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OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION

SMALL BUSINESS ADVOCACY REVIEW PANEL

PROPOSAL FOR POTENTIAL TREE CARE OPERATIONS STANDARD

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COMMENTS OF UTILITY LINE CLEARANCE SAFETY PARTNERSHIP

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COMMENTS OF THE UTILITY LINE CLEARANCE SAFETY PARTNERSHIP

I. Executive Summary

The Utility Line Clearance Safety Partnership (ULCSP) appreciates the opportunity to comment on OSHA's proposal for a potential tree care operations standard in response to OSHA's SBAR panel.

The ULCSP is comprised of: Asplundh Tree Expert, LLC, Burford's Tree, Inc., The Davey Tree Expert Company, Kendall Vegetation Services , W.A. Kendall and Co., LLC, Lewis Tree Service, Inc., Lucas Tree Experts, McCoy Tree Surgery, Nelson Tree Service, LLC, Penn Line Corporation, Terry Tree Service, LLC, Ironwood Heavy Highway, LLC, The Townsend Corporation, Trees, Inc., Wright Tree Service, and Wright Service Corp.

Each member engages in vegetation management for electric utilities, municipalities, and commercial customers. This work includes clearing the rights of way to create and maintain electric power line rights of way. Using specialized techniques, highly trained employees are largely able to perform this work without de-energizing the power lines or equipment. ULCSP members perform the overwhelming majority of line-clearance tree trimming operations in the country.

As noted in our comments in response to the OSHA's ANPRM for a potential tree care standard, ULCSP member organizations engage in line-clearance tree trimming as that term is defined by OSHA's Electric Power Generation, Transmission and Distribution Standard, 29 C.F.R. § 1910.269(x), the existing vertical standard for the industry. The ULCSP participated extensively in the rulemaking to promulgate section 1910.269. Additionally, ULCSP members are actively involved in the continued development of the American National Standards Institute (ANSI) Standard for Arboricultural Operations – Safety Requirements (ANSI Z133–2017). These two documents are the primary resources for ensuring safety for line-clearance arborists.

As discussed below, an additional vertical standard that covers line-clearance tree trimming is unnecessary. Section 1910.269 addresses the overwhelming majority of the hazards OSHA proposes to address in a potential tree care standard. To the extent any line-clearance tree trimming work is not covered by Section 1910.269, the industry relies on ANSI Z133. An additional industry-specific vertical standard will not materially reduce a significant risk to line-clearance arborists and the costs of complying with two vertical standards is not justified by any potential benefits.

Accordingly, ULCSP urges OSHA to categorically exclude any line-clearance tree trimming work from the scope of a potential tree care operations standard. In the alternative, if line-clearance tree trimming is not excluded, OSHA should draw any requirements applicable to line-clearance tree trimming from ANSI Z-133.

II. OSHA should Exclude Line-Clearance Tree Trimming from a potential tree care operations standard and Amend the Definition of "Line Clearance Tree Trimming" in Section 1910.269(x)

a. Section 1910.269 already provides comprehensive protection for the line-clearance tree trimming industry

OSHA should exclude line-clearance tree trimming from a potential tree care operations standard. "Line-clearance tree trimming" is currently defined in section 1910.269(x) to cover "the pruning, trimming, repairing, maintaining, removing, or clearing of trees, or the cutting of brush" that occurs within 10-feet of electrical supply lines and equipment.[1] Section 1910.269 is the existing vertical standard for the line-clearance tree trimming industry and contains several provisions that apply to line-clearance tree trimming. For line-clearance tree trimmers who are "qualified persons" as defined by section 1910.269 the entirety of section 1910.269 applies, except for paragraph (r)(1). For line-clearance tree trimmers who are not "qualified persons" under section 1910.269, paragraphs (a)(2), (b), (c), (g), (k), (p), and (r) apply.

As noted in ULCSP's comments in response to OSHA's ANPRM, the applicable provisions in 1910.269 include, but are not limited to:

- Protection from electrical hazards through the use of insulated equipment and other methods, and compliance with minimum approach distances (1910.269(l) and 1910.269(r)(1))
- Restrictions on performing work during adverse weather conditions (1910.269(r)(1)(vi))
- Requirements for brush chippers, including locking devices, mechanical infeed systems or infeed hoppers that prevent contact, secure access panels, and personal protective equipment (1910.269(r)(2))
- Requirements for sprayers and related equipment (1910.269(r)(3))
- Guards and personal protective equipment for stump cutters (1910.269(r)(4))
- Requirements for gasoline-engine power saws, including all of the provisions in Section 1910.266(e) as well as requirements for separate lines for saws weighing more than 15 pounds, controls that return the saw to idle when released, clutches that

[1] Specifically: Section 1910.269(x) defines "line-clearance tree trimming" as "the pruning, trimming, repairing, maintaining, removing, or clearing of trees, or the cutting of brush that is within the following distance of electric supply lines and equipment:

(1) For voltages to ground of 50 kilovolts or less-3.05 meters (10 feet);

(2) For voltages to ground of more than 50 kilovolts-3.05 meters (10 feet) plus 0.10 meters (4 inches) for every 10 kilovolts over 50 kilovolts..

will not engage while the saw is in idle, prohibitions on drop starting in certain situations, and requirements for maintenance and repairs (1910.269(r)(5))

- Requirements for backpack power units, such as prohibiting operation when other employees are within 10 feet, quick shutoff switches, and maintenance and repair provisions (1910.269(r)(6))

- Specifications for ropes, including inspections, minimum diameters and breaking strengths, and storage and repair provisions (1910.269(r)(7))

- Fall protection requirements, including the provisions in 1910.67 for work from aerial lifts, as well as specifications for climbing ropes and safety saddles for work performed in trees (1910.269(r)(8) and 1910.269(g))

- CPR and first aid training (1910.269(b))

- Requirements for job briefings, which must be performed before each job and include a discussion of hazards, work procedures, special precautions, energy source controls, and personal protective equipment (1910.269(c))

- Requirements for hand and portable power tools, including generators and hydraulic and pneumatic tools (1910.269(i))

- Provisions applicable to live-line tools (1910.269(j))

- Requirements for mechanical equipment such as aerial lifts and other vehicular equipment, including reverse signal alarms, outrigger provisions, compliance with applied load ratings and minimum approach distances, and rollover protective structures that meet Subpart W of Part 1926 (1910.269(p))

Thus, both electrical and non-electrical hazards in line-clearance tree trimming are extensively regulated by section 1910.269 already. Moreover, generally applicable standards in Part 1910 (e.g., OSHA's horizontal standards on PPE, machine guarding, and power tool use) also apply. *See* 29 C.F.R. § 1910.269(a)(1)(iii).[2]

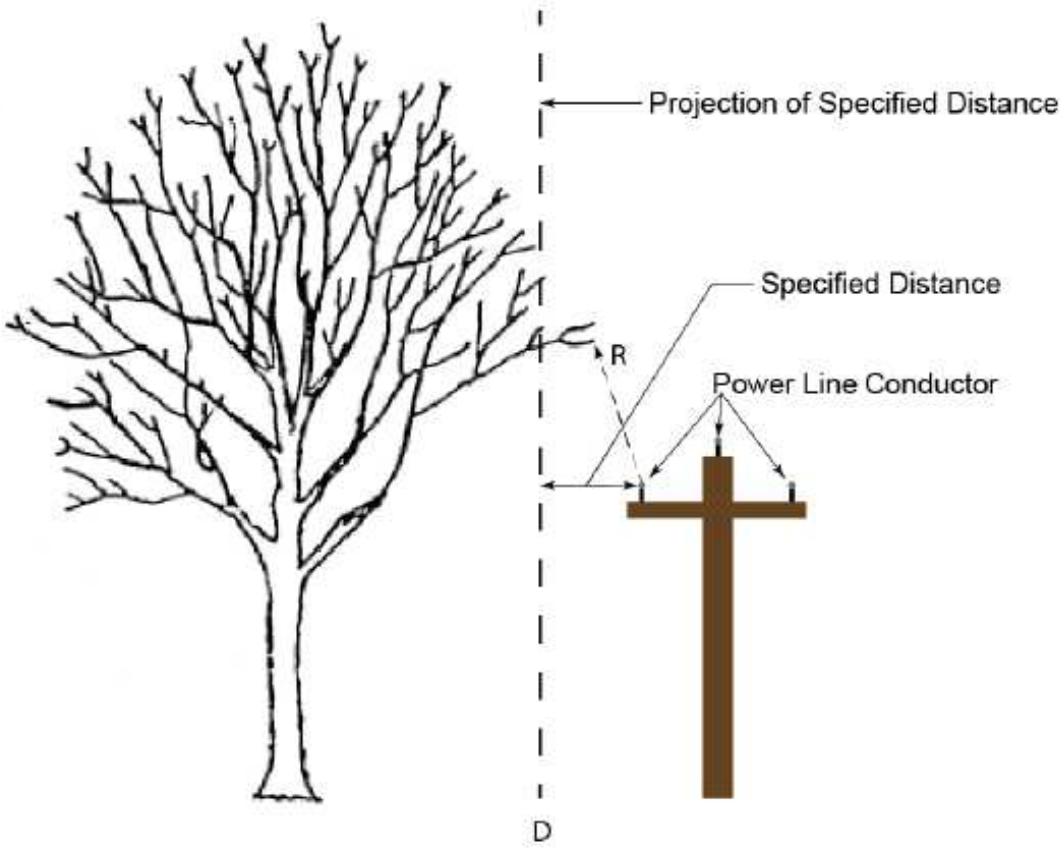
The extent to which section 1910.269 covers line-clearance tree trimming is highlighted by OSHA's interpretation of the definition of such work in 1910.269(x) as expressed in the agency's guidance. *See* OSHA's "Questions and Answers on 29 CFR 1910.269 and 29 CFR Part 1926, Subpart V" at page 28.[3] In OSHA's view:

[2] 29 C.F.R. § 1910.269(a)(1)(iii) provides "[t]his section applies in addition to all other applicable standards contained in this part 1910. Employers covered under this section are not exempt from complying with other applicable provisions in part 1910 by the operation of §1910.5(c). Specific references in this section to other sections of part 1910 are for emphasis only."

[3] Questions and Answers on 29 CFR 1910.269 and 29 CFR Part 1926, Subpart V, available at https://www.osha.gov/dsg/power_generation/QandAFinal.html (last visited June 2, 2020).

> In ascertaining whether work meets the definition of line-clearance tree trimming, *the determining factor is the location of the tree or brush being worked on, not the location of the employee or the location of the work being performed.* Work meets the definition of line-clearance tree trimming if *any part* of the tree or brush being worked on is within the specified distance, horizontally, of electric supply lines or equipment. In other words, the specified distance extends vertically up and down next to, rather than radially from, the power line conductor or associated equipment.

According to OSHA, section 1910.269 applies to even ancillary tasks associated with line-clearance tree trimming that take place outside of the 10-foot distances specified in 1910.269. *See* OSHA's "Questions and Answers on 29 CFR 1910.269 and 29 CFR Part 1926, Subpart V" at 28 (emphasis added).[4] Using the figure below, OSHA's view is that "[t]he tree is within the specified distance if any part of the tree is on the side of that vertical projection closest to the line or equipment (D) without regard to the radial distance from the line or equipment (R). *Id*.



See OSHA's "Questions and Answers on 29 CFR 1910.269 and 29 CFR Part 1926, Subpart V" at 27 (figure extracted from same). Thus, for example, if any part of a tree being worked on comes within this 10-foot vertical threshold, the work is covered by section 1910.269, even if the employee is working on the opposite side of the tree. As another example, if a crew is working to

[4] Questions and Answers on 29 CFR 1910.269 and 29 CFR Part 1926, Subpart V, available at https://www.osha.gov/dsg/power_generation/QandAFinal.html (last visited June 2, 2020).

remove a tree with branches located within 10-feet of an electrical conductor as shown above, section 1910.269 would apply even to the chipping of brush or tree branches associated with that work until the tree removal is completed. *Id*. at 28.

The extent to which section 1910.269 covers line-clearance tree trimming establishes that an additional standard on line-clearance tree trimming would only add to regulatory complexity, would not materially reduce a significant risk to employees, and is therefore unnecessary. In fact, during the 2014 rulemaking to revise section 1910.269, OSHA agreed that an additional standard for line-clearance tree trimming was unnecessary. Specifically, in the preamble of the final rule for section 1910.269, OSHA declared that "the Agency does not believe it is necessary to employee safety to address in § 1910.269 every hazard faced by line-clearance tree trimmers." 79 Fed. Reg. 20316, 20342. OSHA explained that "employers in every industry, including line-clearance tree trimming firms, must identify all OSHA standards applicable to their work, along with their general duty clause obligations." *Id.* Line-clearance tree trimming firms have worked diligently to comply with section 1910.269 since its revision as well as other Parts of 1910. While OSHA noted that it would revisit whether line-clearance tree trimming should be covered under a proposed tree care standard, we do not believe OSHA has shown a sufficient justification, with findings supported by substantial evidence, to regulate something it decided not to six years ago. If OSHA believes line-clearance tree trimming is in need of additional regulation, then OSHA should engage in a separate rulemaking to propose amendments to Section 1910.269 rather than using two vertical standards to cover the same industry.

Under the proposed regulatory framework, a potential tree care standard "would apply to line-clearance tree trimming *also covered* by section 1910.269." PIRFA at 160 (emphasis added). In fact, the agency recognizes that the proposals in the current regulatory framework "might be somewhat duplicative of, or overlap with [section 1910.269] . . . ." PIRFA at 157. We agree, but OSHA fails to appreciate that this duplication and overlap will have consequences. The addition of another generally applicable standard that applies to line-clearance tree trimming within the distances specified in section 1910.269(x) would create confusion and undoubtedly lead to ambiguities about which standard applies to the same work. In our experience, when safety standards are difficult for employees to understand (and in this case distinguish), employees have difficulty applying them, which leads to more instances of oversight, more mistakes, and ultimately more injuries.

OSHA notes in the Preliminary Initial Regulatory Flexibility Analysis[5] (PIRFA) that based on its statements made during the 2014 rulemaking on section 1910.269, the agency "believes" a proposed rule under the current regulatory framework would not conflict with section 1910.269. PIRFA at 157. OSHA fails to take into account the above discussion regarding the 10-foot provision in the definition and the associated guidance as well as the ancillary tasks covered by section 1910.269. Put another way, OSHA apparently does not recognize the extent to which section 1910.269 covers line-clearance tree trimming. Based on

[5] See *Final PIRFA OSHA Small Business Advocacy Review Panel* (March 13, 2020), available at https://advocacy.sba.gov/2020/03/19/osha-posts-materials-for-small-business-panel-on-tree-care-operations/ (last visited June 1, 2020).

OSHA's Preliminary Initial Regulatory Flexibility Analysis[6] (PIRFA), OSHA has not shown that including line-clearance tree trimming in a propose tree care standard would materially reduce a significant risk in light of the extent to which section 1910.269 already covers this work.

b. In excluding line-clearance tree trimming from coverage under a Tree Care standard, OSHA should amend the definition of "line-clearance tree trimming"

ULCSP supports OSHA's regulatory alternative to exclude line-clearance tree trimming work covered by section 1910.269 (PIFRA Alternative 2). However, doing so would fail to recognize the potential for confusion posed by the 10-foot distances specified in the definition of line-clearance tree trimming in section 1910.269(x).[7] For OSHA to successfully effectuate an exclusion for line-clearance tree trimming, it must do so categorically based on the type of work and without regard to the distances specified in 1910.269(x). In other words, OSHA should exclude all line-clearance tree trimming work from a proposed tree care standard, regardless of whether such work meets the distances specified in section 1910.269(x).

Therefore, to effectively exclude line-clearance tree trimming from a potential tree care standard, we propose OSHA adopt the following definition of "line-clearance tree trimming," which broadens the existing definition in Section 1910.269(x):

> ***Line-Clearance Tree Trimming*** means the pruning, trimming, repairing, maintaining, removing, or clearing of trees, or the cutting of brush or vegetation management work that is performed by line-clearance tree trimmers or trainees for the construction or maintenance of the rights of way of electrical supply lines and equipment on behalf of an organization that operates, or that controls the operating procedures for, those lines or equipment.

This proposed definition differs from the current definition in section 1910.269(x) by focusing on the type of work performed by line-clearance tree trimmers and by removing the distances specified in section 1910.269(x). Such a definition would make clear that line-clearance tree trimming work is not included within the scope of a proposed tree care standard.

In sum, line-clearance tree trimming is already comprehensively addressed by section 1910.269 and other generally applicable sections of Part 1910. Therefore, OSHA should not include line-clearance tree trimming within the scope of any potential tree care standard. ULCSP agrees with the Tree Care Industry Association (TCIA), the petitioner in this

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[6] See *Final PIRFA OSHA Small Business Advocacy Review Panel* (March 13, 2020), available at https://advocacy.sba.gov/2020/03/19/osha-posts-materials-for-small-business-panel-on-tree-care-operations/ (last visited June 1, 2020).

[7] As we expressed in the rulemaking for Section 1910.269, the 10-foot distance criterion in section 1910.269(x), (referred to as the "10-foot rule" by ULCSP members), is already problematic for the industry. *See* 79 Fed. Reg. 20316, 20342 (Apr. 11, 2014). We reiterate those concerns here. We also note that using the 10-foot distance-based distinction to determine applicability of 1910.169 versus a proposed tree care standard undermines the very same reasons for which OSHA found ULCSP's concerns with the 10-foot rule to be "unpersuasive" in the preamble of the Section 1910.269 final rule. *Id*. at 20342.

rulemaking, that any work covered by Section 1910.269 should not also be covered by a proposed tree care standard and a new definition of line-clearance tree trimming is necessary to achieve that result.

c. ANSI Z-133 Standard for Arboricultural Operations effectively supplements Section 1910.269

To the extent any hazards are not addressed by Section 1910.269, ULCSP members supplement their safety programs with ANSI Z-133. ULCSP members strongly support ANSI Z-133 and remain actively involved in its continued development. Several representatives from several ULCSP member organizations serve on the ANSI Z-133 committee. Committee delegates include representatives from OSHA, the tree care and line-clearance tree trimming industry, labor organizations, manufacturers, and other interested stakeholders. Through the development of ANSI Z-133, ULCSP members and the line-clearance tree trimming industry as a whole are able to take advantage of collaborating with these stakeholders to ensure the continued safety of line-clearance arborists. In addition to section 1910.269, ULCSP members generally structure their safety programs around ANSI Z-133.

During the 2014 rulemaking on section 1910.269, OSHA explained that the agency did not incorporate a comprehensive tree-trimming standard in section 1910.269, and expressed concerns during that rulemaking that there were non-electrical hazards not addressed by that section or even the 1982 version of ANSI Z-133. *See* 79 Fed. Reg. at 20342 – 43. In 2017, however, the ANSI Committee added or amended provisions to ANSI Z-133 that address many of the hazards of concern to OSHA, particularly the non-electrical hazards. Specifically, these changes include:

- Expansion of the rules for working in proximity to electrical hazards (Section 4); including dividing electrical hazards into three categories: General, Incidental Line Clearance, and Utility Line Clearance;

- Increased requirements pertaining to climbers and aerial lift operators when pruning, with respect to having a hand saw available while working aloft;

- Expansion and clarification of the requirement for arborists to be secured at all times while working alone;

- Clarification of the requirements for ensuring all moving parts of vehicles and mobile equipment come to a complete stop before performing maintenance;

- New requirements and clarifications with respect to the use of winch lines;

- New requirements for removing equipment from service if inspection reveals a defect that could affect safe operation of the equipment;

- Expanding requirements for chocking wheels of aerial devices;

- Requiring at least two workers trained in first aid/CPR for field crews with two or more workers at a worksite;

- Requirements for use of hands-free radio communication between qualified arborists and crane operators during "blind picks";

- Expanding the requirements for limbing, bucking, and moving debris so that only one worker can cut a single tree during limbing and bucking to prevent the work of one worker from creating a hazard to another.

With these 2017 revisions, section 1910.269, ANSI Z-133, and the other generally applicable sections of Part 1910 comprehensively address the hazards facing line-clearance arborists.

Supplementing section 1910.269 with ANSI Z-133 provides the necessary flexibility for the line-clearance tree trimming industry to ensure safety as work practices and technology evolve, while also providing OSHA with an effective enforcement mechanism to regulate the industry. The benefits of flexibility are two-fold. First, ANSI Z-133 is written in performance-oriented language, which allows for flexibility with respect to compliance and ensuring safety. Second, as discussed in more detail below, the best practices and work methods in the line-clearance tree trimming industry change rapidly as technology advances and ULCSP members and others find safer methods to accomplish the work. Because the line-clearance tree trimming industry is well represented on the ANSI Z-133 Committee, updates to ANSI Z-133 account for and reflect the most up to date work practices as work methods and technology evolve. The few (if any) hazards that may later arise can adequately be addressed using the General Duty Clause together with the latest edition of ANSI Z-133 as evidence that a particular hazard is recognized in the industry. In light of this current enforcement mechanism, OSHA's position in the PIRFA that adopting Alternative 2 would be less protective and leave workers exposed to the hazards they would be protected against is baseless.

III. If line-clearance tree trimming is not excluded from a tree care standard, OSHA must clarify that the provisions of Section 1910.269 take priority over any requirements of a proposed tree care standard

Under the current regulatory framework, OSHA proclaims that the proposed tree care standard would apply in addition to section 1910.269 with respect to line-clearance tree trimming. As explained above, if OSHA includes line-clearance tree trimming, there will undoubtedly be several duplicative and overlapping requirements between the two standards. With respect to line-clearance tree trimming, OSHA must declare that section 1910.269 is more specifically applicable and, in all respects, takes priority over a potential tree care standard. The line-clearance tree trimming industry has invested substantially in its efforts to comply with and provide training on the requirements of section 1910.269.

Consistent with our comments above regarding focus on the type of work, OSHA should premise applicability of a proposed tree care standard based on the work and activities being performed, rather than the height or size of the tree being worked on. Focusing on the height and/or size of the tree will do nothing for safety and complicate compliance and enforcement.

Few hazards exist when removing or trimming a sapling. Moreover, with the fall protection requirements in section 1910.269, we find it unnecessary to use height as a trigger for applicability of a proposed tree care standard.

Lastly, OSHA should not incorporate multi-employer responsibility into a proposed tree care standard. Under the current proposal, employers who perform tree care operations would be required to ensure that all workers on the ground not enter the drop zone during tree care operations, regardless of the work being performed for other employers. PIRFA at 19. This is problematic for several reasons. First, arguments as to the validity of OSHA's multi-employer policy aside, we fail to see how this would achieve any meaningful benefit. OSHA would likely continue to issue citations under its multi-employer policy even without specific inclusion in a proposed tree care standard. Moreover, OSHA's multi-employer policy has already been the subject of great scrutiny as evinced by litigation before the Occupational Safety and Health Review Commission and federal circuit courts of appeal and including such a vast doctrine into a regulatory framework would lead to potentially confusing results that differ from established precedent. Second, drop zones in tree care can be unpredictable, and citations issued to covered tree care employers would likely be "tack-on" citations in the event of an accident. Lastly, OSHA has not quantified the costs of imposing multi-employer protections. In our view, this would greatly increase costs for covered entities.

IV. ULCSP urges OSHA to base the proposed tree care standard on ANSI Z-133

If line-clearance tree trimming is not excluded from a potential tree care standard, we urge OSHA to carefully determine the extent to which work is covered by existing standards, such as section 1910.269 and a new tree care standard. If not excluded, ULCSP members generally support OSHA's using ANSI Z-133 as a starting point for any requirements that apply to line-clearance tree trimming.

a. OSHA should avoid adopting by reference ANSI Z-133 – Standard for Arboricultural Operations (PIRFA Alternative 31)

As discussed above, ULCSP believes ANSI Z-133 is an extremely valuable document for the line-clearance tree trimming industry and the larger tree care industry as a whole. ULCSP commends OSHA on recognizing the strength of ANSI Z-133 and for proposing as an alternative to adopt it by reference rather than promulgating an OSHA-specific standard (PIRFA Alternative 31). However, adopting ANSI Z-133 by reference would write the 2017 version of the standard into the Code of Federal Regulations with no way to incorporate future updates other than through notice and comment rulemaking.

b. OSHA should draw from ANSI Z-133 rather than adopting it by reference

ULCSP recognizes that OSHA's proposed tree care standard is largely consistent with ANSI Z-133 and supports consistency to the extent practicable. However, OSHA also proposes to regulate the following topics in addition to ANSI Z-133:

- **A written tree care safety and health program**

All ULCSP members already have existing written safety and health programs and, if subjected to a proposed tree care standard, strongly oppose any requirement to create an additional program for tree care. Some of these programs, of course, are required by OSHA standards, including Hazard Communication, Personal Protective Equipment, First Aid, and Hearing Protection.

With respect to the substantive line-clearance tree trimming work, the programs of ULCSP members generally include information about trees (such as tree growth, conditions, assessments and diagnoses); line-clearance operations, including information on safely cutting, pruning, and removing limbs and vegetation; electrical hazards and minimum approach distances; job briefings and hazards assessments; work zone safety; brush disposal; procedures for responding to reactions from insect bites and poisonous plants; selection, inspection and use of tools and equipment; vehicle and equipment operation; and more.

ULCSP members developed their respective programs at significant cost. Subjecting the line-clearance tree trimming industry to a proposed tree care standard would not only require those employers to develop new tree care programs, but would likely require changes to existing programs developed to comply with 1910.269.

OSHA has underestimated the costs of developing similar programs to comply with a proposed tree care standard and failed to account for the additional resources necessary to harmonize existing programs with 1910.269. On average, ULCSP members each spent tens of thousands of dollars developing and implementing these programs, not including the costs associated with providing training on these programs.. ULCSP members estimate approximately the same amount of time and resources will be required to develop a new tree care program if subjected to the proposed standard. OSHA fails to accurately account for these costs, which are not justified by increased safety in light of the existing programs established under 1910.269.

- **First aid kit consistent with Appendix A of 1910.266**

ULCSP members strongly oppose OSHA's proposal to conform the contents of first aid kits with the logging standard. Logging operations are entirely different from line-clearance tree trimming. Moreover, ULCSP members are already required to comply with the first aid provisions of section 1910.269, and in turn section 1910.151. Moreover, ANSI Z-133 already specifies that arborists must have first aid kits meeting ANSI Z-308.1 (2009).

ULCSP strong urges OSHA to adopt PIRFA Alternative 16, which would permit the employer discretion to stocking first aid kits with supplies based on the employer's determination as to which supplies are necessary based on the type of work to be performed at a particular worksite. Logging is a separate and distinct industry. Line-clearance tree trimming is not logging. Line-clearance arborists do not fell trees or remove arbor to turn those materials into commercial products. The work methods are entirely different. Therefore, employers should have discretion in stocking first aid kits as necessary for the work they are performing.

- **Requiring AEDs at each worksite**

At present, "OSHA's potential tree care operations standard would require that employers ensure that each worksite where employees would be exposed to an electrical hazard, either from overhead power lines or underground utilities, have at least one FDA-approved AED available." PIRFA at 28.

ULCSP members strongly oppose any requirement to provide AEDs at each worksite for several reasons. First, no OSHA standard requires employers to provide AEDs. It makes little sense for OSHA to start with a general tree care standard, considering that even OSHA's electrical standards do not impose such a requirement, even for the utility industry.

Second, we note that during the recent rulemaking to revise section 1910.269, OSHA considered requiring but ultimately decided not to require AEDs on worksites subject to 1910.269 because there was "insufficient evidence in the record that AEDs exposed to the environmental extremes typical of work covered by [section 1910.269] would function properly if an incident occurs." 79 Fed. Reg. at 20370. Now, without citing any evidence, "OSHA believes preliminarily that the improved technology in FDA-approved AEDs in recent years has resulted in increased durability, enhanced usability even by untrained persons, and lowered cost." PIRFA at 28-29.

OSHA's preliminary beliefs about technological feasibility of AEDs are not sufficient to justify such a requirement through regulatory action. OSHA must make technological feasibility findings expressly. The agency cannot simply assume AEDs are technologically feasible to materially reduce a significant risk to employee safety and health.

If such a requirement were imposed, ULCSP members alone would require several tens of thousands of AEDs. Even under a phased-in approach, OSHA has not demonstrated that the market can support such demand based on the number of AEDs required by even the line-clearance tree trimming industry. Indeed, several articles have been published on the national shortage of AEDs in the United States in various environments and public spaces.[8]

Third, the costs associated with complying with this requirement would be astronomical. Line-clearance tree trimmers often work in small crews and their employers often have thousands of crews at various locations. According to a survey of ULCSP members, larger member organizations member organization would need to acquire over 20,000 AEDs to equip each of their crews, with many others requiring several hundred to a few thousand AEDs, if covered by a tree care standard requiring AEDs at each worksite. OSHA also fails to account for the fact that covered employers would need to purchase several additional AEDs—beyond those required for each worksite—to serve as spare units to account for defects and wear and tear to ensure AEDs are always available at each worksite and maintain compliance. For larger

[8] *See, e.g.*, Richard A. Lazar, *Imagining a World with All the AEDs We Need* (June 1, 2019), available at https://ohsonline.com/Articles/2019/06/01/Imagining-a-World-with-All-the-AEDs-We-Need.aspx (last visited June 2, 2020); Richard A. Lazar, *A New Model for Increasing Cardiac Arrest Survival Requires We Fix the National AED Shortage, Too* (January 1, 2019), available at https://ohsonline.com/Articles/2019/01/01/A-New-Model-for-Increasing-Survival.aspx (last visited June 2, 2020).

ULCSP members, the costs of such a requirement would be in the millions, with several incurring costs in the hundreds of thousands of dollars.While OSHA's estimated unit cost per AED is somewhat reflective of the approximate market value, OSHA has failed to consider the cost to be incurred for companies that employ hundreds, thousands, and even tens of thousands of crews in various locations.

In a similar vein, OSHA has also vastly underestimated the costs of providing the required training to employees who would be expected to use AEDs. This would typically add at least 30 minutes to an hour onto already provided first aid/CPR training, which now takes approximately an hour to an hour and a half. However, this training requirement becomes more difficult when you consider turnover in the industry and the potential disruptions to existing crews with established and safe working relationships by having to remove an AED-trained individual to another crew to meet this requirement. On crews of two or more, ANSI Z-133 generally accounts for this by providing an exception to the two-person training requirement provided that one person is currently trained and the other is trained within 90 days of hire. Lastly, OSHA's proposal to require AEDs "even when there is no worker exposure to electrical hazards from overhead power lines or underground utilities" is unjustifiable and in no way reflects any reasonable cost-benefit analysis. See PIRFA at 176.

In sum, OSHA has not demonstrated that such a requirement would be either technologically or economically feasible or necessary to materially reduce worker safety.

- **Requiring use of hands-free wireless communication methods**

Under the current regulatory framework, a potential standard would require the use of hands-free radios for communications. OSHA has estimated the costs of this alternative as $250 per radio per employee. For many of the reasons noted above with respect to OSHA's proposal to require AEDs, ULCSP members do not believe hands-free radios should be required and would impose an undue financial burden on employers in the industry.

Similar to the discussion above regarding AEDs, ULCSP members estimate that providing wireless radios to each employee would cost well into the millions for larger organizations with many others needing to spend several hundreds of thousands of dollars. These costs would not be justified by the potential benefits. ULCSP members have found that utilizing hand signals has been effective in line-clearance tree trimming work. ULCSP members adhere to provisions of ANSI Z-133 addresses the use of hands-free radio communication between qualified arborists and crane operators during "blind picks" (i.e., a work situation where the qualified arborist or the load is not in full view of the qualified crane operator).

- **Job briefings and Job Hazard Analyses for all employees (even those working alone)**

Section 1910.269 already requires job briefings are already required for line-clearance tree trimming work, which also incorporate the requirements for conducting a job hazard analysis. All ULCSP members require workers to complete job briefings before each job. The depth of these job briefings focus on the extent of work required, the complexity of the job, and

the job hazard analysis. OSHA should not impose an additional requirement to conduct a job briefing for line-clearance arborists.

ULCSP opposes OSHA's proposal to require employees who work alone to complete a job briefing. As outlined in the PIRFA, OSHA proposes that job briefings be conducted for employees working alone so that a more experienced and knowledgeable employee could fully explain the hazards associated with the job and the contents of the job hazard analysis. See PIRFA at 24-25.

Working alone in line-clearance tree trimming is rare. Typically, working alone only occurs when employees are performing non-line clearance tasks. Under section 1910.269(c)(5) and Section 3 of ANSI Z-133, employees working alone do not need to complete a job briefing, but the employer must plan to ensure the tasks to be performed are planned as if a job briefing were required. See 29 C.F.R. § 1910.269(c)(5). This is typically accomplished by ensuring beforehand that the employee is competent for the assigned task and aware of the associated hazards. Moreover, in our experience, to the extent there have been any safety-related incidents regarding employees who work alone, we do not believe the issue would have been avoided had the employee completed a job briefing. Because working alone is so rare in our industry, no appreciable benefit by requiring job briefings in these scenarios would be justified by the costs, in terms of time and money, for completion and review by a more experienced and knowledge employee, as OSHA suggests.

- **Accounting for employees working alone**

As mentioned above, in line-clearance tree trimming, employees working alone is often rare. To the extent and jobs require employees to work alone, ULCSP members keep track of such workers by tracking the location of their assignments and maintaining communication with the lone worker.

- **Requirements for crane use and a written infeasibility/greater hazard assessment prior to hoisting employees with cranes.**

OSHA's current proposal includes several provisions with respect to cranes. First, OSHA is proposing that under a potential tree care standard, employers would be required to comply with OSHA's Cranes and Derricks in Construction Standard (29 C.F.R. § 1910.1400 et. seq.), (hereinafter, the "Cranes in Construction standard"). According to the PIRFA, "OSHA believes that the hazards of using cranes during tree care operations are similar to the hazards of using cranes during other types of work." PIRFA at 42. The PIRFA, however, lacks any analysis to that effect. Surprisingly, OSHA compares the tree care industry to the construction industry. OSHA notes that the cranes standard (29 C.F.R. § 1926 Subpart CC), reflects the agency's most recent view of how to address the hazards associated with cranes. But it is more accurate to say that the cranes standard reflects the agency's view on the use of cranes *in construction*. Line-clearance tree trimming is not construction work.

This is proposal problematic for several reasons.

We very much disagree with the approach set out in the PIRFA at 42-43 with respect to a general ban on the use of cranes to hoist personnel. It would not be appropriate, as the PIRFA there suggests, to cast the burden on employers to prove in every case the infeasibility of a ban on the use of personnel platforms. Instead, OSHA should follow section 5.7.11 of ANSI Z133.1-2017, which permits cranes to be used to hoist personnel under certain conditions during tree-care operations. We note that California's standard on Tree Work, Maintenance or Removal adopts a similar approach.

First, section 5.7.11 of ANSI Z133.1-2017 has proven itself to prevent a significant risk of harm to employees and has proven itself to be feasible in this particular industry. In the absence of any evidence to the contrary, OSHA should adopt that as a requirement for this particular industry.

Second, a careful reading of the PIRFA passage discloses no assertion that a ban on the use of personnel platforms from cranes would be feasible in this industry, and no such finding could be made. Instead, the PIRFA's discussion consists of the assertion that the ANSI provision is "not consistent" with certain other standards. Any such inconsistency lacks logical relevance, for all industries pose different risks and pose different feasibility issues, and it is OSHA's responsibility under the law to make findings on those points, not just assume them. Also, the Cranes in Construction standard expressly exempts tree trimming and removal – and OSHA presumably used sound logic in including the exemption.

Moreover, the claim of inconsistency is weak. Any inconsistency with the construction crane standard is irrelevant because tree care operations are not construction work and thus that standard could not have been adopted on the basis of any rulemaking finding that such a ban would be feasible in all (or any) tree care work. Any inconsistency with § 1910.180(h)(3)(v) is irrelevant because that standard prohibits riding the "load or hook," not a personnel platform designed for the lifting of personnel. (We are aware of the bald assertion to the contrary in an OSHA interpretation letter (Roy F. Gurnham to Dennis Robertson (Feb. 17, 1993)) but it is unexplained, unsupportable and, as anyone familiar with crane terminology knows, wrong.) That § 1910.180 and its ancestor (ANSI B30.5-1968) were never intended to impose such a ban is the reason why OSHA had to jury-rig a compliance directive (OSHA Instruction CPL 02-01-045, Citation Guidance Related to Tree Care and Tree Removal Operations (August 21, 2008)) that supposedly gave employers flexibility but actually placed the burden on them to prove infeasibility.

OSHA may not adopt an across-the-board ban, assume without evidence that such a ban is feasible in this industry (it is not), assume without evidence that an alternative (section 5.7.11 of ANSI Z133.1-2017) poses a significant risk of harm (it does not), and then cast the burden on the employer of disproving feasibility of the ban in every single case. It is OSHA's burden to find significant risk and the feasibility of such a ban in the industry, and, with respect, that it cannot do.

OSHA should follow section 5.7.11 of ANSI Z133.1-2017, which permits cranes to be used to hoist personnel under certain conditions during tree-care operations. That provision is feasible and safe in our industry, and a ban on such a use of crane in this industry would not be

feasible. In light of the above, to the extent hoisting personnel in tree trimming is prohibited by 29 C.F.R. § 1910.180(h), OSHA should create an exception for the tree care industry to harmonize it with section 5.7.11 of ANSI Z-133. If such an exception is created, the employer should have to assess the availability of other alternatives to hoisting personnel with a crane, although we do not agree the assessment must be in writing to be effective. We do not agree that the employer should have to find that all alternatives are infeasible or would create a greater hazard.

In sum, we urge OSHA to recognize that feasibility concerns attendant with the tree care industry require the approach to hoisting personnel with a crane as outlined in section 5.7.11 of ANSI Z-133 (2017).

V. Conclusion

Because section 1910.269 and other general provisions of Part 1910 already comprehensively address the hazards associated with line-clearance tree trimming, OSHA should categorically exclude this work from a proposed tree care standard. In our view, OSHA has not made the requisite findings to show that the requirements of a new tree care standard, as applied to line-clearance tree trimming, would be economically feasible, or in some instances technologically feasible, or would materially reduce a significant risk to employees in this industry.

ULCSP appreciates the opportunity to provide input on OSHA's proposed tree care operations standard. Please feel free to contact me with any questions.

OGLETREE, DEAKINS, NASH, SMOAK
& STEWART, P.C.

/s/ Melissa A. Bailey
Melissa A. Bailey

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