

RESOLUTION 21-09

A RESOLUTION OF THE MORAGA-ORINDA FIRE PROTECTION DISTRICT OF CONTRA COSTA COUNTY, TO URGE THE CALIFORNIA DEPARTMENT OF TRANSPORTATION TO MITIGATE COMBUSTIVE VEGETATION IN STATE OWNED LANDS TRAVERSING THE DISTRICT

WHEREAS, California State Highway 24 (“Highway 24”) is within the jurisdictional boundaries of the Moraga-Orinda Fire Protection District (“District”) and both the highway and certain roadside directly adjacent to Highway 24 is state-owned land and is subject to the control of the California Department of Transportation (“CalTrans”);

WHEREAS, CalTrans has a legal duty to refrain from creating or contributing to dangerous and unsafe conditions that could result in harm to or the loss of property or life on the highways and certain roadsides directly adjacent thereto that it controls, including with respect to Highway 24, as well as a legal duty to maintain all highways and certain adjacent roadsides within its control, including Highway 24;

WHEREAS, CalTrans acknowledges these legal duties by virtue of its establishment of a Maintenance Program, the prerogatives of which are set forth in the CalTrans Maintenance Manual (“Manual”), including recognition that the CalTrans Maintenance Program “is assigned the care and upkeep of State highways”;

WHEREAS, Section 1.01 of the Manual provides that the “legal definition of maintenance as provided by the California Streets and Highways Code, General Provisions, Section 27 includes...the preservation and keeping of rights of way, and each type of *roadway*, structure, safety convenience or device, *planting*, illumination equipment and other facility, in the *safe* and usable condition to which it has been improved or constructed” (emphasis added);

WHEREAS, Section 1.25.1 of the Manual provides in relevant part that “Caltrans is responsible for the administration, construction, and maintenance of the State highway system,” that the “primary function of the Maintenance Program in both man-made and natural disaster is to maintain the State highway system in a safe and operable condition” and that “Caltrans will take action to protect the health, safety, convenience, and welfare of the general public of the State”;

WHEREAS, Section C2.03 of the Manual concerns Development of the Caltrans Vegetation Control Policy and recognizes in relevant part that “[v]egetation control” refers to the “Integrated Vegetation Management (IVM) treatment of all plants growing within highway right of way, whether native, naturalized or in landscaped areas,” and that “Caltrans controls vegetation on State highway roadsides to,” among other purposes, “reduce the risk of fires starting along the roadside”;

WHEREAS, Section C2.04 of the Manual concerns Caltrans Vegetation Control Considerations and provides in relevant part that “[v]egetation should be controlled where necessary for fire prevention”;

WHEREAS, Section C2.06 of the Manual concerns Annual Plans and provides in relevant part that “[e]ach [CalTrans] district prepare an annual plan for vegetation control (VegCon Plan),” that “[t]his plan shall be derived from segment specific decisions which should consider,” among other factors, “fire risk management,” that “[t]he plan is prepared *each spring*, and is the reference document for planning and scheduling Maintenance operations and for budget planning” (emphasis added), and that an annual VegCon Plan should account for a variety of factors relevant to reducing fire risk, including “vegetation control strategies that have been determined appropriate for the terrain and neighboring land uses” including “fuel load reductions appropriate for site conditions”;

WHEREAS, Sections C2.06.02 and C2.06.03 of the Manual concern Site Specific Fire Risk Plans and Edge Treatment and provide, respectively and in relevant part, that “[a] site specific fire risk plan is prepared by the [CalTrans] District Landscape Specialist for the [CalTrans] Deputy District Director, Maintenance”, that a

Fire Risk Plan “establishes specific fire control measures for road edges, while considering the likelihood of a fire occurring and the consequences of a fire to the roadside and to adjacent properties,” that “[e]dge treatments are determined by the District Landscape Specialist, and are part of the Caltrans Vegetation Control Plan,” and that “a VegCon Plan must consider fire risk *in sufficient detail* to reflect changing vegetation types along highway edges, differing adjacent land uses, highway configurations, and annual rainfall impacting expected vegetation growth which may increase/decrease fire risk, and urban interface” (emphasis added);

WHEREAS, Section C2.06.04 of the Manual concerns VegCon Plans and identifies terms relating to the date by which a VegCon Plan for a particular CalTrans District should be completed annually and the substantive requirements for the plan, including that “VegCon Plans should be completed... *by April 1 of each year*” (emphasis added) and shall “contain details for vegetation control on roadsides”;

WHEREAS, an April 27, 2007 memorandum authored by CalTrans Director Will Kempton and directed to CalTrans District Directors regarding “Roadside Management for Fire Safety” (“April 2007 Memo”) recognized that “[e]ach District shall prepare a plan for vegetation control *by April 1 of each year*” (emphasis added), that “[t]he plan specifically identifies vegetation control for all highway segments,” that a VegCon Plan is “one of the main tools used to direct work done to stay in compliance with [CalTrans’s] standard policy to mow and clear between four and ten feet from the edge of the paved shoulder,” that the paved shoulder is “where 74 percent of roadway fires start”, and that CalTrans’s “principal obligation is to provide fire risk control from the roadway”;

WHEREAS, the April 27, 2007 Memo also stated that, when CalTrans receives notice regarding the need for vegetation control on the highway roadside, CalTrans “will respond” and will “expend additional resources” when CalTrans determines that there is an “identified necessity to control the risk of fire from affecting others” and that CalTrans’s “goal is to maintain a safe, effective, and economical vegetation control program which responds to public concerns in an open, flexible and professional manner”;

WHEREAS, the April 27, 2007 Memo was included in the 2020 and 2021 CalTrans District Four Roadside Fire Prevention Plans;

WHEREAS, CalTrans’s Division of Maintenance issues Fire Prevention Guidelines, which recognize in, in relevant part, that “each [CalTrans] [D]istrict should develop [an] annual Fire Risk Plan in conjunction with a VegCon Plan and review workplans and methods used for fire mitigation,” that “[a]reas adjacent to grass, brush, or forest-covered lands represent a small portion of the total right of way but are at-risk for generating large and damaging fires” and are typically recognized in each site specific Fire Risk Plan;

WHEREAS, since March 2018, MOFD has made ongoing and sustained efforts to engage CalTrans District Four in an attempt to obtain the District’s Site Specific Fire Plans and VegCon Plans that conform to the above-stated standards of its Manual and, in response to such efforts, District Four has yet to provide any Site Specific Fire Plan or a VegCon Plan in any year since 2018 that addresses the requirements prescribed for such a plan in the Manual;

WHEREAS, based on its inquiries since 2018, MOFD has confirmed that CalTrans has not prepared a Fire Risk Plan in three of the last six years, that the plans prepared were a collection of outdated materials that did not satisfy the requirements for a Fire Risk Plan prescribed in Chapter C2, Section 1 of the Manual, that, in 2020, District Four relied upon an herbicide application schedule (i.e., a Microsoft Excel spreadsheet reflecting pre-emergent herbicide mix ratios and mowing prescriptions) as its VegCon Plan, and that the herbicide schedule and mowing plan does not satisfy the requirements for a Site Specific Fire Risk Plan prescribed in Chapter C2, Section 1 of the Manual;

WHEREAS, after engaging local elected officials regarding this issue, in October 2020, CalTrans Director Toks Omishakin committed to MOFD that District Four would prepare a VegCon Plan and Site Specific Fire Risk Plan in a timely manner and with local fire agency input;

WHEREAS, in December 2020, CalTrans District Four staff disclosed that they have never prepared a VegCon Plan with the elements prescribed under Chapter C2, Section 1 of the Manual and have never produced

a Site Specific Fire Risk Plan and they would need CalTrans Headquarters to provide them with a template for such purpose;

WHEREAS, in February 2021, MOFD staff requested draft copies of the 2021 VegCon Plan and Site Specific Fire Risk Plan from CalTrans District Four staff and District Four staff neither committed to provide such documents and nor confirmed that such documents were currently under development;

WHEREAS, in March 2021, after MOFD repeatedly inquired as to whether CalTrans would produce a Site Specific Fire Risk Plan and compliant VegCon Plan by the April 1 deadline prescribed in the Chapter C2, Section 1 of the Manual and the April 27, 2007 Memorandum, staff from the Office of Roadside Management for CalTrans responded that a 1992 Environmental Impact Report (EIR) dictates that CalTrans districts need not submit their VegCon Plans to CalTrans Headquarters until April 15 for the upcoming Fiscal Year, commencing July 1, 2021 through June 30, 2022, and further advised that CalTrans districts are performing vegetation management based on VegCon Plans that were approved for the prior Fiscal Year, i.e., July 1, 2020 through June 20, 2021;

WHEREAS, on April 1 and April 15, 2021, CalTrans District Four did not provide MOFD with its 2021 Site Specific Fire Risk Plan or a compliant VegCon Plan and have yet to provide such plans as of the date of this resolution, despite further inquiry from MOFD regarding the status of such documents;

WHEREAS, in 2020 and 2021, numerous roadside ignitions have caused vegetation fires throughout MOFD's jurisdiction, notably the California fire in Rodeo which burned 225 acres;

WHEREAS, most recently, on June 11, 2021 a roadside ignition caused a vegetation fire to start on Westbound Highway 24 at the Wilder off ramp and rapidly spread onto watershed lands of the East Bay Municipal Utility District due to the unmitigated fuels in close proximity to the roadway, requiring two alarms and regional automatic aid to extinguish;

WHEREAS, pursuant to California Government Code section 835, "a public entity is liable for injury caused by a dangerous condition of its property if the plaintiff establishes that the property was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and that either (a) [a] negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition; or (b) [t]he public entity had actual or constructive notice of the dangerous condition under [Government Code] Section 835.2 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition"; and

WHEREAS, pursuant to California Government Code section 835.2, "[a] public entity had actual notice of a dangerous condition within the meaning of subdivision (b) of [Government Code] Section 835 if it had actual knowledge of the existence of the condition and knew or should have known of its dangerous character," "[a] public entity had constructive notice of a dangerous condition within the meaning of subdivision (b) of [Government Code] Section 835 only if the plaintiff establishes that the condition had existed for such a period of time and was of such an obvious nature that the public entity, in the exercise of due care, should have discovered the condition and its dangerous character."

NOW, THEREFORE, BE IT RESOLVED by the Board of Directors of the Moraga-Orinda Fire District as follows:

SECTION 1. The Board recognizes that, as of the time of this resolution, the conditions on the roadside adjacent to Highway 24 under CalTrans's control pose a dangerous and unsafe condition that, left unabated, could result in the loss of property or life in the event that a roadside ignition causes unmitigated vegetation on the roadside to burn in an uncontrolled wildfire.

SECTION 2. The Board further recognizes that development of a Site Specific Fire Risk Plan and satisfactory VegCon Plan, to the extent that both materially comply with the standards set forth in the Manual, would constitute a significant fire abatement measure and would reduce the degree of risk currently posed by the roadside conditions on Highway 24.

SECTION 3. The Board further recognizes that, since at least March 2018, MOFD has made good-faith, repeated, and sustained efforts to notify CalTrans regarding these conditions and has requested that, in effort to mitigate such risk, that CalTrans prepare a Site Specific Fire Risk Plan and VegCon Plan that comply with the standards set forth in the Manual, and that, despite MOFD's efforts, as of the date of this resolution, CalTrans has still failed to produce either such plan to MOFD.

SECTION 4. The Board urges CalTrans, District Four to prepare a Site Specific Fire Risk Plan, to prepare a VegCon Plan that meaningfully complies with the criteria set forth in Chapter C2, Section 1 of the Manual, and to submit both plans to MOFD. MOFD urges CalTrans to do so as soon as practicable, but by no later than the start of CalTrans's upcoming Fiscal Year, i.e., July 1, 2021.

SECTION 5. The Board directs MOFD staff, either directly or acting through legal counsel, to articulate the legal risks of failing to prepare a Site Specific Fire Risk Plan and a compliant VegCon Plan per the standards set forth in Chapter C2, Section 1 of the Manual in a letter to the CalTrans Director.

SECTION 6. Effective Date

This Resolution shall become effective upon the date of approval and ratification by the code reviewing body of the County of Contra Costa.

PASSED, APPROVED and ADOPTED this 19th day of May, 2021 at the regular meeting of the District Board of Directors held virtually on May 19, 2021, on motion made by Director Danziger, seconded by Director Donner, and duly carried with the following roll call vote:


AYES: DIRECTORS BATIX, DONNER, DANZIGER, JEX, AND JORGENS

NOES: NONE

ABSENT: NONE

ABSTAIN: NONE

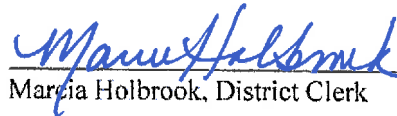
Resolution 21-09
Dated: May 19, 2021



Craig Jorgens, President
Board of Directors


I certify that this is a full, true and correct copy of the original document which is on file in my office, and that was passed and adopted by the Moraga-Orinda Fire Protection District on the date shown.

ATTEST:




Marcia Holbrook, District Clerk

APPROVED AS TO FORM:



Jon Holtzman, District Counsel

APPROVED AS TO CONTENT:



Dave Winnacker, Fire Chief