February 18, 2021

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Transmittal Via E-mail: edith.hannigan@bof.ca.gov

RE: Proposed Revisions to the February 8th State Minimum Fire Safe Regulations

Dear Ms. Hannigan:

The revisions to the February 8th draft of the State Minimum Fire Safe Regulations (Regulations) proposed by the Rural County Representatives of California (RCRC), the California State Association of Counties (CSAC), and the Urban Counties of California (UCC) are attached in red-line format. Our three organizations represent all fifty-eight California counties – i.e., the local jurisdictions with greatest experience applying the Board of forestry's (the Board) regulations for over 30 years, and the greatest responsibilities under the current proposal.

Local jurisdictions have a unique role in implementing the Board's regulations, and therefore a unique perspective in this rulemaking process. These regulations cannot succeed in achieving the Board's wildfire safety goals without partnership and cooperation between the Board and counties. We hope and expect that the Board will give the concerns expressed by locally-elected officials and technical experts the respect and consideration they are due.

In addition to the red-line text, the county organizations offer the following comments on several items of substance in the most recent draft Regulations:

The "Thresholds for Limiting Development on Existing Roads" are not appropriate.

The February 8th draft retains Board staff's essential proposal to create massive "no build" zones throughout California. The precise road width and grade triggering these building prohibitions may have changed, but the basic proposal to hold individual

single-family homeowners responsible for offsite public roads that they do not control, and cannot possibly afford to fix, remains the Regulations' most troubling feature.

As explained in depth in prior oral and written comments, this proposal is fundamentally unfair, will exacerbate California's already severe housing crisis, and may result in regulatory takings liability for local governments and the Board. These adverse consequences do not depend upon whether the road width triggering the Regulations' "no build" provisions is set at 20 feet, 14 feet, or something else. Board staff have been unable to provide any estimate of the number of acres, parcels, or people impacted by the proposed prohibitions, at any level, and efforts to tweak the thresholds are thus based on speculation rather than data.[1]

The proposal to prevent all "building construction" – including individual homes and Accessory Dwelling Units (ADUs) on parcels with no other viable use – is fundamentally flawed and should be removed in its entirety. Local governments are certainly sensitive to the Board's concerns over development in areas where access in less-than-optimal. These concerns are most appropriately addressed through a "buckets" structure as described below, which would greatly improve fire safety by limiting any larger developments in these areas, and any development in excess of the property owners' reasonable expectations based on current zoning.

The proposed limitation on ADUs and wildfire rebuilds is especially inappropriate.

The foregoing flaws are exacerbated in the case of ADUs and disaster rebuilds. Regarding the former, California's state policy strongly promotes ADU construction – as recognized in the Board's own emergency regulations. The Legislature *has already* "contemplat[ed] if there is a point at which a road providing access to an ADU...is of such substandard quality that to build...along it would be creating or replicating an excessively hazardous situation" – and has specifically rejected the outright prohibition of ADU construction as proposed by staff.

Government Code Section 65852.2 explicitly delineates the extent to which ADU development may be restricted in areas based on "the impact of accessory dwelling units on traffic flow and public safety" and provides that, notwithstanding such impacts, "a local agency shall ministerially approve" ADU construction on any residential or

[1] Several commentators have suggested that California explore tax incentives or voluntary buyout programs to encourage property owners to relinquish development rights for properties in fire prone areas. (Such programs have been used successfully in other states to reduce exposure to flood risk.) While beyond the scope of these regulations, it is worth noting that such mechanisms represent an appropriate and lawful means of reducing the risks presented by existing development rights, when those rights cannot simply be taken away by regulation.

mixed-use parcel meeting certain minimal requirements (Government Code Section 65852.2, subdivisions (a), (e)). Board's staff's proposal contravenes the spirit, and quite possibly the letter, of this provision and asks the Board to improperly substitute its judgment for that of the Legislature. This suggestion should be firmly rejected.

The proposal to flatly prohibit rebuilding of existing homes and businesses lost due to disaster within these "no-build" areas is more severe than the prior draft regulations and is especially ill-conceived. Rebuilding an existing home or business creates no new impact, no heightened fire risk, and no increased fire serve need. There is no nexus to require upgrades to existing public roads as a condition of rebuilding these structures.

Moreover, prohibiting homeowners and small businesses who have lost everything from rebuilding their homes is unfair, particularly to under-insured and lower-income residents who cannot simply afford to move elsewhere. The resulting displacement would also hinder achievement of the region's housing goals, further exacerbating the housing and homelessness crisis. Board staff's concern for "replicating an excessively hazardous situation" is notable, but this does not justify dispossessing residents of their homes and livelihoods. And, as noted above, this effort would almost certainly generate regulatory takings challenges. These provisions should be removed in their entirety.

The "aggregate risk threshold" proposal is fatally flawed and not implementable.

As a threshold matter, the intended operation of the proposed "aggregate risk threshold" is not clear. Section 1270.03.02(a) provides that "*Building Construction shall not be approved* where Access is provided by Roads that do not meet the minimum requirements in § 1273.05.02," but Section 1270.05.03 indicates that the "aggregate risk" provision applies "*[p]rior to approving any Building Construction*...where Access is provided by an existing Road or Roads that do not meet the requirements in § 1273.05.02" – an apparent contradiction.

Regardless, the underlying concept is flawed and not fixable. Many local jurisdictions will not have precise data regarding the "estimated daily vehicle trips" for each road within their boundaries. The expense and burden to perform these calculations for every single road (often comprising many hundreds or thousands of lineal miles) is severe, and would constitute an unreimbursed state mandate. More importantly, this proposal would place the entire burden of upgrading the road on the first property owner who seeks to build a home or small business after the "aggregate risk threshold" has been triggered - which replicates the fairness, housing constraint, and takings issues described above.

The Board's concern for cumulative impacts of multiple small developments is understandable. As discussed in greater detail below, there are reasonable options for addressing that concern – but this is not one of them. These "aggregate risk" provisions should be removed in their entirety.

"Option 2" represents the best approach for Section 1270.03(c).

Aside from the "no build" features discussed above, the general approach for tiering laid out in Section 1270.03(b)-(c) is a step in the right direction. Requiring all non-exempt Building Construction to improve onsite roads, while holding larger developments responsible for the public roads accessing their property, represents the right approach to balance public safety and private burden. Of the proposed tiering proposals, "Option 2" represents the best approach. As explained in greater detail in the attached margin comments, we suggest setting the specific thresholds under this option at 15 residential units, and equivalent amounts of commercial and industrial square footage.

As noted above, counties are sensitive to the Board's concerns regarding the cumulative impact of multiple small developments served by public roads that do not meet current standards. We would propose to address this concern by establishing an alternative trigger for offsite road upgrades whenever Building Construction exceeds the density or intensity allowed by current (July 1, 2021) zoning by more than 20%. This will effectively "cap" the amount of small development allowed without upgrades and without interfering with property owners' reasonable expectations (the critical inquiry for regulatory takings – and basic fairness).

The proposal to involuntarily transfer inspection responsibilities to local governments contravenes Public Resources Code Sections 4119 and 4290.

Unlike prior drafts of the Regulations, the most recent draft proposes to limit CalFIRE's inspection responsibility and authority to the State Responsibility Area (SRA), and make local jurisdictions primarily responsible for inspections in the Local Responsibility Area Very High Fire Hazard Severity Zone (LRA VHFHSZ) (without a delegation from CalFIRE). While many local jurisdictions will desire to have this responsibility delegated to them in both SRA and LRA VHFHSZ, the Board lacks legal authority to compel unwilling local governments to perform these inspection and enforcement functions in either area.

Public Resources Code Section 4119 gives CalFIRE responsibility to "enforce the state forest and fire laws" and "inspect all properties...subject to the state forest and fire laws." By its terms, this provision is not limited to the SRA. Further, Public Resources Code Section 4125 – which gives local governments primary responsibility for "prevention and suppression of fires" – says nothing about state law enforcement,

which remains CalFIRE's responsibility. Local governments would not have the ability to obstruct CalFIRE enforcement efforts in either the SRA or LRA VHFHSZ, and the Board cannot do so either. Further, nothing in Section 4290 gives the Board the power to regulate enforcement or inspection responsibilities, particularly where those matters are fully covered by state law.

As drafted, the proposed Regulations will not qualify for the "Class 8" Categorical Exemption, and will require full review under the California Environmental Quality Act.

The current draft of the Regulations would require individual building construction, in many areas, to substantially upgrade existing roads. Unlike larger projects, these individual buildings are typically ministerially permitted, and do not themselves undergo California Environmental Quality Act (CEQA) review. Consequently, adoption of these regulations represents the *only* opportunity for environmental review of the impacts of these road expansions – and CEQA *requires* that such review be performed.

Board staff has suggested that the Board may attempt to apply the Class 8 categorical exemption to forego CEQA review of the regulations. That is quite clearly erroneous and would open the regulations to legal challenge and potentially years of delay. The Class 8 exemption applies to "actions taken by regulatory agencies...to *assure* the maintenance, restoration, enhancement, or protection of the environment...."[2] The courts have explained that such "assurance" is not provided - and the exemption does not apply - where actions taken to address one environmental concern could result in other potentially significant effects.[3] Like this case, that matter concerned a regulation that "encouraged third parties to pave roads." The court found it reasonably foreseeable that the regulation would actually result in such road improvements taking place, for which CEQA review was required. This circumstance is no different.

Moreover, even if the Class 8 exemption might otherwise fit, categorical exemptions may not be applied "where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances."[4] In this case, the unusual circumstance of a *statewide regulation*, involving substantial road construction (among other activities) *often in remote, ecologically sensitive areas*,

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[2] CEQA Guidelines section 15308.

[3] *California Unions for Reliable Energy v. Mojave Desert Air Quality Management Dist.* (2009) 178 Cal.App.4th 1225.

[4] CEQA Guidelines section 15300.2.

plainly creates a reasonable possibility of significant impact, rendering the Class 8 exemption doubly inappropriate.

As drafted, the Regulations will require an economic impact assessment under the Administrative Procedures Act, including an evaluation of effect on housing costs.

The Administrative Procedures Act (APA) requires administrative agencies to prepare an economic impact assessment of proposed regulations, including consideration of the effect of the proposed regulatory action on housing costs (Government Code Sections 11346.2(b)(2)-(5), 11346.3, 11346.5(a)(7)-(12)). "Mere speculative belief is not sufficient to support an agency declaration of its initial determination about economic impact. Rather, the agency must provide in the record any facts, evidence, documents, testimony, or other evidence upon which it relies for its initial determination...These provisions plainly call for an evaluation based on facts." (*Western States Petroleum Assn. v. Board of Equalization* (2013) 57 Cal.4th 401.) The *Western States* court further indicated that the assessment must include some quantification of the economic impact of the regulation, developed using proper methodology. In this case, Board staff have been unable, as yet, to provide any estimate of the extent of area affected by the "no build" provisions (or other development limitations), and consequently have no basis for any compliant estimate of the costs imposed by these regulations on businesses in general and housing in particular. This fails to comply with the APA, and, if not remedied, may open the regulation to successful legal challenge.

Our organizations have prepared the attached red-line revisions (with explanatory comments) to address the foregoing concerns. We invite members of the Board's careful review, and we look forward to addressing the Board directly at the forth coming workshop.

Thank you for your consideration.

Sincerely,

CATHERINE FREEMAN	TRACY RHINE	JEAN KINNEY HURST
Legislative Representative	Senior Legislative Advocate	Legislative Representative
CSAC	RCRC	UCC

Cc: Wade Crowfoot, Secretary, Natural Resources Agency
Hazel Miranda, Deputy Legislative Secretary, Office of the Governor
Keith Gilless, Chair, Board of Forestry
Matt Dias, Executive Officer, Board of Forestry