such as unmanaged vegetation in proximity to electrical infrastructure.

Both prevention and mitigation are needed to manage wildfire risk. Prevention includes “ignition prevention.” Between 2014-2018, CAL FIRE identified electrical power generation as igniting more fires than lightning strikes. (Id., 34, Figure 3.2). These events are particularly damaging when ignition occurs in a location with extreme wind conditions. Approximately, 31,138 structures were lost between Summer 2007 to Summer 2020 due to powerline-caused wildfires. (Id., 36).

In 2019, the Wildfire Safety Division (WSD) in the California Public Utility Commission (CPUC) relocated to the Natural Resources Agency (NRA) as the Office of Energy Infrastructure Safety (<https://energysafety.ca.gov>). As part of its vision of “a sustainable California, with no catastrophic utility-ignited wildfires, that has access to safe, affordable, and reliable electricity”, WSD required all IOUs to provide Wildfire Mitigation Plans (WMPs). Utilities have provided these plans, which provide insight into why, what, when, and how they will address risk reduction related to wildfires. The IOUs intend, as part of their WMPs, to scale-up fire mitigation efforts through a combination of undergrounding electrical cables, hardening electrical infrastructure (e.g., covered conductors, switching of wood poles to steel or other non-flammable materials), and removing fuel-prone vegetation to avoid future losses from imminent wildfire risk. The three largest IOUs proposed to invest \$14.76 billion between 2020-2022 to implement projects in 10 categories of mitigation effort. (Id., 37). For example, PG&E’s 2021 WMP has three overarching goals: (1) reducing wildfire ignition risk, (2) enhancing wildfire risk situational awareness, and (3) reducing the impact of PSPS events. (PGE 2021). The main WMP expenditure categories are shown in Figure 2.

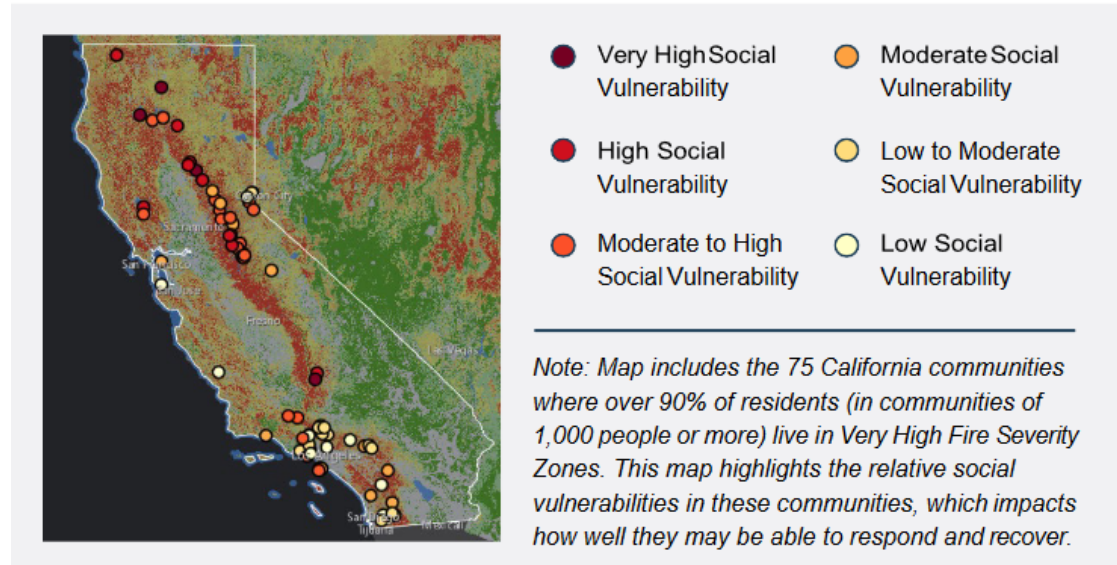
Mitigation Category	PG&E		SCE		SDG&E	
	2019 actual	2020 planned	2019 actual	2020 planned	2019 actual	2020 planned
Risk assessment and mapping	Not Reported		Not Reported		\$0.3	\$1.1
Situational awareness and forecasting	\$28.8	\$48.3	\$2.0	\$2.6	\$94.4	\$96.5
Grid design and system hardening	\$1,690.1	\$1,696.9	\$993.2	\$1,088.4	\$226.7	\$217.1
Asset management and inspections	\$235.1	\$162.1	\$123.9	\$85.6	\$13.6	\$51.7
Vegetation management and inspections	\$709.5	\$857.1	\$330.3	\$200.6	\$50.3	\$49.9
Grid operations and protocols	\$18.5	\$71.3	\$7.6	\$91.7	\$8.8	\$21.0
Data governance	\$36.1	\$88.2	\$2.4	\$11.7	\$0.0	\$0.3
Resource allocation methodology	Not Reported		\$61.6	\$78.5	\$0.1	\$10.8
Emergency planning and preparedness	\$19.7	\$36.9	\$17.9	\$23.5	\$4.7	\$7.7
Stakeholder cooperation and community engagement	\$38.8	\$28.7	Not Reported		Not Reported	

Figure 2: Examples of Mitigation Categories from Wildfire Mitigation Plans

(WSD, 2020, Figure 3.3 Utility Spending)

The three largest utilities intend to accelerate spending on wildfire mitigation. PG&E will spend a little over \$3 billion; Southern California Edison (SCE) will spend \$1.4 billion, and San Diego Gas and Electric Company (SDG&E) will spend \$459 million.

Three million people live in very-high risk fire zones including wildlife-urban interfaces. Some communities are particularly vulnerable to fire risks given the limited ability to respond to fire risks. Figure 3 shows a range of social vulnerability based on residence location, income and health factors for 75 communities living in the highest risk fire areas.



Source: Direct Relief, "Which California Communities are Most Vulnerable to Wildfires?" (July 30, 2019)

Figure 3: Map of Social Vulnerability in California connected to Very High Fire Severity Zones

The three largest California utilities need to accelerate their prevention and mitigation work in preparation for the upcoming fire season and beyond. The WMPs outline a work plan with the largest funding set aside for all three utilities for system hardening to avoid future ignition. PG&E and SCE have set aside vegetation management as the second largest expenditure category.

The next section of this report examines the potential for increasing the use of categorical and statutory exemptions from CEQA to accelerate wildfire prevention and mitigation work across the multi-jurisdictional landscape in order to avoid future losses to human and environmental communities. This report explores categorical and statutory exemptions under CEQA based on the premise that faster implementation of mitigation and prevention measures will contribute to a safer California and result in wildfire loss avoidance. The assumption behind this research is that risk reduction work to adjust to existing wildfire risks as reflected in the WMPs will require accelerated implementation and this will include identifying mechanisms within existing regulations to support high priority activities in existing utility WMPs. In conclusion, this report will discuss the potential for broader legislative fixes.

As background to the next section, it is the authors' understanding that construction associated with electric distribution under 50kV do not require California Public Utility Commission (CPUC) permits or "discretionary permits or approvals by local governments" though "non-discretionary local permits for the construction and operation of these projects" will still be

required.² It is also the authors' understanding that IOUs do not need CPUC permitting approval "for replacement of existing powerline facilities or supporting structures with equivalent facilities or structure, the minor relocation of existing powerline facilities, the conversion of existing overhead lines to underground, or the placing of new or additional conductors, insulators, or their accessories on or replacement of supporting structures already built."³ In most instances, this will cover the type of fire mitigation and prevention projects proposed in the WMPs so that utilities would only need to work with agencies to obtain required approvals within a local jurisdiction.

II. Use of CEQA Exemptions to Accelerate Implementation of WMPs

CEQA is California's primary environmental legislation requiring public agencies to conduct environmental review to inform government decision makers and the public about potential environmental impacts and means to prevent or mitigate significant and avoidable environmental impact. The California legislature has defined a number of instances where a proposed project may qualify for an exemption under CEQA based on the nature of the activity proposed or the urgency of the situation. The legislature creates statutory exemptions as part of the CEQA statute while the Natural Resource Agency creates categorical exemptions through rulemaking.

The following section focuses on a set of exemptions that have been applied to the type of utilities work proposed in the WMPs and to general wildfire mitigation efforts. This section will cover four categorical exemptions (existing facilities exemption, replacement or reconstruction exemption, minor alterations to land exemption, and the common sense exemption), and one statutory exemption (the emergency project exemption). For each exemption, the authors reviewed the California Public Resources Code, the California Code of Regulations (CCR), and relevant legal cases.

As adopted by the legislature, the Public Resource Code section 21084 (a) includes the requirement to develop "a list of classes of projects that have been determined not to have a significant effect on the environment and that shall be exempt from [CEQA]." These categorical exemptions are available when a project requires discretionary approval as long as there is no "impact on an environmental resource of hazardous or critical concern where designated, precisely mapped, and officially adopted pursuant to law by federal, state, or local agencies"; "cumulative impact of successive projects of the same type in the same place"; "reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances"; "damage to scenic resources" on scenic highways, be located on a "hazardous waste site", and/or "substantial adverse change in the significance of a historical resource".⁴ "Significant" in the context of a "significant effect" is understood within CEQA as having a

² Public Utilities General Order 131-D, Section III-C, Adopted June 8, 1994, Modified August 11, 1995(Available at <https://www.cpuc.ca.gov/-/media/cpuc-website/files/legacyfiles/g/5063-go131d.pdf>)

³ Id. at Section III-A (1995).

⁴ CEQA Guidelines § 15300.2

“substantial or potentially substantial adverse change to any of the physical conditions within the area affected by the project.”⁵

Agencies follow a three step CEQA review process: 1) Determine whether a proposed activity is a project; 2) For activities determined to be projects, determine whether the project is exempt from the CEQA review process under either a statutory exemption or categorical exemption and 3) For projects not deemed to be exempt, determine whether the project may have a ‘significant effect on the environment.’⁶

Statutory exemptions as codified under Public Resources Code section 21080, *et seq.* do not require discretionary review of whether a project would result in significant effects on the environment. “Emergency projects” as defined under sections PRC 21080(b)(2)-(4) are statutorily exempt from CEQA.

CEQA Existing Facilities Categorical Exemption (Class 1)

Vegetation ignition is a major potential cause of wildfire.⁷ CEQA for “existing facilities” may apply to IOU’s vegetation management plans for fuel load reductions or defensible space (hand/mechanical thinning or possibly prescribed burning) under WMPs as necessary maintenance. This maintenance work would achieve important outcomes by avoiding carbon emissions, ecosystem services losses, infrastructure, and timber losses.

IOUs are deemed to be Class 1 “existing facilities” for purposes of CCR Section 15301 which covers “existing facilities of both investor and publicly owned utilities used to provide electric power, natural gas, sewerage, or other public utility services.”⁸

The “maintenance.... or minor alteration of existing public or private structures, facilities, mechanical equipment, or topographical features, involving negligible or no expansion of existing or former use” are not subject to CEQA review under a categorical exemption.⁹ 14 CCR Section 15301. This exemption may require the utility to provide evidence to the agency of conditions on the site when a particular facility was installed as compared to conditions today to demonstrate that the work will be maintenance work. Utilities have already received exemptions under this category. In 2021, PG&E received exemptions for tree removal and pruning from the California Department of Transportation, District 3 to allow for their vegetation removal project to proceed in the State right of way.¹⁰

⁵ Public Resource Code § 21068

⁶ *Protect Tustin Ranch v. City of Tustin*, 70 Cal App. 5th 951, 959 (2021).

⁷ Approximately 16% of the utility ignition fires that burned more than 10 acres between 2014-2018 were known to be caused by contact with vegetation; while 32% of the utility ignition fires causing more than ten acres to burn between 2014-2018 were caused by equipment failures.

https://energysafety.ca.gov/wp-content/uploads/docs/strategic-roadmap/final_report_wildfiremitigationstrategy_wsd.pdf#%5B%7B%22num%22%3A388%2C%22gen%22%3A0%7D%2C%7B%22name%22%3A%22Fit%22%7D%5D, p. 18. (See Appendix B)

⁸ CEQA Guidelines § 15301(b)

⁹ CEQA Guidelines § 15301.

¹⁰ PG& E Tree Removal/Pruning Encroachment Permit 0221-6LT-0428 (December 9, 2021) Notice of Exemption; <https://ceqanet.opr.ca.gov/2021120175> (This exemption was provided as part of implementing PG&E’s Wildfire and

CEQA Replacement or Reconstruction Categorical Exemption (Class 2)

Undergrounding and hardening of IOU assets is an essential part of WMPs effort to reduce ignition risk. For work that utilities may want to do with undergrounding or hardening of certain infrastructure, CEQA Guidelines section 15302 allows for:

Replacement or reconstruction of existing structures and facilities where the new structure will be located on the same site as the structure replaced and will have substantially the same purpose and capacity as the structure replaced, including but not limited to...replacement or reconstruction of existing utility systems and/or facilities involving negligible or no expansion of capacity...[or] conversion of overhead electric utility distribution system facilities to underground including connection to existing overhead electric utility distribution lines where the surface is restored to the condition existing prior to the undergrounding. CEQA Guidelines § 15302(a), (d).

This exemption was used by the City of San Diego in 2018 to approve an electrical undergrounding project for 11 blocks in San Diego. The City issued a “Notice of Exemption” for a project involving “trenching...installing conduit and substructures such as transformers on concrete pads,’ installing cable through the conduits, providing individual customer connections, removing overhead utility lines and poles, and installing new streetlights.”¹¹ The Notice also provided for “installation of curb ramps, sidewalk repair, street resurfacing” and “[a] street tree removal, relocation, and/or trimming that would be done under the supervision of the City Arborist.”¹²

Under municipal process, the City required an appeal be filed within 10 business days of the Notice. No administrative appeals were filed. A citizen who filed a law suit asserting that the environmental review was inadequate, was unable to proceed because the court found that she had failed to exhaust her administrative remedies in a timely fashion and that the City’s process complied with CEQA.¹³

This case highlights an important point for proceeding on needed utility fire prevention and mitigation. A city’s “notice of a right to appeal” is a different document than a “notice of exemption” under CEQA. The City of San Diego filed both. The “right to appeal” was required by San Diego city law while the “notice of exemption” is required by CEQA and allows for a 35-day statute of limitation period to challenge an agency decision.¹⁴ In requesting exemption for purposes of replacement or reconstruction, IOUs will need to maintain awareness of the

Safety Plan and Community Wildfire Safety Program and did not involve ground disturbance); PG& E Tree Removal/Pruning Encroachment Permit 0221-6LT-081 (December 22, 2021) <https://ceqanet.opr.ca.gov/2021120546>

¹¹ Notice of Exemption, Group 160621 Underground Utility Districts San Diego, Project No. 594590 (July 30, 2018).

<https://onbase.sandiego.gov/OnBaseAgendaOnline/Documents/ViewDocument/NOE%20Group%20160621%20Underground%20Utility%20Districts%20Project%20No.%20594590.pdf.pdf?meetingId=1417&documentType=Agenda&itemId=31931&publishId=149236&isSection=false>

¹² Id.

¹³ *McCann v. City of San Diego*, 70 Cal. App. 5th 51, 69 (Jan. 5, 2022)

¹⁴ Pub. Res. Code § 21167.

potentially different timelines for “right to appeal” versus “notice of exemptions” before proceeding on proposed work.

The replacement or reconstruction exemption has been used before with other agencies including the Regional Water Quality Control Board, Lahontan Region to improve one mile of electrical line and vegetation management.¹⁵ It was applied in 2021 to vegetation management activities in Cazadero, Sonoma County by the California State Coastal Conservancy.¹⁶

If the utilities pursue a strategy of using this categorical exemption which may be applicable to undergrounding projects and asset hardening projects, the utilities may need to work with lead agencies to provide evidence that the “cumulative impact of successive projects” is unlikely to have a significant effect on the environment. For most projects unless they are located within post-installation sensitive habitats, this should be possible as the categorical exemption would not have otherwise been adopted.

CEQA Minor Alterations to Land Categorical Exemption (Class 4)

Under section 15304 of the CEQA Guidelines, “minor public or private alterations in the condition of land, water, and/or vegetation which do not involve removal of healthy, mature, scenic trees except for forestry or agricultural purposes” may be exempt from CEQA. Section 15304 may be of interest to the IOUs in implementing WMPs, as lead agencies may exempt projects involving “minor trenching and backfilling where the surface is restored.” Section 15304(f) of the guideline language provides as an illustration of the exemption: “fuel management activities within 30 feet of structures.”¹⁷ This exemption was recently applied to quite extensive fuel treatments to begin in Spring 2022. The California Department of Forestry and Fire Protection issued the exemption for reducing wildfire risk across 46 acres of publicly owned land by herbicide treatments, thinning, and removal of dead and dying trees, and removing ground cover. The project includes consultation with the California Department of Fish and Wildlife (CDFW) and the Regional Water Quality Control Board.¹⁸

A similar fuel reduction project has been proposed along 70 acres of road east of Ukiah under the same exemption.¹⁹ In 2020, the California Department of Parks and Recreation issued a similar notice of exemption on 29 acres of Mt. Diablo State Park.²⁰ In 2021, the Feather River Resource Conservation District used this exemption to cover vegetation treatments on 35 acres.²¹ There are

¹⁵ Vikingsholm Wildfire Prevention Project, Notice of Exemption, <https://ceqanet.opr.ca.gov/2020100498/2>

¹⁶ Ready for Wildfire Cazadero, Notice of Exemption, <https://ceqanet.opr.ca.gov/2021060239>

¹⁷ CEQA Guidelines § 15304(f), (i).

¹⁸ Lone Pine Fuel Reduction Notice of Exemption <https://ceqanet.opr.ca.gov/2022020338>

¹⁹ Mill Creek Road Shaded Fuel Break, Notice of Exemption, <https://ceqanet.opr.ca.gov/2022020337>

²⁰ Defensible Space for Wildfire Protection, Notice of Exemption, <https://ceqanet.opr.ca.gov/2020060011/2>

²¹ Mohawk Valley Wildfire Resiliency Project-Plumas Eureka CSD, Notice of Exemption, <https://ceqanet.opr.ca.gov/2021050187>

numerous other examples in the Governor’s Office of Planning and Research (OPR) database, which functions as the CEQA documents public clearinghouse.²²

CEQA Common-Sense Exemption- Categorical Exemption

Section 15061(b)(3) of the CEQA Guidelines provides the common-sense exemption, which states: “where it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment, the activity is not subject to CEQA.” The lead agency has the responsibility to ensure that there is evidence to support that it considered possible environmental impacts and concluded that the common-sense exception applied. This exemption is difficult to apply in the case of any WMP activity that might include trenching (undergrounding) or large amounts of vegetation removal. As one court indicated “if legitimate, reasonable questions can be raised about whether the project might have a significant impact, the agency cannot find with certainty the project is exempt.”²³

CEQA Emergency Exemptions – Statutory Exemption

CEQA applies to discretionary projects but is not triggered for emergency repairs to public service facilities necessary to maintain service,²⁴ projects to restore/replace facilities damaged under a state of emergency,²⁵ or “specific actions necessary to prevent or mitigate an emergency.”²⁶ In the case of an emergency, a lead agency does not need to consider the environmental impacts of the project as long as they can provide a reasoned explanation why an “emergency” exists that forms the basis for the lead agency’s decision to issue a notice of exemption.

This section describes what constitutes an “emergency” emergency project” under CEQA. It summarizes the legislative history of changes to the CEQA Guidelines to clarify the emergency exemption for mitigating emergencies CEQA Guidelines Section 15269 (c), highlights public concerns raised about the interpretation of the emergency exemption, analyzes the application of the emergency exemption to utility fire risk mitigation activities, and identifies potential resistance to the use of the emergency project exemption.

A. Definition of “Emergency”/ “Emergency projects”

An “emergency” is defined by the statute as:

a sudden, unexpected occurrence, involving a clear and imminent danger, demanding immediate action to prevent or mitigate loss of, or damage to, life, health, property, or

²² Four acres of treatment in the Feridell Ranch Wildfire Fuels Reduction Project (California Department of Fish and Wildlife, Eastern Sierra-Inland Deserts Regions); 24 acres of private land under the lead agency of the Placer County Resource Conservation District (January 11, 2021) <https://ceqanet.opr.ca.gov/2019120353/3>; 311 acres of Las Posadas Demonstration State Forest (July 24, 2019) <https://ceqanet.opr.ca.gov/2019070983/2>

²³ *California Farm Bureau Fed'n v. California Wildlife Conservation Bd.*, 143 Cal. App. 4th 173, 194 (2006)

²⁴ Public Resources Code §21080 (b) (2)

²⁵ Public Resources Code §21080 (b) (3)

²⁶ Public Resources Code §21080 (b) (4)

essential public services. ‘Emergency’ includes such occurrences as fire, flood, earthquake, or other soil or geologic movements, as well as such occurrences as riot, accident, or sabotage. PRC §21060.3

The same definition for “emergency” appears in section 15359 of the CEQA Guidelines with further clarification of what constitutes an “emergency project” under Public Resources Code section 21080 (b) (4) for purposes of implementing CEQA. The Guidelines provide in full that:

The following emergency projects are exempt from the requirements of CEQA.

(a) Projects to maintain, repair, restore, demolish, or replace property or facilities damaged or destroyed as a result of a disaster in a disaster stricken area in which a state of emergency has been proclaimed by the Governor pursuant to the California Emergency Services Act...

(b) Emergency repairs to publicly or privately owned service facilities necessary to maintain service essential to the public health, safety or welfare. Emergency repairs include those that require a reasonable amount of planning to address an anticipated emergency

(c) Specific actions necessary to prevent or mitigate an emergency. This does not include long- term projects undertaken for the purpose of preventing or mitigating a situation that has a low probability of occurrence in the short-term. But, this exclusion does not apply (i) if the anticipated period of time to conduct an environmental review of such a long-term project would create a risk to public health, safety or welfare, or (ii) if activities (such as fire or catastrophic risk mitigation or modifications to improve facility integrity) are proposed for existing facilities in response to an emergency at a similar existing facility.

California wildfires are incorporated within this definition of “emergency”. As PRC §21060.3, “fire is understood to be the type of “sudden, unexpected occurrence, involving a clear and imminent danger, demanding immediate action to prevent or mitigate loss of, or damage to, life, health, property, or essential public services.” While it is possible to argue that “wildfire” is no longer “unexpected” in California given the last several years of rampant wildfire, a given wildfire event remains unexpected because it is not possible at the start of a fire season to predict precise ignition events. The CAL FIRE 2022 Fire Season Outlook anticipates 2022 being a year that is likely to have wildland fire emergencies.²⁷ Multiple dry and windy periods across Southern California may lead to fast fire spread as seen with the Airport Fire in Bishop, California moving 10 miles in one day in February 2022.²⁸ National predictions for Northern

²⁷ The 2022 “Fire Season Outlook” provides “Extended dryness originating from January is expected to continue into the Spring with little precipitation leaving most of the state in moderate to extreme drought conditions prior to Summer. These continued dry conditions with above normal temperatures through Spring will leave fuel moisture levels lower than normal increasing the potential for wildland fire activity.” <https://www.fire.ca.gov/incidents/2022/>

²⁸ National Significant Wildland Fire Potential Outlook, Predictive Services, National Interagency Fire Center, Outlook Period March-June 2022, Executive Summary, p. 2, https://www.predictiveservices.nifc.gov/outlooks/monthly_seasonal_outlook.pdf

California include “earlier than normal flammable dead and live fuel conditions and early start to the main portion of the fire season” and for Southern California “the potential for significant fires will become above normal across coastal areas in June...” plus “live fuel moisture...[that] is now well above normal over most of the geographic area.”²⁹ Without short-term prevention or mitigation, the 2022 Fire Season will pose threats to life, health, property, and public services.

B. Legislative History of CEQA Guideline 15269 (c)

Public Resources Code section 21083 provides that OPR in cooperation with the Natural Resources Agency, is required to periodically update the CEQA Guidelines to assist public agencies include local governments, special districts, and state agencies with determining whether an activity is subject to or excepted from environmental review. Revisions to CEQA Guidelines section 15269 (c) were introduced as part of a larger revision of the guidelines in 2018.

In 2018, the NRA revised the language from section 15269(c) that had stated: “The following emergency projects are exempt from the requirements of CEQA...(c) Specific actions necessary to prevent or mitigate an emergency. This does not include long-term projects undertaken for the purpose of preventing or mitigating a situation that has a low probability of occurrence in the short-term.”

Two additional clauses were added to section 15269(c) to clarify that certain “long-term” projects would be considered under CEQA’s emergency exemption as long as such activities either involved (i) a “risk to public health, safety, or welfare” due to the length of the anticipated environmental review or (ii) risk mitigation activities are being “proposed for existing facilities in response to an emergency at a similar existing facility” to improve facility integrity.³⁰ These changes were deemed to be “non-substantive changes.”³¹

In its CEQA Final Statement of Reasons, the NRA stated that it added the additional language in section 15269(c) to clarify how “imminent” an emergency must be to qualify as an emergency under Public Resources Code §21060.3. Specifically, the language was changed to reflect the decision in *CalBeach Advocates v. City of Solana Beach* 103 Cal. App 4th 529, 537 (2002).

In this case, the nonprofit CalBeach argued that the City of Solana Beach should not have allowed an emergency exemption under CEQA to permit homeowners to build a seawall to protect against a potential sea bluff collapse. In this case, homeowners had observed early signs of bluff collapse and applied for a permit in January 2000 which was issued in February 2000 and then modified in June 2000. The City decided that the modified design required a special use permit and issued a proposed mitigative negative declaration in October 2000. On November 16,

²⁹ Id. pp. 4-5.

³⁰ NRA, Final Statement of Reasons for Regulatory Action Amendments to the State CEQA Guidelines (November 2018) at 60. Available at: https://files.resources.ca.gov/ceqa/docs/2018_CEQA_Final_Statement_of%20Reasons_111218.pdf.

³¹ Notice of Public Availability of Modifications to Text of Proposed Regulation and Addendum to the Initial Statement of Reasons and Informative Digest (July 2, 2018), OAL Notice File No. Z-2018-0116-12 <https://files.resources.ca.gov/ceqa/docs/update2018/CEQA-guidelines-revisions-15-day-notice-july-2-2018.pdf>

2000, the homeowners consulting engineer indicated that erosion in a “matter of weeks” might lead to a catastrophic bluff collapse as evidenced by other local collapse. The homeowners requested on December 5, 2000, an exemption to CEQA with the submission of a letter from a geotechnical engineer that “there is no question that if construction is to be deferred until after certification of the City’s EIR, this coastal bluff will collapse.” On December 19, 2000, the City Council approved a Resolution allowing for the permit under CEQA’s emergency exemption and filed notices of exemption with San Diego County and the State of California. On June 12, 2001, CalBeach filed to set aside the approval and to require Solana Beach to certify an EIR. The city and homeowners filed for summary adjudication on the same day and a hearing was held on July 20, 2001, granting the motion for summary adjudication.

In 2002, the appellate court reviewed the trial court’s decision and highlighted the necessity for the agency to present “substantial evidence”, defined as “enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion even though other conclusions might also be reached.”³² The appellate court agreed with the trial court that the danger posed by the collapsing cliff qualified for the emergency exemption even though the collapse would not be an “unexpected occurrence.”

Public Concerns Raised Regarding the Application of CEQA Emergency Exemption

Four comments were received by the NRA regarding the 2018 revision of the CEQA Guidelines regarding the scope of the emergency exemption under CEQA Guidelines § 15269. One comment from the Environmental Defense Center (EDC) is worth quoting in full:

Section 15269 Should be Revised to Ensure that the Expansion of the Emergency Exemption does not Exceed the Definition of Emergency. CEQA defines “emergency” as “a sudden, unexpected occurrence, involving a clear and imminent danger, demanding immediate action to prevent or mitigate loss of, or damage to life, health, property, or essential public services.” CEQA Guidelines § 15359. The proposed amendment to the Guidelines would expand the exemption for emergencies to include “emergency repairs...that require a reasonable amount of planning.” This expansion is vague and overbroad, and appears inconsistent with the definition of emergency. In fact, this expanded exemption could easily swallow the rule. The proposed amendment should be eliminated, or at least clarified to ensure that it is consistent with the definition of “sudden, unexpected occurrence.”³³

This comment highlights the main public issue for IOUs wishing to pursue an emergency exemption. IOUs must be able to provide sufficient evidence to a public agency to demonstrate that proposed WMP activities qualify within the regulatory definition of “emergency project” to

³² CEQA Guidelines § 15384 (a); Other courts examining CEQA cases have defined substantial evidence as “evidence of ponderable legal significance that is reasonable in nature, credible, and of solid value, to support the agency’s decision.” *Protect Tustin Ranch v. City of Tustin*, 70 Cal App. 5th 951, 960 (2021).

³³ California Natural Resources Agency, Statement of Reasons for Regulatory Action, Amendments to the State CEQA Guidelines, OAL Notice File No. Z-2018-0116-12
https://resources.ca.gov/CNRALegacyFiles/ceqa/docs/2018_CEQA_ExA_FSOR.pdf at p. 362.

respond to a statutorily defined emergency such as a wildfire. NRA responded to the comments of the EDC:

The Agency declines to make a change based on this comment regarding the emergency exemption in CEQA Guidelines section 15269. As the commenter notes, the CEQA Guidelines include definitions for a number key words, including “emergency.” (Guidelines, § 15359) This definition already applies in the context of section 15269 and the Agency finds that it is not necessary to add language making the exemption consistent with the definition. That said, case law states that “the anticipation of [an occurrence] does not prevent it from being an emergency.” (*CalBeach Advocates v. City of Solana Beach* (2002) 103 Cal. App.4th 529, 537.) Thus, as the 15-day language reflects, the Agency made further revisions to Guidelines section 15269 to be consistent with case law.³⁴

The Planning and Conservation League (League) submitted a similar comment to the NRA expressing concern that repairs that can be planned for should not be deemed to be an “emergency” and that “preventative work would not be an emergency condition.”³⁵ In response, the NRA reiterated that the planning must be required “to address an anticipated emergency” and disagreed with the League that the section would only apply to “serious” or “significant” risks associated with an emergency.

A third comment was received by the United Auburn Indian Tribe of the Auburn Rancheria who expressed concern that:

If aggressively used, the proposal could greatly expand the use of emergency exemptions beyond bona fide emergency situations and result in unstudied and unmitigated environmental effects, including those to TCRs [traditional cultural resources], as there would be no CEQA document or process. Almost any agency could try and argue its project protects public health, safety, or welfare - after all, these are the very purposes of municipal and state government.

This also could be of particular concern for TCRs in and near rivers, coastlines, and forests - relating to water (levees, dams, etc.) and fire control. The proposal could also create a potential end run around AB 52 and tribal consultation contrary to the intent of the legislature. We therefore cannot support the revisions as proposed.³⁶

The tribe proposes the need to retain tribal consultation during emergency projects to protect traditional cultural resources. A supplemental comment from the Tribe indicated concern that the guidelines used words that are not defined in CEQA including ““reasonable amount” of planning, “anticipated” emergency, “anticipated” period of time, a “risk” to public health, safety or welfare, and “similar” existing facility.³⁷ The comment further recommended the inclusion of the term “significant” before “risk”. In responding to these comments, NRA noted that the

³⁴ Id. at 362.

³⁵ Id. at 401.

³⁶ Id. at 462

³⁷ Id. at 645.

change in language was done to reflect the *CalBeach* findings and a clarification was made to indicate that the exemption would be available “to address an anticipated emergency.” NRA also pointed to existing guidance from the Native American Heritage Commission on ensuring that emergency responses are undertaken using culturally-appropriate practices.³⁸

A final comment was received from the Middletown Rancheria of Pomo Indians of California expressing concern that the 2018 revised guideline would be “vague and overbroad, and appears inconsistent with the definition of emergency.” The tribe noted for the record:

Emergency response actions can cause extensive damage and destruction to tribal cultural resources. The Middletown Rancheria has worked with federal, state and local agencies on many emergency management and recovery activities such as the 2015 Valley Fire, 2016 Clayton Fire and recent Napa fires (not official name) emergency recovery and management related activities and projects. We have established and continue to establish mechanisms with the agencies for the protection and treatment of tribal cultural resources potentially impacted and found in conjunction with such emergency projects.³⁹

The NRA acknowledged the comment and reiterated that the exemption was created by the Legislature and interpreted by the courts and is not a creation of the agency. They reiterated that the any project planning associated with the exemption must be required to “address an anticipated emergency.” The agency indicates that its understanding of the *CalBeach* case is that that Pub. Res. Code § 21080 “exempts not only projects that mitigate the effects of an emergency but also projects that prevent emergencies which we can anticipate from known risks such as bluff collapse.”⁴⁰

C. Application of the Emergency Exemption to Utility Fire Risk Mitigation Activities

The 2018 amendments apply to longer term utility ignition prevention and fire risk mitigation activities wherever a lead agency has evidence that “(i) if the anticipated period of time to conduct an environmental review of such a long-term project would create a risk to public health, safety or welfare, or (ii) if activities (such as fire or catastrophic risk mitigation or modifications to improve facility integrity) are proposed for existing facilities in response to an emergency at a similar existing facility.”⁴¹ In both cases, the lead agency must be able to demonstrate that the IOUs actions are being taken in response to a statutory “emergency.”

The 2018 amendments offer a reasonable possibility for allowing fire mitigation activities to proceed as long as there is sufficient evidence that either the environmental review process would create a substantial risk to the public or the work that is being undertaken from a WMP is in response to wildfires at a similar facility. A lead agency issuing a notice of exemption will be

³⁸ Protecting California Native American Sites During Drought, Wild Land Fire, and Flood Emergencies: A Guide to Relevant Laws and Cultural Resources Management Practices (2015), <http://nahc.ca.gov/wp-content/uploads/2017/03/Protecting-CA-NA-Sites-During-Drought-Wild-Land-Fire-and-Flood-Emergencies.pdf>

³⁹ Comments and Responses supra note 33 at 610.

⁴⁰ Id. at 610.

⁴¹ CEQA Guideline 15269 (c)

held to the judicial standard of “substantial evidence” which means that “substantial evidence must support each element of the definition of an emergency”.⁴²

Under the guideline amendment, there are two conditions that trigger the emergency exemption. First if there is a **“risk to public health, safety, or welfare” due to the length of the anticipated environmental review**⁴³ and second if **risk mitigation activities are being “proposed for existing facilities in response to an emergency at a similar existing facility.”**⁴⁴

Both conditions apply here to the activities detailed within IOUs Wildlife Mitigation Plans particularly within high-risk fire zones (See Appendix 3 for a map of CPUC’s California’s High Fire Risk District).

1. Risk to Public Health, Safety, or Welfare

First, there is indirect evidence that “public health, safety, or welfare” may be jeopardized in the regions where the utilities operate if projects for the upcoming 2022 fire season are unable to be completed in a timely manner due to permitting timeframes.

The current length of time between proposed mitigation projects implementation and environmental review can have impacts. For example, in June 2020, the Western Area Power Administration (WAPA) in cooperation with the Trinity Public Utility District proposed vegetation management in areas with dense vegetation and steep terrain to reduce fire risk for both communities and public land (See Figure 4). A CEQA notice of preparation was published on December 11, 2020, indicating the intent to prepare an EIR/EIS for a “Wildfire Risk Reduction, Reliability and Asset Protection” program. Meanwhile in August 2021, lightning-caused fires broke out in Trinity County covering some of same areas under the proposed wildfire risk reduction program leading to evacuation and power shutoffs within the region where environmental review was being undertaken. As of April 5, 2022, the EIR/EIS had yet to be published and presumably the proposed fuel reduction work described in the EIR/EIS has yet to be undertaken. Long permitting times can increase the risk that an ignition event associated with aging or outdated utility infrastructure will create harm to public health, safety or welfare. A forthcoming report from the Cal Poly Wildfire Urban Interface Institute will highlight the types of environmental and property losses that are avoided by undertaking timely fire prevention and mitigation efforts.

⁴² *Calbeach Advocates v. City of Solana Beach* (2002) 103 Cal. App. 4th 529.

⁴³ CEQA Guideline 15269 (c)(i)

⁴⁴ CEQA Guideline 15269 (c)(ii)

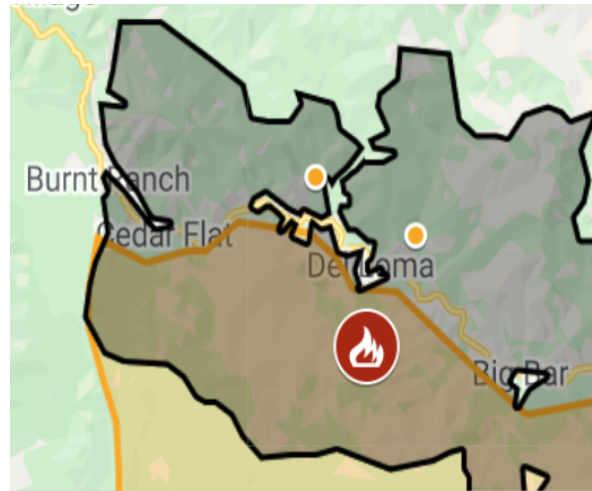


Figure 4: The project map from the WAPA map on the left illustrates wildfire risk reduction areas including Big Bar and Hayfork. The image on the right shows areas from the August 2021 fire perimeter that includes areas north of Big Bar where fire mitigation work was proposed.

Each of the California IOUs has filed a Risk Assessment Mitigation Phase (RAMP) report that identified risk rankings based on the history of prior incidents, the likelihood of future events, and the possibility of major consequences. San Diego Gas & Electric’s (SDG&E) number one risk was wildfire (including public safety power shutoffs) because 64% of its service territory has been designated as high fire threat districts (HFTD).⁴⁵ Ninety seven percent of ignition events of concern for SDG&E take place within a HFTD.⁴⁶ Of these HFTDs, 61% are categorized as Tier 3 “extreme risk” for “destructive utility-associated wildfires”.⁴⁷ Likewise, wildfire risk is the top risk for Pacific Gas & Electric (PG&E). The possibility of any ignition event in one of these “extreme risk” areas should be considered a high-potential occurrence needing immediate preventive measures. Preparing environmental review for each implementation of a WMP could take multiple years with potentially severe impacts on both human and environmental communities including *inter alia*, wildfire smoke exposure and habitat loss. For areas where utilities are concerned about the potential of existing utility assets to spark an ignition, utilities may shut off electrical utilities particularly during dry, windy weather. The CPUC allows for Public Safety Power Shutoffs which have led to over nine billion customer outage minutes.⁴⁸ Time delays associated with CEQA review in these areas may lead to additional utility shutoffs.

⁴⁵ CPUC Safety Policy Division Staff Evaluation Report on SDG&E’s and SoCal Gas’ Risk Assessment and Mitigation Phase Application Reports, (November 5, 2021) at 5-6, 107 <https://www.cpuc.ca.gov/-/media/cpuc-website/divisions/safety-policy-division/reports/spd-evaluation-of-sdge-and-socalgas-2021-ramp-reports.pdf> (Table 1 Ranking risk scores)

⁴⁶ *Id.* at 107

⁴⁷ *Id.*

⁴⁸ California Public Utilities Commission, “ESRB-8,” July 12, 2018, <https://docs.cpuc.ca.gov/publisheddocs/published/g000/m218/k186/218186823.pdf>; Patrick Murphy (March 19, 2021), Preventing Wildfires with Power Outages: the Growing Impacts of California’s Public Safety Power Shutoffs, PSE Blog, <https://www.psehealthyenergy.org/news/blog/preventing-wildfires-with-power-outages-2/#ref>

Depending on the season and the exposure of a particular community, these shutoffs could have potential human health impacts.

2. Mitigation of Similar Emergencies at Existing Facilities

Second, the type of work proposed by the utilities is for “existing facilities” where there is a risk of similar emergencies to those experienced by other utility facilities. In 2020 and 2021, there are unfortunate examples of utility equipment failure including the 56,000-acre Zogg fire and the 963, 276-acre Dixie Fire. Ability to reduce risks at “existing facilities” in high-risk fire areas through some combination of vegetation management, undergrounding, and infrastructure hardening in high-risk regions would avoid future expected emergencies.

The emergency exemption has been relied upon by numerous lead agencies. Most recently as illustrated in Appendix A, the California Department of Fish and Wildlife approved an emergency exemption for SDG&E to amend its Natural Conservation Community Plan (NCCP) in preparation for 2022 wildfire risk reduction activities allowing the utility to “impact an additional 20 acres of habitat from wildfire risk reduction activities provided SDG&E complies with all avoidance, minimization, and mitigation requirements of their existing NCCP permit in implementing those activities.”⁴⁹ (See Appendix A). The NCCP amendment recognizes that the activities are necessary “to reduce the risk of catastrophic wildfires” and that the utilities needs to “conduct important wildfire risk reduction activities ahead of and during the 2022 wildfire season” because “[d]elaying these activities would create a risk to public health, safety, and welfare through increased risk of catastrophic wildfire.”⁵⁰ The exemption applies to “wildfire risk reduction activities in the short term.”⁵¹ The activities that are included cover overhead (grid) hardening, strategic undergrounding, covering conductors, pole replacement and inspections, vegetation management in high fire threat districts, pole brushing, and wildfire fuels management.⁵²

The California Department of Transportation on May 13, 2021, used the emergency exemption for a PG&E Encroachment Permit. The proposal was to replace a transmission pole within the State Right of Way in a tier 2/3 High Fire Threat District. The rationale for issuing the exemption was “This work is in support of PG&E's Wildfire Safety Plan (WSP) and Community Wildfire Safety Program (CWSP) for Electric Distribution and Transmission, as required by the Federal Judges' Mandate No. CR-14-0175 and the Public Utilities Commission of the State of California (CPUC) Order Instituting Rulemaking 18-10-007 to Implement Plans pursuant to Senate Bill 901 (2018).”⁵³ PG&E had previously received a notice of exemption for a larger project involving

⁴⁹ See, CDFW Notice of Exemption and Attachment issued to SDG&E on February 17, 2022. Available at: <https://ceganet.opr.ca.gov/2022020435>.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ State Clearing House Number 2021050283 May 13, 2021, Belden City, Plumas County, https://files.ceganet.opr.ca.gov/269956-1/attachment/GkEBeax5MgM2bZ7dGPgAt66qfgFvJbLdyh_cXvtIqjgzCSqJX0hC0zmVo-U9qSHG0RtjOoDFiPWOJK6M0

replacing utility distribution poles and overhead conductors in Shingletown California on the basis that the “Work is in support of PG&E’s Wildfire Safety Plan.”⁵⁴

On June 28, 2021, the California Coastal Conservancy issued a notice of exemption for the San Lorenzo Valley Water District to engage in fuel reduction work “to increase wildfire resilience of its water tanks, pump houses, access roads, and other critical water infrastructure such as treatment plans and intakes”. The exemption covered both the emergency exemption and the exemption for minor alterations.⁵⁵

In an additional relevant example from 2021, the California State Coastal Conservancy issued a notice of exemption for the Sonoma Land Trust Wildfire Resiliency effort involving 55 acres of treatment for fire hazards that would include “shaded fuel break creation and management...and forest thinning” by hand crews. The Conservancy as the lead agency relied on the 2017 Tubbs Fire and the 2019 Kincadee fires that both burned up to the border of the Trust lands as a reason for invoking the emergency exemption.⁵⁶

The City of Clearlake relied on the entire emergency exemption not just Section 15269 (c) as part of its “Very High FHSZ Fuels Reduction” project designed with CAL FIRE to reduce fuel loads on city lands and in the “Yolo County Water Shed” that “have created dangerous conditions and increased risk of catastrophic wildfire.”⁵⁷

A similar notice of exemption was issued on January 19, 2021, to ensure removal of hazardous vegetation in “CAL FIRE’s highest priority areas in Lake County” that include fuel loads from previous wildfires in 2015 and 2018.⁵⁸

In January 2021, Sonoma County approved an emergency exemption for the Russian River County Sanitation District for an Emergency Force Main Project requiring the replacement of 800 linear feet of sewer pipeline based on a “threat of imminent failure” based on known sewer leaks. The program was deemed exempt because it is necessary “to prevent an anticipated

⁵⁴ Caltrans Encroachment Permit 02-19-6-UC-0354 for Pacific Gas and Electric (PG&E); <https://ceqanet.opr.ca.gov/2019090357/2> (On the exemption form issued for this project, the Lead Agency checked a categorical exemption rather than the statutory exemption)

⁵⁵ San Lorenzo Valley Water District Wildfire Resiliency, <https://ceqanet.opr.ca.gov/2021060645>

⁵⁶ Sonoma Land Trust Wildfire Resiliency, Notice of Exemption (6/7/2021) <https://ceqanet.opr.ca.gov/2021060143> (also invoking Categorical Exemption 15304); Similar application were posted for 60 acres of fuel reduction for additional Sonoma County preserves Fuel Reduction and Burn Area Restoration for Wildfire Resiliency in Sonoma County, Notice of Exemption, <https://ceqanet.opr.ca.gov/2021060144>; Wildfire Resiliency at Sonoma County Regional Parks, Notice of Exemption, <https://ceqanet.opr.ca.gov/2021060348>; Wildfire Resiliency at Spring Lake Regional Park, Notice of Exemption, <https://ceqanet.opr.ca.gov/2021060341>; Lake County Hazardous Fuel Reduction Project, Notice of Exemption, <https://ceqanet.opr.ca.gov/2021010189/2>

⁵⁷ (March 15, 2021) <https://ceqanet.opr.ca.gov/2021030397>

⁵⁸ Lake County Hazardous Fuel Reduction Project, (January 19, 2021) <https://ceqanet.opr.ca.gov/2021010189/2>; The Notice can be found here showing a primary reliance on “imminent wildfire emergencies” https://files.ceqanet.opr.ca.gov/267105-2/attachment/4fbhO-Heq8kHmoiWht6r_B4rmt3Mmavk7Gp_A1X2C3PZ922gLC7BfH9qCrJTbuuz2VsrHx03lkhK_U920

emergency” involving a “potential sewage leak into the Vacation Beach Neighborhood or mainstream Russian River.”⁵⁹

The NRA on September 10, 2019, approved a request by CAL FIRE for an emergency exemption to CEQA in order to complete the 1,016-acre Webster Vegetation Management Project, one of 35 priority projects that CAL FIRE had identified as needed to mitigate wildfire risk near vulnerable communities through fuel management. The NRA concluded that the “crush and burning to reduce dense, continuous stands of 8-foot tall chamise chaparral” needed “immediate implementation...to protect the communities of Creston and Parkhill, Santa Margarita and Atascadero in San Luis Obispo.”⁶⁰ The State letter suspending CEQA concluded that the Governor’s proclamation of a “state of emergency involving forest conditions near vulnerable communities” formed the basis for proceeding without applying CEQA.⁶¹ The NRA concluded that this suspension may be revised or further conditioned as necessary to protect public health and the environment. Suspension of additional regulatory requirements may be considered as project implementation proceeds. The suspension does not alter any requirements imposed by law.”⁶²

California Polytechnic State University has invoked the emergency exemption for the removal of 43 trees and construction of firebreaks after a fire in 2018 forced evacuation of students from dormitories.⁶³ In December 2021, the California Department of Transportation (Caltrans) relied on the emergency project exemption to replace an existing culvert damaged by uncontrolled fire in order prevent failure of an embankment.⁶⁴

D. Potential Resistance to the Use of the Emergency Exemption by Lead Agencies

Even though the use of the emergency exception by the IOUs to prevent and mitigate potential wildfire risk is a reasonable reading of Section 15269, groups may attempt to argue for a very narrow definition of what constitutes an emergency. It will be hard for these groups to sustain a legal argument that CEQA would prevent the application of the emergency exemption to high priority essential work under a WMP to harden existing assets, underground existing assets, or remove vegetation that is an ignition risk. All previous case law interpreting the CEQA Guideline’s application of the emergency exemption predates the 2018 revision of CEQA Guidelines section 15269.⁶⁵ The previous case law found that a post-earthquake redevelopment

⁵⁹ Russian River County Sanitation District, Notice of Exemption, (January 26, 2022) Doc. No. 49-01262022-021

⁶⁰ Letter from Wade Crowfoot, NRA to Chief Porter, Department of Forestry and Fire Protection Regarding Webster Vegetation Management Project (September 10, 2019)

⁶¹ <https://www.gov.ca.gov/wp-content/uploads/2019/03/03.22.19-State-of-Emergency-Attested.pdf>

⁶² Letter from Wade Crowfoot, *supra* note 60.

⁶³ Emergency Tree Removal- Hillside Fire Response, <https://ceqanet.opr.ca.gov/2017108388>

⁶⁴ 1P290: Fire Damaged Culvert Replacement, https://files.ceqanet.opr.ca.gov/274914-1/attachment/il-FVtqR6oSlCk6JymXeC0t6ZrR5-mrL_rxXu0Z2U6Z2IU78dom1TOb9mwsRCyO5nknB7VvHf4_0ulce0

⁶⁵ In 1986, the court was asked to determine that a soil liquefaction emergency that would take 6 years to mitigate was an emergency. The court concluded that “The “emergency” exception of section 21080 subdivision (b)(4) is obviously extremely narrow. “Emergency” as defined by section 21060.3 is explicit and detailed. We particularly note that the definition limits an emergency to an “occurrence” not a condition, and that the occurrence must involve

and recovery plan would not qualify for the emergency exemption because the plan extended in large part beyond actions “necessary to prevent or mitigate an emergency.” (*Castaic Lake Water Agency v. City of Santa Clarita* (1995) 41 Cal.App.4th 1257). The finding in *Castaic Lake Water* was based on a reading of precedent in *Western Municipal Water District v. Superior Court* 187 Cal. App. 3d 1104 (1986) where the court found that the emergency exemption did not apply. In the *Western Mun. Water Dist.* Case, the San Bernardino Valley Municipal Water District (SBVPWD) had argued that a soil liquefaction emergency was impending, and that the city must drill two emergency wells to begin to dewater over the course of about six years an aquifer that was subject to liquefaction. Petitioners argued that the SBVPWD misconstrued what types of events might qualify for an emergency and prevailed because the Court agreed that an emergency exemption must be understood to be “obviously extremely narrow.” *Id.* at 1111. The *Castaic* case appears to be inapplicable in light of the post-emergency nature of the project in that case.

The IOU’s proposed prevention work is designed to prevent an imminent emergency arising from 2022 Summer fire season. Likewise, *Western* does not serve as precedent given that the only evidence available of the liquefaction risk in that case was that there was likely to be a catastrophic earthquake event with San Bernadino as a likely epicenter. The SBVMPD was unable to carry its burden to provide “significant evidence” of emergency conditions. In the case of the utilities proposed fire prevention and mitigation work, it will be easier to identify equipment risk factors that immediately increase wildfire ignition risk (e.g., Risk Assessment Mitigation Phase data) than it would be to identify earthquake data to measure “end of the century” liquefaction risk.

However, the revision of CEQA Guidelines section 15629 was based explicitly on the *Calbeach Advocates v. City of Solana Beach* case that supports the interpretation that wildfire prevention and mitigation is likely to qualify as an emergency project if an agency can demonstrate “substantial evidence” of emergency conditions. In *Calbeach*, the court discussed in some detail whether an emergency must be an “occurrence” not a “condition” based on the findings in *Western Mun. Water District*. The plaintiffs argued that beach erosion is a condition and not an “occurrence” as required by the statute. In the *Calbeach* case, the Court suggested that a collapse of a bluff, which was at issue in the case, must “like an earthquake or a forest fire” be deemed to be a sudden “occurrence” because “it is something that happens...all at once.”⁶⁶ A wildfire is like a bluff collapse because when it occurs, they it is likely to happen “all at once” after ignition has happened.⁶⁷ As noted above, fires in some areas, such as grasslands, are becoming not just more intense but also more extensive.

Just like the collapse of the beach cliff in *Calbeach*, wildfires are not necessarily “unexpected occurrences.” Fire scientists can see the types of situations that are likely to culminate in a wildfire if ignition causes unmanaged fuel to burn or ignition sparks catch on untreated or

a “clear and imminent danger, demanding immediate action.” *Western Municipal Water District v. Superior Court* 187 Cal. App. 3d 1104, 1111 (4th Dis. 1986) (Emphasis in original)

⁶⁶ *Calbeach Advocates v. City of Solana Beach* (2002) 103 Cal. App. 4th 529 at 537 (2002)

⁶⁷ *Id.* at 530.

exposed flammable surfaces. But as the *Calbeach* court decided “the anticipation of a collapse does not prevent it from being an emergency.”⁶⁸ Pub. Res. Code section 21080, subdivision (b)(4) exempts not only projects that mitigate the effects of an emergency, but also projects that prevent emergencies. In order to design a project to prevent an emergency, the designer must anticipate the emergency.”⁶⁹ The Court refused to confine emergency to unexpected occurrences because “then projects can never be designed to prevent emergencies.” The Court concluded that “Substantial evidence supports a finding that the collapse of the bluff could cause damage to life, health, and property.”⁷⁰ Similar logic would apply in the case of priority utility ignition prevention work for the 2022 fire season to avoid extensive losses.

Challenges may still be brought even though agencies have a sufficient record of substantial evidence in support of their decision. The Stanford Environmental Law Clinic on behalf of Landwatch San Luis Obispo, the Santa Lucia Chapter of the Sierra Club, and The Cambria Land Trust (environmental groups) requested a review of the Regional Water Quality Control Board’s (RWQCB) Order for discharges of brine from the Cambria Community Service District’s (CCSD) “Emergency Water Supply Project.” The environmental groups argued that the project should not have qualified for an emergency exemption because the water treatment facility is a response to a drought which is not “an unexpected occurrence that happens all at once like an earthquake or a riot” but “an ongoing condition that may last several years without producing the sort of acute crisis point described by the [emergency exemption].”⁷¹ The environmental groups asserted that the project in question involving a recycled water injection system as a backup water source had been already been in the planning stages before the Governor’s declaration of a state of emergency. The groups asserted that CCSD was moving forward without CEQA review on the basis that CCSD had been identified as having critical drinking water shortages (only 60-90 days of water supplies). The environmental groups disagreed with the RWQCB’s justification:

The basis for claiming the exemption is that CCSD’s water situation is dire, and the Emergency Water Supply Project will avoid potentially disastrous consequences from not having adequate water for health, safety, sanitation, and fire protection and will mitigate the effects of the drought emergency declared by the Governor and emergencies that result from future critical water shortages.⁷²

⁶⁸ *Id.* at 537.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ Petition requesting Review of California Regional Water Quality Control Board Order No. R3-2014-0050 (December 12, 2014).

https://www.waterboards.ca.gov/public_notices/petitions/water_quality/docs/petitions/a2350petition.pdf

⁷² California Regional Water Quality Control Board, Central Coast Region, Order No. R3-2014-0050, Water Discharge Requirements and Water Recycling Requirements for the Cambria Community Services District Emergency Water Treatment Facility Recycled Water Re-injection Project (2014).

The RWQCB issued an emergency permit to CCSD authorizing it to provide 250-acre feet of water to service existing water supply conditions and not to serve any new development.⁷³ The permit indicated that water pipes should avoid impacts to potentially sensitive areas either by being installed above the ground or being attached to bridges.⁷⁴ The emergency permit would be valid either until the Water Shortage Emergency was declared ended or the project was authorized through the approval of a Coastal Development Permit.⁷⁵ The County required certain information to be provided including expected discharge volumes into ponds, chemical constituents of discharge, hydrogeologic modelling, measures to prevent drawdown of coastal waters, impacts of water withdrawals on riparian resources, project-related development in the 100-year flood plan, and impacts of noise and light on biological resources and public recreation.⁷⁶ Mitigation measures were included for archaeology, the California Red-legged frog, and special status plants.⁷⁷ The permit included an additional justification from the Cambria Community Service District for the emergency work based on the total rainfall in the Cambria area “being approximately 65 percent of the minimum rainfall needed to fully recharge the two coastal stream aquifers serving as the community’s sole water supply.”⁷⁸

The environmental groups brought a lawsuit requesting a writ of administrative mandate in California Superior Court in 2014. The Court ruled in favor of the CCSD on the basis of the drought declaration that was in effect stating, “The administrative record contains substantial evidence to support the conclusion that there was an imminent water supply shortage and justification for the CEQA exemption.”⁷⁹

E. Process for Use of Emergency Exemption

If utilities pursue the use of the emergency exemption, they must request a lead agency to make a finding that a project is exempt.⁸⁰ If a lead agency finds that a project is exempt, it may file a notice of exemption triggering a 35-day statute of limitations for legal challenges.⁸¹ If the agency files a notice of exemption, then the notice should contain a brief description of the project, location of the project, “a finding that the project is exempt from CEQA including a citation to... the statute under which it is found to be exempt”, and “a brief statement of reasons to support the finding.”⁸² In the case that no notice is filed with OPR then potential litigants will have a 180-day statute of limitations to file a legal challenge.

⁷³ San Luis Obispo, Department of Planning and Building, ZON2013-00589, Emergency Permit, Cambria Emergency Water Supply Project (Issued May 15, 2014; expiration date November 15, 2014) at 1. Available at: <https://www.cambriacsd.org/files/8e2511b1f/16-slo-co-emergency-cdp-re-ccsd-ewsp-5-15-14.pdf>.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at 2.

⁷⁷ *Id.*

⁷⁸ *Id.* at 8.

⁷⁹ *Landwatch San Luis Obispo County v. Cambria Community Service District*, Case 14 CVP-0258 (

⁸⁰ *City of Pasadena v. State of California* 14 Cal. App. 4th 810, 826 (1993)

⁸¹ Public Resources Code 21080(b) (State agency) or 21152(b) (local agency)

⁸² CEQA Guidelines Section 15062(a)(1)-(4)

An agency issuing an emergency exemption must provide in the record adequate documentation to demonstrate that the project proposed qualifies because it is in response to an emergency and qualifies as an emergency project. there is substantial evidence supporting the finding of an exemption.⁸³

Obtaining an emergency exemption should be a relatively quick process due to the emergency nature of the action. In the case of the recent Notice of Exemption issued by CDFW to SDG&E,⁸⁴ the utility contacted CDFW on November 2, 2021, to request an emergency exemption for wildfire risk reduction activities covered in its CPUC-approved Wildfire Mitigation Plan.⁸⁵ The emergency exemption was issued to SDG&E on February 17, 2022.

Conclusion

The IOUs are in a very good position to request categorical and statutory exemptions from authorities responsible for CEQA implementation for undergrounding, utility hardening, and vegetation management needed to implement WMPs. As noted above, dangerous wildland emergency fire conditions have already been observed in both Northern and Southern California that are likely to expose California's population to loss of life, health, property, and public services.⁸⁶

The IOUs are also in a good position to request emergency exemptions for priority projects within WMPs that need to be done in preparation for the upcoming fire season in high fire threat areas which unfortunately cover much of California. (See Appendix C) It would be advisable for the IOUs to consult with certain key stakeholders such as tribal groups before proceeding on applying for an emergency exemption for work that may involve traditional cultural resources to ensure broad support for the IOU work.

There should be few barriers to IOUs requesting statutory or categorical exemptions that are needed on priority projects to prevent or mitigate wildfire risks associated with utility operations in high-fire risk regions such as the covering of bare lines.

If the IOUs are finding challenges with agencies refusing to issue notices of exemption either under CEQA's statutory exemptions or categorical exemptions and need to proceed on implementing WMPs in a timely manner, the IOUs should consider approaching the legislature to amend the CEQA law providing a statutory exemption to CEQA for work done under WMPs in high-risk fire areas. Statutory exemptions have been legislated in the past in response to state emergencies. For example, in 2015, water recycling and groundwater replenishment projects to

⁸³ *Concerned Dublin Citizens v. City of Dublin* (2013) 214 Cal.App.4th 1301, 1311)

⁸⁴ See CDFW Notice of Exemption and Attachment issued to SDG&E on February 17, 2022. Available at: <https://ceqanet.opr.ca.gov/2022020435>.

⁸⁵ Letter from SDG&E Director Environmental Services and Sustainability to Regional Manager, South Coast Region of CDFW (November 2, 2021) <https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=195778&inline>

⁸⁶ See discussion at footnotes 24-25.

improve drought conditions were exempted from CEQA review either for a period of a year and a half or until the “drought emergency ends.”⁸⁷

More recently, in 2020, Senate Bill 288 was approved that provided statutory exemptions until 2023 from CEQA review on certain projects critical to the State’s transportation future including the institution or increase of new bus rapid transit, bus, or light rail services, on public rail or highway rights-of-way.”⁸⁸ Notice of exemptions must be filed with the OPR and the county clerk of the location where the project is located.⁸⁹

In September 2021, Governor Newsome approved SB-155 that statutorily exempts from CEQA review projects until January 1, 2025 that “conserve, restore, protect, or enhance, and assist in the recovery of California native fish and wildlife, and the habitat upon which they depend.”⁹⁰ Any lead agency seeking to apply this statutory exemption must obtain the concurrence of the Director of the Fish and Wildlife Department that the project has “long-term net benefits to climate resiliency, biodiversity, and sensitive species recovery” and “includes procedures and ongoing management for the protection of the environment.”⁹¹ A “notice of exemption” shall be filed within 48 hours of making a determination that a project is exempt.

Given the need to prevent another wildfire season in California season like the 2021 season, the IOUs should seek Notice of Exemptions for emergency work from lead agencies as soon as possible to implement WMP prevention and mitigation efforts and to avoid future potential utility shutdowns.

Sources

California Council on Science and Technology (CCST), *The Costs of Wildfire in California: An Independent Review of Scientific and Technical Information* (Teresa Feo, Amber Mace, Sarah Brady, Brie Lindsey) (2020), <https://ccst.us/wp-content/uploads/The-Costs-of-Wildfire-in-California-FULL-REPORT.pdf>

CALFIRE, *Top 20 Largest California Wildfires*, (January 13, 2022) https://www.fire.ca.gov/media/4jandlhh/top20_acres.pdf

California State Auditor, *Electrical System Safety: California’s Oversight of the Efforts by Investor-Owned Utilities to Mitigate the Risk of Wildfires Needs Improvement*, Report 2021-117 (March 24, 2022), <https://www.auditor.ca.gov/reports/2021-117/index.html#chapter1>

⁸⁷ Former Public. Resources Code 21080.008 and 21080.45

⁸⁸ Codified at Pub. Res. Code § 21080.25.

⁸⁹ California Public Resources Code 21080.25 (b)(5)

⁹⁰ California Public Resources Code 21080.56(a)(1)

⁹¹ Id. at 21080.56(c)(1) and (c)(2)

Pacific Gas and Electric Company, 2021 *Wildfire Mitigation Plan Report*, Rulemaking 18-10-007, February 5, 2021

Squares, Leah. California Wildfires: Mapping Social Vulnerability. Direct Relief. July 30, 2019. <https://www.directrelief.org/2019/07/which-california-communities-are-most-vulnerable-to-wildfires/>

Wildfire Safety Division (WSD), California Public Utilities Commission, *Reducing Utility-Related Wildfire Risk* (prepared by Boston Consulting Group) (draft December 2020).

Appendix 1- Examples of Notices of Exemption for Wildfire Mitigation Projects

Notice of Exemption

Appendix E

To: Office of Planning and Research
P.O. Box 3044, Room 113
Sacramento, CA 95812-3044
County Clerk
County of: _____

From: (Public Agency): California Dept. of Fish and Wildlife, South Coast Region
3883 Ruffin Road
San Diego, CA 92123
(Address)

Project Title: San Diego Gas & Electric Company Natural Community Conservation Plan Bridge Amendment

Project Applicant: San Diego Gas & Electric Company

Project Location - Specific:
San Diego Gas & Electric Company service territory in San Diego and southern Orange

Project Location - City: _____ Project Location - County: San Diego, Orange

Description of Nature, Purpose and Beneficiaries of Project:
See attachment.

Name of Public Agency Approving Project: California Department of Fish and Wildlife

Name of Person or Agency Carrying Out Project: San Diego Gas and Electric Company

- Exempt Status: (check one):
[] Ministerial (Sec. 21080(b)(1); 15268);
[] Declared Emergency (Sec. 21080(b)(3); 15269(a));
[x] Emergency Project (Sec. 21080(b)(4); 15269(b)(c));
[] Categorical Exemption. State type and section number: _____
[] Statutory Exemptions. State code number: _____

Reasons why project is exempt:
See attachment.

Lead Agency Contact Person: Karen Drewe Area Code/Telephone/Extension: 310-387-9260

If filed by applicant:
1. Attach certified document of exemption finding.
2. Has a Notice of Exemption been filed by the public agency approving the project? Yes No
Signature: David Mayer Date: 2/17/2022 Title: Env. Program Manager



ATTACHMENT TO NOTICE OF EXEMPTION
San Diego Gas & Electric Company Natural Community Conservation Plan Bridge Amendment

The California Department of Fish and Wildlife (CDFW) has approved a small amendment, CDFW tracking no. 2835-1995-79-5-A1 (Bridge Amendment), to the San Diego Gas & Electric Company's (SDG&E) Natural Community Conservation Plan, CDFW tracking no. 2835-1995-79-5 (NCCP), and the associated NCCP permit. SDGE requested the Bridge Amendment because it needs take coverage for its 2022 wildfire risk reduction activities. The Bridge Amendment allows SDG&E to impact an additional 20 acres of habitat from wildfire risk reduction activities provided SDGE complies with all avoidance, minimization, and mitigation requirements of their existing NCCP permit in implementing those activities. This Bridge Amendment provides SDG&E interim take coverage for its wildfire risk reduction activities while SDG&E and CDFW, in coordination with interested stakeholders, work on a broader amendment (Major Amendment), and associated review under the California Environmental Quality Act (CEQA), that will provide a larger increase in the NCCP's take coverage while also strengthening the NCCP's avoidance, minimization, and conservation measures, leading to improved long-term conservation outcomes. The Bridge Amendment will benefit California residents and natural resources by permitting SDG&E to conduct activities to reduce the risk of catastrophic wildfire.

CDFW approved the Bridge Amendment relying on the CEQA statutory exemption for specific actions necessary to prevent or mitigate an emergency. (Cal. Pub. Res. Code, § 21080(b)(4); Cal. Code Regs., tit. 14, § 15269.) The Bridge Amendment falls within the class because the amendment will allow SDG&E to conduct important wildfire risk reduction activities ahead of and during the 2022 wildfire season. Delaying these activities would create a risk to public health, safety, and welfare through increased risk of catastrophic wildfire. The Bridge Amendment will allow SDG&E to conduct its wildfire risk reduction activities in the short term while SDG&E and CDFW, and other interested parties, work on a major, long-term amendment to the NCCP and associated environmental review.

Notice of Exemption

Appendix E

To: Office of Planning and Research
P.O. Box 3044, Room 113
Sacramento, CA 95812-3044
County Clerk
County of: _____

From: (Public Agency): Caltrans, District 2
1657 Riverside Drive
Redding, CA 96001
(Address)

Project Title: Pacific Gas & Electric Company, Pole Replacement project (Encroachment Permit No. 02-21-6-UC-0124)

Project Applicant: Pacific Gas & Electric company

Project Location - Specific:

The project is located on State Route 70 in Plumas County at PM 16.884

Project Location - City: Belden Project Location - County: Plumas

Description of Nature, Purpose and Beneficiaries of Project:

Pacific Gas & Electric is proposing to replace Transmission pole #009/004, a 50' pole with a 60' H1 LDSP pole set 12' deep. Frame pole TPD-11" arm, with 17' separation to the nearby 12KV line. Overhead conductors will be temporarily suspended across Highway 70 while the pole is replaced. The pole to be replaced is located inside the State ROW. A helicopter will be used to set the pole, the helicopter will fly over State Route 70 with the pole suspended. The work to be performed will occur in the 23 High Fire Threat District. The California Department of Transportation would issue an encroachment permit to allow for the proposed work to occur within the limits of the State Right of Way.

Name of Public Agency Approving Project: Caltrans for issuance of an Encroachment Permit

Name of Person or Agency Carrying Out Project: PAR Electric Construction, on behalf of PG&E

Exempt Status: (check one):

- Ministerial (Sec. 21080(b)(1); 15268);
- Declared Emergency (Sec. 21080(b)(3); 15269(a));
- Emergency Project (Sec. 21080(b)(4); 15269(b)(c));
- Categorical Exemption. State type and section number: _____
- Statutory Exemptions. State code number: _____

Reasons why project is exempt:

The CEQA lead agency determined that the project would be Statutorily exempt according to, Section 15269; Emergency Projects, subsections (b) and (c), this work is exempt from the requirements of CEQA. This work is in support of PG&E's Wildlife Safety Plan (WSP) and Community Wildlife Safety Program (CWSP) for Electric Distribution and Transmission, as required by the Federal Judges' Mandate No. CR-14-0175 and the Public Utilities Commission of the State of California (CPUC) Order Instituting Rulemaking 18-10-007 to Implement Plans pursuant to Senate Bill 901 (2018). The California Department of Transportation would issue an encroachment permit to allow for the proposed work to occur within the limits of the State Right of Way. The work proposed to occur within the State Right of Way would not have a significant impact of the environment.

Lead Agency
Contact Person: Emiliano Pro Area Code/Telephone/Extension: (530) 945-4323

If filed by applicant:

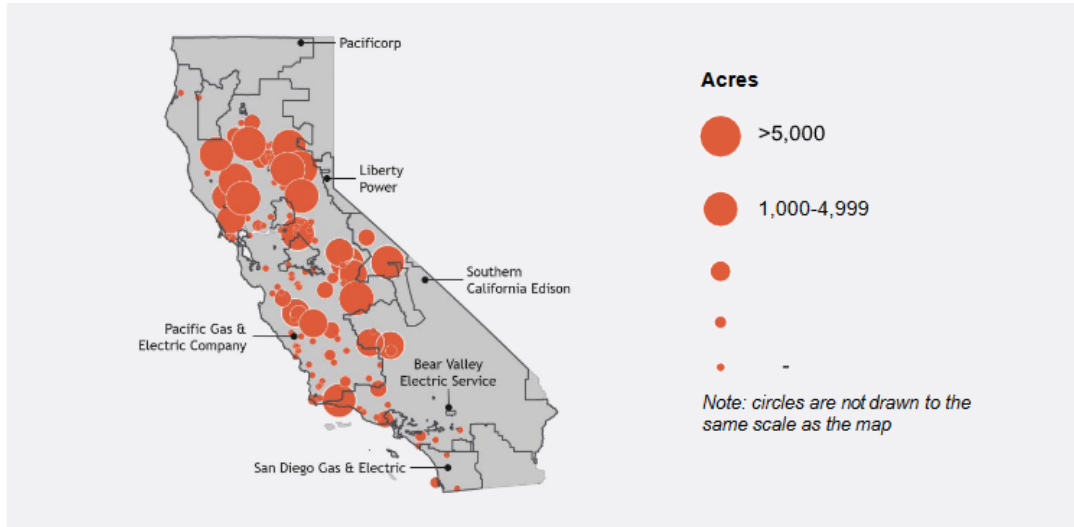
1. Attach certified document of exemption finding.
2. Has a Notice of Exemption been filed by the public agency approving the project? • Yes No

Signature: Emiliano Pro Date: 5/13/2021 Title: Senior Env. Planner

Signed by Lead Agency Signed by Applicant

Authority cited: Sections 21083 and 21110, Public Resources Code. Date Received for filing at OPR: _____
Reference: Sections 21108, 21152, and 21152.1, Public Resources Code.

Appendix 2- Ignition Data Map from CPUC Fire Incidents Data and CALFIRE (CALFIRE 2022)



Note: Includes 1) self-reported IOU ignition data for PG&E, SDG&E and SCE (CPUC Fire Incidents Data 2014-2017) and 2) CAL FIRE data for fires over 1,000 acres with electrical power as cause of fire (CAL FIRE, 2014-2017 Wildfire Activity Statistics, April 2019)

Sources: CPUC Fire Incidents Data 2014-2018, (2018); CAL FIRE, 2014-2017 Wildfire Activity Statistics, (April 2019)

Appendix 3 CPUC High Fire Threat District, California Public Utilities Commission, “CPUC FireMap,” <https://ia.cpuc.ca.gov/firemap/>

California Fire Maps- Tiers 1, 2, and 3

CPUC High Fire Threat District - Tier 3



CPUC High Fire Threat District - Tier 2



CPUC HFTD-Zone 1 (CAL FIRE High Hazard Zones Tier1)



California County Boundaries

