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Via Email: Staff@OAL.CA.GOV

Ms. Debra Cornez, Acting Director
California Office of Administrative Law
300 Capital Mall, Suite 1250
Sacramento, CA 95814

Re: **Objections and Recommendations of the Howard Jarvis Taxpayers Association On Emergency Regulations Proposed by the State Board of Forestry (BOF) OAL File Number 2011-1201-02E**

Dear Ms. Cornez:

Pursuant to Title 1, Cal. Code Regs. § 55, the following objections and recommendations are submitted on behalf of the Howard Jarvis Taxpayers Association (HJTA), regarding the above-captioned emergency regulations. HJTA urges OAL to DISAPPROVE the proposed regulations.

The proposed regulations impose a so-called "benefit fee" on the owners of structures within a State Responsibility Area (SRA). According to section 1665.1 of the proposed regulations, their purpose is to implement Chapter 8, Statutes of 2011 (ABX1 29, Blumenthal). A copy of Chapter 8, Statutes of 2011, is provided as Attachment A.

As will be explained in greater detail below, HJTA raises the following principle objections to these regulations:

- Despite being called a "fee" in the regulations, the proposed exaction is an illegal tax under the California Constitution.
- The tax imposed by these regulations is an effort to implement a statute which was not enacted legally. The regulation therefore lacks authority and is inconsistent with the California Constitution.
- In its treatment of multi-unit dwellings the proposed regulation is inconsistent with and is not authorized by statute.

The Proposed "Fee" Is in Fact an Unconstitutional Tax. Article XIII A, Section 3(b) of the California Constitution defines "tax", with certain specific exceptions as "any levy, charge, or *exaction of any kind* imposed by the State" (emphasis added). A copy of this provision of the Constitution is provided as Attachment B. Unless one of the five specific constitutional exceptions applies, the "fee" imposed by these regulations is clearly a tax, and therefore must conform to the constitutional requirements for taxes.

There are five specific exceptions to the constitutional definition of "tax" (Article XIIIA, § (3)(b)(1) to § 3(b)(5). Three of these[1] could not be applicable under any conceivable argument. Examination of the remaining two exceptions will reveal that they also are inapplicable to this proposed "fee".

Article XIIIA, § (3)(b)(1) provides that an exaction is not a tax if it is "imposed for a specific benefit conferred or privilege granted directly to the payor that is not provided to those not charged," The putative purpose of the "benefit fee" is to provide fire prevention service in state responsibility areas. Such services, however, cannot be to some property owners and not provided to others. The proposed benefit fee is to be paid by owners of structures located within an SRA, but is not paid by property owners in SRAs who do not have structures on their property. Fire prevention efforts by the state accrue to the benefit of all property owners in an SRA, not only to those who have structures on their property. The proposed benefit fee, therefore, is not a fee which is exempt from the Article XIIIA definition of tax by virtue of this exemption.

Similarly, Article XIIIA, § (3)(b)(2) provides that an exaction is not a tax if it is "imposed for a specific government service or product provided directly to the payor that is not provided to those not charged". The analysis in this case is identical. If, purely for the sake of argument, we were to concede that the government activities which would be funded by the proposed fees actually constitute a "service or product", they still are not and cannot be provided to those who own properties in SRAs with structures without also being provided to those owning properties in SRAs without structures. The so-called fee is not exempt from the constitutional definition of tax and it is therefore a tax a tax, subject to the statutory and constitutional limitations upon taxes.

The record of AB X1 29 demonstrates that the State is well aware of this difficulty in their proposal. When Governor Brown signed AB X1 29 on July 7, 2011, he took the relatively unusual step of writing a signing message. A copy of that message is included as Attachment C. In that letter Governor Brown said the following:

> A fee consistent with the "beneficiary pays principle," such as the one intended in this bill, can achieve significant General Fund savings. However, as currently drafted, the revenues may not materialize. I am directing the Department of Finance and CAL FIRE to work with the Legislature during the remaining legislative session to identify necessary clean-up language to realize these revenues.

Governor Brown clearly recognizes that the proposed benefit fee violates constitutional tax restrictions by saying that a fee "consistent with" the constitutional exception would raise revenue, but that "as currently drafted" revenues under AB X1 29 "may not materialize". The reason that the fees "may not materialize" is precisely because the fee created by AB X1 29 *is not "*consistent with the 'beneficiary pays principle'".

The "necessary clean-up language" that Governor Brown referred to in his letter was inserted into SB X1 7 (Committee on the Budget) as amended September 1, 2011 (Attachment D). This bill attempted to create a fee "consistent with the 'beneficiary pays principle'" by imposing the fee on all property owners in SRAs. Thus it would have been a fee imposed on one group – property owners within SRAs – but not imposed on the property owners outside of SRAs. Arguably this would have been a fee exempt from the Article XIIIA, Section 3 definition.

This is proven further in the legislative record of SB X1 7. According to the analysis of SBX1 7 prepared by the Assembly Budget Committee (Attachment E) expressly states that one of the specific purposes of the bill was "To make AB 29 X1 more compliant with Proposition 26 by requiring all property owners within the SRA (including owners of land) be included in the fee, since they all benefit from CAL FIRE's fire protection services." SBX1 7 was not enacted. Thus

[1] Section 3(b)(3) – fees for licensing, permits, investigations, etc.; Section 3(b)(4) – fees for entry into or rental of state property; Section 3(b)(5) – court-imposed fines or penalties.

the fact that ABX1 29 imposed an unconstitutional tax was never corrected in the manner that the Governor felt was necessary.

Both the plain language of the proposed regulation, and the subsequent history of the Governor's and Legislature's actions to correct ABX1 29 demonstrate clearly that the so-called "fee" imposed by these regulations is, in fact, an illegal tax[2]. There is a wealth of case law distinguishing between fees and taxes. By characterizing the exaction in these regulations as a fee rather than as a tax, the proposed regulation violates the APA Clarity standard. It is an action that is not in accordance with standards prescribed by other provisions of law in violation of Government Code section 11342.1.

The Statutes Enacted Pursuant to ABX1 29 are Unconstitutional. As demonstrated, the "benefit fee" enacted by the proposed regulation is, in fact, a tax under Article XIIIA, § (3) of the California Constitution. With respect to taxes, subdivision (a) of this section provides, in relevant part, that "Any change in state statute which results in any taxpayer paying a higher tax must be imposed by an act passed by not less than two-thirds of all members elected to each of the two houses of the Legislature." In short, a tax is unconstitutional unless the Legislature enacted it by a 2/3 vote of the elected members of each house.

ABX1 29 was enacted on a vote of less than 2/3 of each house. Copies of the votes in each house are included with this letter as Attachment F. Passage of a bill in the Senate by a 2/3 majority requires 27 votes; ABX1 29 only obtained 23 votes. Passage of a bill by a 2/3 majority in the Assembly requires 54 votes; ABX1 29 only obtained 52 votes.

Since the statutes enacted by ABX1 29 violate the constitutional requirement of Article XIIIA, § (3)(a), they are invalid. The reliance upon these statutes enacted by ABX1 29 therefore violates the Authority and Reference standards of the APA.

The Regulations' Treatment of Multi-Unit Structures Lacks Authority in Statute. The only apparent putative legal basis for imposing the benefit fee in these regulations is public Resources Code § 4212(a)(1). This section requires the adoption of emergency regulations "to establish a fire prevention fee for the purposes of this chapter in an amount not to exceed one hundred fifty dollars ($150) to be charged on *each structure* that is within a state responsibility area" (emphasis added). The immediately preceding section, PRC 4211, defines "structure" as "a *building* used or intended to be used for human habitation." Taken together, these two provisions can only reasonably be interpreted to authorize a "fee" of no more than $150 on any single building.

The proposed regulation violates this statutory limitation. It creates, without any legal authority, a category called a "multi-dwelling unit structure" (proposed § 1665.2). This is, in brief, a single residential building which has multiple dwelling units, such as an apartment or condominium structure. The regulations then impose a fee structure which ignores the statutory limitation that the fee may be no more than $150 on each building. Proposed section 1665.6(c) provides that "The Benefit Fee for multi-dwelling unit structures shall be one hundred fifty dollars ($150) for the first dwelling unit and an additional twenty-five dollars ($25) for each additional dwelling unit up to the total dwelling units contained in the multi-dwelling unit structure." This provision would result in imposition of fees not authorized by the statute.

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[2] The regulations themselves appear to acknowledge this deficiency. Proposed § 1665.6(b) contains a sentence saying "The fee will be consistent with Section 3 of Article XIIIA of the California Constitution." It is unclear what this sentence accomplishes. At the very least it violates the Clarity standard of the APA. To the extent that this sentence is intended to avoid an argument that the fee unconstitutionally violates Section 3 of Article XIIIA, it is obviously pointless. An unconstitutional regulation does not magically become constitutional merely because it includes a sentence asserting that it is constitutional

Assume, for example, a single condominium or apartment building with eleven dwelling units. Since it is a single building, under PRC § 4212(a)(1) the maximum permissible fee on this building would be $150. Under the proposed regulation, however, the fee on this single building would be $400 - $150 for the first dwelling unit and $25 each for the remaining 10 dwelling units. In this example the regulations would result in a fee on a single building which unquestionably exceeds the limit imposed by statute.

To the extent that the proposed regulation authorizes fees exceeding $150 per building they violate the Authority, Reference, and Consistency standards of the APA. They also section 11342.2 of the Government Code.

Miscellaneous Deficiencies. The regulations also contain the following violations of the APA.

- Necessity. The record of the rulemaking does not include a statement of the specific purpose of each adoption, amendment, as required by Title 1, Cal. Code Regs. § 10. The proposal thus violates the APA Necessity standard.
- Non-duplication. Proposed section 1665.6(a) describes certain requirements of other laws in apparent violation of the non-duplication standard of the APA.
- Authority and Reference: The authority and reference citations in the regulations, when provided, appear to be incorrect. For example, proposed section 1665.4 purports to define the manner in which the Benefit Fee will be imposed. The reference citation is to Public Resources Code § 4111, a section which has nothing to do with the imposition of fees. Sections 1665.5, 1665.6 and 1665.7 contain no authority and reference citations at all.

On the basis of these objections and recommendations, the Howard Jarvis Taxpayers Association urges OAL to Disapprove file 3 1211-1201-02E.

Thank you for your consideration in this matter. .

Sincerely,

MICHELMAN & ROBINSON, LLP

William L. Gausewitz