March 22, 2021

TO: SENATOR BILL DODD AND ASSEMBLY MEMBER JIM WOOD

FR: CONSUMER ATTORNEYS OF CALIFORNIA: NANCY PEVERINI
PERSONAL INSURANCE FEDERATION: SEREN TAYOR
NAMIC: CHRISTIAN RATAJ

RE: **SB 332 (DODD/WOOD) OPPOSE**

The Consumer Attorneys of California must oppose SB 332, which is scheduled to be heard shortly before the Senate Judiciary Committee. SB 332 provides that a certified burn boss and a private landowner upon whose property a certified burn boss performs, supervises, or oversees a prescribed burn are not liable for damage or injury to property or persons that is caused by a prescribed burn authorized by law unless the prescribed burn was conducted in a grossly negligent manner.

CAOC supports the use of increased prescribed burns (planned, deliberate burns), and actions that would actually result in more prescribed burns. SB 332, however, does not accomplish that goal; instead, its unintended effect will be catastrophic for California's property and people. We believe it is poor policy to lessen the legal accountability standard of professionals doing one of the most dangerous things one can do in California—start a wildfire. If SB 332 were to pass, the burden would fall on yet again the homeowners and community, with homes and lives as payment. We understand that this bill aims to address a lack of insurance for prescribed burners; therefore, instead, California should resolve the matter by addressing the insurance problem with an insurance solution such as the AB 1054 insurance risk pool concept, rather than burden families and communities with wildfire devastation through no fault of their own. Further, the economics of large wildfire losses do not support the notion that adding the word "gross" alleviates the underwriters concerns because wildfire liabilities regularly far exceed indemnification policy limits—this results in exposure of all available insurance under a policy while leaving wildfire victims left with a more difficult and less efficient cost recovery process.

LEGAL IMMUNITY FOR NEGLIGENT CONDUCT IS NOT THE SOLUTION TO THE LACK OF PRESCRIBED BURNS.

We have identified three recent sources that dive into the lack of prescribed burns; not one recommends legal immunity for negligent conduct.

- Governor's Forest Management Task Force, July 17, 2020 Recommendations
  Recognizing the insurance problem (versus liability issues due to litigation), the task force stated: "in the initial recommendation made by the January 1, 2019 deadline, the RxWG recommended working with the Forest Stewards Guild to advertise their prescribed fire insurance option to ensure a multi-state sustainable prescribed fire insurance solution. Given the state of the insurance markets due to COVID-19, we also continue to explore State options to create a public private partnership because we believe State supported programs that allow private industry to

engage need to be part of the solution…. Given the need to diversify risk to create a sustainable insurance product, the current lack of policies being written in California, and the work already completed by the Forest Stewards Guild, we decided the most expeditious and long-term solution was to assist the Forest Stewards Guild with a multi-state insurance solution."

The Governor's task force did not identify immunity for negligent conduct as a solution.

- Sacramento Bee, "Burning California to save it: Why one solution to raging wildfires can't gain traction." (February 25, 2021).
  This article explored the issue of prescribed burns and poses the question, why not do more prescribed burns occur? The article stated, "One problem is air pollution, which makes regulators leery about allowing smoke in the air." The article also discussed claims by the Western Klamath Restoration Partnership that the Forest Service is blocking burns and discussed CalFire spending just over 10% of its $2.5 billion annual budget on thinning and burning. Cal Fire's staff chief stated the projects are "ready to go" but are waiting "funding, resources, crews, equipment." The article does not mention anywhere the reduction of legal rights a solution.

- Senate Democrats Blueprint for a Safe California
  "Develop liability and contracting standards to ensure vegetation management and tree service firms meet necessary insurance and liability Standards. Partner with companies on transportation costs to deliver forest materials to the nearest biomass facility." We read the blueprint to mean that the prescribed standards for the burn bosses should be so tight, and so protective of communities, that insurers feel better about insuring such a highly regulated industry.

  In addition, the blueprint calls for an "Increase the use of prescribed burns in appropriate areas with an emphasis on streamlining statewide and regional air regulations and liability laws (such as liability for state-certified burn bosses), while ensuring public health and safety is protected."

  Developing liability and contracting standards makes sense; however, liability standards do not equate to immunity for negligent conduct. Indeed, CAOC could support clarity in liability standards in this area. For example, in California, two different approvals are needed for a burn—an air permit and a smoke management plan from the CA Air Resources Board or a regional air pollution district. In some cases, Cal Fire has to also sign off. Should permit receival and following of all protocols be admissible evidence of reasonable conduct? Yes. Importantly, the solution provided in SB 332 ignores all of the factors/recommendations provided in these sources and instead restricts the legal rights of homeowners, public entities and insurers (via subrogation rights) to seek redress for negligent conduct.

THE PRACTICAL IMPACT OF SB 332

Under current law, a person is generally liable for negligent conduct, i.e., the lack of ordinary care. This policy encourages reasonable conduct and acts as deterrent for people to ignore the law. "Ordinary negligence consists of a failure to exercise the degree of care in a given situation that a reasonable person under similar circumstances would employ to protect others from harm. To support a theory of gross negligence, a plaintiff must allege facts showing either a want of even scant care or an extreme departure from the ordinary standard of conduct." (Anderson v. Fitness Internat._ LLC_ 4 Cal. App. 5th 867) Gross negligence is extremely difficult to prove.

Imagine the impact to homeowners, the state and public entities should SB 332 pass. A prescribed burner or homeowner can have the correct permits, etc., but also act in a negligent manner that can cause a catastrophic mega fire, killing hundreds and destroying communities. In one example, a permit holder decided to take his helicopter up for an aerial view. The blades caused wind that directly led the fire to spread to neighboring lands…under SB 332, the destruction caused by that negligence would be lawful and protected.

COMPARISONS TO OTHER STATES WITH THE LESS PROTECTIVE STANDARD ARE NOT RELEVANT

Some states provide strict liability for prescribed burns (Hawaii, Delaware, Rhode Island, Minnesota, and Wisconsin). Under a strict liability standard, a court would hold burners liable for any property damage caused by an escaped prescribed fire, regardless of the action of the burner. California is in line with most states (general negligence standard). Five states have a gross negligence standard applicable in some circumstances, although there is no clear or documented authority showing that that lesser standard has caused more prescribed burns or led to more insurance.

As you can see in the discussion above, there are many reasons enough prescribed burns aren't occurring; but no one can say that a change in the liability standard (making it worse for homeowners) will directly lead to more insurance availability or more burns. Indeed, the five states (Georgia, South Carolina, Nevada, Michigan and Florida) with a gross negligence standard are not similar to California. The everglades wildfires haven't burned 14,000 homes killing 85 people in one fire. The consequences of negligent conduct in California based on the horrendous fire tornadoes and quick spread we have seen cannot be underestimated. We believe that immunizing negligent conduct when the impact can be so devastating is bad policy, increasing wildfire risk and further exposing families to danger or financial burden. CAOC would support an insurance fund that correctly addresses the issue but, unfortunately, we cannot support the approach in SB 332 and must respectfully oppose the bill.
Thank you for considering our views

cc: Senate Judiciary Committee