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VIA ELECTRONIC FILING

Office of Energy Infrastructure Safety
California Natural Resources Agency
715 P Street, 20th Floor
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RE: MUSSEY GRADE ROAD ALLIANCE COMMENTS ON THE PROPOSED ACTION ON E-FILING, FORMATTING REQUIREMENTS, SUBMISSION OF CONFIDENTIAL INFORMATION

The Mussey Grade Road Alliance (MGRA or Alliance) files these comments pursuant to the instructions in the Notice of Proposed Action for Energy Safety's proposed Confidential Information and Process & Procedure regulations,¹ which authorizes replies to stakeholder comments on the Large Utility WMPs (Wildfire Mitigation Plans) by June 13, 2022. Pursuant to Government Code section 11346.5, subdivision (a)(13), the Alliance requests that Energy Safety consider the proposed alternatives, modifications, and supplements herein.

The Alliance has been an active participant in the Wildfire Mitigation Plan reviews both before and after responsibility for overseeing these plans was transferred to the new Office of Energy Infrastructure Safety. Access to non-confidential utility data has been a cornerstone of the Alliance's participation. The Proposed Action, however, fails to adequately safeguard this access and the Alliance respectfully requests that Article 3 be modified to allow public input into the confidentiality determination process.

The Alliance comments are authored by the Alliance expert, Joseph W. Mitchell, Ph.D.

¹ Office of Energy Infrastructure Safety; NOTICE OF PROPOSED RULEMAKING; E-FILING, FORMATTING REQUIREMENTS, SUBMISSION OF CONFIDENTIAL INFORMATION; April 28, 2022.

Respectfully submitted this 13th day of June, 2022,

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MUSSEY GRADE ROAD ALLIANCE COMMENTS ON THE PROPOSED ACTION ON E-FILING, FORMATTING REQUIREMENTS, SUBMISSION OF CONFIDENTIAL INFORMATION

The Mussey Grade Road Alliances' (MGRA or Alliance) supports the efforts of the Office of Energy Structure safety to build a regulatory framework that will support its mission to prevent utility-related wildfires in California. In general, MGRA supports the draft rules incorporated into the Proposed Action. However, there is a significant and potentially serious omission from the rules regarding the submission of confidential information which needs to be brought to Energy Safety's attention. Specifically, there is no mechanism for public input in the confidentiality review process and no mechanism by which members of the public can challenge a utility claim of confidentiality. This may potentially make Energy Safety a litigant in Public Records Act actions, transferring power to determine reasonableness from Energy Safety to the courts.

1. CONFIDENTIALITY REQUIREMENTS

1.1. Applicable Government Code

As described in the Proposed Action,² there are several Government Code sections relevant to public access and confidentiality:

“Government Code section 6250, et seq., the California Public Records Act, requires Energy Safety to provide members of the public with access to documents used to conduct Energy Safety's business.

Public Utilities Code section 583 prohibits the California Public Utilities Commission from disclosing information that a public utility submits to the Commission except for information which the Public Utilities Act (Pub. Util. Code §§ 201 – 2282.5) requires “to be open to the public.” Government Code section 15475(c) provides that Energy Safety will continue to receive information that was submitted to the Public Utility Commission's former Wildfire Safety Division. This subdivision requires Energy Safety to comply with the Public Utilities Code section 583 prohibitions against disclosure of information.

² Proposed Action; pp. 3-4.

Government Code section 15475(c) also requires Energy Safety to (1) maintain the confidentiality of information submitted by public utilities in a manner “consistent with appropriate protections,” and (2) to “provide for the confidentiality of records, the protection of proprietary information, and the protection of the reasonable expectation of customers of public utilities in the privacy of customer-specific records maintained by” the public utility.”

1.2. Article 3. Data Collection, Data Access and Confidentiality

§ 29200. Confidential Information.

The text of Article 3 is comprehensive and it is not necessary to quote it at length here. MGRA has no issues with the existing text, which provides a clear mechanism for submission of and internal review of confidential information.

Subsection (a) of Article 3 details the requirements for an applicant to request confidential designation of a submission.

Subsection (b) of Article 3 describes the process for deficient or incomplete applications.

Subsection (c) describes the process by which the OEIS Deputy Director
“3(c)(1) The Deputy Director shall determine whether to grant an application for confidential designation. An application shall be granted if the applicant makes a reasonable claim that the California Public Records Act or other provision of law authorizes the Office to keep the record confidential. The Deputy Director's determination shall be in writing and shall be issued no later than thirty days after receipt of a complete application.”

Article 3 as proposed provides no mechanism for public challenge and review of a utility's confidentiality declaration, or for the public to provide OEIS with supplemental information.

1.3. Concerns with Confidentiality Claims

MGRA has been active in the review of Wildfire Mitigation Plans since their inception, and has responded to overbroad utility claims of confidentiality. In our comments on the 2022 WMPs for example, MGRA took strong issue with SCE's claim that geographical consequence data should

be considered confidential, even though this is purely a characteristic of the landscape and weather having nothing to do with utility infrastructure.³

As stated in MGRA's 2022 WMP Comments:

*“MGRA strongly prefers to work with public data to ensure that all of our work products can be public, are compliant with the law, and respect legitimate utility property rights and security concerns. To this end MGRA has worked with all utilities to obtain data that has been appropriately filtered to address confidentiality concerns, and the results have been largely satisfactory from our standpoint.”*⁴

In addition to objecting to SCE's specific confidentiality claim, MGRA proposed several recommendations to Energy Safety:

- *“Energy Safety should find that wildfire risk geographic data cannot be considered critical infrastructure under federal law and should not be classified as confidential based on California Government Code 6255.”*
- *“Energy Safety should require that in addition to posting all data requests that utilities also be required to post all confidentiality declarations as part of the WMP review process.”*
- *“Energy Safety should create and publish an administrative process by which stakeholders can challenge and litigate confidentiality claims.”*
- *“Energy Safety should accelerate development of a public portal for GIS data, so that stakeholders do not have to request this data from utilities, so that utilities do not have to take extra effort to prepare special versions for stakeholders, and so that appropriate access restrictions can be automatically enforced.”*⁵

The Proposed Resolution for SCE was issued on June 2, 2022⁶ and contains no mention of MGRA's confidentiality recommendations. Neither does the present Proposed Action allow any

³ 2022-WMPs; MUSSEY GRADE ROAD ALLIANCE COMMENTS ON 2022 WILDFIRE MITIGATION PLANS OF PG&E, SCE, AND SDG&E; April 11, 2022; p. 61-64. (MGRA 2022 WMP Comments).

⁴ Id; p. 61.

⁵ Id; pp. 63-64

⁶ OFFICE OF ENERGY INFRASTRUCTURE SAFETY; DRAFT EVALUATION OF 2022 WILDFIRE MITIGATION PLAN UPDATE SOUTHERN CALIFORNIA EDISON; June 2, 2022.

mechanism for public input or review of utility confidentiality claims. This is a grievous omission especially in light of the potential effects of Article 3 of the new regulations on procedural transparency.

1.4. Another Example of Overbroad Confidentiality Claims

On May 9, 2022, OEIS released version 2.2 of its GIS data standard guidelines.⁷ Among the comments received by OEIS, were those of Southern California Edison (SCE or Edison).⁸ One of the changes that Edison requests is:

*“CONFIDENTIALITY SHOULD BE DETERMINED AT THE FEATURE CLASS LEVEL
The proposed revisions would allow utilities to indicate if an entire feature class or table is considered confidential but still require each specific field in the geodatabase to be marked “Yes” or “No” for confidential treatment. SCE strongly supports basing public dissemination of data at the feature class level as opposed to the individual, specific field because there are millions of records making it difficult to administer and higher risk for improper release of data that should remain confidential. As SCE has previously explained, a feature class should not be made public unless all data fields in the feature class are non-confidential.”⁹ (Underline ours)*

Edison’s claim is dangerous and spurious. By adding just one field that is confidential to a feature class, say “distribution system”, Edison would effectively render that class inaccessible to the public. Effectively this process would classify swathes of non-confidential as confidential just because they happen to be in the same data structure as confidential data. The information added could be of only internal value, for example the name of the person last updating each record, but yet this addition would be enough to classify the entire data class as inaccessible to the public. The appeal to “millions of records” is also spurious. Modern databases can filter information from millions of records at time – that is what they are built for. No reply comments were allowed in response to the GIS standard, so Edison’s request to OEIS remains unchallenged in the record.

⁷ OEIS 2022-GIS-DRS; OFFICE OF ENERGY INFRASTRUCTURE SAFETY’S GEOGRAPHIC INFORMATION SYSTEMS DATA STANDARD GUIDELINES; VERSION 2.2; JANUARY 2022; Update May 9, 2022.

⁸ OEIS 2022-GIS-DRS; Southern California Edison Company’s Comments on GIS Data Reporting Standard Version 2.2 Draft Guidelines; June 8; 2022.

⁹ Id; p. 3.

Should OEIS accept SCE's request, it would allow Edison to permanently block access to vast swathes of its GIS information, and under Article 3 of this proposed Rules, there would be no public recourse to challenge this determination aside from filing a lawsuit against the Office of Energy Infrastructure Safety.

Edison in particular has characteristically stood for a more restrictive approach to data sharing and more aggressive approach to confidentiality claims. It is within its rights to make such claims, and it is the responsibility of Energy Safety to critically evaluate those claims, but the one missing and critical element in this process is public input.

2. PUBLIC INPUT AND PROCESS FOR CONFIDENTIALITY CLAIMS

Public safety is best served by a fully transparent and open process. This interest is recognized in Government Code Section 6250, the California Public Records Act. To the extent that Energy Safety's processes are open to public input, this public input needs to be informed by free and open access to appropriate information. In order to enforce this open access, members of the public need to have a mechanism to ensure due process. While these rights are ensured through the California legal system, it would be far more efficient and less burdensome on both the public and OEIS to provide an internal mechanism that also grants rights to those who may oppose the designation of specific information as confidential, and who may have additional information to that provide Energy Safety regarding an applicant's request for confidentiality.

2.1. Members of the Public or Stakeholders Should be Able to Challenge or Provide Additional Information Regarding a Request for Confidentiality

In the process proposed in Article 3, the applicant requesting a confidentiality designation (Applicant) is required to meet a number of requirements and provide specific information to justify their claim of confidentiality. This information will be evaluated by OEIS, which may at its discretion request additional information. While OEIS is responsible to ensure that the application is complete and correct, it is possible that information that the Applicant provides may not fully or accurately represent the Applicant's claim as perceived by other Stakeholders or members of the public. Stakeholders or other members of the public may:

- have a different interpretation of how the Applicant's information may be interpreted under the California Public Records Act,
- have additional factual information that might change OEIS's determination,
- have a different interpretation of how the Applicant's information relates to conclusions regarding critical infrastructure or competitive advantage, or
- have knowledge that the statements made by the Applicant are false.

Article 3 should have a mechanism by which OEIS can accept additional information from stakeholders and the public, evaluate such information, and if necessary use it to affect its determination of confidentiality.

2.2. Public Input Regarding a Confidentiality Designation Should not be Limited by Time

It should be possible for a stakeholder or member of the public to provide input to OEIS regarding a confidentiality designation after the Deputy Director makes their determination. While a comment period prior to the determination may be useful, it is possible that a stakeholder will not know that a particular piece of information has been designated as confidential until a discovery request is refused long after the determination of confidentiality.

For example, if a stakeholder is reviewing a Wildfire Mitigation Plan and serves a discovery request on a utility, the stakeholder may find out only after the utility responds that the requested information had been previously designated as confidential by OEIS. If the stakeholder examines the grounds for the confidentiality designation and finds that they are flawed, the stakeholder will need immediate redress at that point in time in order to timely conduct their WMP review.

2.3. Applicants Should be Allowed to Reply to Requests for Review

In order to ensure due process rights, OEIS should provide any request for review or additional information received by third parties to the Applicant and then allow Applicants to reply. The Deputy Director should then review both the new information and the Applicant reply and then deny the request for review, remove or deny the confidentiality designation, or request additional information from the Applicant.

2.4. There Should Be a Process for Expediting a Challenge or Review of a Confidentiality Designation

Many OEIS proceedings have strict limitations on comment periods. For this reason, OEIS (and the Wildfire Safety Division previously) have correctly imposed expedited three day response times for data requests. A stakeholder requiring an expedited response should state the grounds for their request as a part of their request for review. OEIS will respond to the stakeholder within three days accepting or denying their request to expedite. If the request to expedite is accepted, OEIS will set a deadline for Applicant's reply and set a date for the Deputy Director's determination.

In the event that an expedited review results in a revocation of the Applicant's confidentiality claim, the fourteen day period during which confidentiality status remains unchanged under 3(c)(3) should be reduced to a time to be designated by the Deputy Director.

2.5. An Internal Process for Review Will Reduce the Burden on Energy Safety and the Public

Should information be designated as confidential by OEIS, the Applicant will be under no obligation to provide that information to stakeholders or the public in response to discovery requests during OEIS proceedings such as Wildfire Mitigation Plan reviews.

In lieu of an internal confidentiality review process that is controlled and managed by OEIS, the only recourse that a member of the public would have would be to file a Public Records Act request to OEIS. Since OEIS has already designated the information in dispute as confidential, it would therefore be obliged to deny the Public Records Act request. If the stakeholder has additional information that challenges the basis of the confidentiality determination, they will have to file a lawsuit challenging the determination under California Government Code Sections 6258-6260. OEIS would be obliged to litigate the suit in order to defend its determination.

Requiring the public to seek legal redress as its first and only recourse puts a substantial burden on stakeholders wanting to contribute to proceedings before the Office of Energy

Infrastructure Safety. It would also consume valuable OEIS legal resources and taxpayer money, effectively making the OEIS the legal counsel for the utilities.

Beyond the legal considerations, the structure of the proposed Article 3 defeats the goal of transparency that Energy Safety has pursued since its founding. It sets up a potentially corrupting relationship between OEIS and the utilities with no public oversight, and creates an “us” versus “them” dynamic, with “us” being OEIS and IOUs and “them” being the public. This is an unnecessary dynamic that would create distrust of the process and provide no discernable benefit to the people of California. In the interest of creating an open and public organization, Energy Safety must create a mechanism for public appeal of confidentiality designations.

3. PROPOSED ADDITION TO ARTICLE 3

The following is example language that could be added as Article 3, Section (f) to remedy the aforementioned shortcomings in the Proposed Action.

(f) Public Appeal of Confidentiality Designation

(1) If a member of the public (appealing party) wishes to appeal a determination of confidentiality, they shall file such appeal under the docket under which the information designated confidential was submitted. A public appeal of a confidentiality designation shall:

- (A) identify the requesting the party requesting review and their interest in the requested information;
- (B) provide a factual basis for the appeal that addresses all bases under which confidentiality was granted by the Deputy Director;
- (C) cite and discuss provisions of the California Public Records Act or other law that would disallow the Office to keep the record confidential;
- (D) state whether an expedited review is required and if so provide justification and requested timeframe for resolution.

(2) Upon receipt of an appeal request, the Office shall provide this request within one business day to the party who had requested a confidential designation (originating party)

(3) The originating party may reply with additional information supporting their confidentiality request within five business days.

- (4) The Deputy Director shall make a determination regarding the appeal after review of the appeal and originating party reply within thirty days of the receipt of the reply.
- (5) If the appealing party requests an expedited review, the Office shall respond approving or denying expedited review within three business days. If the expedited review is approved, the Office will provide dates for the originating party reply and determination in its response.
- (6) In the event that the Deputy Director revokes the determination of confidentiality in response to the appeal,
- (A) The originating party may request a review by the Director as per 3(c)(2)
- (B) In the event an expedited review has been approved, the Deputy Director's determination will set dates for review request deadlines and final determination.

4. CONCLUSION

In the interest of openness, transparency, and efficiency the Office of Energy Infrastructure Safety should adopt a mechanism that allows the public to request a review of a designation of confidentiality within the OEIS framework without having to revert to a formal legal challenge that would be costly in time, resources, and money for both the public and OEIS. These comments offer an example of how such a mechanism might be implemented, and we urge Energy Safety to add language that captures the spirit of these suggestions and creates a robust and flexible review framework for confidentiality designations.

Respectfully submitted this 13th day of June, 2022,

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