United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR, Complainant, v. THE DAVEY TREE EXPERT COMPANY, Respondent.	OSHRC Docket No. 11-2556

ON BRIEFS:

Ronald Gottlieb, Appellate Attorney; Heather R. Phillips, Counsel for Appellate Litigation; Joseph M. Woodward, Associate Solicitor of Labor for Occupational Safety and Health; M. Patricia Smith, Solicitor of Labor; U.S. Department of Labor, Washington, DC
For the Complainant

John R. Mitchell, Stacey A. Greenwell; Thompson Hine LLP, Cleveland, OH; Stephen J. Axtell; Thompson Hine LLP, Dayton, OH
For the Respondent

Melissa Bailey; Ogletree, Deakins, Nash, Smoak & Stewart, P.C., Washington, DC
For Amicus Curiae Utility Line Clearance Coalition (ULCC)

Tressi L. Cordaro, Bradford T. Hammock; Jackson Lewis P.C., Reston, VA
For Amicus Curiae Tree Care Industry Association, Inc. (TCIA)[1]

[1] TCIA has asked the Commission to take judicial notice of portions of the Federal Register, several interpretation letters issued by OSHA, and a PowerPoint document. We deny this request. First, the Commission and the courts regularly consider the regulatory history of a standard published in the Federal Register and OSHA interpretive documents for purposes of taking into account their effect (if any) on legal, rather than factual issues; this does not implicate judicial notice. *See* Fed. R. Evid. 201 (judicial notice). Second, as to the Michigan OSHA PowerPoint for tree trimming, TCIA has offered it for the truth of what it states, but its content does not meet the requirements for judicial notice—it is not "generally known within [the Commission's] territorial jurisdiction" nor is it "accurately and readily determined from sources whose accuracy cannot be questioned." *Id.*

DECISION

Before: ATTWOOD, Chairman; MACDOUGALL, Commissioner.

BY THE COMMISSION:

The Davey Tree Expert Company provides tree care services for residential and commercial clients, and utility line clearance and vegetation management for electric utility companies. On February 23, 2011, a Davey Tree crew was engaged in line clearance work at a worksite near DuBois, Pennsylvania. This work involved felling trees, which were left on the ground where they fell. One of the trees being felled hit two other trees, causing a limb to fall and strike a Davey Tree employee, fatally injuring him. After an inspection, the Occupational Safety and Health Administration issued Davey Tree a citation alleging two serious violations of the logging standard, 29 C.F.R. § 1910.266, one of which was later withdrawn by the Secretary. Under the remaining citation item, the Secretary alleged a violation of § 1910.266(d)(6)(i) (work areas in logging operations) with a proposed penalty of $7,000. Following a hearing, Administrative Law Judge Dennis L. Phillips issued a decision vacating the citation on the ground that the logging standard does not apply to the cited conditions.

The only issue before the Commission is whether the logging standard applies to the work that was being performed by Davey Tree at the cited worksite.[2] For reasons different than those expressed by the judge, we find that this work is not covered by the logging standard; therefore, the standard's requirements do not apply to the conditions cited here. Because the logging standard does not apply, we vacate the citation.

DISCUSSION

When determining the meaning of a standard, the Commission must first look to its text and structure. *Superior Masonry Builders Inc.*, 20 BNA OSHC 1182, 1184 (No. 96-1043, 2003). "If the meaning of the [regulatory] language is 'sufficiently clear,' the inquiry ends there." *Beverly Healthcare-Hillview*, 21 BNA OSHC 1684, 1685 (No. 04-1091, 2006) (consolidated) (citing *Unarco Commercial Prods.*, 16 BNA OSHC 1499, 1502 (No. 89-1555, 1993)), *aff'd in relevant part*, 541 F.3d 193 (3d Cir. 2008). If "the meaning of [regulatory] language is not free from doubt," the standard is ambiguous. *Martin v. OSHRC (CF & I Steel Corp.)*, 499 U.S. 144, 150-51 (1991); *see also Exelon Generation Co. v. Local 15, Int'l Bhd. of Elec. Workers*, 676

[2] We note that the same type of work and the same applicability issue is presented in *The Davey Tree Expert Company*, OSHRC Docket No. 12-1324, which we also issue today.

F.3d 566, 570 (7th Cir. 2012) ("A regulation is 'ambiguous' as applied to a particular dispute or circumstance when more than one interpretation is 'plausible' and 'the text alone does not permit a more definitive reading.' " (citing *Chase Bank USA, N.A. v. McCoy*, 562 U.S. 195, 207 (2011))); *Sec'y of Labor v. Beverly Healthcare-Hillview*, 541 F.3d 193, 197-98 (3d Cir. 2008) (citing *CF & I*'s "free from doubt" test). Only if the standard is ambiguous will the Commission defer to the Secretary's reasonable interpretation of that standard. *CF & I*, 499 U.S. at 150-51, 158; *Unarco*, 16 BNA OSHC at 1502-03.

In deciding the applicability issue here, the judge considered two provisions of the logging standard: a "scope and application" provision, § 1910.266(b)(2), which states that the standard "applies to all logging operations as defined by this section"; and the standard's definition of "logging operations," § 1910.266(c), which states:

> Operations associated with felling and moving trees and logs from the stump to the point of delivery, such as, but not limited to, marking danger trees and trees/logs to be cut to length, felling, limbing, bucking, debarking, chipping, yarding, loading, unloading, storing, and transporting machines, equipment and personnel to, from and between logging sites.

The judge concluded that the definition of "logging operations" is ambiguous and could apply to the work Davey Tree was performing, but he found that the Secretary had failed to give adequate notice that the cited standard was applicable due to various inconsistencies.

On review, the parties focus—as they did before the judge—on these same two provisions and largely center their arguments on whether a logging operation, as defined in the standard, includes felling alone, or requires both felling and moving to be covered by the standard's requirements. Specifically, the Secretary argues that the definition of "logging operations" in § 1910.266(c) applies to any employer that fells trees, regardless of whether those trees are subsequently moved. Davey Tree argues that the "and" between "felling" and "moving" in the definition must be read to require both the felling and moving of trees for a logging operation to take place.

Our analysis, however, starts with the first "scope and application" provision, § 1910.266(b)(1), which provides context for other provisions of the logging standard, including the definition of "logging operations." *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000) ("[A] reviewing court should not confine itself to examining a particular statutory provision in isolation. The meaning—or ambiguity—of certain words or phrases may only become evident when placed in context."); *Am. Fed'n of Gov't Employees, Local 2782 v.*

Fed. Labor Relations Auth., 803 F.2d 737, 740 (D.C. Cir. 1986) ("[R]egulations are to be read as a whole with 'each part or section . . . construed in connection with every other part or section.' " (citation omitted)); *see also Otis Elevator Co.*, 24 BNA OSHC 1081, 1086, 1087 n.10 (No. 09-1278, 2013) (reviewing language of the cited provision "along with the structure and context of the standard" to determine the scope of the standard), *aff'd*, 762 F.3d 116 (D.C. Cir. 2014). This provision plainly states that the logging standard covers all "types of logging"—defined as the harvesting and logging of forest products:

> This standard establishes safety practices, means, methods and operations for all types of logging, regardless of the end use of the wood. These types of logging include, but are not limited to, pulpwood and timber harvesting and the logging of sawlogs, veneer bolts, poles, pilings and other forest products.

§ 1910.266(b)(1). By using the word "harvesting," which is the process of cutting and gathering a crop, *see* Random House Unabridged Dictionary 875 (2d ed. 1993); Random House Dictionary 648 (unabridged 1971), and coupling "logging" with various types of logs and products made from logs, this provision unambiguously uses "logging" to refer to a process—gathering timber from the forest for use in making such products.

The specific reference to "forest products" in this provision is significant. The Secretary would have us read the sentence, "[t]hese types of logging include, but are not limited to . . . other forest products," to mean that the logging standard covers not only logging that produces traditional forest products, but also logging that does not produce those types of products, such as felling trees for line clearance purposes. He further claims that, in any event, the term "product" is broad enough to include felled trees that are left to decompose in the woods, as Davey Tree did here. However, the Secretary's reading of this language ignores the well-established principle of statutory construction that "[w]here a general term is followed by specific terms, the general terms are construed to include only matters similar in nature to the matters described by the specific terms." *Sw. Bell Tel. Co.*, 6 BNA OSHC 2130, 2133 n.10 (No. 14761, 1978) (citing 2A C. Sands, Sutherland Statutory Construction § 47.17 (4th ed. 1973)) (finding that "hazards such as" can only include hazards in "the same general category" as those listed); *see also Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2171 (2012) (applying this principle to catchall phrase that follows list of specific terms); *Ruhlin Co.*, 21 BNA OSHC 1779, 1782 (No. 04-2049, 2006) (finding unreasonable Secretary's interpretation that "[p]rotective equipment, including" encompassed types of personal protective equipment

that "warn" when the listed equipment "protects") (citing *Carlyle Compressor Co. v. OSHRC*, 683 F.2d 673, 675-76 (2d Cir. 1982) (finding that the Secretary could not reasonably interpret "hazards such as" in 29 C.F.R. § 1910.212(a) to include hazards that are not similar to those enumerated in the section)). Applying this principle, the general phrase "other forest products" must be construed to include only those forest products that are similar to the ones specifically listed. *See* § 1910.266(b)(1).

The first two types of logging identified on the list—pulpwood and timber harvesting—involve cutting trees down and then taking them away, i.e. "gathering" the trees just like any other crop; the very definition of harvesting. *See* Random House Unabridged Dictionary 875 (2d ed. 1993); Random House Dictionary 648 (unabridged 1971). In other words, these two types of logging require felling the trees and then moving them to another location.[3] The other items on the list—"the logging of sawlogs, veneer bolts, poles, pilings"—all reference manufactured goods made from trees. Given that the listed items must be "in the same general category," the phrase "other forest products" must refer to goods made from trees or wood cut down and taken away just like other harvested crops. *See Sw. Bell*, 6 BNA OSHC at 2133 n.10. Indeed, the definition of "logging operations" reflects that trees are harvested and moved like other crops, as it specifies, "moving trees and logs from the stump *to the point of delivery*." § 1910.266(c) (emphasis added). As Davey Tree argues on review, the phrase "to the point of delivery" implies a commercial purpose, and we note that harvesting is typically done for such purposes.

Because § 1910.266(b)(1) plainly manifests that "logging" refers to the process of harvesting wood from the forest, the phrase found in the definition of "logging operations"—"felling and moving trees and logs from the stump to the point of delivery"—must be a description of that process, beginning with felling and ending at the point of delivery. *See* § 1910.266(c). When § 1910.266(c) is read in context with §§ 1910.266(b)(1) and (2), it is clear

[3] This is also reflected in § 1910.266(h), "Tree harvesting," which addresses activities that span the entire tree harvesting sequence, from felling to transporting the trees and logs to the point of delivery: manual felling, limbing and bucking, chipping (in-woods locations), yarding, loading and unloading, transport, and storage. These activities are also those listed in the definition of "logging operations" as examples of activities that might, but do not necessarily have to, occur during a logging operation. *See* §§ 1910.266(c) and (h)(2)-(8). The inclusion of yarding, loading and unloading, and transport is consistent with using the term "harvesting" to include moving the felled trees so they can ultimately be made into a product.

that this phrase is a description of the *process* of logging.[4] Because these elements together describe what constitutes "logging," the elements are prerequisites to the standard's coverage, not separately included activities. As the TCIA aptly asserts in its amicus brief, the definition's phrase serves as "the book ends of logging operations."

In this context, the Secretary's argument that the "and" in this phrase from the definition should be read as an "or," and therefore, the logging standard applies to "*either* felling *or* moving trees and logs," fails. Indeed, such an interpretation would nullify § 1910.266(b)(1)'s language, which unambiguously "establishes safety practices . . . and operations for all *types*" of harvesting and logging of forest products. § 1910.266(b)(1) (emphasis added); *see Duncan v. Walker*, 533 U.S. 167, 174 (2001) ("It is [a court's] duty to give effect, if possible, to every clause and word of a statute." (internal quotation marks and citations omitted)); *Summit Contractors, Inc.*, 23 BNA OSHC 1196, 1202-03 (No. 05-0839, 2010) (noting rule of statutory construction that every word be given effect), *aff'd*, 442 F. App'x 570 (D.C. Cir. 2011) (unpublished). Similarly, the Secretary's contention that the language "*operations associated with* felling and moving trees and logs" indicates an intent to cover *any* activity associated with logging, irrespective of whether it takes place as part of a logging operation, also fails. *See* § 1910.266(c) (emphasis added). For § 1910.266(b)(1) to be effective, the phrase "operations associated with . . . " must refer to operations that occur when logging is taking place.

Finally, we reject the Secretary's argument that the logging standard's regulatory history requires a contrary result. *See Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980) ("Absent a clearly expressed legislative intention to the contrary, [a statute's] language must ordinarily be regarded as conclusive."); *Arcadian Corp.*, 17 BNA OSHC 1345, 1348 (No. 93-3270, 1995) ("The plain meaning of the statutory language being clear, we look to the legislative history only to determine whether there is 'clearly expressed legislative intention' contrary to that language 'which would require us to question the strong presumption that Congress expresses its intent through the language it chooses.' " (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 n.12 (1987))).

[4] Similarly, the logging standard's training requirements contemplate that employees will be working in an environment where the logging *process* is occurring. An employer must train employees not only on the hazards of their specific work tasks, *see* § 1910.266(i)(3)(iii), but also on "[t]he requirements of this standard," *see* § 1910.266(i)(3)(vi). In other words, employees must understand the requirements associated with all other aspects of the logging process.

In the preamble of the proposed rule, OSHA stated: "Logging operations fell trees and transport logs, chips or whole trees from stump to mills for processing." Logging Operations, Notice of Proposed Rulemaking, 54 Fed. Reg. 18,798, 18,798 (May 2, 1989); *see also id.* (referring to logging as "where trees are felled and converted into logs" and describing the process as being from felling to limbing, bucking, transporting, yarding, and loading (quoting Bureau of Labor Statistics (BLS) bulletin)), *id.* at 18,800 (referring to "every step in the logging process, from felling the tree to transporting it to the mill" (quoting BLS bulletin)). In the preamble of the final rule, OSHA similarly stated:

> Logging consists of felling trees (usually by chain saws), removing the limbs and branches (limbing), and cutting or splitting the trees into manageable logs (bucking). Trees and logs are then moved (yarding) to central locations (landings) by one of several methods (e.g., skidding or forwarding). . . . At the landing, logs are mechanically loaded onto trucks, railroad cars or barges for transport to sawmills. In some cases logs are formed into log rafts for transport to sawmills.

Logging Operations Final Rule, 59 Fed. Reg. 51,671, 51,672 (Oct. 12, 1994).

OSHA also explained in the final rule's preamble that it added the definition of "logging operations" to the logging standard—it was not in the proposed rule—"to emphasize that this standard *covers those operations involving the felling and moving of felled trees*, as opposed to other operations, such as road building that are preparatory to rather than part of logging operations." *Id.* at 51,700 (emphasis added). In other words, OSHA sought to cover the various operations that are *part of* the process of felling trees and moving felled trees.[5] As OSHA indicated, the phrase "regardless of the end use of the wood" was used in § 1910.266(b)(1) to signify its intent to expand the prior logging standard, which applied only to pulpwood logging, to create a comprehensive standard applicable to all types of logging—i.e., to encompass logging operations that produced forest products other than just pulpwood. *Id.* at 51,672, 51,673. Thus, there is no "clearly expressed legislative intention" contradicting our conclusion that the terms

[5] In support of his assertion that the standard is applicable even if felled trees are not subsequently moved, the Secretary cites a statement in the final rule's preamble to the effect that felling trees to clear land for construction activities is a logging operation. *See* Logging Operations Final Rule, 59 Fed. Reg. at 51,699. However, it appears that OSHA may have been referring to felling trees in preparation for the building of roads and trails that would be used for logging. In any event, trees felled to clear land would necessarily have to be moved, and when read in context with the remainder of the preamble, it appears OSHA assumed that such trees would be gathered and delivered into commerce.

"logging" in §§ 1910.266(b)(1) and (b)(2), and the definition of "logging operations," plainly refer to a process that involves both felling trees and moving the felled trees. *See GTE Sylvania*, 447 U.S. at 108; *The L.E. Meyers Co., High Voltage Sys. Div.*, 12 BNA OSHC 1609, 1612 n.6 (No. 82-1137, 1986) (citing *United States v. Fisk*, 70 U.S. 445, 447 (1865); *United States v. Moore*, 613 F.2d 1029, 1040 (D.C. Cir. 1979); *In re Rice*, 165 F.2d 617, 619 n.3 (D.C. Cir. 1947)) (recognizing that "there may be circumstances in which strict adherence to the usual definitions of 'and' and 'or' would frustrate the drafter's intent or create an inconsistency with other provisions," but finding no evidence of such intent).

In sum, this is not a case in which the Commission is required to consider whether deference is owed to the Secretary's interpretation of an ambiguous standard—the meaning of the logging standard is plain.[6] *See Exelon Generating Corp.*, 21 BNA OSHC 1087, 1090 (No. 00-1198, 2005) (upholding unambiguous reading of cited standard that was consistent with structure of whole standard and its preamble). The scope and application provisions of the logging standard make clear that the definition's description of "logging operations" as "felling and moving trees and logs from the stump to the point of delivery" means the *process* of logging, which requires *both* felling trees and moving the felled trees. Accordingly, we conclude that the logging standard does not apply to the line clearance work performed by Davey Tree at the cited worksite and vacate the citation.

SO ORDERED.

/s/
Cynthia L. Attwood
Chairman

/s/
Heather L. MacDougall
Commissioner

Dated: February 26, 2016

[6] Because we find the language of the logging standard unambiguous on this issue, we need not address other aspects of the judge's analysis, including his reliance on an OSHA directive, Citation Guidance Related to Tree Care and Tree Removal Operations, CPL 02-01-045 (Aug. 21, 2008).

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SECRETARY OF LABOR, Complainant, v. DAVEY TREE EXPERT COMPANY, and its successors, Respondent.	OSHRC DOCKET NO. 11-2556

APPEARANCES:	Michael P. Doyle, Esquire U.S. Department of Labor Office of the Solicitor 170 South Independence Mall Road West Suite 630 E, The Curtis Center Philadelphia, Pennsylvania 19106-3306 For the Complainant	John R. Mitchell, Esquire Thompson Hine, LLP 3900 Key Center 127 Public Square Cleveland, Ohio 44114-1291 For the Respondent
BEFORE:	Dennis L. Phillips Administrative Law Judge	

DECISION AND ORDER

Background

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to § 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* ("the Act"). Davey Tree Expert Company ("Davey Tree" or "Respondent") is an employee-owned company that, among other things, cuts down and trims trees that pose a danger to power lines. It provides services to nearly every state in the United States and many Canadian provinces that include all phases of tree and landscape services, including vegetation management and line clearance. This case involves an incident that occurred on February 23,

2011 on the DuBois 137 project, near DuBois, PA, where Respondent was clearing trees and plant debris along the path of power lines running through the Treasure Lake community.[1] Employee Douglas Sprankle, age 55, was fatally injured when a 74-foot tall oak tree Davey Tree employees were removing, first hit another tree's limb, and then hit a birch tree, causing a limb on the birch tree to fall and strike Mr. Sprankle.[2]

Between February 24, 2011 and August 17, 2011, an authorized representative of the Secretary of Labor ("Secretary" or "Complainant") inspected the accident site. On August 29, 2011, the Secretary issued to Davey Tree a citation alleging a serious violation of 29 C.F.R. § 1910.266(d)(6)(i)[3] with a proposed penalty of $7,000. On or about September 1, 2011, the Occupational Safety and Health Administration ("OSHA") received Respondent's timely notice of contest. On October 28, 2011, the Secretary filed her complaint. Respondent filed its answer on December 21, 2011.

On June 29, 2012, Davey Tree filed a Motion for Summary Judgment. Respondent asserted that it was entitled to summary judgment on the grounds that: 1) it was not in the logging industry and was not engaged in logging operations, and 2) it was engaged in utility line-clearance work, regulated by 29 C.F.R. § 1910.269, Electrical Power Generation, Transmission and Distribution and not the cited standard. In response, on July 13, 2012, the Secretary filed a Cross-Motion for Partial Summary Judgment. She asserted that she was entitled to deference to her interpretation of the logging standard that would apply it to Respondent's activities at the accident site. Both motions were denied by this Court on July 19, 2012.

[1] In its opening brief, Respondent disagreed with the characterization of the work performed pursuant to the Penelec contract as a "project." (Davey Tree Br., at p. 40, n.4). The Court uses "project" here consistent with its everyday definition as "a specific plan or design" in the context of Davey Tree's contract with Penelec. *See Merriam-Webster's Collegiate Dictionary* 993 (11th ed. 2005).

[2] Mr. Odrosky testified that Mr. Sprankle had worked at Davey Tree for about 10 years, had served as a foreman a couple of times, and was a second-class climber. (Tr. 376).

[3] A second citation item was withdrawn at the hearing and is no longer before this Court. (Tr. 7-8; GX-1-6).

A hearing on the matter was heard in Erie, Pennsylvania on July 24-26, 2012. The parties have filed briefs, and this matter is ready for decision.

Cited Standard

The cited standard provides:

> 29 C.F.R. § 1910.266(d)(6)(i): Employees shall be spaced and the duties of each employee shall be organized so the actions of one employee will not create a hazard for any other employee.

The citation alleges that:

> 29 C.F.R. § 1910.266(d)(6)(i): Employees were not spaced and the duties of each employee were not organized so the actions of one employee would not create a hazard for any other employee:
> (a) worksite off Bay Road in the Treasure Lake community, near DuBois, PA. On or about February 23, 2011, the duties of the employees manning the come-along were not organized, and the employees were not spaced, so that the actions of the chainsaw operator (the feller) would not create a struck-by hazard.

Stipulations

Prior to trial, the parties agreed upon and submitted the following stipulations:

1. The Davey Tree Expert Company (Davey Tree) is a corporation headquartered in Kent, Ohio.

2. In 2011, Davey Tree had more than 5,000 employees.

3. A winch is a mechanical device that is used to adjust the tension of a rope.

4. Jeff Odrosky was an employee of Davey Tree on February 23, 2011.

5. Adam DeMoss was an employee of Davey Tree on February 23, 2011.

6. Douglas Sprankle was pronounced dead on February 23, 2011.

7. Douglas Sprankle was an employee of Davey Tree at the time of his death.

8. Joseph F. Tommasi is Davey Tree's Corporate Director of Safety and has held that position since 2010.

9. Prior to becoming Corporate Director of Safety, Mr. Tommasi served as Davey Tree's Manager of Safety and Loss Prevention for eight years.

(Joint Pre-hearing Statement).

Jurisdiction

In its Answer, Respondent admitted that it was at all relevant times engaged in a business affecting commerce and an employer employing employees. (Answer, at ¶¶ 5, 7). Respondent also admitted that jurisdiction of this action was conferred upon the Commission by § 10(c) of the Act, 29 U.S.C. § 659(c). (Answer, at ¶ 1). Based on the parties' pleadings, stipulations and the trial record, the Court finds that Respondent, at all relevant times, was engaged in a business affecting commerce and was an employer within the meaning of §§ 3(3) and 3(5) of the Act, 29 U.S.C. §§ 652(3) and 652(5). The Court also finds that jurisdiction of this proceeding is conferred upon the Commission by § 10(c) of the Act. The Court also finds that the Commission has jurisdiction over the parties and subject matter in this case.

Secretary's Burden of Proof

To establish a *prima facie* violation of the Act, the Secretary must prove by a preponderance of the evidence that: (1) the cited standard applied to the condition; (2) the terms of the standard were violated; (3) one or more of the employees had access to the cited condition; and (4) the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition. *Offshore Ship Bldg., Inc.*, 18 BNA OSHC 2169, 2171 (No. 99-257, 2000), *Atl. Battery Co.* 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

A violation is serious if there is a substantial probability that death or serious physical harm could result from the violative condition. 29 U.S.C. § 666(k). Complainant need not show that there is a substantial probability that an accident will occur; she need only show that if an accident occurred, serious physical harm would result. *Phelps Dodge Corp. v. OSHRC*, 725 F.2d 1237, 1240 (9th Cir. 1984).

Relevant Testimony and Findings of Fact

Four witnesses testified for the Secretary at trial: Mary Keffer, OSHA Compliance Safety and Health Officer ("CSHO"); Jeffrey Nathan Odrosky, Davey Tree's foreman at the time of the accident; Michael St. Peter, logging safety consultant and the Secretary's expert on logging safety and Bradley A. Wright, Davey Tree's general foreman. Respondent's two witnesses were Joseph F. Tommasi, Davey Tree's Corporate Safety Director, who also testified as an expert on the line clearance industry and Paul A. Cyr, Respondent's expert witness on the logging industry. (Tr. 417).

Jeffrey Nathan Odrosky has been a foreman for Davey Tree for about five years. His duties are to maintain the Pennsylvania Electric Company's ("Penelec") right-of-ways, remove danger trees and clear power lines.[4] He uses chainsaws, climbing gear, ropes, cranks, and bucket trucks when performing his job. As a foreman, he is required to maintain his equipment and make sure everything is safe and in working condition, ensure that everybody working on his crew is wearing their personal protective equipment, and make sure that everybody is doing their job. Although he does not have the power to fire employees, he has the authority to correct anyone operating in an unsafe manner. If an employee refuses to comply with his directives, he has the authority to report that employee up the chain of command, to Brad Wright, the general foreman, who in turn reports to Regional Manager Kevin Crowe. (Tr. 278-79).

From January 26, 2011 through mid-March, 2011, Mr. Odrosky was the foreman for the manual crew maintaining the power lines on the DuBois 137 circuit project both inside and outside the Treasure Lake community under contract with Penelec. The geography of the area was residential, with woods, back roads, back lots, empty lots, and areas with no roads, or

[4] Penelec is the name of the company providing electricity to the area. Mr. Odrosky testified that a "Danger Tree" is anything that is split, broken, dead, rotten, or has woodpecker holes or cankers, or is leaning really hard toward a power line. (Tr. 282).

houses. Mr. Odrosky testified that there were two manual crews and about ten bucket crews that worked on the project.[5] (Tr. 168, 279-81, 283, 298, 325; Government Exhibit ("GX")-22, at p. 21).

The work of clearing lines and doing routine maintenance takes place every four to five years. (Tr. 245, 281-82). He previously worked on the circuit in 2006 or 2007 when he removed about two hundred trees from the stump at Treasure Lake. From the time sheets prepared on January 26, 2011, Mr. Odrosky testified that, on that date, while working outside of the Treasure Lake community, his crew pruned (also referred to as trimmed) six trees and cut down 18 trees that were not underneath the power lines, but on the side of the power lines. The trees they removed were large enough to endanger the power lines if they fell. He estimated that they would work anywhere from 30-100 feet from the power lines. He also estimated that his crew alone removed approximately 400 trees on the project. He testified that the project entailed work both inside and outside the Treasure Lake community. No tree harvesting was occurring. Rather, trees that posed a threat to the power lines (danger trees) were to be identified and removed. Once trees were on the ground they would remove the limbs and leave the trees on the property. He did not know the ultimate fate of the felled trees but, on occasion, he saw landowners gathering firewood. (Tr. 254, 293-302, 306; GX-22, at pp. 18, 21).

Mr. Odrosky read from a Davey Tree "Safety & Training Tailgate" document entitled "Falling Trees and Avoiding Struck-by's," discussing falling trees and avoiding struck-bys. (GX-19). The document requires that the arborist making the cut establish a 360 degree drop zone where tree sections are intended to fall.[6] No person may enter the drop zone at any point

[5] Mr. Odrosky defined manual crews as three-man crews that climb trees and manually pull or crank trees over. He stated that a two-man bucket crew used a bucket truck and chainsaws to work a tree from the bucket and chip the brush. (Tr. 283, 287).

[6] Mr. Odrosky testified that a "drop zone" was "anywhere all the way around the tree that stuff could fall off the tree

unless the arborist acknowledges that person and that it is safe to enter. The document also requires a final safety check to ensure that all workers involved in the felling are away at least 1.5 times the height of the tree being felled, the path is clear, the notch properly cut, and the direction of the fall correct. As a margin of safety, employees are to add an additional 10% to the height of the tree.[7] Employees not involved in felling the tree should be kept at a distance twice the height of the tree being felled. Even where employees cannot be 1.5 tree lengths away, they should never be less than one tree length away from the tree as stated in Davey Tree's "Safety & Training Tailgate" document entitled "Precision Tree Felling Plan." (Tr. 308-17, 401; GX-20).

Davey Tree does not give instructions on how to determine the height of the tree. (Tr. 312, 408-09). Mr. Odrosky testified that he can look up and guestimate the height of the tree. He also explained a "stick trick" that helps employees determine how far out a tree could come.[8] The person cutting the tree is responsible for making the height assessment. (Tr. 312-13, 383).

Mr. Odrosky testified that on February 23, 2011, at about 11:00 a.m., a Davey Tree crew spotted a danger tree he estimated to be 70-80 feet tall located 25-30 feet from the power lines.[9] The top half of the tree was dead, its bark was off and it was leaning about 20 per cent toward the power lines. The oak tree posed a hazard to the power lines and the crew decided to remove it.[10] Because of its condition, Messrs. Odrosky, Merrill Nearhood, Sprankle, Randy Hipps, and DeMoss, operating basically as "one big crew," determined that it was safer to remove the oak

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or hit somebody." (Tr. 309).

[7] Mr. Odrosky testified that the additional 10 percent margin of error was needed "Because you never know. Trees do funny things. They can go any direction they want, sometimes." (Tr. 313-14).

[8] Mr. Odrosky testified that to perform the "stick trick" you get a stick as long as from your hand to your chin. When holding the stick up, you notch the tree were your hand is, and step back until the top of the stick is at the top of the tree. The top of the tree is going to land where that lines up. The stick trick did not determine the exact height of a tree. It is intended to tell a user when the user is one full tree length from a tree. (Tr. 312, 383).

[9] Mr. Odrosky testified that the danger tree was an oak tree. (Tr. 326).

[10] CSHO Keffer testified that Mr. Odrosky told her that the felled tree leaned toward the power line. (Tr. 180).

tree from the stump rather than climb the tree and remove it in pieces.[11] Mr. Odrosky explained that cutting a tree with a dead crown is not safe because the condition of dead wood is unknown. It could be soft and break when an employee is in the tree. Mr. Odrosky also explained that whether cutting from the top or the bottom, the feller uses a chain saw. It was Mr. Odrosky's opinion that it is safer to use a chain saw on the ground than to take it to the top of the tree. (Tr. 175-81, 326-27, 330, 375-77, 398).

Mr. Odrosky testified that the crew was aiming to drop the oak tree into an opening 30-40 feet wide. To guide the danger tree to the spot where it was to fall, the crew decided to use a throwball to affix a line to the tree and attached a come-along (also referred to as a winch or rope puller) to an anchor tree. A come-along is a manual device that is attached between the tree to be felled and an anchor tree.[12] The come-along is hooked to a rope attached to the anchor tree. An employee physically cranks the rope to put pressure on the tree being cut. The purpose is to control the direction that the tree will fall and direct it away from the power lines. (Tr. 331-32, 338-39, 368-71, 394, 397; Respondent Exhibit ("RX")-Z, RX-AA).

After lunch, Mr. Odrosky attached the rope to the oak tree and the other employees set the crank on the anchor tree that Messrs. Nearhood and Sprankle had selected. Mr. Odrosky did not measure the distance from the oak tree and the anchor tree. Mr. Nearhood was responsible for walking the line through the brush to ensure that it was not obstructed or hung up on something. Mr. Sprankle tightened the rope and stepped out of the way. Mr. Odrosky made his

[11] These five employees were working together on February 23, 2011 because Mr. Schmoke was not present. Mr. Odrosky estimated that Foreman DeMoss had climbed about two hundred trees from the start of the project through the accident. CSHO Keffer testified that she agreed that it is safer to cut a tree that is dying at the top from the bottom. (Tr. 176-77, 286-87, 329).

[12] CSHO Keffer testified that at the time of the accident Respondent used a technique where its employees tied a rope around the tree being felled and then pulled the rope to an anchor tree that was further away, whereupon an employee used a come-along or winch system to tighten the rope to create tension on the tree being felled in order for the employees to ensure that the tree being felled would fall in the path intended by the employees. (Tr. 109-12; GX-14-13, GX-14-15, GX-15, Picture 035).

notch and notified the crew that he was going to make his back cut. Mr. Sprankle began cranking the come-along. After a while, Mr. Sprankle became fatigued and Mr. Nearhood took over the cranking duties.[13] Mr. Sprankle retreated up a hill to a point where Mr. Odrosky "thought he was well out of harm's way." Mr. Odrosky thought that Mr. Sprankle was two tree lengths from the felled tree. Having turned over the cranking to Mr. Nearhood, Mr. Odrosky testified that Mr. Sprankle was no longer actively involved in the felling operation.[14] As Mr. Nearhood cranked the tree, Mr. Odrosky cut a little more.[15] The oak tree started to come over and one of its limbs about 25 feet up the oak tree hit a limb of another tree about 10-15 feet away. This other tree caused the felled tree to spin off its stump. The oak tree then hit a third live, birch tree and knocked that birch tree over. Mr. Odrosky testified that he shouted a warning to Messrs. Sprankle and Nearhood that the oak tree was falling. Then, Mr. Hipps, who was cutting brush ahead of the crew upon the right-of-way, yelled "He got hit, he got hit." [16] (Tr. 131, 179, 181, 327-29, 334-39, 341, 343-48, 371-72, 401; GX-14-10, GX-17).

The crew ran to Mr. Sprankle, who had been hit in the back of the head by the birch tree. He was face down and breathing, but was otherwise unresponsive. They called 911, but did not have an address since they were at a vacant lot. So they went through the woods trying to get a house number. There were no numbers on the houses and they did not know the name of the next cross street. All they knew was that they were on Bay Road, which goes around the lake. Mr. Odrosky testified that the 911 operators did not know precisely where they were, so the crew

[13] CSHO Keffer testified that she was told that ratcheting the come-along was a difficult job where two people took turns. (Tr. 180-81).
[14] Mr. Odrosky also testified that if Mr. Nearhood had tired of cranking, Mr. Sprankle could have stepped back in to crank some more. He testified that it sometimes required three people to complete the cranking effort. (Tr. 372-74). Because of this possibility, the Court finds that Mr. Sprankle remained involved in the oak tree felling operation and was still a part of the team felling the tree at the time of the accident. (Tr. 691-92).
[15] Mr. Nearhood was beyond the distance of the felled tree, 77 feet from the felled tree that was 74 feet high. (Tr. 173).
[16] At the time of the accident, Mr. Sprankle was beyond one tree length of the felled tree. (Tr. 173-74).

decided to put Mr. Sprankle into the truck and bring him south on the road to the marina. Mr. Sprankle was pronounced dead at the scene. (Tr. 348-50).

Mr. Odrosky testified that the distance from the felled tree to the anchor tree is supposed to be 1-1.5 times the height of the tree to be felled. The felled oak tree was 74-feet tall. Therefore, the anchor tree should have been about 110 feet away. Mr. Odrosky's believed that the anchor tree was the requisite 1.5 tree lengths from the felled tree. However, the anchor tree was later measured to be only 77 feet away. There were potential anchor trees located two tree lengths away. Mr. Odrosky explained that a person is supposed to be two tree heights away from the tree being felled if not involved in the felling. On that basis, Mr. Sprankle should have been 150 feet away. Measurements revealed that he was only 95 feet away. Mr. Odrosky explained that Mr. Sprankle was prepared to step back in and resume cranking if Mr. Nearhood became fatigued. Because he remained involved in the felling, Mr. Odrosky testified that Mr. Sprankle was allowed to be closer. Mr. Odrosky admitted that Mr. Sprankle could have retreated further away, but in his view, both Messrs. Nearhood and Sprankle were sufficiently far from the felled oak tree that it could not have hit them. Mr. Odrosky also testified that the drop zone was an area 10 feet on either side of the line between the anchor tree and the felled oak tree. The tree fell 12 degrees from that line, not far off the intended felling path. (Tr. 333-37, 342, 346, 377-78, 395-96, 401-02, 407-08; GX-17-10).

Mr. Odrosky testified that he did not expect that the smaller tree that was first hit and caused the felled oak tree to spin off its stump, would cause a problem. He anticipated that the felled oak tree would simply brush past the smaller tree and fall in its intended path. That the felled oak tree got caught up in the branch of the smaller tree was characterized as an "unexpected event" since he did not intend the oak tree to roll off the stump. He testified that

these events occur once every 50 to 100 times. He also testified that none of the crew members, including Messrs. Sprankle and Nearhood, could have been hit by the felled oak tree because they were standing far enough away from it. (Tr. 339-40, 395-96, 405, 407).

When interviewed by the CSHO, Mr. Odrosky was asked whether he was a logger. He said that he was not a logger, but a line clearance tree trimmer.[17] He explained that he never works out in the woods, harvesting trees. Rather, he clears power lines. The trees he clears may be up to 100 feet from power lines and are removed only when they pose a threat to strike those lines. On this project, the trees he removed averaged from 70-100 feet tall. Mr. Odrosky testified that on February 4, 2011, 30 trees were cut down by the two crews. He estimated that half the trees were brought down from the stump, while the other half were climbed and cut from the top down. (Tr. 299, 330, 384-85, 390-92; GX-22-23).

Mr. Odrosky testified that the Treasure Lake Home Owners Association is very protective about their trees.[18] They were only allowed to remove trees that endangered power lines. At no time did Respondent harvest the trees. Rather, the trees were allowed to lie where they fell. (Tr. 402-04).

In response to the fatality report, CSHO Keffer was sent to the worksite.[19] She testified that upon arrival at the Treasure Lake community on Thursday, February 24, 2011, she drove along Bay Road to find the accident site. She saw a number of trees that had been cut down

[17] During the trial, CSHO Keffer testified that she could not recall whether or not any Davey Tree employee told her he was a "logger." (Tr. 171-72). Mr. Odrosky testified that "trimming" meant "Climbing a tree and taking limbs off from the side of the power lines." (Tr. 387).

[18] CSHO Keffer testified that she believed that there was a homeowner's association within the Treasure Lake community that reviewed and approved tree removal projects. (Tr. 209-11).

[19] CSHO Keffer has been a federal OSHA CSHO since February, 2010, and before that a North Carolina state OSHA CSHO since February, 2007. While a North Carolina CSHO, she attended a two-week training course that discussed logging and logging operations, including the spacing of employees involved in logging operations. In 2004, she received a Bachelor of Science degree in safety sciences from the Indiana University of Pennsylvania. She has not received any specific instruction concerning line clearance and tree trimming, logging, 29 C.F.R. §§ 1910.266, 269, or American National Standards Institute ("ANSI") Z133.1. (Tr. 77-79, 137-38, 150-52).

along the road, but could not pinpoint the accident site.[20] The CSHO placed a call to Mr. Tommasi, who met her at the site. She also met with Respondent's Regional Safety Manager, Dennis Traeger, and obtained some general information about both the company and the accident. She conducted a group interview of employees who were involved in the accident.[21] The interview took only 10-15 minutes because the employees were shaken and upset. Also, the CSHO wanted to get back to inspect the site. She took the crew's contact information so she could call them the following week to conduct interviews.[22] The CSHO, along with Messrs. Mitchell, Tommasi, Wright, Traeger, and Kevin Crowe, then caravanned to the site where the accident happened. Two other men from the International Brotherhood of Electrical Workers ("IBEW") union joined them there. None of the employees involved in the accident participated in this part of the inspection. (Tr. 79-85, 88-89, 103, 189-95; RX-X, at p. DT001273).

She described Treasure Lake as a private, gated residential community with security guards and at least two entrances that include about 2,000 homes on 9,000 acres in a heavily wooded, rustic area. The community also includes two lakes, four beaches, a marina, a stabling facility, ski lodge and ski slope area, two golf courses, a country club, a shopping area, two

[20] At the hearing, CSHO Keffer continued to have difficulty locating the accident site. In response to a question, she marked the accident site with a circled "A" on the map of Treasure Lake. (Tr. 93-95; Joint Exhibit (" JX") -I). However, she was unsure of the location and indicated that, rather than the accident site, the "A" represented the "general vicinity" of the accident. (Tr. 95). She then marked what she believed to be the accident site with a circled "B." (Tr. 95-96). She further testified that she clocked the distance from the accident site to the Marina parking lot at the intersection of Bay Road and Treasure Lake Road at one mile. (Tr. 102-03). The Court finds the JX-I's distance scale to be contradictory. The linear scale shows that 1 inch equals 1,320 feet, but directly below that JX-I indicates "SCALE 1" = 660'" The accident site reference point "F" marked on JX-I by Mr. Tommasi that is near Guana Court is 1 mile from the intersection of Bay Road and Treasure Lake Road using the linear scale that shows 1 inch equals 1,320 feet. The Court finds that the CSHO mistakenly marked the accident site with the letter "B" that is near Caymans Road at the trial, and that she had actually visited the site marked with the letter "F" on February 24, 2011.

[21] The group included Respondent's employees Messrs. Odrosky, DeMoss, Hipps, and Nearhood. Mr. Nearhood was later killed in a car accident on about March 1, 2011. (Tr. 85, 104-05).

[22] CSHO Keffer testified that there were two crews involved in manual falling trees on February 23, 2011 that could potentially obstruct Penelec services; one crew consisting of Messrs. Odrosky, Hipps and Sprankle, and the other crew comprised of Messrs. Nearhood and DeMoss. She agreed that every tree that Davey Tree cut down during the course of the Penelec contract was removed because it was viewed to be a potential disruptor to electrical service. (Tr. 177-78).

sewage plants, townhouses, and other amenities.[23] CSHO Keffer described the area around the accident as being very secluded, remote, heavily wooded and undeveloped.[24] She testified that she did not see any houses along Bay Road where the trimmers had been working. She took video and photographs of the accident site on February 24, 2011. She testified that the photograph at GX-14-2 shows the felled tree at "A" and the tree that struck the deceased at "B", and the photograph at GX-14-10 also shows the felled tree at "A" and the tree that struck the deceased at "B". She also testified that the photograph at GX-14-6 was taken from the road and it shows where the stump and the tree being felled were.[25] She further testified that the photograph at GX-14-13 shows the anchor tree at "A" and photograph at GX-14-9 shows the place where Mr. Sprankle was struck. She also testified that the video that she took on February 24, 2011 at GX-15, picture 035, depicted the tree where the come-along and rope had been attached at the time of the accident. (Tr. 91, 96-98, 100-01, 105-12, 126-27, 222-23, 229-33; JX-I, GX-14, GX-15, #34-35, GX-17-1).

Davey Tree was on the site to perform line clearance and tree trimming operations. Based on employee interviews, CSHO Keffer learned that the project involved the felling of approximately 1,000 trees along 86 miles of Penelec electrical lines.[26] No heavy machinery was involved. The project began at the end of January and was scheduled to go through mid-March. General foreman Brad Wright explained to the CSHO that Davey Tree is under contract with

[23] The community also included a utility center, shopping area, bank, and post office. (Tr. 231).
[24] CSHO Keffer testified that her application of the factors set forth in Directive 45 were based upon her traveling up the road that led from the security gate to the accident site and back. She further testified that there were no houses and it was all wooded once she made the turn onto Bay Road. (Tr. 234-36, 241-42, 249; JX-I).
[25] CSHO Keffer testified that GX-17-1 is a power point depiction with annotations on photograph GX-14-6 that show: 1) the butt of the felled tree, 2) the stump of the felled tree, 3) the intended direction of felling path, 4) where the felled tree struck the second [birch] tree, 5) the tree where the come-along was tied, and 6) were Mr. Sprankle was struck by the second falling [birch] tree. She further testified that the second [birch] tree was actually twin, or split, trees that had grown together at the stump, but separated as they grew. (Tr. 126-28; GX-17-1).
[26] The Court finds that there were no predetermined number of trees to be removed, but rather, danger trees were to be identified as posing a hazard to the integrity of the electric supply lines, and removed on an as-needed, case-by-case basis.

Penelec to conduct this type of work approximately every four years, in the same area. Of the approximately 1,000 trees to be felled, 60-70% would be taken down wholesale, meaning from the stump and allowed to free fall into the area. The felled trees were generally located between 20-30 feet on either side of the power lines. CSHO Keffer testified that she considered the area comprising 86 miles by 30 feet to be a large tract of land in the context of OSHA Directive, CPL02-01-045 ("Directive 45"). (Tr. 114, 116, 171, 237, 241-43, 255-57).

The CSHO was told that trees were being taken down at the rate of 15-30 per day. At the time of the accident, about three weeks into the six to eight week project, Respondent had felled approximately 300 trees. The felled trees were not cut into logs to length. CSHO Keffer testified that Respondent was "felling limited trees" and not cutting down all the trees in the Treasure Lake community. She further testified that some limbs were removed so the trees would not get hung up on anything in the woods. She also stated that Respondent was not yarding,[27] loading, dragging or unloading the logs.[28] There was no logging yard, and employees were not being transported from logging site to logging site. Davey Tree was not harvesting any wood product. Rather, the cut trees were abandoned whey they fell and treated as waste and left where they fell. (Tr. 164-68, 221, 252, 254, 257-58).

The CSHO learned that a second felling manual crew of two men was operating down the road at the time of the accident. Respondent also had bucket crews on the site. Bucket crews trim trees and bushes from a bucket truck, and remove vegetation that could potentially interfere with the operability of power lines.[29] All members of the Davey Tree crew were wearing appropriate personal protective equipment. (Tr. 168-70, 177-78, 196).

[27] 29 C.F.R. § 1910.266(c) defines "yarding" as "The movement of logs from the place they are felled to a landing."
[28] CSHO Keffer testified that Respondent did not have a chipper at the work site on February 23, 2011. (Tr.258).
[29] CSHO Keffer did not interview any bucket crew member who worked at the Treasure Lake community. (Tr. 170).

CSHO Keffer further testified at the hearing that, during her first visit to the site, she did not take any measurements of the area.[30] She explained that the terrain was hilly, snow-covered and a little bit difficult to get through. Also, she was not sure how stable the trees were and she did not want to put herself into a hazardous situation. [31] She testified that Mr. Tommasi told her that Respondent did not have to have a written felling plan when cutting down trees because Davey Tree was trimming trees under the 29 C.F.R. § 1910.269 standard and not operating under the 29 C.F.R. § 1910.266 logging standard. With the site visit completed, the CSHO went back to her car and clocked the distance from the accident site to the intersection of Bay Road and Treasure Lake Road where the employees had told her they had met the emergency crew at about a mile.[32] On May 13, 2011, CSHO Keffer interviewed Messrs. Odrosky, DeMoss, Hipps, Crowe, and Wright.[33] (Tr. 98-102, 181, 184; JX-I).

The CSHO returned to the site on June 27, 2011 to take some more measurements, video and photographs. She testified that she was able to relocate the precise locations involved by matching the site with the photographs taken on the first visit. She stated that the site was "pretty much the same" as it had been after the accident, except the felled tree by the stump was not there and there was no blood on the ground where Mr. Sprankle had been struck. She took video and photographs of the site, including photograph GX-13-3 that depicted the branch of the struck tree and the area up to the top of the hill where Mr. Sprankle was struck. She also testified

[30] CSHO Keffer testified that Messrs. Tommasi and Traeger took measurements at the accident scene while she was there. (Tr. 191-92).
[31] During her June 20, 2012 deposition, CSHO Keffer stated that she did not take measurements on February 24, 2011 because "the scene was a little bit overwhelming for me at the time." She further explained at her deposition that "It was a little bit intimidating simply because the number of people who were there, …"
[32] During her initial visit to the accident site, CSHO Keffer testified that she developed thought that Respondent had violated the logging standard because the tree that struck Mr. Sprankle had been able to free-fall into a large area beyond anyone's home. (Tr. 99, 102).
[33] Messrs. Odrosky and DeMoss were both crew foremen who were supervising two separate manual crews at the time of the accident. Messrs. Nearhood and Donnie Schmoke generally worked with Foreman DeMoss. (Tr. 116-117).

that photograph GX-13-2 showed the trunk of the felled tree and one of the twin trees underneath it. (Tr. 117, 120-24, 192; GX-13-2, GX-13-3, GX-14-9, GX-16).

Mr. Tommasi told her that the height of the felled tree was 74-feet. She measured the distance from the stump of the removed tree to the anchor tree at 77 feet. She also measured the distance from the stump to the twin birch trees that were struck at 45 feet, from the anchor tree to where Mr. Sprankle had been struck at 45 feet, and from the twin birch trees to where he had been struck at 50 feet. The power lines were approximately 23.5 feet behind the felled tree, and the area where Respondent's manual crews were working on February 23, 2011 at the time of the accident was adjacent to Bay Road. She calculated that by hitting that tree, the felled oak tree deviated from the intended fall path toward the anchor tree by 12 degrees. The area on both sides of the road was wooded. CSHO Keffer initially testified that she did not see any houses in the immediate area of the accident.[34] There were houses going south, near the intersection of Treasure Lake and Bay Roads. (Tr. 117-19, 124-26, 136, 173, 237, 272; JX-I, GX-16, GX-17-10).

CSHO Keffer recognized that the logging standards have two components: (1) the felling of trees and (2) moving the felled trees to the point of delivery. She did not interpret the standard as requiring both components to be present for the standard to be applicable. As a result of her inspection, the CSHO determined that the logging standards were applicable and Respondent was issued a citation alleging that employees were not spaced so the actions of a tree feller did not create a hazard for those employees working in another area, as required by 29 C.F.R. § 1910.266(d)(6)(i). In her view, the actions of the feller, Mr. Odrosky, created a struck-by hazard

[34] During cross examination when shown photograph GX-14-12 that she took on February 24, 2011, CSHO Keffer testified that there was a house nearby where Mr. Sprankle fell. She did not know where the house was, but believed that it was not on Bay Road. She did not measure the distance from the house to where Mr. Sprankle died. She was also unaware that Mr. Hipps had run to a house that was "[n]ot very far on the left hand side of the [Bay Road] road just up from this tree" trying to get help. (Tr. 197-200, 248-49; GX-27, at p. 36).

to Messrs. Sprankle and Nearhood, the employees who were operating the come-along. (Tr. 130-33, 157-60; GX-1-5).

CSHO Keffer testified that the decision to cite the logging standard was based on her evaluation of the site, the situation on the ground and OSHA Directive 45.[35] She explained that Directive 45 outlines a number of factors to evaluate and consider when determining whether or not an operation is tree trimming or logging.[36] One of those factors is the scale and complexity of the tree removal project. For example, Directive 45 contrasts the cutting down of a substantial number of trees versus a small-scale operation where only a few trees would be removed. Here, the project called for the removal of up to 1,000 trees with the potential to lean or fall into the power lines along the 86 mile long power line right of way, 60-70% of which were felled from the stump and able to free fall to the ground. The CSHO considered the estimated removal of 600-700 trees to be a significant number because it "did seem like a lot of trees." [37] She also considered the length of the project. A logging operation takes a week to a couple of months. Here, the project lasted almost two months. CSHO Keffer testified that Respondent's employees told her that they typically fell one tree per hour per man on a crew, or somewhere between 7 and 15 trees each day per crew. (Tr. 114, 116, 131-34, 136, 220, 241-42, 251-52; GX-18).

CSHO Keffer testified that Directive 45 also considers the type of equipment being used. According to Directive 45, logging operations usually involve the use of heavy machinery to cut, move and load trees. That was not the case here, where the crew was using chainsaws, ropes and pulls. Another consideration under Directive 45 is the location of the operation. Typically, logging takes place in remote or rural areas. In her opinion, the location was remote and

[35] The effective date of Directive 45 is August 21, 2008. (GX-18-1).
[36] CSHO Keffer testified that she evaluated each directive heading and the situation and weighed the differences. (Tr. 135, 153, 218).
[37] CSHO Keffer testified that she used the 1,000 number given her by Mr. Wright on May 13, 2011 and never went back and checked the actual number of trees that Davey Tree removed. (Tr. 245).

removed. The area was large enough to fell a 74-foot tall oak tree at the stump that ultimately led to Mr. Sprankle's demise in one of the lots within the Treasure Lake community.[38] Also, she testified that when the crew called 911, they had no specific place to meet the emergency crews. The crew put Mr. Sprankle into the truck and drove him to the nearest intersection, which was about a mile down the road. (Tr. 102, 134-36, 245-46; JX-I).

In her view, Davey Tree was not in the tree care business.[39] Rather it was caring for power lines, which involved the trimming and removal of trees. The CSHO agreed that many of the terms and conditions set forth in Directive 45 are not clearly defined and subject to interpretation. She also testified that Directive 45 did not convey how much weight should be afforded to any particular factor being considered. CSHO Keffer recognized that, under Directive 45, National Office approval is required to be obtained before the logging standards are issued to an employer engaged in small-scale tree removal or one whose primary business is performing tree care operations. She was not aware whether National Office approval had been obtained before the citation was issued to Respondent. (Tr. 206-09, 212-19, 226-27; GX-18).

The CSHO testified that she had no knowledge how the logging standards, tree trimming standards, or ANSI Z133.1were promulgated. This was the first time she visited anything she considered to be a logging site. The CSHO testified that the cited logging standard requires that employees be at least two tree lengths from the feller when cutting down the trees.[40] The violation was characterized as serious because, based on the history of trees hitting people; it could cause death, physical harm, or permanent disability. A penalty of $7,000 was proposed,

[38] CSHO Keffer testified that on about February 23, 2011, Respondent was working on a stretch along Bay Road from about Caymans Road at around lots 173 and 193 up toward the accident site over a distance that she did not know. (Tr. 246-47; JX-I). She also testified that the 74-foot oak tree that Mr. Odrosky cut was an average-sized tree for the area. (Tr. 136).

[39] She testified that a person whose primary business is caring for trees in an arborist. (Tr. 208).

[40] During cross examination, she admitted that the logging standard did not include a requirement that an employee must be a distance away from the tree being felled by the feller that is twice its length. (Tr. 202).

which is the maximum for serious citations. The violation was also considered to pose a greater probability of occurring due to the amount of time employees would be felling trees and the number of employees who were exposed or could be exposed to the hazard. Reading from the OSHA-1B Penalty Worksheet, the CSHO noted that no adjustments were made for size, good faith or history. CSHO Keffer testified that Davey Tree has well over 250 employees, disqualifying it for a credit for size. The high severity of the violation prevented an adjustment for good faith. Also, Respondent has a history of serious violations, preventing any adjustment for a good safety history. (Tr. 139-42, 145-50; GX-3).

Michael St. Peter is a self-employed logging safety consultant who works under the name of St. Peter Safety Services. His biggest account involves training and education for the Maine Certified Logging Professional Program. Additionally, he does consulting for logging companies, sawmill operations, paper companies, public utilities and municipalities. He teaches the directional felling of trees, mechanical harvesting, safety and operations. He also provides programs on hearing conservation, hazardous material, lock-out/tag-out, and anything associated with safety training in the logging industry, including a four-day instructional training segment on chainsaw directional felling. Mr. St. Peter has visited thousands of logging sites in a professional capacity over his 35 year career. He is a member of the Forest Resources Association, Production Efficiency and Safety Training Committee, in the northeast. He is also a member of the Sustainable Forestry Initiative Safety and Training Committee in Maine; and the Maine Logger Education Alliance Network. (Tr. 413-16, 491).

Mr. St. Peter was tendered by the Secretary as an expert in the field of logging safety and submitted his expert report.[41] Mr. St. Peter agreed that the logging industry and the line clearance tree trimming industry are two separate and distinct industries. He testified that he

[41] Without objection, the Court accepted Mr. St. Peter as an expert in logging safety. (Tr. 417).

worked with arborists before, on a very limited basis and noted that there are some arborists that also do logging. Some of those people participate in his training. He never worked in the line clearance tree trimming industry, and does not hold himself as an expert in the safety practices that are relevant to that industry. (Tr. 417, 439, 459-61; GX-4).

Mr. St. Peter testified that he has used a come-along approximately ten times but that they are rarely used in the logging industry. Mr. St. Peter did not visit Treasure Lake. Rather, he relied on written material, photographs and videotape taken by the CSHO. He did not believe that not visiting the site was a hindrance to his forming an opinion. In his consulting work, there are times when he does not visit the site, but rather relies on written reports, photographs and videotape. In his view, the videos and photographs that he reviewed gave him a sufficient sense of what happened and he was comfortable forming an opinion. However, he also testified that actually visiting a site is always beneficial. (Tr. 433-36, 444).

To Mr. St. Peter, the worksite looked like a logging operation because trees were being felled into standing wood. The terrain also looked like a logging operation because of the different types of terrain, steep slopes, flat areas and different types and sizes of trees. He pointed out that felling safety does not depend on whether the trees or logs are being moved anywhere. Felling safety, he testified, is paramount, regardless of the end use of the trees. The same rules should apply whether a tree is being felled on a logging job or by someone in their backyard. (Tr. 440-41).

Mr. St. Peter testified that logging operations has two components. The first component is operations associated with felling. The second component involves moving the trees and logs from the stump to the point of delivery.[42] He also testified that the scope and

[42] Mr. St. Peter testified:

Q. [extraneous material omitted] You would agree with me, in order to be engaged in logging operations,

application of the logging standard at 29 CFR § 1910.266 is designed to establish safety practices, means and methods for operations for those companies that are actively engaged in harvesting commercial wood products. He agreed that Davey Tree was not producing any forest products but, rather, was a line clearance tree trimming company. He also agreed that Davey Tree was not harvesting commercial wood products.[43] Mr. St. Peter noted that, at times, loggers engage in pre-commercial thinning operations. Pre-commercial thinning involves thinning a stand of timber, usually in the initial stages of growth, much like weeding a garden. Removing undesirable stems allow the healthier stems to a better growth rate. In this operation, the thinned logs are left in the woods and some are recovered for biomass chips. Similarly, logging also can involve land clearing a right-of-way, such as for a pipeline, and on extremely steep ground. In these operations, the trees may be cut with chainsaws and left on the ground. A rarer example of logging operations is to improve fish habitat, where trees along streams are left where they fall to mimic the natural occurrence of trees that are blown down. Mr. St. Peter testified that, in these instances, that trees are not being moved makes no difference to the hazards faced by the feller or the team of fellers. (Tr. 465-66, 468, 472, 474, 497-99).

Mr. St. Peter testified that at Treasure Lake, Davey Tree was engaged in standard line clearance tree trimming activities, and was there for the sole purpose of removing potential obstructions to the uninterrupted electrical service to that community. Also, during the course of this case, Mr. St. Peter learned that line clearance tree trimmers typically operate as a team and often operate in three-man crews. In contrast, loggers typically work as one-man crews,

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that you must satisfy two components, the first being that you must be engaging in operations associated with felling, and also the second component, which is: And moving trees and logs from the stump to the point of delivery. Do you agree with that question or that statement?

A. Yes.

(Tr. 472).

[43] During cross examination, Mr. St. Peter admitted that he had previously stated that a logging company harvests forest products for commercial use. (Tr. 443-44).

although there can be two-man crews.[44] The feller works alone to fell trees. Then a second person, such as a skidder operator, harvests the trees and hauls them out of the drop zone to be transported to a logging yard. (Tr. 171, 220-21, 466, 476-78).

Mr. St. Peter highlighted several generally accepted rules and practices regarding logging safety. He testified that workers should be spaced and duties organized so that safe work zones are maintained. The rule is that in logging operations no worker should be within two tree lengths, in all directions, of someone felling a tree.[45] He testified that the two tree length rule has been imposed in the logging industry as long as he has been in it, roughly 35 years. As he indicated in his expert report, OSHA uses the two tree length rule as a standard for separation of work areas. This formed the basis for his opinion that Davey Tree workers were required by OSHA to be two tree lengths away from the tree being felled on February 23, 2011. Mr. St. Peter admitted that there is no requirement for a two-times tree height rule within the cited standard at 29 C.F.R. § 1910.266(d)(6)(i). (Tr. 417-20, 430, 476, 480-84, 491; GX-4, at p. 7).

Mr. St. Peter explained that being one tree length away is not always sufficient because falling trees often encounter other trees and branches that may be struck and fall greater than one

[44] Mr. St. Peter testified that one person can be a logging company engaged in logging where the person fells and moves trees, even at varying times. (Tr. 492-93, 500).

[45] Mr. St. Peter testified that the two tree length rule is set forth in documents that helped him form his opinion in this case. One of those documents was the Forest Resources Association analysis of a close call safety alert from 2010. The Forest Resources Association is a logging industry or forest products industry national organization that he considers to be a long time authoritative source of safety rules for the logging industry. (Tr. 421-22; GX-7). Reading from the document, he noted that the second recommendation states:

> Never assume you are in a safe position when close to an active felling operation. Always stay at least two tree lengths, twice tree length, away from a timber cutter.

(Tr. 424).

Mr. St. Peter testified that he also relied on the Forest Resources Association safety alert from 2001. (Tr. 425; GX-12). The first full sentence under Recommendations for Correction states:

> Always observe the two tree length rule: All personnel except the feller must remain at a distance from all felling operations of at least twice the height of trees being felled.

(Tr. 426).

tree length distance. He termed this a "domino effect," where one tree strikes another, causing it to fall a greater distance than the height of the original tree. The domino effect could be stopped by cutting down every tree it could possibly hit. This was not an option on the DuBois 137 project. Mr. St. Peter was familiar with many instances of a felled tree striking another tree, causing the felled tree to roll off the stump. He testified that felling a tree in the woods is not an exact science, and that there are a lot of factors that can affect the ultimate direction of the tree. (Tr. 429-30, 441-42, 446-47).

When manually felling trees, all the hazards must be determined prior to felling. The information regarding hazards on the ground and in the air is used to establish safe work zones. The logger must also determine the lean of the tree. A proper escape route for the person cutting the tree must be established. Finally, the logger needs to establish a cutting plan, mapping the succession of cuts that are to be made, the sequence of those cuts and other considerations such as whether you need to use wedges. (Tr. 417-19).

His expert report notes that the overall goal is to space the workers and organize their duties so that the actions of one worker will not create hazards for other personnel. It was Mr. St. Peter's opinion that the Davey Tree crew was not spaced in a safe manner at the time of the accident. He noted that the come-along was less than two tree lengths from the tree being cut. He testified that they should have picked an anchor tree that was two tree lengths away.[46] (Tr. 431-33, 436-38, 479; GX-4, at p.6).

Mr. St. Peter testified that the two tree length rule is important to prevent the feller from accidentally dropping the tree on the skidder, because these people are working independently of each other. With the feller operating a loud chainsaw and with his personal protective equipment

[46] Mr. St. Peter also admitted that he was speculating whether or not there may have been a suitable anchor tree beyond the one that was used on February 23, 2011. (Tr. 445).

on, he may not know what's going on with the skidder behind him. Also, the skidder operator, who's driving a heavy piece of equipment and machinery and is dragging logs, may not know what's going on with the feller. Indeed, the feller and the skidder usually work independently and in different work areas. (Tr. 484-87).

The logging standard at 29 CFR §1910.266(h) provides an exception to the two tree length rule where the employer can demonstrate that a team of employees is necessary to manually fell a particular tree. An exception to the two tree length rule is also made for someone who is assisting the feller. Nonetheless, Mr. St. Peter testified that if a two-man crew was felling a tree near a river using a come-along, and a person operating the come-along was one tree length away, he would consider the situation unsafe because of an inadequate distance between the individual felling the tree and the individual pulling the tree. Mr. St. Peter testified that he prescribes to the rule that all personnel must remain at a distance at least twice the height of the tree being felled. (Tr. 421, 487-88, 494-96).

Bradley A. Wright has been a general foreman for Davey Tree for eight years and was the general foreman at the DuBois 137 project. He supervises 28 employees. He explained that the DuBois 137 Circuit comes out of the DuBois substation and provides power from Treasure Lake to within a couple miles of Penfield.[47] The total distance covered by the project was 86 miles, all of which was adjacent to a power line. Davey Tree was contracted to remove and trim trees to clear power lines and make them safe for four years. Under that contract, cut wood belonged to the property owner and was to stay on the premises. Mr. Wright described the Treasure Lake community as largely residential, with very little woods. Trees were removed both top-down and from the stump. Mr. Wright could not remember how many trees were removed. However, during the interview with the CSHO he agreed that he could have said that

[47] Penfield is six to eight miles from Treasure Lake. (Tr. 506).

the project involved the removal of approximately 1,000 trees, 60-70% of which he estimated were felled from the stump. (Tr. 504-13).

Davey Tree's first witness was Joseph Tommasi, the Corporate Director of Safety for Davey Tree Service. He has been employed by Respondent for 19 years and has been its Corporate Safety Director for over two years. Before becoming Corporate Safety Director, he spent nine years as the Manager of Safety and Loss Prevention.[48] As Corporate Safety Director, he has oversight of the safety programs of Davey Tree and its subsidiaries. He is directly involved in developing safety programs and their distribution through the organization, administration of the programs, oversight of a team of employees that are involved in field safety activities and administrative staff. Mr. Tommasi testified both as a fact witness and expert in the tree care and line clearance industries. His expert report was received in evidence. (Tr. 54, 524-28, 553, 654; RX-N) (*See also* Court's Order Denying Complainant's Motion to Exclude Expert Witness Report and Testimony of Joseph F. Tommasi, dated July 10, 2012).

He testified that Davey Tree has approximately 7,000 employees in the United States and Canada. The parent company, Davey Tree Expert Company, works coast-to-coast providing tree care as arborists including utility line clearance, residential and commercial services.[49] Tree care encompasses a cross-section of work activities including the planting of trees, the fertilization of trees, pest management, and utility line clearance operations. Mr. Tommasi

[48] He started in 1972 as a utility line clearance tree trimmer in training and progressed to become a junior trimmer (also referred to as a qualified utility line clearance arborist), and then crew foreman. He worked in the field from 1972 through 1982 at the Tree Preservation Company that was under contract with Consolidated Edison Company. He worked on vegetation management, tree trimming and tree removal to clear power lines on a daily basis. He testified that vegetation management is the pruning of trees, removing trees or tree sections, brush cutting, and applying herbicides or growth regulators. From 1982 through 1994, he was the Director of Safety and Equipment at the Tree Preservation Company, where he was responsible for the safety and fleet management program of a utility line clearance company of 1,500 employees. His resume states that he is a "1977 Graduate, Business Administration, Seton College Yonkers, NY." (Tr. 532, 550; RX-N, at p. 11).

[49] Mr. Tommasi testified that "arborist work" refers to arboriculture, arbor, and trees themselves. Arborists strive to reach a positive outcome for trees in the environment. (Tr. 533).

testified that it is necessary to manage trees so they can coexist with electric lines. He stated that arborists work for residential, commercial or institutional clients, as well as utility companies or other governmental agencies. (Tr. 525-33).

Mr. Tommasi testified that safety is a core value of Davey Tree and stressed that their employees are their most valuable asset. Respondent educates their employees in the work that they are going to perform and provides in-depth training to both field persons and supervisors. Davey Tree incorporates safety into the progression of job skills and job classifications so that when they are training a trimmer, they are building the next generation of management personnel. Mr. Tommasi testified that he has an organized process for discipline. If the violation is one that can cause death or severe injury, the result could be suspension or termination. (Tr. 533-34, 547-548).

Mr. Tommasi testified that Davey Tree participates in several trade associations. It has been involved with the Tree Care Industry Association ("TCIA"), the national trade group, for several years.[50] He testified that he has been the chair of the TCIA Safety Committee, sat on the TCIA Government Affairs Committee, and is the president of the Utility Line Clearance Coalition. Davey Tree is also involved with the National Society of Arboriculture and is an active supporter of the International Society of Arboriculture ("ISA"), the secretariat for the ANSI Z133 Committee, that writes the safety rules for the line clearance industry.[51] Mr. Tommasi represents Davey Tree on the ANSI Committee and has served as chair of a few of the task groups. The purpose of these organizations is to represent the industry in regulatory affairs, share information and continue to better professionalism within the industry. Davey Tree has commented on rulemakings for both Federal and State OSHA, principally in the areas of

[50] He testified that TCIA was referred to as the National Arborist Association in years past. (Tr. 548).
[51] Mr. Tommasi testified that utility line clearance arborists are also governed by ANSI Z133.1 as an industry consensus standard. (Tr. 569).

standards that apply to tree care, including the promulgation of 29 C.F.R. § 1910.269. Together with their industry counterparts, they work toward developing the most appropriate safety standards for the industry. (Tr. 547-50, 570; RX-G).

Mr. Tommasi testified that in the late 1990's there was considerable discussion about OSHA extending the applicability of the logging standard to arborists. The tree care industry was considering legal action to prevent this extension. Members of the tree care industry met with senior representatives of both Federal and State OSHA to try to resolve the issue. OSHA requested that the industry present information on the difference between the two industries. As a result, a document entitled "Differences between Arborists & Loggers" was prepared detailing the differences between the logging and tree care industries. He testified that he considered himself an expert in any attempted application of the logging standard, 29 C.F.R. § 1910.266, to the tree care industry.[52] After reading Directive 45, he believed it was an attempt by OSHA to apply the logging standard to the tree care industry. (Tr. 555-63, 614; RX-N).

Mr. Tommasi testified that line clearers are a service provider. They are there to clear vegetation from the electric supply lines and to maintain safe and reliable electrical service to consumers. Logging is a forest products industry that gathers and harvests wood products and brings them to a point of delivery for profit. Tree trimming constitutes about 40% of an arborist's activities. This includes pruning trees and clearing trees from the electric lines. Twenty-seven percent of their activities involve tree removal.[53] Arborists address soil deficiencies, tree problems, drainage, aeration, and the care and preservation and removal of trees. They work in most urban areas as well as in suburban/exurban areas. Much of the work

[52] In his opinion, 29 C.F.R. § 1910.266 does not apply to the utility line clearance arborist industry. (Tr. 570, 606-07, 610; RX-N).
[53] CSHO Keffer testified that she did not know what percentage of Davey Tree's work constituted tree felling. (Tr. 228).

involves public areas where you may encounter pedestrian, private residences, public buildings, cemeteries, and a cross-section of environments. Exurban and rural areas may have homes in a wooded environment. In a line clearance environment, there is always the presence of electrical hazards. Mr. Tommasi testified that the majority of the work that a line clearance arborist does is performed aloft in an aerial lift device, by pruning or by preparing a tree for removal either by sectional removal or by placing a rope for felling a tree. Most often, they climb trees where they either prune or, where necessary, prepare the tree for removal. (Tr. 555-67; RX-N).

In contrast, logging harvests trees for profit and turns them into forest products. Loggers work on large tracts of land where there are large volumes of trees to harvest. They typically work in very rural areas and are not in the same type of work environment as clearance tree trimmers. The time a logger spends aloft is minimal since logging is associated with felling trees from the ground. (Tr. 564-67).

Mr. Tommasi opined that the logging standards are "very much" written regarding independent workers doing logging work, harvesting trees, using heavy equipment and gathering a product with the least amount of harm to the trees as a product. This, he suggested, is inconsistent with the tree care industry which always focuses on the interdependent activity between arborists. Their work with the tree is a service and the end result is clearance of the electric supply lines. There is nothing in the logging standards that speak to the safe work methods for arborists working aloft for sectional tree removal, to reduce the crown out of the tree or to take the tree down safely, piece by piece. Furthermore, it is Mr. Tommasi's opinion that applying the logging standards to the tree trimming industry creates conflicts in areas such as first aid training, safety and equipment. (Tr. 639-40; RX-N, at p. 8).

Healthier trees are the work product of an arborist that are less hazardous, more

aesthetically pleasing, and of aesthetic, cultural and environmental value to the owner. The trimmed branches are debris for disposal. Loggers, in contrast, actually use the wood. For arborists, chainsaws are one of an array of tools that also includes hand pruners, pull-saws, handsaws, and hydraulic tools. In logging, however, chainsaws are used exclusively. Also, arborists, including Davey Tree, work interdependently, relying on each other to perform their work. If you are working aloft and near power lines, you have a coworker with you on the job. Trees are removed and pruned as a team. Bucket crews have a leader and one or two other persons with him. A climbing crew is made up of a leader, trimmers, climbers or a line clearance tree trimmer trainee as well as other trimmers. Until the tree comes down, every person aids each other and is part of the team, even if not needed at the moment. Mr. Tommasi testified that employers do not want team members to wonder off someplace unknown or perhaps unsafe. Felling a tree with a pull rope requires a crew. Come-alongs are used regularly. (Tr. 567-68, 571-73, 692-93; RX-N).

Logging involves the use of a significant amount of specialized heavy equipment including log skidders, log forwarders, shears and grapples that are not used by arborists. In contrast, arborists use pole pruners for use around electrical conductors to trim vegetation back and clear power lines, hydraulic pole tools, handsaws, ropes and saddles for climbing trees. Mr. Tommasi estimated that 75 per cent of an arborists work is done aloft and 75 per cent of that work is done with an aerial device from bucket trucks with an aerial device sometimes referred to as a "boom."[54] To the best of his knowledge, bucket trucks are not used in the logging industry. (Tr. 573-76).

Mr. Tommasi outlined the potential hazards encountered by line clearance tree trimmers.

[54] A "boom" is an elevating, non-conductive, rotating aerial device that enables workers to safely go aloft and prune trees. (Tr. 574-75).

The first hazard is electrical. Because the work takes crews in proximity of electrical conductors, electrical safety is a paramount concern. Other safety concerns involve employees working at heights with hand and power tools and the potential for falls. Mr. Tommasi noted that 34% of the deaths in the line clearing industry are due to electrocutions. In the logging industry, 66% of the deaths are caused by struck-by hazards. The fatality rate for arborists is 1.1 workers in 10,000. That annual fatality rate in the logging industry is 18.2 workers in 10,000. Davey Tree has a fatality rate below the national average. Also, its recordable incident rate is below the national rate in the industry. Mr. Tommasi testified that Davey Tree suffered a second fatality in 2011 when, in Alabama, a worker manning the pull line was struck by a tree during a felling operation. The employee was struck when he was standing less than two tree lengths away from the tree being felled. (Tr. 535-36, 576-80, 679-81; RX-N).

Mr. Tommasi testified that line clearance is governed by 29 C.F.R. § 1910.269, or portions of it that have been identified by OSHA as specifically applicable to the line clearance industry. Residential, commercial, and utility line clearance arborists are also governed by ANSI Z133, the industry consensus standard.[55] The regulations are designed to protect arborists working across different environments. Mr. Tommasi noted that ANAI Z133.1-2006 edition, at 8.5.12, states that "When a pull line is being used, workers involved in removing a tree or trunk shall be cleared by a minimum of one tree length." Davey Tree has supplemented that rule by stating that the clearance "should" be 1.5 tree lengths. (Tr. 569, 590-94, 667; RX-G, at p. 26). Also, at 8.5.13, the ANSI standard states that:

> Workers not directly involved in **manual land-clearing** operations shall be at least two tree lengths away from the tree or trunk being removed.

[55] Mr. Tommasi testified that ANSI Z133.1, American National Standard for Arboricultural Operations – Safety Requirements, supplements 29 C.F.R. § 1910.269. He further testified that OSHA uses ANSI Z133.1 as a reference in OSHA enforcement proceedings involving a general duty violation. (Tr. 591-92; RX-G).

EXCEPTION
This requirement does not apply in the presence of site restrictions such as waterways or cliffs. Other arborists and workers shall be beyond the tree's striking range at a distance as close to twice the tree's height, as practicable.

(Tr. 594-95; RX-G, at p. 26).

According to Mr. Tommasi, the reference to "manual land clearing operations" was put in for those times when an arborist is felling a tree and there is nobody helping him, such as when they are not concerned about the tree falling into electrical wires. In such an instance, all workers are to be away from the felled tree at twice its height. (Tr. 595-96).

Mr. Tommasi testified that OSHA recognized that the tree clearance industry was a service provider to the electric industry and uniquely qualified to work up to certain minimum approach distances with proper tools and techniques. The tree care industry was actively involved in working with OSHA to develop the portions of Part 1910.269 that applied to the line clearance industry.[56] The ANSI Z133.1 safety standard for arborcultural operations goes back to 1968. With the active participation of the ANSI Committee, OSHA used the 1982 edition of Z133.1 as a basis for its rulemaking. He further testified that the Edison Electric Institute[57] and the IBEW were both actively involved in working with the ANSI Committee. (Tr. 581-84; RX-N).

Mr. Tommasi pointed out that the logging and electrical standards were promulgated at the same time, but with different participants. The promulgation process for both began around 1987 and concluded around 1994. There was no input from any logging industry trade associations or companies in the promulgation of 29 C.F.R. § 1910.269. In Mr. Tommasi's

[56] Mr. Tommasi testified that 29 C.F.R. § 1910.269 is the electric generation transmission, distribution standard for the electric utilities across the nation. He stated that it principally applies to qualified employees working directly with electric power, as well as in part to utility line clearance tree trimming industry employees who work proximate to the electrical system. (Tr. 581-84).
[57] The Edison Electric Institute is the trade organization for the investor-owned electric utilities in the United States. (Tr. 583).

view, this underscores that the logging industry is separate and distinct from the line clearance industry. He testified that OSHA would have taken language from the logging standard over into 29 C.F.R. § 1910.269 in 2005 if OSHA intended to apply the logging standard to line clearance operations. In fact, OSHA did so, but only in regards to the chainsaw section.[58] Mr. Tommasi also testified that the line clearance tree trimming industry, IBEW, and Edison Electric Institute were not involved in the promulgation of 1910.266. (Tr. 584-89, 607-08).

Mr. Tommasi testified that Directive CPL 02-01-044 entitled "Citation Guidance Related to Tree Trimming and Tree Removal Operations" ("Directive CPL 02-01-044"), issued on June 25, 2008, essentially stated that if an employer put a chainsaw to a tree it was considered to be a logger. It was so broad-sweeping, restraining and inappropriate that the tree care industry immediately rose against it. Legal action was threatened and it was shortly withdrawn by OSHA. Directive 45 effective August 21, 2008 was intended to replace Directive CPL 02-01-044. At no point did OSHA seek the guidance of the line clearance industry before producing that document. Davey Tree was not asked to participate and the document was never opened up for notice and comment. His detailed review of the Preamble to the logging standard contained no indication that anybody from the tree care industry was involved in the rulemaking process. There was never any knowledge that, without notice, OSHA would seek to apply the logging standard to the tree care industry. (Tr. 611-14, 637-38; RX-L, RX-M, RX-N, at p.7).

Mr. Tommasi considered Directive 45 to be vague. He pointed out that nothing in the document provides guidance regarding how to apply it to the workplace. He testified that it is so subjective and interpretive that, when you attempt to apply it tree-by-tree or site-by-site, an arborist in the field or a supervisor never knows whether he is right or wrong. For example, it

[58] 29 C.F.R § 1910.269(r)(5) explicitly incorporates the standard for gasoline powered saws found at 29 C.F.R § 1910.266(e).

describes activities that line clearance is not involved with, such as large-scale tree removal and the use of heavy equipment. The document also refers to harvesting, and the line clearance industry does not harvest or gather timber. (Tr. 615, 651-52; RX-N, at p. 8).

In his view, Directive 45 creates inconsistency which he described as the "enemy of safety." Mr. Tommasi testified that training programs are less effective in the absence of a consistent set of rules to follow and understand. A consistent set of rules is essential to safety, especially when working aloft with power lines. To adhere to Directive 45, every arborist and every one of Davey Tree's 3,000 crew leaders would need to make individual determinations if the logging standards applied at each location, every day. (Tr. 614-16, 652).

Mr. Tommasi recognized that Directive 45 states that there are times when an employer's operations go beyond those of typical tree care operations and engages in a tree removal project that is sufficiently large and complex to constitute a logging operation. However, he did not agree that Davey Tree was ever engaged in an operation that would bring it under the logging standard. He did not believe that the DuBois 137 project was sufficiently large and complex to constitute a logging operation. (Tr. 659-61, 690-91, 696; GX-18-9).

Mr. Tommasi identified the accident site as a cul-de-sac, near a house on 65 Guana Court. (Tr. 633-34, JX-I, circled with "F" in blue).[59] Other houses and homes were scattered within the Treasure Lake community which he described as a developed, gated residential suburban area with a lot of amenities geared to people who like an outdoor lifestyle. The work being done was immediately roadside on a developed right-of-way corridor feeding electricity to homes in the community. The right-of-way corridor was an 86 mile long narrow ribbon of land, approximately 30 feet wide, with property adjacent to it. About 60 miles of line were within Treasure Lake. There were some trees adjacent to the right-of-way that leaned in and presented

[59] Mr. Tommasi testified that he visited the accident site on two occasions. (Tr. 627, 632).

a danger to the power lines. (Tr. 224, 635-37).

Mr. Tommasi stated that Davey Tree was not engaged in logging at the date of the accident.[60] They were not harvesting trees. They were working on a vegetation management project, pruning and selectively removing by arborist means, consistent with ANSI Z133.1 and 29 C.F.R. § 1910.269. The operation did not entail the use of any heavy equipment, such as bulldozers. Rather, trees were felled by teams consistent with utility arborist work practices. The site was not a large tract of logging land. It was in a suburban neighborhood adjacent to a road on a developed right-of-way. Also, this was not a project involving clearing acres and acres of land in a remote, rural area to build a transmission line or anything of that nature. It was a maintenance project on a narrow ribbon of land for the Penelec electric supply system. The project was "typical line clearance arborist work." (Tr. 617-18, 642, 690-91; RX-N).

Mr. Tommasi never requested an opinion letter from OSHA to clarify any aspect of Directive 45. Because they did not believe that the logging standards applied to them, Davey Tree did not seek a variance from the logging standard before the start of the DuBois 137 Circuit project. Also, he never circulated Directive 45 to lower-level managers or gave instructions that managers should contact him when they engage in a large-scale project to determine whether the logging standard applied. Although Mr. Tommasi was aware of the Penelec contract, he was not specifically aware of the DuBois 137 Circuit. Prior to the start of that project, nobody involved with it called to inquire whether the logging standard applied. (Tr. 660-61, 684, 688).

According to Mr. Tommasi, after the accident, the CSHO asked him if they had a felling plan. He took the question to mean that she was looking for a document. He told the CSHO that, although as arborists they are not required by the standard to document job briefings, they

[60] Mr. Tommasi testified that Davey Tree was not engaged in the logging business. He stated that logging is "another industry and we're not engaged in logging." (Tr. 551).

do so anyway and would seek to get her a copy. Mr. Tommasi testified that the crew had developed a felling plan before felling the tree that was consistent with the norm of line clearance tree trimming industry.[61] (Tr. 101-02, 630-31, 656).

It was Mr. Tommasi's opinion that the employees were properly spaced so the actions of any employee did not endanger any other. He explained that the distance between the tree being felled, the anchor point, and the separation of the workers was greater than one tree length. Consistent with ANSI Z133.1, they were outside of the striking range of the tree being felled.[62] The employees identified escape routes for the feller and for the man on the come-along.[63] When Mr. Sprankle became fatigued and handed off the winching of the come-along, he followed the retreat path, but was readily available to return to aid his coworker if necessary. Mr. Tommasi stressed that Mr. Sprankle was not an observer, but part of the crew. Had he retreated 20 yards further, he would not have been readily available to assist his coworkers. He stated that it would not have been feasible to have to shout for the employee to come over because, during a felling operation, you have an active tree and time is ticking away. (Tr. 629-30, 644, 650, 672-73).

Mr. Tommasi believed that the employees worked safely to bring down the tree and that both Messrs. Nearhood and Sprankle were in safe locations. Tragically, the crew did not anticipate that if the felled tree struck a branch of a nearby small tree, the felled tree would shift, hit a third birch tree and reach Mr. Sprankle who positioned himself in what he thought was a safe area. The accident was a tragedy, but not the result of violations. He testified that trees may fall in an unintended direction once every 50-100 times, but he did not consider the accident to have been foreseeable. However, he agreed that, when in a wooded area with a tree canopy

[61] Mr. Tommasi's expert report stated that "The crew members developed, communicated and implemented a plan." (RX-N, at p. 9).
[62] Mr. Tommasi testified that the "fall zone" of the oak tree being felled was 74 feet around the oak tree. (Tr. 672).
[63] Mr. Tommasi testified that Respondent's employees' use of the come-along in a straight-line directional pull was standard operating procedure within the tree care industry and consistent with ANSI Z133.1. (Tr. 620-21).

and brush on the ground it is foreseeable that, when a tree falls, it might hit another tree, either on the way down, causing misdirection, or striking another tree when it hits, causing hazards to people more than a tree length away. Mr. Tommasi testified that Davey Tree examined the circumstances surrounding the accident and did not find any violation of its safety practices or the standards that it works under, *i.e.* 29 C.F.R. § 1910.269 and ANSI Z133.1. Respondent did not issue any safe practices violation notices to any employee engaged in the felling of the tree on February 23, 2011. (Tr. 619, 643-45, 674-78).

Respondent called Paul A. Cyr as its expert witness on the logging industry. Mr. Cyr testified that he has been hired by both employers and attorneys to serve as an expert witness regarding logging-related questions. He has been qualified as an expert witness many times in different courts throughout the United States and in administrative hearings involving OSHA. (Tr. 701, 713; RX-O).

In 1980, he was hired by OSHA as a Forest Products Safety Specialist. Mr. Cyr went through a short apprenticeship period on how to do inspections with a Senior Compliance Officer. Afterwards, he spent several years focusing primarily on logging inspections, many of which involved fatalities. He was a compliance officer for nearly eleven years. (Tr. 703-04, 709).

In 1985 the OSHA Training Institute asked him to help develop a Logging Safety and Health course that would be delivered through the OSHA Training Institute. He wrote most of the syllabus, provided pictures and developed course content pursuant to the syllabus.[64] In 1986,

[64] Mr. Cyr explained that the course he started teaching in 1986 was a Sawmill Safety and Health Course that had a half day module built into it on logging safety and health. In early 1994, he was asked to put together a week-long Safety and Health Training Program on Logging Safety and Health, focusing on the new logging standards. Later that year, the one-week sawmill course expanded into a two-week course with a week on sawmill safety and health and a week focusing on logging safety and health. After OSHA issued the "Miles letter" in 1986, which allowed the logging standards to be applied to the tree clearing line maintenance industry, Mr. Cyr built a half-day module into the logging course to teach compliance officers and others the distinctions between tree care work and logging and

he began teaching the course mainly to compliance officers and continued to do so until he retired in 2002. After his retirement he continued teaching the course until 2006. To the best of his knowledge, he was the last person to teach the course. Mr. Cyr became an OSHA supervisor in 1991 and supervised a team of compliance officers who were involved in many logging inspections. He estimated that he was involved in hundreds of logging inspections. (Tr. 704-08, 756).

Mr. Cyr described logging as one of the most hazardous industries in the country. OSHA concentrated its efforts on Maine because of the high accident and fatality rates in that state. As a result, he did a lot of training and outreach as well as inspections. He became the District Office Manager when OSHA opened a new district office in Bangor, Maine. As District Office Manager he hired nine compliance officers, a secretary and began conducting inspections from just south of Bangor to the extreme northern part of Maine. After several years, they became a full scale office and he became a Supervisory Team Leader. (Tr. 707, 709, 712).

Not long after developing the OSHA logging course, Mr. Cyr's superiors were contacted by the National Office to seek his help and input in developing a more updated, modern logging standard. The then current standard applied only to the logging of pulp wood used to make paper products. If logs were being sent to a saw mill, a veneer mill or a plywood mill the standard did not apply. OSHA wanted to make the logging standard apply to all types of logging and bring the old logging standard and the old ANSI standard up to date and make it more comprehensive. (Tr. 714-15).

In 1988 OSHA announced its intent to update the rule in the Federal Register and sought comments and input from the logging industry. OSHA held public hearings around the country

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how to tell when a tree care company was actually performing logging work. The courses were attended by Federal and State compliance officers, private industry people and consultation services. Sometimes, other government agencies would send representatives. (Tr. 754-56).

to seek input from industry in order to promulgate and finalize the standard. At this time, Mr. Cyr was recognized as an expert in the logging-related industry within OSHA. He became the go-to person on logging issues. He was involved in writing parts of the standard and served on the committee that reviewed the language of the proposed standard. Due to issues with the logging industry, certain provisions were stayed for seven or eight months. During that period, Mr. Cyr worked extensively with the National Office to address those issues. In the fall of 1994, he was asked to develop a formal logging safety program tailored to the new standard. (Tr. 716-18, 733-34).

Mr. Cyr testified that he read extensive portions of the record made during the rulemaking process, including the comments that were submitted by various companies, associations and individuals. He helped with outreach, travelled around the country and had meetings with the stakeholders in the logging industry. He had personal knowledge of who was submitting comments on the proposed rule. The line clearing industry did not comment and did not participate in the rulemaking process and OSHA did not seek any input from the line clearing industry. To his knowledge, the logging standard was never intended to regulate arborists or the line clearance utility industry. This changed in 1996, when a letter was issued by John B. Miles, who was the Director of the Directorate of Compliance Programs, stating that arborists, including line clearance tree trimming, were going to be regulated under the logging standard ("Miles letter"). The Miles letter created a furor in both the line clearance tree trimming industry and the tree care industry. (Tr. 720-22, 724-25, 733-34; RX-I).

As a result, Mr. Cyr was detailed to the National Office where there was a huge meeting set up by OSHA through the National Arborist Association to bring in the stakeholders to discuss why the Miles letter should not apply the logging standards to the tree care industry. After the

meeting, he suggested that OSHA did not know enough about the tree care industry to make an intelligent decision. He recommended that they learn more about the industry. As a result, he attended training sessions, observed tree care operations, and performed statistical analysis of injuries, illnesses and fatalities in the tree care versus the logging industry. They spent weeks learning about the tree care industry and held frequent meetings with OSHA in the National Office. As a result, OSHA rescinded the Miles letter. OSHA stated that, in some instances, tree care people may operate as loggers. This was consistent with his recommendation that there may be rare instances where arborists may be engaged in logging, but for the most part, they are not loggers. Deputy Assistant Secretary for OSHA, E.B. Blanton, issued a memo saying that, if you are going to contemplate issuing logging citations to employers in the tree care industry, approval must first be obtained from the National Office. (Tr. 743-46).

Mr. Cyr testified that, in his opinion, the Treasure Lake project was not one of those "rare instances" where line clearance tree trimmers were operating as loggers.[65] After reviewing the CSHO's field notes and other pertinent material, it was Mr. Cyr's opinion that application of Directive 45 to the DuBois 137 project was inconsistent with the scope and application of the

[65] Mr. Cyr testified:

> Q. Let me stop you for a second, here. You talked about rare instances where line clearance tree trimmers were behaving as loggers. Now you've seen Government [exhibit] 17-10. You've seen the Treasure Lake community. You've heard the testimony through the course of this trial. On February 23, 2011, was that one of those rare instances where line clearance tree trimmers were behaving as loggers?
> A. It was not.
> Q. Tell me why you say that, Mr. Cyr?
> A. Because, one, they were not logging, they were engaging in line clearance tree trimming work. It is – it doesn't take – there's a thing that Bob Dylan said: It doesn't take a weatherman to know which way the wind blows. It is very easy for me and for a lot of people to distinguish between what is a line clearance tree trimming operation and what's a logging operation. These are simply, you should go on-site, take a look at what the activities are, see what they're doing, see what kind of machinery is there, see what they're doing with the trees or the wood that's being harvested, if it's being harvested or if it's being cut, and it's very easy to make a determination as to whether something is logging or not. In this case, there was a paved road going up and down the area of the --- where the incident occurred. There was only very few trees. I walked up and down the road, 1,000 feet each way. There was a power line there. It was obvious that they were simply trimming trees and removing danger trees along the power line. They weren't going deep into the woods to harvest trees. It was just so – it was obvious and plan as the nose on my face that on that day, nobody at that site who worked for Davey Tree was engaged in logging operations.

(Tr. 746-47).

logging standard. In his view, this was not, in any way, shape, or form, a logging operation. To the contrary, in every way, shape, and form, it was a line clearance /tree trimming operation. The employees were cutting a relatively small number of trees and very few of those were cut at the stump. An equal number were pieced down from a bucket truck or by climbing the tree. Loggers do not do any of that work. There was no heavy equipment. There were no unusually hazardous conditions. There were no feller bunchers, tree sheers, or any of the typical logging machinery at the work site. They were trimming trees without removing them. They were caring for those trees. They were using a come-along which he testified that he had never seen used before in the logging industry. Having reviewed the materials prepared by CSHO Keffer, he noted that both the SIC and NAICS codes for the tree care industry were used to describe the work involved at the DuBois 137 project. [66] (Tr. 735-36, 746, 759-67; RX-O, p. 14, RX-Z).

He pointed out other factors that indicated to him that this was not a logging operation. There were few trees. Over a 2,000 foot stretch, he found about a half dozen stumps. The crew was not going deep into the woods to harvest trees. To access the community, they went through a security gate to a developed residential area. There were no log yards[67] that would typically be associated with logging activities. It was a beautiful rural, pastoral and gated community that was not at all typical of an area being logged.[68] His interviews of employees, their depositions

[66] SIC stands for "Standard Industrial Classification Code." NAICS stands for "North American Industrial Classification System." (Tr. 758-59).

[67] A logging yard is a central collection area for the logs. It is often a clear-cut area where logs can be piled up and loaded into trucks. The logs may then be either further processed or bucked into shorter logs, or they may be loaded, tree-length, onto a truck and then trucked to market. (Tr. 705-06, 738).

[68] Mr. Cyr testified:

> Q. Did you consider this to be a rural, remote type of area typically associated with a logging operation?
> A. I did not.
> Q. Tell me why you say that, Mr. Cyr.
> A. Well, because of the paved roads. I mean, we went through a gate that was intended to at least provide security access to a developed – a lot – developed residential area. I did not see any log yards, I did not see any harvesting equipment that would typically be

and the testimony produced nothing that would lead him to believe that they were engaged in anything different than typical line clearance work. (Tr. 746-49).

In his view, to distinguish between line clearance tree trimming and logging, one simply determines what is being done with the trees or wood being harvested. In order to be involved in logging operations, both felling and moving trees from logs to the point of delivery must be present. He pointed out that moving trees is an important concept in logging because you have to move the trees to market in order to make logging economically viable. If you simply felled the trees and left them on the ground, you would quickly go out of business. Leaving wood or abandoning wood, as Davey Tree did on February 23, 2011, does not create a forest product as encompassed by the scope and application of 29 C.F.R. § 1910.266(b). Logging is conducted on a very large strip of land, several miles long with a logging road built along that length and 1,200-1,500 feet deep. This is necessary to make it economically feasible to harvest trees and move them out. If they want to log beyond 1,500 feet, they will build another road. That large area is then divided into work areas a couple thousand feet-wide and a crew is assigned to each of those work areas.[69] Mr. Cyr testified that there are two typical types of logging with chainsaws and skidders. Conventional, or manual logging, is the traditional way of doing logging. The other type of logging, which has become more prevalent today, is mechanical harvesting. Mechanical logging uses large machines instead of people with chainsaws to fell, limb, buck, and yard the trees. It may also involve a processor, which is a machine that goes into the woods, snaps the tree off, tilts it horizontally, shears all the branches and top off, and then

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> associated with logging activities. There was a power line that ran up along the Bay Road where we were, but nowhere did I see any indication, anything other than a pastoral and maybe rural, in a way, but a rural, pastoral, gated community that – ***it was a beautiful area and not at all typical of an area that's being logged***.

(*Id.*, at 748-49) (emphasis added).

[69] Both Messrs. Tommasi and Cyr testified that logging generally involves removing trees from large swaths of land rather than a narrow ribbon of land as involved here. (Tr. 636, 738).

places the tree either in a pile for a grapple skidder to get, or a big tractor called a forwarder moves the tree to the log yard. (Tr. 254, 706, 709-11, 726-27, 731, 737-39; RX-O).

In conventional logging, a logger fells the trees, limbs the trees in the woods, and leaves the limbs there. A skidder will come in and haul the logs out to a central collection area. A number of activities take place in the yard. If the logs are not limbed, they are hauled, tree-length, with the limbs on them to the yard and piled up. A large machine called a delimber, picks up the log, snaps off the limbs, cuts off the top and puts the log into a pile. It may also buck the logs into smaller pieces by a large saw called a slasher. A large semi-tractor-trailer truck will back into the yard. A grappling device, called a log loader, will pick up the several logs at a time and load them on the truck. The logs are then strapped onto the truck and taken to market. (Tr. 705-06, 710-11).

Mr. Cyr testified that, since 1980, loggers no longer climb trees. Today, they have large machines that go in on the logging roads. He has never seen a logger climb a tree to take it down. He testified that bucket trucks are not used in the logging industry. Logging also does not involve tree trimming or electrical line service. (Tr. 740-42).

Mr. Cyr began to become familiar with the arborist industry in 1980. As he became more familiar with that industry he realized that there were huge differences between the logging and line clearance industries. Although there were some similarities in that they both use chainsaws and cut trees, he recognized huge contrasts. Mr. Cyr never saw a come-along used in harvesting trees. Loggers never leave felled trees on the ground. Line clearers climb trees, work from bucket trucks and fell danger trees. Danger trees are essentially unmarketable because they are dead, broken, rotted and have little or no commercial value. (Tr. 735, 742-43; RX-Z).

Mr. Cyr discussed the purpose of ANSI Z133.1 which requires that workers not directly

involved in manual land clearing operations be at least two tree lengths away from the tree being removed.[70] He testified that he worked with the TCIA and others to have that provision put into ANSI Z133.1. Mr. Cyr testified that ANSI Z133.1 adequately protects workers from potential accidents like those encountered by Mr. Sprankle. It addresses in a far more detailed manner than 29 C.F.R. § 1910.269 or even 29 C.F.R. § 1910.333, how to deal with, avoid, minimize or control those hazards encountered in the line clearance tree trimming industry. For example, the logging standards do not have any reference to rigging, ropes, use of tools, use of herbicides, and proximity to power lines within a 10-foot radius. (Tr. 771-74; RX-G, at p. 26, ¶8.5.13).

He further testified that, in manual land clearing operations, there are fairly large tracts of land that are manually cleared. There are no power lines to be dealt with, just an open area. Manual tree felling techniques use a chainsaw. There is no need for a team. ANSI defines manual land clearing as "The removal of trees, shrubs, and vines using chainsaws or other cutting tools where no structures or objects need to be avoided and pull lines are not used to pull or drop a tree and/or trunk to the ground." (Tr. 769-70).

He emphasized that there was no manual land clearing taking place at the DuBois 137 project. First, the employees were in very close proximity to power lines which, by itself is sufficient to remove the work from the definition of manual land clearing. Additionally, at Treasure Lake, they were not engaged in the wholesale destruction or removal of trees that did not have any obstructions in the way. They were simply removing danger trees from the power lines, trimming other trees, applying herbicides and doing brush and vegetation management. Using manual methods, a typical logger would be expected to cut between 50-100 or 120 trees a day. Mechanically, a logger could fell thousands of trees daily. (Tr. 772-73).

[70] Mr. Cyr testified that he served as OSHA's representative to the ANSI Z133.1 committee for several years. (Tr. 767-68).

According to Mr. Cyr, 29 C.F. R. § 1910.266(d)(6)(i) was promulgated because of concern over employees being struck by trees and injuries occurring at the log yards. Because activities overlap, employee were getting killed or injured because one employee did not know what other employees were doing. To eliminate such hazards, one employee could stop his work until a nearby employee is finished with his work or you could space the employees to prevent the overlap. An exception was built into the rule where a team of loggers was needed to fell a particular tree.[71] Normally, loggers operate individually while tree trimmers involve a team working together. Here, a team was involved in felling the trees. Therefore, in Mr. Cyr's opinion, even if the standard applied to Davey Tree, it was not violated. Mr. Cyr testified that loggers are not prohibited from using a come-along. He also testified that it was not necessarily dangerous for a worker to man a come-along when it is 77 feet away from a 74-foot tall tree. He explained that if you have escape paths and a competent feller, the hazard would be no greater than that normally encountered when cutting trees. (Tr. 776-87, 795, 798; RX-O, at p. 14).

Mr. Cyr summed up his expert opinion:

1. Davey Tree's operations on February 23, 2011, consisted of line clearance tree trimming operations, not logging operations.

2. The regulations at 29 C.F.R. § 1910.269(r) and ANSI Z133.1 apply to the operation, not 29 C.F.R.§ 1910.266.

3. Davey Tree was in compliance with 29 C.F.R. § 1910.269(r) and ANSI Z133.1.

4. The standard cited by OSHA at 29 C.F.R. § 1910.266 does not apply to Davey Tree's

[71] 29 C.F.R. § 1910.266(h) Tree harvesting – (1) General requirements … (iv) states:

> No employee shall approach a feller closer than two tree lengths of trees being felled until the feller has acknowledged that it is safe to do so, unless the employer demonstrates that a team of employees is necessary to manually fell a particular tree.

Davey Tree was not cited for a violation of 29 C.F.R. § 1910.266(h)(1)(iv).

line clearance trimming operations generally, and did not apply to Davey Tree's line clearance tree trimming operations on February 23, 2011.

5. In attempting to apply 29 C.F.R. § 1910.266, OSHA is misinterpreting its own Compliance Directive, the scope and application of its logging standard, as well as its own definition of the term "logging."

6. Even if deemed applicable, Davey Tree was in compliance with the cited standard at the time of the accident and did not violate the standard.

7. There is no factual evidence in the portion of the OSHA case file that he reviewed that the alleged violation caused the accident. (Tr. 783-90; RX-0).

Issues and Positions of the Parties

The threshold issue addressed by the parties is whether the logging standard at 29 C.F. R. § 1910.266(d)(6)(i) can properly be applied to arborists in the power line clearance industry. Respondent argues that the activities of arborists are not "logging operations" as set forth in 29 C.F.R. § 1910.266(c) which defines "logging operations" as:

> Operations associated with felling *and* moving trees and logs from the stump to the point of delivery, such as, but not limited to, marking danger trees and trees/logs to be cut to length, felling, limbing, bucking, debarking, chipping, yarding, loading, unloading, storing and transporting machines, equipment and personnel to, from and between logging sites.

(emphasis added)

Respondent asserts that deference is an issue only when a regulation is vague. Davey Tree contends that, in plain language the word "and" is to be read as a conjunctive, not a disjunctive. Therefore, the definition of "logging operations" unambiguously requires that both the felling and moving of trees takes place. Davey Tree asserts that it was engaged only in the felling of trees, which were allowed to lie where they fell.

The Secretary argues that the word "and" can be read either as a conjunctive or as a disjunctive. This injects an ambiguity into the standard that makes it subject to interpretation. The Secretary reads the "and" in the definition as a disjunctive and would apply the logging standards anytime an employer engages in either felling trees from the stump or moving trees, regardless of the final destination of those trees. The Secretary asserts that her interpretation is reasonable and entitled to deference.

Even if the definition of "logging operations" is ambiguous, the Davey Tree asserts that the Secretary is not entitled to deference because her interpretation is not reasonable. Also, the logging standards were never intended to apply to arborists. By applying them to arborists, the Secretary's interpretation is invalid under the Administrative Procedure Act ("APA") because it was adopted without notice or comment.

Assuming that the Commission defers to the Secretary's definition, the next issue is whether the activities of Davey Tree on the DuBois 137 project were sufficiently extensive to qualify as a "logging operation." Respondent argues that the factors set forth in Directive 45, determine when the logging standards will apply. OSHA's CSHO Keffer, testified that she relied solely on Directive 45 (*i.e.*, not the logging standard's plain language) in issuing the August 19, 2011 citation to Davey Tree. Respondent argues that her testimony demonstrates that Directive 45 was an impermissible amendment to the logging standard without the required notice and comment. Respondent further argues that, even if Directive 45 is determined to be a valid exercise of the Secretary's rulemaking power, to not allow the Court to analyze Directive 45 in relation to Davey Tree's February 23, 2011 line-clearance activities would deprive Davey Tree of any review. None of the case law the Secretary cites supports her position that the Court cannot and should not analyze a compliance directive in determining whether a standard applies.

In any event, Respondent asserts that the factors listed in Directive 45 demonstrate that the logging standards did not apply to the DuBois 137 project. Davey Tree points out that Directive 45 unequivocally states that "the removal of a tree, or even several trees, from a residential lot, does not constitute 'logging' in ordinary language or under the standard." This is precisely what Davey Tree was doing on February 23, 2011. Davey Tree was working along the established electric supply line right of way corridor in a private, residential community trimming trees, cutting brush, and selectively removing danger trees that interfered or had the potential to interfere with the energized power lines. Respondent also asserts that the Secretary did not establish that a substantial number of trees were removed, that the DuBois 137 Project was in a rural or remote location, that heavy machinery or mechanical equipment was used, or that the size of the lot where the trees was removed was large. Finally, Respondent points out that Directive 45 clearly states that a citation under the logging standard cannot be issued to an employer whose primary business is performing tree care operations without notice and approval from the National Office. Here, the CSHO testified that she was not aware of whether the National Office granted approval of the August 19, 2011 citation. The Secretary failed to put forth any evidence that the National Office did, in fact, approve the citation as required by the August 2008 Directive. (Tr. 170-71, 178, 204-07, 223-25, 466, 506-09, 513, 634-35, 693, 748-49; RX-M, at pp. iii, 3-4, 8).

The Secretary contends that the definition of "logging operations" applies to any employer who is cutting trees from the stump. It is her position that how she decides to enforce the logging standard is a matter of prosecutorial discretion.[72] Directive 45 is an exercise of that

[72] The Secretary asserts that Directive 45 is a general statement of policy, which announces to the regulated community how the agency will exercise its prosecutorial discretion when enforcing the logging standard. *See Syncor Int'l Corp. v. Shalala*, 127 F.3d 90, 93-94 (D.C. Cir. 1997) (explaining differences between interpretive rules and general statements of policy). (Sec'y Reply Br., at p. 13).

discretion. It contains instructions to OSHA field personnel on how to enforce the logging standards. The Secretary asserts that Directive 45 sets out certain factors that are neither determinative nor exclusive. They are an exercise of her prosecutorial discretion and are only guides to the application of the logging standard. The thrust of those factors is that the Secretary will exercise her discretion to apply the logging standard to any employer involved in the felling of a substantial number of trees, in remote or rural locations, usually while using heavy equipment, regardless of the end use of the felled trees. The Secretary also asserts that Directive 45 confers no substantive rights on employers.

Should the Commission hold that the standard applies, the parties dispute whether the facts establish the violation as alleged. In addition, Davey Tree raises several affirmative defenses. Respondent asserts that, as applied, the standard was unconstitutionally vague; that compliance with the standard would create a greater hazard; and that conflicts between the logging and line clearance standards rendered compliance impossible.

. ***Discussion and Analysis***

1. Deference

A. The Secretary's interpretation that the logging standards can apply where there is tree felling, but no moving of trees, is entitled to deference.

The seminal issue is whether the definition of "logging operations" as contained in 29 C.F.R. § 1910.266(c) requires both the felling *and* moving of trees, or whether the definition applies whenever operations include the felling *or* moving of trees.[73] It is undisputed that Davey Tree was only felling trees. Therefore, if the "and" is read as requiring both activities, the standard is inapplicable and the citation must be vacated.

In *Martin v. OSHRC ("CF&I")*, 499 U.S. 144, 157-158 (1991) ("*CF&I*"), the Supreme

[73] The standard defines the term "felling" to mean "[t]o cut down trees." *See* 29 C.F.R. § 1910.266(c).

Court held that the Commission must defer to the Secretary's interpretation of an ambiguous regulation only if it is reasonable, taking into account "whether the Secretary has consistently applied the interpretation embodied in the citation," "the adequacy of notice to regulated parties," and "the quality of the Secretary's elaboration of pertinent policy considerations." *See also Skidmore v. Swift & Co.*, 323 U.S. 134, 139 (1944); *Frank Diehl Farms v. Sec'y of Labor*, 696 F.2d 1325, 1330 (11th Cir. 1983). "[I]t is axiomatic that the Secretary's interpretation need not be the best or most natural one by grammatical or other standards. Rather, the Secretary's view need be only reasonable to warrant deference." *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 702 (1991) (internal citations omitted).

Deference is appropriate only when the language under review is ambiguous. *See Howmet Corp. v. EPA*, 614 F.3d 544, 549 (D.C. Cir. 2010). An ambiguity exists if the regulatory text may be plausibly construed in more than one way, "and the text alone does not permit a more definite reading." *Chase Bank USA, N.A. v. McCoy*, ___ U.S. ___, 131 S.Ct. 871, 880 (2011); *see also McCreary v. Offner*, 172 F.3d 76, 82 (D.C. Cir. 1999) (ambiguity exists where language is "reasonably susceptible to more than one meaning"). That is the case here.

The definition of "logging operations" states:

> "Logging operations." Operations associated with felling *and* moving trees and logs from the stump to the point of delivery, such as, but not limited to, marking danger trees and trees/logs to be cut to length, felling, limbing, bucking, debarking, chipping, yarding, loading, unloading, storing, and transporting machines, equipment and personnel to, from and between logging sites.
>
> 29 C.F.R. § 1910.266(c) (emphasis added).

According to Davey Tree, the emphasized "and" between "felling" and "moving" must be understood in a strict conjunctive sense, so that both felling and moving activities must take place for a logging operation to exist. Although Davey Tree's reading of the definition is

plausible, the Secretary's contrary interpretation – that "and" as used in the definition is to be given a cumulative or disjunctive meaning – is also plausible.[74] Because the definition may be plausibly read in more than one way, the Court finds its language is ambiguous.

The courts have long recognized that "the word 'and' is not a word with a single meaning, for chameleon like, it takes its color from its surroundings." *Peacock v. Lubbock Compress Co.*, 252 F.2d 892, 893 (5th Cir. 1958). Thus, "and" can have either a conjunctive or disjunctive meaning depending on the context in which it is used. *See Reese Bros., Inc. v. United Sates*, 447 F.3d 229, 235 (3d Cir. 2006). To understand how "and" is used in the definition of "logging operations," the Commission must consider the entire definition, not just the specific phrase at issue. *See Phoenix Roofing, Inc.*, 17 BNA OSHC 1076, 1077 (No. 90-2148, 1995) ("In interpreting a disputed term in a standard, we look to the provisions of the whole law, and to its object and policy.") (internal quotation marks and citation omitted).

Despite Respondent's protestations that the word "and" must unambiguously be read as a conjunctive, the Review Commission has struggled with the concept and has recognized that, under certain circumstances, "and' can mean "or." *See, e.g. The L.E. Meyers Company, High Voltage Systems Division*, 12 BNA OSHC 1609, 1611 (No. 82-1137, 1986), *rev'd on other grounds*, 818 F.2d 1270 (6th Cir. 1987); *Schiavone Construction Co.*, 5 BNA OSHC 1385 (No. 12767, 1977); *Sweetman Constr. Co.*, 3 BNA OSHC 2056 (No. 3750, 1976); *Isseks Brothers, Inc.*, 3 BNA OSHC 1964 (No. 6415, 1976); *Island Steel & Welding, Ltd.*, 3 BNA OSHC 1101 (No. 2931, 1975); *Eichleay Corp.*, 2 BNA OSHC 1635 (No. 2610, 1975); *Dic-Underhill*, 2 BNA OSHC 1651 (No. 2232, 1975); *Carpenter Rigging & Contracting Corp.*, 2 BNA OSHC 1544, 1545-47 (No. 1399, 1975); *Cf. B & B Insulation Inc.*, 5 BNA OSHC 1265 (No. 9985, 1977),

[74] The Secretary argues that the "and" is disjunctive and any felling of a tree constitutes logging operations, including instances where the trees are allowed to lie where they fall.

rev'd, 583 F.2d 1364 (5th Cir. 1978).

For example, the standard at 29 C.F.R. § 1926.28(a)[75] originally used the term "and" but the Secretary applied that word in the disjunctive. To clarify her intent, the Secretary, without notice and comment rulemaking, amended the standard to replace "and'' with "or." A long line of cases involved whether changing "and" to "or" constituted a substantive change in the standard requiring notice and comment rulemaking. *See The L.E. Meyers Company, High Voltage Systems Division*, 12 BNA OSHC at 1612 (and cases cited therein). This further required the Commission to consider whether "and" as written in the original standard was a conjunctive or a disjunctive. Ultimately, the Commission determined that "and" must be read as a conjunctive. *Id.* Although, on appeal to the Sixth Circuit, that case was reversed on other grounds, the court accepted the Commission's determination that the standard was improperly amended from "and" to "or", and that the original standard which defined "and" as a conjunctive remained in effect.

The 1989 Notice of Proposed Rulemaking for the logging standard stated at the very outset: "The Occupational Safety and Health Administration (OSHA) proposes to issue employee safety requirements for *all* logging operations, *regardless of the end use of the forest products* (saw logs, veneer bolts, pulpwood, chips, etc.)." Logging Operations, 54 Fed. Reg. 18798 (proposed May 2, 1989) (to be codified at 29 C.F.R. § 1910.266) (emphasis added). It could be argued that the language "regardless of the end use" implicitly assumes some end use for the wood, not just allowing the wood to rot in the woods. However, the evidence establishes that there are instances where otherwise undeniable "logging operations" do not involve moving

[75] The original standard stated:

> The employer is responsible for requiring the wearing of appropriate personal protective equipment in all operations where there is an exposure to hazardous conditions *and* where this part indicates the need for using such equipment to reduce the hazards to the employees (emphasis added).

trees. For example, the Secretary's expert witness, Mr. St. Peter, testified that trees felled during pre-commercial thinning projects to promote the healthy growth of trees are often left on the ground. Mr. St. Peter also described other instances where trees are felled and left on the ground, as in the case of clearing a pipeline right-of-way, or where trees are left near streams to "improve fish habitat." (Tr. 498-99).

Similarly, Davey Tree's interpretation would exclude from coverage the movement of trees and logs when such operations are unaccompanied by felling activities. As Mr. St. Peter testified, in logging operations, the movement of trees sometimes takes place as long as a month after they are felled by workers who were not involved in the felling process. (Tr. 493). *See Or. Occupational Safety & Health Div. v. Mad Creek Logging*, 861 P.2d 365, 367-68 (Ct. App. Ore. 1994) (holding that company hired to move and load felled trees was governed by state-level logging safety standards, even though no timber cutting was taking place at worksite). The Secretary's interpretation of "logging operations" would cover these situations and, in so doing, would better effectuate the Act's broad remedial purposes. To refuse to defer to the Secretary's interpretation of "and" as a disjunctive would prohibit application of the logging standards to those situations which would otherwise qualify as logging operations.

Also, it is clear that elsewhere in the definition, "and" is used in the disjunctive. Again, "logging operations" is defined as "operations associated with felling and moving trees *and* logs from the stump to the point of delivery."[76] (emphasis added). There is no dispute that the definition applies to operations including trees or logs, and does not require that both trees and logs be felled or moved. The definition also covers "marking danger trees *and* trees/logs to be cut to length[.]" 29 C.F.R. § 1910.266(c) (emphasis added). The marking of danger trees,

[76] *See Huffington v. T.C. Grp., Inc.*, 637 F.3d 18, 22 (1st Cir. 2011) (noting that term "associated with" has broad meaning).

standing alone, would clearly be included within the definition, even if unaccompanied by the "marking of trees/logs to be cut to length." Finally, the definition includes "transporting machines, equipment *and* personnel to, from *and* between logging sites." 29 C.F.R. § 1910.266(c) (emphasis added). Obviously, the transport of machines and personnel to a logging site would fall within the definition, even if equipment were not also moved there and even if it were move "to", but not "between," a logging site. A standard principle of statutory construction provides that "identical words and phrases within the same statute should normally be given the same meaning." *Hall v. United States,* 132 S.Ct. 1882, 1891 (2012); *Powerex Corp. v. Reliant Energy Servs., Inc.,* 551 U.S. 224, 232 (2007).

In its brief, Davey Tree gives examples from Directive 45 that, Davey Tree asserts, demonstrates that the Secretary did not consider that the moving of a tree necessarily constitutes logging operations:

- "OSHA's *Logging operations* standard covers *some, but not all,* tree removal operations." (RX-M, at p. iii) (emphasis added).
- "This instruction is a Federal Program Change that provides guidance on criteria that will assist in determining when a tree removal activity is the type of operation covered by the Logging operations standard . . ." (*Id.,* at p. 2.)
- "The activities of employers who are performing tree care operations will not be considered 'logging' for two reasons: first, because these operations mostly involve tree care or trimming, not removal; and second, because tree removal in a tree care operation occurs only incidentally or on a small scale." (*Id.,* at p. 4.)
- "[N]ot every removal of a tree is a logging operation subject to the standard." (*Id.,* at p. 4.)
- "[T]he removal of several trees from a residence . . . generally would not be considered a logging operation." (*Id.,* at p. 5.)
- "[T]he removal of one or several trees from a lot typically would not be considered a logging operation." (*Id.,* at p. 6.)

- "[A] simple tree removal using a chain saw to cut down a tree, and a chipper to dispose of the branches and trunk pieces would likely not fall under the *Logging operations* standard." (*Id.*, at p. 6.)

(Davey Tree Br., at pp. 15-17)(emphasis in original).

Respondent's argument is flawed. The examples it gives do not use the term "move" which is used in the definition of "logging operations." Rather, the term used in Directive 45 is "removal." Removal is an inclusive term that is aptly applied to both felling and moving. A tree is removed from a lot when it is both felled and moved off. Either operation, by itself, constitutes but a part of the tree removal process.

Finally, the Secretary's interpretation is consistent with a formal pronouncement that she issued on this topic in 2006. In that year, the Secretary filed a brief in *Pettey Oil Field Servs., Inc.*, No. 05-1039, 2006 WL 2050961, at **1, 4 (O.S.H.R.C.A.L.J. June 22, 2006), in which she stated: "Section 1910.266(b)(1) establishes the scope and application of the logging regulations. *The end use of the wood, whether it be used to make paper, or is left in the woods to decompose after felling, is not relevant to whether an activity is considered logging.*" (emphasis added).[77] That the Secretary's first announced her interpretation in a brief does not make it unworthy of deference. *Auer v. Robbins*, 519 U.S. 452, 462 (1997). In *Pettey Oil Field Services*, the Secretary issued a citation under 29 C.F.R. § 1910.266 to an employer that was in the business of installing gas lines. At the time of the inspection, company employees were pushing down trees with heavy machinery to clear an area for the installation of gas lines. They were not

[77] Exhibit A, attached to the Secretary's brief, is a legal brief entitled "The Secretary of Labor's Response to Pettey Oil Field Services' Motion for Summary Judgment and Secretary's Brief in Support of Secretary's Motion for Summary Judgment." The Secretary filed this brief in the *Pettey Oil Field Services* case in March 2006. The Commission may take judicial notice of the Secretary's brief. *See* Fed. R. Evid. 201; *Kramer v. Time Warner Inc.*, 937 F.2d 767, 774 (2d Cir. 1991) ("courts routinely take judicial notice of documents filed in other courts, again not for the truth of the matters asserted in the other litigation, but rather to establish the fact of such litigation and related filings"); *Keating Bldg. Corp.*, No. 04-0774, 2006 WL 508323, at *1 n.1 (O.S.H.R.C.A.L.J. February 2, 2006) (Rooney, J.) (taking judicial notice of documents filed in different Commission proceeding). The brief is offered not to prove the truth of the matters asserted therein, but rather to show that the Secretary's interpretation is constant.

moving the trees from the site, but rather were pushing them to the side and cutting them into pieces so they could decompose naturally. *See Pettey Oil Field Servs., Inc.*, 2006 WL 2050961, at **1, 4. *Pettey Oil Field Services* establishes that, since at least 2006, the Secretary has formally interpreted "logging operations" under 29 C.F.R. § 1910.266 to include felling operations in which the wood is left onsite to decompose. There is no evidence that the Secretary has ever departed from that interpretation in any proceeding before the Commission. Her consistent interpretation of "logging operations" as pronounced through the formal means of an administrative adjudication suggests that it is entitled to deference. *See CF& I*, 499 U.S. at 156-57.[78]

Accordingly, the Court finds the Secretary's interpretation to be reasonable and concludes that the logging standards can apply where there is felling but no moving of trees.[79]

B. The Secretary's interpretation that the logging standards are applicable to arborists in the line clearing industry whenever they are involved in removing trees from the stump is not entitled to deference.

[78] *See CF&I*, 499 U.S. at 156-57, where the Supreme Court stated:

> The Secretary's interpretation of OSH Act regulations in an administrative adjudication . . . *is* agency action, not a *post hoc* rationalization of it. Moreover, when embodied in a citation, the Secretary's interpretation assumes a form expressly provided for by Congress. See 29 U.S.C. § 658. Under these circumstances, the Secretary's litigating position before the Commission is as much an exercise of delegated lawmaking powers as is the Secretary's promulgation of a workplace health and safety standard. (emphasis in original).

But see also:

> [T]he decision to use a citation as the initial means for announcing a particular interpretation may bear on the adequacy of notice to regulated parties, . . . on the quality of the Secretary's elaboration of pertinent policy considerations, . . . and on other factors relevant to the reasonableness of the Secretary's exercise of delegated lawmaking powers.

Id. at 158.

[79] *See* Logging Operations, 59 Fed. Reg. 51672, **51697-98 (Oct. 12, 1994) (to be codified at 29 C.F.R. §§ 1910 and 1926) ("The record clearly shows that felling activities are the most hazardous activities of the logging operation. According to the WIR [Work Injury Report] survey, more than one-half of all reported injuries involved various felling activities (citation omitted). OSHA believes that if the standard did not include hazards associated with felling the trees, that the majority of employees in the logging industry would still be exposed to significant risk of injury and death. Therefore, in the final OSHA has retained coverage of tree felling operations."). (RX-D).

The Secretary would have that end the inquiry. In her view, once the "and" is read in the conjunctive, the definition unambiguously applies to any operation where trees are felled from the stump. She argues that any decision to enforce the logging standards only on activities where a substantial number of trees are felled is strictly a matter of prosecutorial discretion. In her view, Directive 45 is merely an exercise of that discretion, conferring no substantive rights on employers. "Prosecutorial discretion" cannot "be treated as a magical incantation which automatically provides a shield for arbitrariness." *Chaney v. Heckler*, 718 F.2d 1174, 1187 (D.C. Cir.1983), *Rev'd on other grounds*, 470 U.S. 821 (1985), c*iting Med. Comm. for Human Rights v. SEC*, 432 F.2d 659, 673 (D.C. Cir. 1970), *vacated as moot*, 404 U.S. 403 (1972). The Secretary cannot hide behind "prosecutorial discretion" to foreclose examination of whether her interpretation of the standard is entitled to deference.

An ambiguity exists if the regulatory text may be plausibly construed in more than one way, "and the text alone does not permit a more definite reading." *Chase Bank USA, N.A. v. McCoy*, 131 S.Ct. at 880; *see also McCreary v. Offner*, 172 F.3d at 82 (ambiguity exists where language is "reasonably susceptible to more than one meaning"). Contrary to the Secretary's assertion, the Court finds the definition of "logging operations" to be ambiguous in regards to the scope of the operation to which it would apply. The Secretary's decision to apply the logging standards to arborists is based on her interpretation of the logging standard. As discussed, *infra*, the Secretary's inconsistent and conflicting interpretations of the logging standard demonstrate that the definition of "logging operations" is ambiguous. So viewed, the issue is not whether she properly exercised her prosecutorial discretion, but whether her interpretation of the logging standard is entitled to deference.

As noted in *CF&I*, the Supreme Court held that a determination that the Secretary's

interpretation of an ambiguous regulation is reasonable and entitled to deference must take into account "whether the Secretary has consistently applied the interpretation embodied in the citation," "the adequacy of notice to regulated parties," and "the quality of the Secretary's elaboration of pertinent policy considerations." *CF&I*, 499 U.S. at 157-58. That history demonstrates that the path the Secretary traveled here in arriving at her current interpretation is a twisted and winding road that is anything but a model of consistency.

The Secretary's first attempt to define the logging standards in a manner that would apply them to line clearers appeared in a March 12, 1996 Memorandum, entitled Scope of Logging Standard – 1910.266, from the Directorate of Compliance Programs which responded to a question regarding the scope of the logging standards:

> Question 2. A power company is cutting trees to make way for the installation of power poles. The company burns the trees after they are cut. Is this operation covered by the Logging Standard? If not, what standard applies?
>
> Answer: The above operation is not covered by the Logging Standard. The Electric power generation, transmission, and distribution standard, 29 CFR 1910.269(r), Line clearance tree trimming operations apply.

(*See* RX-H.)

On March 4, 1998, the Directorate of Compliance Programs sent a letter to the Deputy Executive Director of the National Arborist Association, taking a contrary position and stating that the logging standard applied to tree care operations. (RX-I). According to the Miles letter, "OSHA believes that [the] definition is broad enough to include commercial tree cutting and trimming operations which OSHA did not expressly exempt from coverage of the Logging Operations Standard." (RX-I, at p. 2).

Three months later, OSHA withdrew the "Miles letter." (*See* RX-J). On July 1, 1998, the Directorate of Enforcement Programs issued a memorandum to Regional Administrators and State Designees stating unequivocally that "[u]ntil …discussions have produced further

resolution of the compliance issues affecting arborists, citations for violations of 1910.266 shall *not* be issued to employers in SIC 0783 [*i.e.*, tree care employers] who are not engaged in logging operations." (RX-K) (emphasis added).[80]

In March 2001, without notice or explanation, OSHA edited its March 12, 1996 memorandum, striking out the answer cited above and stating that the information "no longer reflects current OSHA policy." (RX-H.) In June 2008, OSHA issued Directive CPL 02-01-044. (RX-L). Directive CPL 02-01-0044 took a completely different position from what had been communicated in the past, essentially stating that the removal of any tree at the stump constituted a "logging operation." (*Id.*) Just two months later, OSHA again changed its mind. It cancelled Directive CPL 02-01-044 and issued Directive 45, providing that some, but not all, tree removals are subject to the logging standard. (Exhibit RX-M). The Secretary's inconsistency in determining when a "logging operation" is in progress is demonstrated by comparing the various "examples" provided by Directive CPL 02-01-044 and Directive 45.

In Directive CPL 02-01-044 the Secretary states:

> Example #3-Removing a Single Tree at a Residential Worksite
> A company is removing a single tree in a residential neighborhood. What standards apply in this scenario?
> Determining what standards apply depend on the method the employer uses to remove the tree, not the location of the site. If the employer is cutting down the whole tree all at once at the stump, §1910.266 (plus applicable Industry standards) would apply…..

Similarly:

> Example #5-Mixed Tree Removal Methods-Multiple Trees
> A homeowner hires an employer to remove three trees on his property. The employer is able to cut down one tree at the stump, but decides that the two other trees must be removed solely by piecing. What standards would apply in this

[80] It should be noted that the Secretary is not suggesting that this is an exercise of prosecutorial discretion, but rather that she will not enforce the logging standards to employers "who are not engaged in logging operations." This quote suggests that the Secretary believes that she has the authority to cite an employer for a violation of 29 C.F.R. § 1910.266 even if it is not engaged in logging operations.

> scenario?
> If the employer uses multiple methods to remove trees (cutting at the stump and piecing out) at one worksite, then the *Logging operations* standard as well as other applicable General Industry standards would apply to all tree removal operations at the worksite and to all associated activities there even if some trees are removed solely by piecing out. Application of the *Logging operations* standard to the entire worksite will ensure uniform protection for employees.

However, in Directive 45 the Secretary makes an almost 180 degree turn:

> Example 5: Limited Residential Removal. A homeowner hires a tree care company to remove two diseased trees from a residential lot in a suburban area. The size of the lot allows one tree to be felled at its base but the other tree must be removed in sections. This tree removal operation would not fall under the *Logging operations* standard since the number of trees is small, the type of equipment needed is limited, and the location of the project is not remote.

Moreover, at p.4, of Directive 45, the Secretary states:

> "For example, the removal of a tree, or even several trees from a residential lot, does not constitute "logging" in ordinary language or under the standard."

By her own words, in Directive 45 the Secretary is not relying on "prosecutorial discretion" to cite an operation as logging only when a substantial number of trees are involved. Rather, she is interpreting the standard using its "ordinary language". However, in her brief, she argues that according to the "plain language" of the definition of "logging operations" any activity involving the cutting of trees from the stump with a chainsaw in wooded or rural locations constitutes logging. (Sec'y Reply Br., at pp. 2-3, 5). Indeed, in Directive CPL 02-01-044, felling that same single tree constituted logging operations under the same "ordinary language."[81]

[81] The Secretary's brief at p. 25, n.6, contains a citation that deserves discussion. *National Roofing Contractors Ass'n v. U.S. Dep't of Labor*, 639 F.3d 339, 343 (7th Cir. 2011)("*NRC"*) involved the OSHA standard at 29 C.F.R. § 1926.510(b)(13) requiring certain defined fall protection. The standard contained an exception that allowed an employer to show that it was appropriate to use an alternative method of fall protection not listed in the standard. In 1999, the Secretary issued a Directive explicitly allowing employers to use an unlisted method, slide guards, without having to show that they were appropriate. In 2010, the Secretary issued a new Directive, revoking the 1999 Directive, and stating that, as set forth in the standard, employer's using slide guards would henceforth be required to show that they are appropriate. The 7th Circuit denied the NRC's contention that the 2010 Directive was invalid because it was not adopted

Also, according to 29 C.F.R. § 1910.266(c), the definition of "logging operations" applies to operations "associated with felling *and* moving trees and logs" in the plural. In Directive CPL 02-01-044, in Example #3, supra, the Secretary indicates that despite the seemingly plain wording of the standard, in Directive CPL 02-01-044 the definition of "logging operations" applies to the moving and felling of a single tree.[82] However, in Directive 45 which rescinded and replaced Directive CPL 02-01-044, the Secretary stated that "the removal of a tree, or even several trees from a residential lot, does not constitute "logging" in ordinary language or under the standard." (RX-M, at p.4). This demonstrates an inherent ambiguity in the definition. Here, of course, it is undisputed that Davey was removing multiple trees. Therefore, on its face, it would appear that whether the definition of "logging operations" includes removal of a single or multiple trees is irrelevant. However, as noted, in Directive 45 the Secretary asserts that the removal of "even several trees" from a residential lot "does not constitute 'logging' in ordinary language or under the standard." This language demonstrates that the number of trees being removed is relevant when determining if "logging operations" are occurring.

These inconsistencies also demonstrate that Davey Tree lacked adequate notice of the

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by rulemaking. That court stated that this was not an improper rulemaking, but an appropriate exercise of prosecutorial discretion. The court also observed that, while the 1999 Directive reflected a policy of lenience toward the Secretary's enforcement of the standard, the 2010 Directive instituted a policy of strict enforcement. The Court stated that a policy of enforcing a regulation is not itself a new safety standard. *Id.*, at 343. This case is readily distinguishable from this matter. In *NRC*, the standard's obligations were clearly and unambiguously set forth. The decision to enforce the standard leniently was clearly an exercise of prosecutorial discretion. Similarly, the later decision to enforce the standard as written, after clearly giving notice to employers, was similarly a proper exercise of prosecutorial discretion. In contrast, the scope of the standard in this matter was not clearly defined and was subject to inconsistent interpretation by the Secretary.

[82] This directive was rescinded and replaced by Directive 45. In her Reply Brief, the Secretary states that Directive CPL 02-01-044 was rescinded, not because it misinterpreted the definition of "logging operations", but as an act of prosecutorial discretion. (Sec'y Reply Br., at pp. 12-13). The Secretary apparently maintains the view that the definition of "logging operations" includes the felling of a single tree and that she retains the prosecutorial discretion to enforce it as such. (*See* Respondent's Reply Br., at pp. 8-9) ("The Secretary's interpretation would mean any time an employer had to fell or move a single tree or log for any reason, it would be considered engaged in logging operations. For example, if a painting company had to cut down a tree to paint a house, it would be engaged in "logging operations.").

Secretary's interpretation. The Secretary argues that Directive 45 was sufficient to provide notice to Davey Tree that the logging standards were applicable to the work it was conducting on the DuBois 137 project. However, in light of the earlier competing assertions, the "guidelines" provided by Directive 45 provided little context from which Davey Tree could be said to have notice that the Secretary now intended to apply the logging standards to its current project.

At § IX ("Program Procedures") of Directive 45, the Secretary states of the tree care industry:

> There may be situations, however, when an employer's operations go beyond those typical of tree care operations, and it engages in a tree removal project that is sufficiently large and complex to constitute a logging operation within the meaning of the standard.

Here, however, the evidence establishes that the DuBois 137 project was a routine and typical line clearance operation. (Tr. 618, 660, 690-91, 694-95, 747-48). Also, in Directive 45 the Secretary stated that "[t] he scale of logging operations typically includes cutting down a substantial number of trees on a large tract of land." (RX-M, at ¶ IX, A.1.a.). At the hearing, the CSHO was unable to define "substantial." (Tr. 212, 219).

The inherent vagueness of Directive 45 is further demonstrated at p.4 where the Secretary states that:

> There may be situations, however, when an employer's operations go beyond those typical of tree care operations, and it engages in a tree removal project that is sufficiently large and complex to constitute a logging operation within the meaning of the standard. Accordingly, citations alleging a violation of 29 C.F.R. §1910.266 *Logging operations* may be issued to an employer engaged in small-scale tree removal, or one whose primary business is performing tree care operations, only after prior approval from the Directorate of Enforcement Programs in the National Office.

Implicit in this statement is that the definition of "logging operations" is sufficiently subjective that the CSHO must first get confirmation from the National Office. If a trained

CSHO cannot be expected to make the determination regarding what constitutes a "logging operation," neither Directive 45 nor the standard give sufficient guidance to enable line clearers to make that determination in the field. The difficulty facing arborists must also be viewed in light of the fact that conditions in the field may change from site to site, arguably constituting "logging operations" in one location, and not logging a few hundred feet down the road.[83]

The Secretary asserts that Directives do not have the force and effect of law and convey no important procedural or substantive rights to employers or individuals. *See Caterpillar, Inc.*, 15 BNA OSHC 2153, 2173 n.24 (No. 87-0922, 1993) (OSHA Field Operations Manual ("FOM") is an internal manual that provides guidance to OSHA professionals, but does not have the force and effect of law, nor does it confer important procedural or substantive rights or duties on individuals."). In her view, a Directive is only an instruction to its field personnel regarding how to enforce the logging standards and constitutes no more than an exercise of prosecutorial discretion that confers no rights on employers. (Sec'y Reply Br., at pp. 12-13). However, as the Secretary, herself, noted in her brief:

> As a publicly accessible document, CPL 02-01-045 also informs the regulated community how OSHA will exercise its prosecutorial discretion when enforcing the logging standard. *See National Roofing Contractors Ass'n v. U.S. Dep't of Labor*, 639 F.3d 339, 343 (7th Cir. 2011); *Syncor Int'l Corp. v. Shalala*, 127 F.3d 90, 94 (D.C. Cir. 1997).

Sec'y Br., at p. 15.

There is a significant difference between the OSHA FOM, which is issued as a directive to instruct field personnel how to conduct inspections, cite violations, and calculate penalties, and a statement setting forth the Secretary's interpretation of a regulation, which clarifies how

[83] As an aside, the Court notes that Davey Tree tries to make an issue of the CSHO's alleged failure to obtain clearance from the National Office. In this regard, the Secretary is correct in asserting that this instruction does not confer any rights on the employer since it is clearly only a directive to field personnel and has nothing to do with delineating the obligations of an employer. Still, it is instructive when viewed in the context of the vagueness of the standard.

she will enforce an employer's obligations and, therefore, informs employers of their obligations to avoid citations. Although not entitled to the same deference as norms that derive from the exercise of the Secretary's delegated lawmaking powers, informal interpretations, including agency enforcement guidelines, are still entitled to some weight on judicial review. "A reviewing court may certainly consult them to determine whether the Secretary has consistently applied the interpretation embodied in the citation, a factor bearing on the reasonableness of the Secretary's position." *CF&I*, 499 U.S. at 157 (citations omitted). As noted, under *CF&I*, two of the criteria for deference is the consistency of interpretation and adequacy of notice to the regulated parties. The Court finds that the inconsistency of the Secretary's interpretation and the subjectivity of Directive 45 failed to provide employers in the line clearance industry with adequate notice when the logging standard would apply to them. Directive 45 even fails to provide Compliance Officers with the guidance necessary to enable them to make an independent determination when the logging standard applies. The third criteria listed in *CF&I* is "the quality of the Secretary's elaboration of pertinent policy considerations." *See also, Christopher v. SmithKline Beecham Corp.,* 132 S.Ct. 2156, 2159 (2012) (deference inappropriate when there are reasons to suspect interpretation does not reflect the agency's fair and considered judgment on the matter). In the May 2, 1989, Notice of Proposed Rulemaking, the Secretary announced her intent to extend the then current logging rules to all logging operations regardless of the end use of the forest products. Logging Operations, 54 Fed. Reg. 18798. The proposed standards were to replace the then existing standards which applied only to pulpwood logging. *Id.* She observed that "[a]t every step in the logging process, from felling the tree to transporting it to the mill, workers are subject to a variety of hazards from the environment, type of work, and equipment used." *Id.* at 18800. By revising the logging standards, the Secretary intended to

"provide protection for all loggers involved in harvesting, including loggers employed as part of a mill operation, regardless of the end use of the forest products (saw logs, veneer bolts, pulpwood, chips, etc.)." *Id.* at 18802. Nowhere in this Notice did the Secretary state or imply that the logging standards would apply to any industry beyond the traditional logging industry.

The Secretary adopted the current logging standards on October 12, 1994. Logging Standards, 59 Fed. Reg. 51672 (Oct. 12, 1994). Explaining the definition of "logging operations" the Secretary stated:

> Logging operations" is defined in the final standard as operations associated with felling and moving trees and logs from the stump to the point of delivery, such as, but not limited to, marking, felling, bucking, limbing, debarking, chipping, yarding, loading, unloading, storing, and transporting machines, equipment and personnel from one site to another. The proposed rule did not define logging operations. OSHA has included this definition in the final rule to emphasize that this standard covers those operations involving the felling and moving of felled trees, as opposed to other operations, such as road building that are preparatory to rather than part of logging operations.

Id. at 51700.

Again, nowhere in the preamble is there any mention of the utility line clearing industry.[84] Nor is there any indication that any of the commentators were related to utility line clearance. Mr. Tommasi has been very active in industry trade associations. He has been the chair of the TCIA's Safety Committee, sat on TCIA's Government Affairs Committee, and is the president of the Utility Line Clearance Coalition. Davey Tree is also involved with the National Society of Arboriculture and is an active supporter of the ISA, which is the secretariat for the ANSI Z133 Committee. Mr. Tommasi represents Davey Tree on the ANSI Committee and has served as chair of a few of the task groups. The purpose of these organizations are to represent the

[84]The Commission has held that where a standard is susceptible to different interpretations, "the preamble is the best and most authoritative statement of the Secretary's legislative intent." *American Sterilizer Co.*, 15 BNA OSHC 1476, 1478 (No. 86-1179, 1992); *Phelps Dodge Corp.*, 11 BNA OSHC 1441, 1444 (No. 80-3203, 1983), *aff'd*, 725 F.2d 1237, 1240 (9th Cir. 1984).

industry in regulatory affairs, share information and continue to better professionalism within the industry. Davey Tree has commented on rulemaking for both Federal and State OSHA, principally in the areas of standards that apply to tree care. Mr. Tommasi further testified that the Edison Electric Institute and the IBEW were both actively involved in working with the ANSI Committee. These organizations did not participate in any discussion regarding the incorporation of any portion of the logging standards into 29 C.F.R. § 1910.269, except for one passage. That passage regarded the chainsaw safety section of the logging standard. To his knowledge, no members of the line clearance industry were involved in the promulgation of the logging standards of 29 C.F.R. § 1910.266. Mr. Tommasi testified that there was no input from any log industry trade association or companies in the promulgation of 29 C.F.R. § 1910.269. He pointed out that the logging and electrical standards were promulgated at the same time, but with different participants. The promulgation process for both began around 1987 and concluded around 1994. (Tr. 548, 570, 583-86, 607-08).

When the logging standards were being promulgated, Mr. Cyr was recognized as an expert in the logging-related industry within OSHA. He became OSHA's go-to person on logging issues. He was involved in writing parts of the standard and served on the committee that reviewed the language of the proposed standard. Due to issues with the logging industry, certain provisions were stayed for seven or eight months. During that period, Mr. Cyr worked extensively with the National Office to address those issues. In the fall of 1994, he was asked to develop a formal logging safety program tailored to the new standard. (Tr. 716-18, 733-34).

Mr. Cyr testified that he read extensive portions of the record made during the rulemaking process, including the comments that were submitted by various companies, associations and individuals. He helped with outreach, travelled around the country and held

meetings with the stakeholders in the logging industry. He had personal knowledge of who was submitting comments on the proposed rule. According to Mr. Cyr, the line clearing industry did not comment and did not participate in the rulemaking process and OSHA did not seek any input from the line clearing industry. (Tr. 720-22, 734).[85]

Davey Tree's assertion that, when promulgated, the Secretary did not consider the applicability of the logging standards to arborists in the line clearing industry is also supported by the regulatory history of 29 C.F.R. § 1910.266. For example, when discussing the economic impact of the logging standards the Secretary stated:

> The projected economic impact of the final standard on the logging industry is small. The cost of full compliance with the standard represents only 0.1 percent of the *value of shipments* for this industry as a whole. Although these annual costs of compliance represent a relatively insignificant amount of total

[85] Insofar they purport to suggest what the drafters intended, the Secretary asserts that the statements of Messrs. Tommasi and Cyr regarding post-enactment legislative history are entitled to no weight. For example, she asserts that Mr. Cyr's testimony that, to his knowledge, the logging standard was never intended to regulate arborists or the line clearance utility industry is not entitled to weight. (Tr. 722, 734). Post-enactment legislative history refers to statements made by the drafters after promulgation to demonstrate what they intended pre-enactment. These post-enactment statements are entitled to little weight because they could have had no effect on the vote to enact. *See Bruesewitz v. Wyeth LLC*, 131 S.Ct. 1068, 1081-82 (2011) ("Post enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation."). As the Supreme Court observed:

> "Legislative history," of course, refers to the pre-enactment statements of those who drafted or voted for a law; it is considered persuasive by some, not because they reflect the general understanding of the disputed terms, but because the legislators who heard or read those statements presumably voted with that understanding. *Ibid.* "Postenactment legislative history," *ibid.*, a deprecatory contradiction in terms, refers to statements of those who drafted or voted for the law that are made after its enactment and hence could have had no effect on the congressional vote. It most certainly does not refer to the examination of a variety of legal and other sources to determine *the public understanding* of a legal text in the period after its enactment or ratification. That sort of inquiry is a critical tool of constitutional interpretation. (emphasis in the original).

District of Columbia v. Heller, 554 U.S. 570, 605 (2008).

While an expert may testify as to the knowledge of the promulgator, he may not testify as to the promulgator's intent or motives. *In re Methyl Tertiary Butyl Ether (MTBE) Products Liability Litigation*, 643 F.Supp. 2d 482, 503 (S.D. N.Y., 2009). The testimony of Messrs. Tommasi and Cyr relate to events that occurred during the promulgation process and do not involve statements made post-promulgation or to any statements of intent by the drafters. Insofar as the testimony of Messrs. Tommasi and Cyr relates to what information was sought by OSHA pre-promulgation, it should be granted weight equal to the testimony's general probity. *See Beaver Plant Operations, Inc. v. Herman*, 223 F.3d 25, 31 (1st Cir. 2000) (Unchallenged testimony of industry experts regarding industry practice and understanding of the standard helped established that the Secretary had not provided fair notice of its interpretation of the cited standard.).

> shipments, some firms will bear more costs than others depending on their existing compliance with the various provisions of the standard. . . .
>
> . . . In accordance with the Regulatory Flexibility Act, the Assistant Secretary has made a preliminary assessment of the impact of the rule on small entities. As discussed above, the estimated compliance costs for small firms (i.e., those employing fewer than 20 workers) are estimated to be less than 0.5 percent of the *average annual value of shipments per firm* and will be more than offset by the probable decrease in workers' compensation costs resulting from reduction in logging accidents.

Logging Operations, 59 Fed. Reg. at 51736-37 (emphasis added).

When determining the economic impact of the logging, the Secretary considered the relationship between the costs of compliance against the value of the shipments, *i.e.* the logs, produced by the industry. However, when clearing lines, trees are allowed to lie where they fall. There are no "shipments" which can offset the costs of compliance. Clearly, the Secretary did not consider the economic impact of the logging standards to arborists in the line clearing industry.

A critical task of line clearance arborists is the removal of danger trees. Danger trees are specifically addressed in the logging standard. Similar to the line clearance industry, a danger tree as defined under the logging standard " includes any standing tree that presents a hazard to employees due to conditions such as, but not limited to, deterioration or damage to the tree, and direction or lean of the tree." *Id.* at 51722, 29 C.F.R. § 1910.266(c). However, unlike the situation with arborists:

> Paragraph (h)(1)(vi) of the final rule requires that each danger tree, including lodged trees and snags, be felled, removed or avoided. When the danger tree is felled or removed, it must be felled or removed using mechanical or other techniques that minimize employee exposure before felling is commenced in the area of the danger tree. … OSHA is more explicitly stating in the final rule that dangers trees may be avoided, when necessary, rather than being felled or removed…. [T]he final rule further clarifies OSHA's proposed intent that danger trees do not have to be felled or removed.

Id. at 51723-51724.

Clearly, the drafters of the logging standard preferred that danger trees be left alone, a

concept totally at odds with the job of a line clearance arborist. While the logging standard allows for the removal of danger trees, it prefers that, when necessary, the task be accomplished by mechanical means. For arborists, however, 60-70% of all danger trees are removed manually at the stump. Although removal at the stump would be allowed by the logging standard when employees use techniques "that minimize employee exposure before felling is commenced in the area of the danger tree," the bias of the logging standard against manual removal of danger trees demonstrates that the Secretary did not consider the line clearance industry when promulgating the logging standard.

Another example of inconsideration can be seen in the Secretary's determination that logging employees must wear special protective boots. The Secretary determined that "special circumstances exist in the logging industry which may make it appropriate for employees to provide their own logging boots." *Id.* at 51684. In the preamble, the Secretary noted that:

> Commenters noted that employee turnover in the logging industry is very high. (citations omitted) Some commenters also indicated that employees sometimes work only one or two weeks before leaving, often taking jobs at another logging establishment. These commenters argued that it would be unfair to require employers to pay for expensive logging boots given the high turnover rate of the logging industry. One commenter said:
>
> [I]t frightens us to think that we might be providing a $300 pair of boots for a man that's there a week.
>
> These commenters also contend that for some PPE, particularly logging boots, employers might have to buy new PPE every time they hire a new employee. First, this would be necessary because terminated employees do not return PPE they are issued. Second, these commenters argue that, unlike PPE such as ear muffs and head and leg protection, logging boots are an item of PPE that cannot be reused by other employees because of size and hygienic concerns . Because logging boots cannot be worn by other employees, these commenters said employers view logging boots as "personal clothing." In addition, these commenters said that even if employees did return their logging boots, new employees would be unwilling to wear used logging boots. One commenter said:
>
> Suppose a new employee comes to work in the spring and finds he can't or doesn't

> want to be a logger so he hands in his $200 boots with two weeks wear and tear and leaves. Is the next guy going to accept "used" boots someone else wore?
>
> The commenters said that requiring employers to pay for new PPE, primarily logging boots, for each new employee would place a considerable financial burden on employers. They said the cost would be particularly burdensome for small establishments that comprise the vast majority of the logging industry. Their basis for this conclusion is that logging boots are very costly, ranging from $60 to $400 a pair.
>
> *Id.* at 51683 (citations omitted).

There is no indication in the preamble that the Secretary considered either whether those "special circumstances" exist in the line clearance industry or how this requirement would work for arborists.[86] For example, in 1994, the Secretary estimated that these logging boots cost $200-$400 per pair. *Id.* at 51684. If the logging standard generally applies to line clearance, these employees would be required to purchase this specialized clothing in the event that, on some occasion, they may be called upon to perform work that the Secretary considers a logging operation. Yet, there is no indication that the Secretary ever considered whether such boots would even be appropriate equipment for line clearers.

The evidence also establishes numerous and substantial differences in the operations of loggers and line clearers. Loggers felling trees generally work alone. Line clearers work in teams. Line clearers work close to energized power lines. Loggers generally do not work near power lines. (Tr. 737). Other loggers, skidder operators and others work in the vicinity of loggers felling trees who may enter the drop zone of a tree. Line clearers do not have employees who are not on their teams enter a felling area. There is no evidence that the Secretary considered these differences when she decided to apply the logging standard to line clearers.

[86]Mr. Cyr testified that when he studied the difference between arborist and loggers he realized that there were huge differences. There were some similarities in that they use chainsaws and they cut trees, but started to get more familiar with that industry and I knew right from then that there were huge contrasts between the two industries. (Tr. 742).

Finally, as discussed, s*upra*, the Secretary's interpretation as to whether the logging standards apply to arborists in the line clearance industry has been all over the place. Conflicting letters of interpretation constitute "proof that the Secretary has never truly conducted a reasoned analysis of the issues presented by her interpretation …." *United States Postal Service,* 21 BNA OSHC 1767, 1773, n.8 (No. 04-0316, 2006).

Accordingly, the Court finds that the Secretary is not entitled to deference insofar as she interprets the logging standards to be applicable to arborists in the line clearing industry whenever they are involved in removing trees from the stump. The Court finds the Secretary's interpretation in this regard to be unreasonable when applied to the facts of this case.[87]

C. Directive 45

1. Directive 45 was not a proper instrument to announce an expansion of the applicability of the logging standard to the line clearing industry without engaging in Notice and Comment rulemaking as required by the APA.

Having denied deference to the Secretary's assertion that, when promulgated, the logging standard was intended to apply to arborists whenever they fell trees from the stump, the issue is whether Directive 45 was an appropriate instrument to amend the standard to apply it to arborists. Davey Tree contends that, by extending the applicability of the logging standards to arborists, the Secretary has violated the notice and comment requirements of the APA. 5 U.S.C. § 553(a).

Section 553 of the APA requires agencies to afford notice of a proposed rulemaking and an opportunity for public comment prior to a rule's promulgation, amendment, modification or repeal. Congress, however, crafted several exceptions to these notice and comments requirements, determining that they should not apply to interpretative rules, general statements of

[87] *See CF&I*, 499 U.S. at 154-55 ([T]he Commission is authorized to review the Secretary's interpretations only for consistency with the regulatory language and for reasonableness.").

policy, or rules of agency organization, practice or procedure. 5 U.S.C. § 553(b)(A).

Congress intended the exceptions to § 553's notice and comment requirements to be narrow ones. *Am. Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1044 (D.C. Cir., 1987). The purposes of according notice and comment opportunities were twofold: "to reintroduce public participation and fairness to affected parties after governmental authority has been delegated to unrepresentative agencies,"[88] and to "assure[ ] that the agency will have before it the facts and information relevant to a particular administrative problem, as well as suggestions for alternative solutions."[89] Exceptions to the notice and comment provisions of § 553 are to be recognized "only reluctantly," so as not to defeat the "salutary purposes behind the provisions." *Nat'l Assn. of Home Health Agencies v. Schweiker,* 690 F.2d 932, 949 (D.C.Cir. 1982).

Insofar as Directive 45 would extend the scope of the logging standard to arborists, Respondent's assertion that it violated the APA by adopting it without formal notice and comment rulemaking is well-taken. "Substantive rules are ones which grant rights, impose obligations, or produce other significant effects on private interests.... Interpretive rules, by contrast, are those which merely clarify or explain existing law or regulations." *American Hospital Ass'n*, 834 F.2d at 1045. "An interpretive rule simply states what the administrative agency thinks the statute means, and only reminds affected parties of existing duties [internal quotation and citation omitted]. On the other hand, if by its action the agency intends to create new law, rights or duties, the rule is properly considered to be a legislative rule." *Gen. Motors Corp. v. Ruckelhaus,* 742 F.2d 1561, 1565 (D.C. Cir. 1984) (quoting *Citizens to Save Spencer County v. United States EPA*, 600 F.2d 844, 876 & n.153) (D.C.Cir. 1979)). The Secretary may adopt "interpretive rules" without Notice and Comment rulemaking. However, legislative rules

[88] *Batterton v. Marshall*, 648 F.2d 694, 703 (D.C.Cir.1980).
[89] *Guardian Fed. Savings and Loan Assn. v. Fed. Savings and Loan Ins. Corp.*, 589 F.2d 658, 662 (D.C.Cir. 1978).

are subject to the Notice and Comment requirements of the APA. *Syncor Intern. Corp. v. Shalala*, 127 F.3d 90, 95-96 (D.C. Cir., 1997); *Gen. Motors Corp. v. Ruckelhaus,* 742 F.2d at 1565. Extending a set of rules to an industry heretofore not regulated by those rules clearly imposes new duties upon that industry and, therefore, is an act of legislation, not a matter of interpretation.[90] It is the Court's view that the Secretary's position that arborists in the line clearing industry are subject to the logging standards whenever they are involved in removing trees from the stump is an agency action requiring notice and comment rulemaking.[91] *See Pac. Coast European Conference v. Fed. Maritime Comm.*, 376 F.2d 785, 789 (D.C.Cir. 1967); *Simpson, Gumpertz & Heger, Inc.*, 15 BNA OSHC 1851, 1864 (No. 89-1300, 1992); *aff'd* 3 F.3d 1 (1st Cir. 1993) ("[M]odern administrative law embodies the policy that agencies should make greater rather than less use of notice and comment rulemaking authority."). Also, Directive 45 is clearly not a rule of agency organization, practice or procedure. The extension of the rules may well be a matter of agency policy. However, to hold that any announcement of an agency policy is sufficient to justify eschewing notice and comment rulemaking would effectively render 5 U.S.C. § 553 a nullity.

As noted, the record shows that during promulgation of the logging standards, little if any consideration was given to including arborists. According to Mr. Cyr, after the "uproar" created by the "Miles letter", input from the line clearance industry was essentially limited to a multiple day meeting between OSHA officials and arborist industry representatives. (Tr. 744). That meeting, along with other research conducted by Mr. Cyr and his associates led to rescission of

[90] *See New River Electrical Corp.*, 20 BNA OSHC 1515, 1520 (No. 02-1444, 2003*)* (It is a generally accepted proposition that an "agency may not substantively amend regulations through an interpretation."). *See also United States Postal Service*, 21 BNA OSHC at 1772-73 (Secretary's attempt to declare her position imposing a warning clothing substantive requirement through inconsistent interpretation letters rejected by the Commission and "she must resort to rulemaking under section 6 of the Act, 29 U.S.C. § 655.")

[91] *See Nat'l Motor Freight Traffic Assn. v. United States*, 268 F. Supp. 90 (D.D.C. 1967), *aff'd per curiam*, 393 U.S. 18 (1968) (3-judge court) (importance to industry warrants opportunity for notice and comment).

the Miles letter. On July 1, 1998, the Directorate of Enforcement Programs issued a memorandum to Regional Administrators and State Designees stating unequivocally that "[u]ntil …discussions have produced further resolution of the compliance issues affecting arborists, citations for violations of 1910.266 shall ***not*** be issued to employers in SIC 0783 [*i.e.*, tree care employers] who are not engaged in logging operations." (RX-K) (emphasis added). There is no evidence that members of the arborist industry were ever contacted or otherwise given an opportunity to provide "the facts and information relevant" to whether the logging standards should be applied to arborists.

Not being entitled to deference to her interpretation that the logging standard applied to arborists whenever they felled trees from the stump, to allow her to make them applicable without engaging in formal rulemaking would legitimize rulemaking by fiat and nullify the very purpose of notice and comment rulemaking.

2. Although not a valid extension of the logging standard, Directive 45 provides a framework for determining when the logging standards may apply to line clearers; applying the factors set forth in Directive 45 to the facts of this case, the Court concludes that neither Davey Tree nor a reasonable person in the line clearing industry would conclude that 29 C.F.R. § 1910(d)(6)(i) applied to the DuBois 137 project on February 23, 2011 at the accident site.

While tree care companies usually handle projects that do not constitute logging, in some instances they do handle large-scale logging projects. *See, e.g., Asplundh Tree Expert Co. v. Wash. State Dep't of Labor and Indus.,* 185 P.3d 646, 649-650 (Ct. App. Wash. 2008)(holding that Asplundh was engaged in a logging operation using logging equipment where truckloads of logs left the site each day during line clearance/right-of-way maintenance project, and was thus governed by state-level logging safety regulations with respect to that project).[92] Davey Tree

[92] The Washington state logging standard defines "logging operations" as "operations associated with felling and/or moving trees …" Washington Administrative Code ("WAC") § 296-54-505. Logging is also broadly defined to include "other forest activities using logging machinery." WAC § 296-54-501; *Asplundh Tree Expert Co. v. Wash. State Dep't of Labor and Indus.,* 185 P.3d at 650.

expert, Mr. Cyr, recognized that "[t]here may be some rare instances when they may be engaged in logging activities." (Tr. 745). Davey Tree itself recognizes that there are "rare situations" where a tree care company is involved in manual land clearing. (Resp. Br., at p. 37). There are circumstances where the logging standards may apply to arborists in the line clearing industry and the Secretary has the opportunity to establish, as part of her *prima facie* case, that the standard applies.

Where the applicability of a regulation is unclear, the Commission considers whether "a reasonable person, examining the generalized standard in the light of a particular set of circumstances, can determine what is required…." *Dayton Tire, Bridgestone/Firestone* ("*Dayton*"), 23 BNA OSHC 1247, 1251 (No. 94-1374, 2010) (internal citation and quotations omitted), *rev'd in part on other grounds*, 671 F.3d 1249 (D.C. Cir. Mar. 6, 2012).

The factors listed in Directive 45 set forth the criteria that the Secretary will consider when determining whether to issue a citation under the logging standards.[93] The Secretary asserts that none of these factors is determinative, the list is not exhaustive, and no factor is necessarily more important than the other. However, beyond her rejected argument that she has the "prosecutorial discretion" to cite any felling of trees from the stump as a "logging operation," the Secretary provides nothing beyond the factors set forth in Directive 45. (Tr. 211-12, 226).

At the hearing, the CSHO could not define many of the criteria set forth in § IX of Directive 45. For example, while Directive 45 said that logging involves the removal of a "substantial" number of trees, she could not define what qualified a number of trees as

[93] The Secretary argues that it is not appropriate for the Commission to independently determine whether the DuBois 137 project was a "logging operation" by applying the factors set forth in Directive 45 because it does not create any substantive rights for employers. (Sec'y Reply Br., at p. 14). The Secretary's argument is rejected and the Court finds it appropriate for it to consider the criteria set forth in Directive 45. CSHO Keffer testified that she relied on Directive 45 when alleging Davey Tree had violated 29 C.F.R. § 1910.266(d)(6)(i). (Tr. 204). *See also Drexel Chem. Co.*, 17 BNA OSHC 1908, 1910, n.3 (No. 94-1460, 1997) (Commission "relied on CPLs to support an interpretation of a standard in the past" even though CPL was not binding on the Secretary).

"substantial." Similarly, she could not define other factors in Directive 45, such as "small-scale" tree removal, "unusually hazardous conditions", "rural or remote areas", and "large tracts of land." The CSHO admitted that her decision to recommend citation under the logging standard was based on her subjective interpretation of the facts rather than any objective criteria. Accordingly, there is no objective way to determine whether the scale and complexity of a felling operation justifies being covered under the logging standards. As the CSHO admitted, it is a matter of interpretation. The issue is, based on the factors set forth in Directive 45, whether the Secretary established that a reasonable person familiar with the logging industry would recognize that Davey Tree was involved in logging operations at the DuBois 137 project. (Tr. 213-19).

Factor A. <u>The Scale and Complexity of the Tree Removal Project.</u>

This factor states that the scale of logging operations typically includes cutting down a substantial number of trees on a large tract of land; involve the use of a variety of rough terrain machinery; may involve unusually hazardous conditions; and typically take days to months to complete.

Davey Tree was under contract with Penelec for the maintenance of electric power lines along a ribbon of land 86 miles long and about 30-100 feet wide. Approximately 60 miles lay within Treasure Lake. At the time of the accident, Davey Tree was approximately three weeks into a six to eight week project. It is not clear from the record how many trees were cut down within Treasure Lake at the time of the accident. The entire project entailed the removal of potentially 1,000 trees along the 86 mile length. This comes to 11.63 trees per mile or one tree every 454 linear feet.[94] Only 60-70% of the trees were removed at the stump. Therefore,

[94] 1,000 trees /86 miles = 11.63 trees removed per linear mile. 5,280 feet (mile)/11.63 trees removed per mile=1 tree removed per 454 linear feet.

approximately 7-8 trees were removed at the stump per mile, or one tree approximately every 650-754 feet.[95] (Tr. 114,116, 133-34, 220-21, 243-44, 299, 637).

Over a stretch of 2,000 feet adjacent to the accident site, Davey Tree's expert, Paul Cyr, was only able to locate approximately 6 stumps. That works out to nearly 16 trees removed at the stump per mile.[96] Mr. Cyr testified that on a logging site, there would be hundreds of stumps over a stretch of 2,000 feet. (Tr. 748).

The CSHO was told that the two Davey Tree crews would remove a combined total of 15-30 trees daily. With 60-70% of the trees being felled from the stump, the number of trees felled in that manner would range from 9-21 daily in total by both crews. Mr. Cyr testified that a typical manual logging operation would remove 50-120 trees daily. Treasure Lake prohibited trees from being felled if they did not pose a danger to the power lines. Also there was a forester on site to monitor tree removal. Clearly, the DuBois 137 project did not entail wholesale tree removal. (Tr. 210-11, 252, 402-03, 773).

Another element of this factor states that logging operations take days to months to complete and involve the use of a variety of rough terrain machinery. The CSHO agreed that Davey Tree was not using any rough terrain machinery and that the only power equipment used were chainsaws. Finally, the CSHO agreed that there were no unusually hazardous conditions at the site. The only part of this factor that the CSHO could point to that might qualify the

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[95] 600 trees/86 miles = 6.98 trees removed per mile. 5,280 feet/6.98 trees = 1 tree every 756.4 feet.
700 trees/86 miles = 8.13 trees removed per mile. 5,280 feet/8.13 trees= 1 tree every 649.44 feet.

[96] 2,000 feet = .378 miles (2000/5280)
6 trees removed over 2,000 feet/.378 miles per 2,000 feet = 15.8 trees removed per mile.

Extrapolating that 15.8 trees removed per mile over the 86 mile project indicates that 1,359 trees were felled at the stump over the course of the project. (15.8 trees per mile X 86 miles). This is about twice the expected rate of 600-700 trees to be removed at the stump. The map of Treasure Lake indicates that most of the activity in Treasure Lake occurred on or near private lots.

operation as logging is the length of the project which lasted approximately two months. That, however, was based on the mileage the project had to cover, not on the number of trees removed. (Tr. 133, 249, 253).

This criterion does not suggest that the scale of the DuBois 137 project would lead a reasonable person to conclude that this was a logging operation. Rather, in scale, procedure and scope it was a typical line clearance project. The weakness in the Secretary's contention that this was a large and complex project is underscored by the CSHO's admission that she did not consider the Treasure Lake project to be a complex tree removal operation. Similarly, the lack of any objective standard was underscored when she testified that she considered the 600-700 trees removed at the stump to be a significant number because it "did seem like a lot of trees." Indeed, while she noted that Davey removed 15-30 trees a day, she made no attempt to compare this rate to the logging industry to see how many trees are typically removed in a logging operation. On the other hand, Respondent's expert, Mr. Cyr, testified that manual loggers typically would be expected to fell up to 120 trees daily. (Tr. 134, 250, 252, 617-18, 773).

Factor B. Number of Trees Removed.

The second factor listed in Directive 45 advises that "Logging operations typically involve harvesting large numbers of trees for useable wood." At ¶ B.1b., § IX, it further states that "the removal of several trees from a lot typically would not be considered a logging operation." Finally, harkening back to the first factor, Directive 45 states that "Projects that involve removal of multiple trees would be expected to present greater complexity, for example, if the trees are very large or tall. Such projects may involve several work areas and work crews, and require the use of particular felling methods to ensure the trees fall in the intended direction, and necessitate the use of heavy machinery." (RX-M, at ¶ B.2, § IX).

The number of trees removed was discussed under Factor A. Directive 45 also states that logging involves "harvesting large numbers of trees for useable wood." As noted, *supra*, Directive 45 makes no attempt to define "large numbers." In any event, it is undisputed that no trees were being harvested for useable wood. (RX-M, at p. 5).

Another wrinkle is the statement that "the removal of several trees *from a lot* typically would not be considered a logging operation." (emphasis added). The factor does not define a lot. The CSHO could not tell how many trees were removed from any particular lot, since the lots were in succession where homes had not yet been built. Here the Court finds that the accident occurred at a lot near a house on 65 Guana Court. The CSHO testified that she considered the entire scope of the project when assessing its scale. The Secretary does not explain how an arborist would know to apply that definition of "lot." (Tr. 135-36, 248, 633-34; JX-I, at "F").

Directive 45 also suggests that very large or tall trees are hallmarks of a project of "greater complexity." Here, however, the felled tree was only 74-feet tall and considered average for the area. As set forth in Directive 45, the project involved at least two work crews and required the use of particular felling methods (the come-along) to ensure that the trees fell in the intended direction. However, this factor is modified by the term "and necessitate the use of heavy machinery." This suggests that the use of several crews and the need to ensure a directed fall requires the use of heavy machinery. Because no heavy machinery was used, it is unclear if, under the circumstances at Treasure Lake, the use of two crews and the need to ensure that the tree did not fall on the power lines suggests logging. (Tr. 136, 256).

As noted, supra, ¶ B.2, § IX, of Directive 45 states: "Projects that involve the removal of multiple trees would be expected to present greater complexity, for example, if the trees are very

large or tall." However, ¶ F, § IX, of Directive 45 lists factors that "should not affect the CSHO's determination about whether the *Logging operations* standard applies to a particular tree removal project." Number 6 of ¶ F, § IX, of Directive 45 instructs the CSHO not to consider the "[S]ize of trees removed." Therefore, in one instance the Secretary considers the size of trees relevant when determining if a job is a "logging operation" and, in the next instance, the Secretary states that the size of the trees involved is not a relevant consideration. This inconsistency underscores the difficulty any reasonable employer would have when trying to determine if it was were engaged in a logging operation. In any event, the Court notes that the CSHO testified that DuBois 137 was not a complex project. (Tr. 250).

The Court finds that the facts do not demonstrate that Davey Tree, acting as a reasonable person familiar with the circumstances of the industry, would conclude that this factor indicated that it was involved in a logging operation at the Treasure Lake community on February 23, 2011. Even though the Court finds that the "and" in the definition of logging is read in the disjunctive and does not require both the felling and harvesting of trees, this criterion plainly states that "logging operations *typically* involve harvesting large numbers of trees for useable wood." (emphasis added). While the lack of any harvesting is not dispositive, it certainly is a consideration when determining if Davey Tree was engaged in logging. Whether the number of trees felled was "large" is open to consideration and is highly subjective. Also, while there were multiple crews who had to bring down the tree in a predetermined spot, none of the work was accomplished by heavy machinery, which as set forth in Factor C, § IX, of Directive 45, is a major factor in determining if an operation should be classified as logging. Finally, there is no suggestion that the trees felled at Treasure Lake were unusually large or tall which, according to Directive 45, both is and is not a factor.

Factor C. Types of Equipment or Machines Used to Perform Tree Removal Project.

Directive 45 states that "Logging operations usually involve the use of heavy machinery to cut, move, and load trees." It goes on to list examples of such equipment: Bulldozers, tractors and yarding machines. It is undisputed that no such equipment was used by Davey at Treasure Lake. Directive 45 also makes it clear that the use of additional machines, such as a crane or aerial lift is not itself a conclusive factor in determining the applicability of the logging standards. Indeed, Directive 45 continues, the use of overhead and gantry cranes, crawlers, locomotive cranes and truck cranes, such as were used by Davey Tree, "are either not used, or infrequently used in logging operations." Finally, Directive 45 makes it clear that the use of "a chain saw to cut down a tree….would not likely fall under the *Logging operations* standard."

This factor strongly suggests that the logging standards were not applicable to Davey Tree at Treasure Lake.

Factor D. The Location of the Tree Removal Project.

Directive 45 observes that "Typically, logging operations take place in rural or remote areas, on undeveloped land, or on land that is to be developed." Directive 45 goes on to explain that tree removal in rural or remote locations can add to the complexity of a project. For example, hospital and medical services may be unavailable or not able to reach the site quickly. Directive 45 further states that the location of the project, by itself, does not determine whether the logging standards apply. For example, clearing a number of trees from a tract in preparation for construction activities generally would constitute logging wherever it is performed.

The Secretary takes the position that the accident occurred in an area that was very secluded, remote and heavily wooded. In her testimony, the CSHO asserted that there were no houses along Bay Road, where the trimmers were working. A critical consideration to her was

the CSHO's conclusion that when 911 was called, there were no houses on Bay Road in the area the crew was working and the location was so remote that they had no place to direct the ambulance. Therefore, they placed Mr. Sprankle in a truck and drove him a mile down the road to the next intersection, by the marina. The CSHO was aware that there was a house through the woods, in the vicinity of the accident site. She testified that she did not know the location of the house because, upon entering the community, she only drove along Bay Road. The houses that she saw were not on Bay Road and the CSHO apparently did not consider them close enough to provide a location for the ambulance. The CSHO did not calculate the distanced between the house and the accident site. Neither did she inquire if any member of the crew went to the house to seek help. (Tr. 96- 98, 102-03, 135, 197-98, 200, 249; RX-X, at Photograph Nos. DT001151, DT001176).

Mr. Odrosky's testimony offers a different motivation for meeting the ambulance at the marina. He testified that there were houses in the area, but that the house numbers were not posted. They knew they were on Bay Road, which went around the lake, but did not know the name of the next intersection. Rather than having the ambulance drive around the lake to find them, they decided to have the ambulance meet them at the marina which was about a mile down the road. They then put Mr. Sprankle in the truck and drove him to the marina. Given the circumstances, the crew's decision was not governed by the remoteness of the site, but by the practicalities of the situation.

The photographs and the map also suggest that the location of the accident was in neither a remote nor rural location. The map depicts a highly developed community. While many of the lots were wooded, it was still a suburban area. Although there were lots that were not yet developed with houses at the accident site, there was a house nearby. The Treasure Lake

community surrounding the accident site is hardly a remote or rural location. The deceased's crew was working in an area that was 30-100 feet from the power lines that ran alongside Bay Road. In that regard, whether the lots were wooded or lawn is irrelevant. Photograph no. DT001314, RX-X, clearly shows the power lines and Bay Road behind them. Other photographs in RX-X show at least one home in the background through a wooded lot. (Tr. 94, 234, 236; JX-I; *see also e.g.* photographs at RX-X, Nos. DT001151, DT001155, DT001158, DT001176).

While the factual differences between the two versions are minimal, there are significant differences in the interpretation of those facts. The CSHO took the crew's inability to provide an accurate address to the ambulance and synthesized it with her view that the site was heavily wooded, rural and remote. Mr. Odrosky, however, explained that the crew could not detect any house number, did not know the name of the nearest intersection and realized that it would be easier to meet the ambulance at the marina than have the ambulance drive around Bay Road looking for the accident site. Mr. Odrosky's explanation is consistent with the fact that the accident occurred at a lot near a house on 65 Guana Court and that nearby lots on Bay Road were undeveloped. The CSHO's characterization of the area as remote and rural was also undercut by her admission that, upon entering the Treasure Lake, she was not aware of any of the amenities of the community, such as golf courses, a ski lodge, a stabling facility, a country club and a utility center. The only thing she could remember seeing was a shopping area with a general store. Indeed, at the hearing, she admitted that there was a lot more to the Treasure Lake community than she originally thought. (Tr. 230-35).

Mr. Odrosky was at the site and was part of the decision making process that led to the decision to bring Mr. Sprankle to the marina. His testimony in this regard appeared forthright and truthful. On this issue, the Court finds the testimony of Mr. Odrosky to be more credible

than that surmised by the CSHO, and credit his version of events.

One of Directive 45's primary concerns is that, in rural or remote areas, medical services might not be readily in the event of an accident. Here, however, there was no suggestion that medical services were not readily available. The difficulty in giving a precise location to 911 was not due to the remoteness of the site, but because (1) the accident occurred along Bay Road, (2) the nearby houses did not have readily identifiable numbers on them; and (3) the crew did not know the name of the nearby intersection.

The evidence is clear and the Court finds that neither the Treasure Lake community nor the accident site was a remote, undeveloped area.

Factor E. Size of Land/Lot Where Tree Removal Project is Performed.

According to Directive 45, "Typically, logging operations are performed on large tracts of land where there is space to cut trees down at once at the stump [citation omitted]. By contrast, on smaller lots, it may not be possible to remove a tree simply by cutting it at the stump." CSHO Keffer testified that the Treasure Lake community consists of 9,000 acres. The Dubois 137 project was not conducted over the entire 9,000 acres. Rather it was conducted over an area 89 miles long and 30 feet wide. She considered the 89 miles long by 30 feet wide area to be a large tract of land. CSHO Keffer had no experience in logging and did not talk to anyone in the logging industry to see if this tract of land was akin to the tracts worked by loggers. Most of the trees at Treasure Lake were cut at the stump. While the project was typical of a line clearing operation, the Court finds that the size of the project was consistent with both a logging operation and line clearing work. (Tr. 91, 145, 222, 241-43; RX-M).

Factor F. Factors that Do Not Apply.

In this ¶ the Secretary lists "Factors that Do Not Apply" to whether a job is a "logging

operation."

Factor G. Tree Removal Operations Using Mechanical Equipment.

The Secretary states that mechanical felling equipment, such as bulldozers, are often used to clear land for construction and will generally be subject to the requirements of the logging standard, regardless of the employer's industry sector or the reason the trees are removed. This is very similar to criterion C, "Type of Equipment or Machines Used to Perform Tree Removal Project." Because there was no heavy equipment being used at the site, there is nothing in this factor that would suggest to a reasonable person that the DuBois 137 project was a logging operation.

Weighing the factors set forth in Directive 45, the Court concludes that a reasonable person familiar with the logging industry would not recognize that Davey Tree was involved in logging operations on the DuBois 137 project on February 23, 2011. More importantly, considering the factors set forth in Directive 45, when combined with the facts on the ground, neither Davey Tree nor any reasonable employer in the line clearing industry could have known that they were expected to comply with 29 C.F.R. § 1910(d)(6)(i) on February 23, 2011 while performing work under the DuBois 137 project. Indeed, the evidence indicates that, rather than a logging operation, the DuBois 137 project was a typical line clearing project. The Secretary asserts that Directive 45 makes it clear that the listed factors are "not exhaustive and the CSHO and Area Director should always consider the totality of all conditions relevant to the particular operation, on a case-by-case basis." (GX-18, at p.9). Such cryptic instructions hardly provide guidance that would inform a reasonable employer when it was operating under the logging standard.

Summary

For the foregoing reasons the Court finds that:

(1) the Secretary is entitled to deference insofar as she interprets the logging standard to apply to work that involves the felling *or* removal of trees.

(2) the Secretary is not entitled to deference insofar as she interprets the definition of "logging operations" to include any work that involves the removal of trees from the stump. On that basis, the Secretary does not have the "prosecutorial discretion" to cite any employer so engaged.

(3) Directive 45 was not a proper instrument to announce an expansion of the applicability of the logging standard to the line clearing industry without engaging in Notice and Comment rulemaking as required by the APA.

(4) Directive 45 provides a framework for determining when the logging standards may apply to line clearers; and applying the factors set forth in Directive 45 to the facts of this case, the Court concludes that neither Davey Tree nor a reasonable person in the line clearing industry would conclude that 29 C.F.R. § 1910(d)(6)(i) applied to the DuBois 137 project on February 23, 2011 at the accident site.

Therefore, the Court finds that the Secretary failed to establish that 29 C.F.R. § 1910(d)(6)(i) applied to Davey Tree on February 23, 2011 while it was working on DuBois 137 project at the Treasure Lake community and that the Secretary failed to make out a *prima facie* violation.[97]

Findings of Fact and Conclusions of Law

All findings of facts and conclusions of law relevant and necessary to a determination of the contested issues have been found and appear in the decision above. *See* Fed. R. Civ. P. 52(a).

[97] The Court makes no finding whether or not Davey Tree crew members were adequately spaced or organized.

Order

Accordingly it is **Ordered** that Citation 1 for violation of 29 C.F.R.§ 1910.266(d)(6)(i) is **VACATED.**

/s/
The Honorable Dennis L. Phillips
U. S. OSHRC Judge

Dated: July 1, 2013
Washington, D.C.