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USDA – Forest Service  
Mr. Reggie Woodruff  
Attn: Lands and Realty Management  
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*Via email on Forest Service comment portal*

Re: Comments on U.S. Forest Service Proposed Amendment to FSH 2709.11,  
Ch. 80 – Operating Plans and Agreements for Powerline Facilities

Dear Forest Service Lands team:

Attached please find the comments of Xcel Energy on the U.S. Forest Service's Proposed Amendment to the Forest Service Special Uses Handbook by the addition of Chapter 80 on Vegetation Management, FSH 2709.11, Ch. 80 – Operating Plans and Agreements for Powerline Facilities (*See* <https://cara.ecosystem-management.org/Public/CommentInput?project=ORMS-2718>). We believe the issues identified by these items should be addressed by the Forest Service in the final changes to this Handbook and would appreciate the opportunity to discuss them as conformity and consistency of interpretation are crucial to effective implementation of the various federal initiatives concerned with preventive measures to protect National Forest System lands against wildfire and other risk. For instance, the processes established by this Handbook Guidance cloud, rather than clarify, the Congressional intent of minimizing necessary approval processes and timeframes in vegetation fire risk management.

The complexity contained in the draft Handbook Chapter will not best attain the Congressional objectives of prompt Forest Service (FS) review of Owner/Operator<sup>1</sup> right of way (ROW) related fire and other risk management activities and the broadly stated statutory authority for management of Emergency Conditions and Hazard Trees. *See* 43 USC §1772. In addition, there are instances where confusion is created by the addition of new, undefined terms as surrogates for undefined statutory terms. Perhaps most importantly, there are provisions that are inconsistent with the implementing statute and other provisions that are read to preclude or limit operation of other statutes despite no clear Congressional expression of such intent.<sup>2</sup> Given the considerable, capital

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<sup>1</sup> The statute generally refers to Owners and Operators, and for purposes of these comments, the term Owner is used to encompass both entities.

<sup>2</sup> Judicial precedent concerning statutory interpretation requires a clear expression of Congressional intent

intensive infrastructure projects placed at risk, this Handbook (“Guidance”) must permit flexibility to achieve the objectives of the statutes, related law and the federal-private partnerships they create to protect private investment in public services that create a secure, national electric infrastructure. We urge you to review these comments in conjunction with those also submitted today on the Forest Service Manual addition proposed for implementation of §8630 of the Agriculture Improvement Act of 2018.

As a guiding principle, it would seem that the objective of this Guidance should be to facilitate management of wildfire and utility infrastructure risk and clarify ambiguity rather than to complicate the planning process and dominate the partnerships desired by Congress. Instead, this Guidance will increase the cost and administrative burden to both the Forest Service and Owner, thereby complicating wildfire and risk management to utility infrastructure on National Forest System Rights of Way. Although not an exclusive list, some suggestions to advance the clear Congressional objectives follow.

### Statutory Objectives

The statutory objective for the Guidance is to “enhance the reliability of the electric grid and reduce the threat of wildfire damage to, and wildfire caused by vegetation-related conditions within, electric transmission and distribution rights-of-way and abutting Federal land, including hazard trees.” 43 USC §1772(b)(1).

While the Guidance recites the “vegetation management, inspection, and operation and maintenance of powerline facilities” title of the Plan called for by the statute (FSH §80.1), it fails to highlight the essential features of seeking “to minimize the need for case-by-case approvals for routine vegetation management, facility inspection, and operation and maintenance activities,” for Hazard Tree management (43 USC §1772(b)(4)), the separate and independent objective of Emergency Condition management posed either by vegetation or Hazard Tree conditions (43 USC §1772(e)) and non-vegetation related approaches to risk in achieving grid reliability.

Instead, the Guidance establishes a somewhat cumbersome, complex structure for operating plans, writ large, and de-emphasizes the statutory mandate for a streamlined planning and implementation structure for utility infrastructure ROW risk management. Examples of two such deficiencies are the failure to adequately recognize the on-the-ground nature of identifying emergency conditions while conducting other risk management activities and the extraordinary complexity and limitations imposed on Hazard Tree management. In many instances, confusion will result from equating Hazard Trees with all vegetation and by inserting ambiguity into the statutory definition of abutting land by use of a new term, with neither term being defined.

The Guidance should be focused on a streamlined process to protect powerline and related electrical transmission facilities from fire risk posed by vegetation and other vectors within and abutting the rights of way, with only those approval processes necessary for statutory compliance

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to change an otherwise existing statutory requirement.

being required and a sincere focus on reducing compliance timelines through agency process and management controls.

Equating a Vegetation Fire Risk Management Plan with an Operating Plan Inherently Appears to Have Diminished the Requirement of Obligatory Minimum Approval Timelines and Created Ambiguity in the Planning and Approval Processes

The Guidance requires preparation of an Operating Plan<sup>3</sup> with respect to the statute's vegetation fire risk management objectives (FSH §§81.1 and 86.1.a). This requirement is reiterated throughout the Guidance (*see* FSH §§ 83(1)(b), 83(2), 84, Exhibit 1) and states as its purpose to effectuate "the long-term, cost-effective, efficient, and timely management of facilities and vegetation within the width of the right-of-way and abutting Federal land, including hazard trees, to enhance electric reliability, promote public safety, and avoid fire hazards." (43 USC §1772(a)(3)(B)). The Guidance should clarify any distinction between a traditional ROW operating plan required by the Special Use regulations from planning for wildfire vegetation and other risk management contemplated by 43 USC §1772.<sup>4</sup>

The Guidance has taken the mandatory 120 day approval period and essentially eliminated it in two forms. By equating the vegetation fire risk management Plan with a more inclusive operating and risk management planning process, which provides for more than one year before completion of the permitting, and hence the approval process (FSH §86(3)(c) at Exh. 1). While the Guidance does state a 120 day approval period, it does so while identifying a long list of other permitting requirements and incorporating a long list of permissions for not timely completing approval, effectively eliminating the Congressionally mandated urgency (§86(3)(c)). The Guidance contains limited streamlining, and instead reinforces the limitation of to the "maximum extent practicable." The cumbersome process proposed by the Forest Service appears to be a "business as usual" framework.

The Guidance should make clear that the Plan will be reviewed and approved within 120 days, and absent timely approval, the Plan shall be deemed approved in accordance with 43 USC §1772(f)(3). In addition, the Guidance should take the opportunity to enhance the statutorily Authorized Conditions for activities that do not require further authorization by defining other circumstances appropriate for immediate action and interim approval.

In addition, the items included in Class I activities that do not require Forest Service notification prior to on the ground activity appears to have diminished in favor of Class II activities that do require submission and approval of an annual plan. The Category of Class I activities should

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<sup>3</sup> The term "plan" is defined as "a vegetation management, facility inspection, and operation and maintenance plan..." 43 USC §1772(a)(3). The statute and Guidance also provide for preparation of an Operating Agreement in instances not applicable to these comments.

<sup>4</sup> Submission of a vegetation management Plan appears to be optional with the Owner (the Forest Service "shall provide the owner...with the option to develop and submit a plan." 43 USC §1772(c)(1) and Plan "is prepared by the Owner..." 43 USC §1772(a)(3)(A) and (k)). The Guidance makes plan submission mandatory. This conflict should be clarified by the FS and its position justified in the law.

include more pre-approved actions *e.g.*, ground pole inspections that are normal maintenance although involve some ground disturbance, and the description of Class II activities is too subjective with too much discretion in the Authorized Officer. As proposed, each National Forest will have separate criteria and implementation protocol. To streamline the process, the Forest Service should increase the activities that do not require its notification and approval prior to Owner action given the public purpose achieved by these public private partnerships. Similar consideration should be given to changes necessary for Class III and reducing Forest Service levels of oversight and approval. Finally, Class IV is not adequately defined and at minimum should reiterate the statutory standard recognizing the authority in the Owner to take action upon its identification of an Emergency Condition. This clarification is particularly important given that Emergency Conditions are likely to be encountered in the field while conducting other operational and maintenance activities, without the ability for interaction with the Forest Service.

#### Unlawful Limitations on Management of Hazard Trees

The statute clearly defines the term Hazard Tree as “any tree or part thereof (whether inside or outside a right-of-way)” with respect to its condition and likelihood of causing substantial damage or disruption to the facility or to come within 10 feet of a powerline. 43 USC §§1772(a)(1) and (a)(3)(B).

No provision of the statute or any other legal requirement precludes Hazard Tree management abutting the ROW where that land abutting the ROW also is subject to a Farm Bill Pilot Program Project. Yet this is precluded by the Forest Service. *See also* Xcel Energy comments on proposed FS Manual chapter pertaining to Farm Bill Pilot Program implementation and request for comment letter at <https://cara.ecosystem-management.org/Public/CommentInput?project=ORMS-2717>.

Nor is a Hazard Tree defined to include other forms of vegetation as has been incorporated by the Guidance and the regulation. Instead, both Hazard Trees and other forms of vegetation are subject to the Emergency Conditions and imminent danger statutory provisions. 43 USC §1772(e). Here, regardless of whether the Owner has submitted a Plan, where “vegetation or hazard trees have contacted or present an imminent danger of contacting ... [a facility] from within or adjacent to ... [a ROW, the Owner may] prune or remove the vegetation or hazard tree...”

Somewhat surprisingly, and an exemplar of how the statutory intent has been burdened by this Guidance, is the new, undefined category of “major hazard tree” removal outside the ROW linear boundary. FSH §87.3.1. The statute only defines one class of Hazard Tree and purposely attempts to eliminate any subjectivity by its objective parameters and certification requirement. Furthermore, there is no restriction on Hazard Tree removal from lands abutting the ROW. This is further complicated by the Class IV emergency activities defined in the Guidance that requires Forest Service notification of Emergency activities within 24 hours of initiating the activity (FSH §87.4 and page 43 at C), rather than “not later than 1 day after the date of the response to the emergency conditions.” 43 USC §1772(e)(2)). This statutory language is fairly interpreted to be upon conclusion of the response rather than initiation of the response to the emergency condition, and even if ambiguous, no reason has been provided for so limiting the notification requirement.

Instead of recognizing and implementing the statutory language, the Guidance and regulation have reformulated the definition of Hazard Tree and imposed limitations on where a Hazard Tree may be located and how it is to be managed. The Guidance should be amended to eliminate these arbitrary restrictions contrary to the statutory language and intent.

#### Confusion Pertaining to Undefined Statutory Term “Abutting” and New “Adjacent to” Concept

Without explanation, the Guidance instead of using the statutory language for the Plan to apply to “vegetation within the width of the right-of-way and abutting Federal land,” it has chosen to reformulate the requirement as applying to Forest Service “lands inside the linear right-of-way for powerline facilities and on NFS lands adjacent to either side of the right-of-way...” No interpretative benefit is gained and no clear guidance provided by creating a second, ambiguous standard with respect to the scope of adjacency in contrast with the statutory term abutting.

This new, undefined term results in additional confusion in that the Farm Bill Pilot Program may not be implemented within the ROW, but only on NFS lands *adjacent* to the ROW. Thus, as stated, this Guidance and the proposed Forest Service Manual changes implementing the Farm Bill eliminate the Pilot Project Program. *See also* Xcel comments on proposed FS Manual chapter pertaining to Farm Bill Pilot Program, *supra*.

The Guidance should retain the statutory formulation of the abutting standard and provide clear direction on its implantation without repeal of other laws.

#### Failure to Give Effect to Other Laws, including Executive Orders and the MOU

While the Guidance mentions the multi-party Edison Electric Institute-Forest Service MOU and the Reliability Standards identified by the statute as being required considerations, it provides no assistance in specifying how this consideration will be given. For instance, the MOU states that its purpose is to facilitate cooperation and coordination, yet little specific direction to accomplish this purpose is provided in the Guidance. The MOU also recognizes the requirement for coordination, streamlining and expediting of federal agency review for energy project rights of ways on federal lands, which is not clearly implemented in the Guidance. MOU, §IV and Executive Order 13212 (May 18, 2001).

Similarly, Executive Order 13855 (84 Fed. Reg. 45-48, December 21, 2018) is ignored in its entirety. This EO recognizes the importance of active management of vegetation needed to treat dangerous wildland fire conditions on federal lands and the challenges associated with the regulatory process. *Id.* §1, at Policy and (c). The EO calls for streamlining agency administrative and regulatory policies for fuel reduction in a variety of ways, including *adhering* to minimum time periods and identification of categorical exclusions from the National Environmental Policy Act and creating collaborative partnerships. *Id.* §§ 3 and 6.

While the guidelines identify the requirement to achieve approval within 120 days, there is no penalty or apparent implementation plan, beyond identification of an abundance of opportunities for not meeting those timeframes. Furthermore, the private federal partnership encouraged by the

EO and the MOU is ignored, with no mention of the EO focus on reduction of wildland fire fuel loading. *Id.* §6(b). Likewise, important public private partnerships for wildfire management on National Forest System lands, such as those which currently exist between the Forest Service and certain Owner/Operators of facilities is likewise ignored, both in practice and by the Guidance. These important tools should be advanced by the Guidance, rather than ignored.

### Three Liability Structures Under the Laws

There exist at least three liability structures for wildfire affecting RsOW on National Forest System lands. The standard provision is contained at 36 CFR §251.56(d), and identifies the indemnity and liability to the United States for holders of RsOW, including for wildfire. In particular, it calls out the liability parameters for facilities that are covered by this Guidance, with a current regulatory cap of \$1,000,000.00 (36 CFR §251.56(d)(2)), with an exception for Operating “Agreements.” 43 USC §1772(d) and (g)(2). The liability to the United States under Operating Agreements is \$500,000.00.

The statutorily authorized Farm Bill Pilot Program also contains a liability limit to the United States of \$500,000.00, provided that certain conditions are satisfied. However, as described in these comments and those pertaining to the newly proposed Forest Service Manual chapter pertaining to the Farm Bill Pilot Program, the Forest Service in its Guidance has eliminated the ability to remove Hazard Trees in certain locations. The statute contains no such limitation on the location of Hazard Tree removal as it is a standalone provision governing Hazard Trees and vegetation posing imminent danger. Furthermore, the Forest Service has in practice eliminated the ability to meaningfully participate in the Farm Bill Pilot Program by not approving new plans, despite the separate and independent Congressional authority to do so. These constraints are in addition to those created by the *adjacency* conundrum created by the new Handbook and Manual chapters

The Guidance for both programs should recognize the independence of Emergency Condition and Hazard Tree management from the vegetation fire risk management Plan and Operating Plan requirements of the law.

### Categories of Actions Not Requiring Environmental Analysis and ESA Timelines Not Adequately Addressed

While the Guidance recognizes that the statute calls for use of NEPA categorical exclusions (43 USC 1772(c)(5)), it does not identify or implement any protocols for achieving these statutory mandates. Timely compliance with other laws that condition entry for these statutory purposes, such as Endangered Species Act timelines, also should be streamlined through this Guidance and be amended to include this specificity in an effort to simplify the complex planning process created through Guidance and in accordance with EO 13855.

This objective also can be achieved by evaluation and streamlining of the activity classes that require active Forest Service engagement or approval. *See supra.*

Conclusion

Thank you for your consideration of these comments intended to achieve the statutory objective of an efficient, timely process to establish and implement wildfire risk reduction through vegetation management on National Forest System lands. The Guidance should be amended to limit the need for Forest Service approvals, provide clear direction for swift and streamlined Forest Service approvals when approval is necessary, create operational flexibility in wildland fire risk management and clarify program ambiguity to achieve protection of National Forest System lands consistent with Congressional objectives.

Sincerely,

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