



The Protect Our Communities Foundation
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October 2, 2020

California Public Utilities Commission
Attn: Caroline Thomas Jacobs, Director
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Sent Via Email (wildfiresafetydivision@cpuc.ca.gov)

Re: The Protect Our Communities Foundation's Comments on the Wildfire Safety
Division Draft Wildfire Mitigation Plan Compliance Process

To Whom It May Concern:

The Protect Our Communities Foundation (PCF) provides these comments on the Wildfire Safety Division (WSD) Draft Wildfire Mitigation Plan Compliance Process (draft proposal). PCF generally supports the draft proposal, but submits that the draft proposal takes an overly limited view of WSD's statutory role and the Commission's enforcement capabilities, and that more realistic and comprehensive goals are needed.

I. THE STATUTES REQUIRE WSD TO OVERSEE COMPLIANCE WITH WILDFIRE SAFETY – NOT MERELY WITH RESPECT TO THE UTILITIES' WILDFIRE MITIGATION PLANS.

The draft proposal states that the proposal “will enable the WSD to fulfill its statutory obligation to oversee **compliance with each electrical corporation's plan.**”¹ Section 326(a)(1), however, requires WSD first to “Oversee and enforce electrical corporations' **compliance with wildfire safety** pursuant to Chapter 6 (commencing with Section 8385) of Division 4.1.”²

PCF submits that WSD's duties under Section 8386(d) – the duty to “verify that the plan complies with all applicable rules, regulations, and standards, as appropriate”³ - constitutes a continuing duty which requires that WSD do more than ensure compliance with deficient WMPs. The WSD must do more than ensure compliance with deficient WMPs becomes particularly important where, as here, the Commission both “approved” WMPs and concluded those same WMPs are deficient in myriad ways.

¹ Draft Proposal, p. 3 (emphasis added).

² Pub. Util. Code, § 326, subd. (a)(1) (emphasis added).

³ Pub. Util. Code, § 8386, subd. (d).

A large delta exists between requiring compliance with the utilities' 2020 WMPs which the Commission determined were deficient, and requiring compliance with wildfire safety. Section 326 refers to WSD's compliance with wildfire safety as a whole – the statute is not limited to compliance with the utilities' defective 2020 WMPs.

Wildfire safety, for example, includes Section 8386(a)'s requirement that "Each electrical corporation shall construct, maintain, and operate its electrical lines and equipment in a manner that will minimize the risk of catastrophic wildfire posed by those electrical lines and equipment."⁴

Moreover, under Section 8386.1, enforcement actions are not limited by the Commission's interpretation of "approval."⁵ PCF urges WSD to focus on ensuring compliance with minimizing the risk of wildfire rather than limiting itself to ensuring compliance with the utilities' deficient 2020 WMPs.

II. THE COMMISSION'S ENFORCEMENT CAPABILITIES ARE MORE COMPREHENSIVE THAN THE DRAFT PROPOSAL SUGGESTS.

The draft proposal states that "If the WSD determines that an electrical corporation fails to substantially comply with an approved WMP, the WSD may recommend to the Commission an enforcement action against an electrical corporation consistent with Public Utilities Code § 8389(g). The Commission may then assess penalties, including fines or equitable remedies, if it finds that an electrical corporation has failed to comply with its WMP, consistent with Public Utilities Code § 8386.1."⁶ Although the first sentence tracks Section 8389(g), the second sentence is overly limited as discussed below.

A. The Commission Must Assess Penalties for Noncompliance With WMPs.

The above-quoted wording of the draft proposal suggests that the imposition of penalties by the Commission for a utilities' failure to comply with its WMP could be considered permissive, but Section 8386.1 in fact mandates that the Commission assess penalties on utilities failing to substantially comply with their respective plans: "The commission **shall** assess penalties on an electrical corporation that fails to substantially comply with its plan."⁷ Section 8386.1's mandate comports with Section 2101's mandate that: "The Commission **shall** see that the provisions of the Constitution and statutes of this State affecting public utilities...are enforced and obeyed and that violations are promptly prosecuted..."⁸

⁴ Pub. Util. Code, § 8386, subd. (a).

⁵ Pub. Util. Code, § 8386.1 ("The Wildfire Safety Division's approval of a plan does not establish a defense to any enforcement action for a violation of a commission decision, order, or rule.").

⁶ Draft Proposal, p. 6.

⁷ Pub. Util. Code, § 8386.1 (emphasis added).

⁸ Pub. Util. Code, § 2101 (emphasis added).

B. The Commission’s Enforcement Capabilities Are Not Limited to Section 8386.1 Penalties.

The Commission’s obligation to impose penalties for substantial noncompliance with WMPs constitutes merely one of many enforcement mechanisms available to the Commission. For example, Section 2101 is not limited to ensuring compliance with WMPs, but requires the Commission to enforce the Constitution and all applicable statutes.⁹ Additionally, the Commission can and should bring suit to prevent violations of its rulings via mandamus or injunction.¹⁰ The Commission also has additional powers, such as the power to hold the utilities in contempt.¹¹

The Commission’s cost-recovery evaluation comprises another mechanism likely to promote compliance if performed properly. The Commission can and should find that the costs of implementing wildfire mitigation plans that fail to comply with Commission directives are unjust and unreasonable.¹²

⁹ Pub. Util. Code, § 2101 (“The commission shall see that the provisions of the Constitution and statutes of this State affecting public utilities, the enforcement of which is not specifically vested in some other officer or tribunal, are enforced and obeyed, and that violations thereof are promptly prosecuted and penalties due the State therefor recovered and collected, and to this end it may sue in the name of the people of the State of California. Upon the request of the commission, the Attorney General or the district attorney of the proper county or city and county shall aid in any investigation, hearing, or trial had under the provisions of this part, and shall institute and prosecute actions or proceedings for the enforcement of the provisions of the Constitution and statutes of this State affecting public utilities and for the punishment of all violations thereof.”).

¹⁰ Pub. Util. Code, § 2102 (“Whenever the commission is of the opinion that any public utility is failing or omitting or about to fail or omit, to do anything required of it by law, or by any order, decision, rule, direction, or requirement of the commission, or is doing anything or about to do anything, or permitting anything or about to permit anything to be done, in violation of law or of any order, decision, rule, direction, or requirement of the commission, it shall direct the attorney of the commission to commence an action or proceeding in the superior court in and for the county, or city and county, in which the cause or some part thereof arose, or in which the corporation complained of has its principal place of business, or in which the person complained of resides, for the purpose of having such violations or threatened violations stopped and prevented, either by mandamus or injunction. The attorney of the commission shall thereupon begin such action or proceeding in the name of the people of the State of California, by petition to such superior court, alleging the violation or threatened violation complained of, and praying for appropriate relief by way of mandamus or injunction.”).

¹¹ Pub. Util. Code, § 2113 (“Every public utility, corporation, or person which fails to comply with any part of any order, decision, rule, regulation, direction, demand, or requirement of the commission or any commissioner is in contempt of the commission, and is punishable by the commission for contempt in the same manner and to the same extent as contempt is punished by courts of record. The remedy prescribed in this section does not bar or affect any other remedy prescribed in this part, but is cumulative and in addition thereto.”).

¹² See e.g. Pub. Util. Code, § 8386.4, subd. (b) (requiring the Commission to consider the costs of WMPs in a utility’s GRC or in a comprehensive separate application).

One of the most impactful things the Commission could do to ensure compliance is to cease preventing the utilities from experiencing the consequences of their noncompliance. The Commission can allow the utilities to be held liable to injured persons under Section 2106 simply by declining to issue future safety certificates to noncompliant utilities. If the utilities knew they would not enjoy the safe harbor provisions of Section 451.1(c)¹³ and access to the wildfire safety fund,¹⁴ they would likely comply with the Commission’s directives and legislative mandates.

C. Making Public Enforcement Mechanisms and Internal Agreements Would Enable Better Compliance with the Commission’s Statutory Mandates.

PCF requests more information and reserves comment on the internal agreements between WSD and SED referred to in the draft proposal.¹⁵ PCF seeks the details of the arrangement to ascertain whether internal agreements further the Commission’s broad statutory enforcement authority. PCF also requests that the Commission identify who will be enforcing CEQA with respect to the non-exempt activities the utilities propose in their WMPs.

D. The Draft Proposal Should be Revised to Account for Enforcement of the Utilities’ Present-Day Violations.

The utilities’ existing violations of past Commission decisions have been well documented and are not repeated here.¹⁶ For purposes of these comments, PCF recommends that the draft proposal be revised to include a compliance schedule for the utilities’ existing violations.

¹³ Pub. Util. Code, § 451.1, subd. (c) (uniquely requiring other parties to “create[] serious doubt as to the reasonableness” of the utilities’ conduct in a lawsuit).

¹⁴ Pub. Util. Code, § 3292, subd. (h)(3)(B).

¹⁵ Proposal, p. 5 (“Through internal agreements and a division of responsibilities between the WSD and the Commission’s Safety and Enforcement Division (SED), a process has been outlined to determine consequences. Several factors are assessed to determine whether the WSD should directly issue a Notice of Defect to an electrical corporation, or if SED enforcement action is needed...The WSD proposes to coordinate its efforts with the SED to achieve timely correction of defects identified in Notices of Defects during the WSD’s compliance assessments.[] The WSD may also escalate the defect to a Notice of Noncompliance to order correction from the utility. Upon an electrical corporation’s failure to timely correct an alleged defect, the WSD may inform SED of noncompliance instance and SED may investigate the noncompliance. Following the WSD’s recommendation to the Commission, and pursuant to the Commission’s enforcement authority, the Commission via SED may issue a citation or other enforcement action if an electrical corporation does not correct the identified defects on the prescribed timelines...”).

¹⁶ See e.g. WSD-002; WSD-005; The Protect Our Communities Foundation’s Comments on San Diego Gas & Electric Company’s Remedial Compliance Plan (August 10, 2020); The Protect Our Communities Foundation’s Comments on Wildfire Safety Division Staff Proposal on Changes to Wildfire Mitigation Plan Requirements and Metrics Tables, and Draft Recommendations for Developing a Safety Culture Assessment Process; and the Wildfire Safety Advisory Board Recommendations for Developing the SHEUR Threshold (August 26, 2020).

III. MORE REALISTIC AND COMPREHENSIVE GOALS ARE NEEDED TO AVOID ARTIFICIALLY LIMITING WILDFIRE MITIGATION ACTIVITIES TO THE UTILITIES' PREFERRED ACTIVITIES.

Under the heading “Ongoing Use of Compliance Assessments to Inform WMPs,” the Draft Proposal suggests that use of outcome metrics will “ensure electrical corporations’ future WMPs prioritize efforts in ways that most effectively mitigate wildfire risk and will also allow the WSD to keep the public informed of the progress of WMP implementation,” and then sets forth two goals: first, that “The WSD will assess electrical corporations’ implementation of the initiatives identified in the approved WMPs,” and second, that “The WSD will track outcomes of the reduction of wildfire risks and Public Safety Power Shutoffs (PSPS) events in order to determine the most effective strategy to mitigate areas with the highest risk, and investigate areas not included in WMPs.”¹⁷

A. WSD Should Revise the Statement in the Draft Proposal Suggesting that Use of Outcome Metrics Will Ensure “future WMPs prioritize efforts in ways that most effectively mitigate wildfire risk.”

PCF continues to object to the Commission’s interpretation of the wildfire mitigation statutes as allowing for approval of wildfire mitigation plans that have not undergone an effectiveness analysis. PCF does not reargue the issue here, but notes that when WSD functions are transferred to the Natural Resources Agency, only “lawful rules and regulations” established under the wildfire mitigation statutes “expressly continue in force.”¹⁸

Under any interpretation of the effectiveness analysis required by the wildfire mitigation statutes, however, the use of outcome metrics to prioritize activities necessarily artificially limits the universe of risk reduction activities. The utilities’ WMPs include only the activities that the utilities propose. The outcomes of alternatives to the utilities’ proposals will not be measured by assessing the outcomes of the utilities’ WMPs because the alternatives are not contained within the WMPs.

Relatedly, the draft proposal states as a goal that “The WSD will track outcomes of the reduction of wildfire risks and Public Safety Power Shutoffs (PSPS) events in order to determine the most effective strategy to mitigate areas with the highest risk...”¹⁹ Tracking PSPS outcomes – like tracking outcomes of the utilities’ other proposed activities – fails to best determine effective strategies to mitigate or avoid PSPS events entirely. Alternatives to the utilities’ proposed activities exist which are more effective at mitigating PSPS events, but those alternatives are not contained within the WMPs. Therefore, the outcomes of alternatives will not be tracked by tracking the outcomes of WMPs.

¹⁷ Draft Proposal, p. 6.

¹⁸ Gov. Code, § 15475.

¹⁹ Draft Proposal, p. 6.

At the very least, statements in the draft proposal regarding the benefits of tracking outcomes should be toned down because only the utilities' proposed activities will be considered by tracking outcome metrics.

B. The Draft Proposal Should Be Revised to Incorporate a Two-Way Conversation Between WSD and the Public.

PCF appreciates that WSD intends to keep the public informed.²⁰ PCF recommends that the draft proposal be revised to recognize that the public should have a voice with respect to what activities are incorporated into WMPs in the first place. Keeping the public informed of progress constitutes a one-directional conversation; but the obligation to consider alternatives to the utilities' preferred activities necessarily requires a multi-directional conversation.²¹ In short, ideas other than those generated by the utilities, including from persons and groups that are not financially interested, should be considered and ultimately implemented.

C. The Draft Proposal Should Be Revised to Acknowledge that Some of the Initiatives in the Utilities' "Approved" 2020 WMPs Remain Prohibited.

The first goal set forth in the draft proposal states that "The WSD will assess electrical corporations' implementation of the initiatives identified in the approved WMPs."²² While PCF's position continues to be that a conditional approval does not comprise the approval contemplated by the wildfire mitigation statutes,²³ the Commission's recent issuance of safety certificates *despite* the defects the Commission determined are contained within the 2020 WMPs requires that WSD adjust its view of what it means to "comply" with a 2020 WMP. By allowing for "approval" of deficient WMPs, the Commission's interpretation of the statutes means that the WSD cannot simply assume that all initiatives should be implemented. Some initiatives identified in the approved WMPs remain prohibited and thus cannot be implemented.²⁴

Sincerely,
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²⁰ Draft Proposal, p. 6.

²¹ The Protect Our Communities Foundation's Comments on Proposed Roadmap (June 30, 2020), p. 11.

²² Draft Proposal, p. 6.

²³ The Protect Our Communities Foundation's Comments on Safety Certification Requests (July 9, 2020).

²⁴ Examples include SDG&E's enhanced vegetation practices and SDG&E's fossil-fueled whole-house backup generation, because SDG&E has failed to make the showings required by D.19-05-039.