FINAL STATEMENT OF REASONS

UPDATE OF INITIAL STATEMENT OF REASONS

SECTION 334(d). The Proposed Rulemaking, as originally noticed to the public, amended section 334(d) of title 8 of the California Code of Regulations to make California's definition of a "Repeat" violation more consistent with mandated federal enforcement standards. Under the current federal program, a Repeat violation exists when an employer previously has been cited for the same or similar violation of a standard at any other work site in a federal-enforcement state within the last five years, and the previous citation has become a final order of the U.S. Occupational Safety and Health Review Commission.

In contrast, under California's existing regulation, a Repeat citation can only be issued if the following requirements are met: (1) the Division of Occupational Safety and Health ("Division") has previously cited the employer for a violation of a given standard; (2) the employer has abated the cited violation; (3) the employer violates the same standard within three years of the conduct alleged in the prior citation; and (4) both violations occurred at the same work site or within the same geographic region of the Division. The Proposed Rulemaking as originally noticed would have changed the starting time for calculating the Repeat "look-back" period so that it would begin to run from the latest of the following dates: (1) the date of the final order affirming the existence of the previous violation cited; (2) the date on which the underlying citation became final by operation of law; or (3) the date of final abatement of the underlying cited violation. It further removed the existing establishment site and regional restrictions so that a Repeat violation could be based on a prior violation occurring anywhere in the State.

The Proposed Rulemaking as originally noticed to the public underwent two modifications in response to comments received from the public and in response to changes in Federal Occupational Safety and Health Administration's (OSHA) policies concerning Repeat violations.[1] The first notice of 15-day modifications, published on November 25, 2015, expanded the definition of Repeat violations to include "substantially similar" violations. The Director also changed the look-back period from three years to five years to match the federal look-back period, and deleted the look-back qualifier of final abatement date to eliminate confusion over the provision's applicability, as well as the unintended immunization from Repeat citations resulting during an extended abatement period. The Director also inserted the terms "hazard" and "condition" to match the federal standard, and inserted the terms "and issues a citation" to clarify that a Repeat citation must be based on the issuance of a subsequent citation.

[1]OSHA Instructions CPL 02-00-159, Field Operations Manual (FOM), dated October 1, 2015, *accessible at* https://www.osha.gov/OshDoc/Directive_pdf/CPL_02-00-159.pdf, *accessed* August 3, 2016.

The second 15-day notice of modifications, sent out May 6, 2016, was the Division's response to comments received during the first 15-day comment period and the Division's desire to make the Repeat violation criteria consistent with the federal standard set forth in the federal Field Operations Manual ("FOM"). The federal standard bases Repeat violations on a finding of the same or substantially similar "condition or hazard" as opposed to a particular "standard." The FOM clarifies that a violation of the *same* standard is not a Repeat violation when the hazardous conditions in each case are not substantially similar. Conversely, a violation of a *different* standard can be a Repeat violation when the hazardous conditions in each case are substantially similar. To make California's Repeat definition consistent with its federal counterpart, the Director conditioned the issuance of a Repeat citation on a finding of a violation of a substantially similar "regulatory requirement" as opposed to "standard," and clarified that, with the exception of violations classified as Repeat Regulatory, the "subsequent violation must involve essentially similar conditions or hazards." The Director excluded Repeat Regulatory violations from the federal requirement that the two violations constituting a Repeat be based on "essentially similar conditions or hazards." The Director also deleted the second sentence requiring that a Repeat violation be based on "prior violations cited within the state" because it was inconsistent with the first sentence requiring that a Repeat violation be based on a citation that has become a final order. The Director amended the first sentence of section 334(d) to clarify that a repeat citation must be based on an earlier violation "occurring within the State" for which a citation issued resulting in a final order. The Director also changed the term "becomes" to "became" in the text reading "the date on which the underlying citation became final by operation of law" to make the text grammatically correct.

LOCAL MANDATE DETERMINATION

The Proposed Rulemaking does not impose any mandate on local agencies or school districts.

SUMMARY AND RESPONSE TO COMMENTS RECEIVED DURING THE INITIAL NOTICE PERIOD OF AUGUST 14, 2015 THROUGH OCTOBER 2, 2015.

A. Oral Comments at Public Hearing – October 2, 2015.

Comment A.1.1: Marti Fisher, on behalf of the California Chamber of Commerce, Agricultural Council of California, Air Conditioning Trade Association, American Fire Sprinkler Association, American Pistachio Growers, Associated Builders and Contractors of California, Associated Builders and Contractors – San Diego Chapter, Associated General Contractors of California, Associated Roofing Contractors of the Bay Area Counties, Inc., California Attractions and Park Association, California Professional Association of Specialty Contractors, California Assoc. of Sheet Metal and Air Conditioning Contractors National Association, California Chapter American Fence Association, California Construction and Industrial Materials Association, California Cotton Growers Association, California Cotton Ginners Association, California Farm Bureau Federation, California Fence Contractors Association, California Framing Contractors

Association, California Fresh Fruit Association, California Hotel and Lodging Association, California League of Food Processors, California Lodging Industry Association, California Retailers Association, California Solar Energy Industry Association, Construction Employer's Association, Family Business Association of California, Flasher Barricade Association, Golden State Builders Exchange, Nisei Farmers League, Plumbing-Heating-Cooling Contractors Association of California, Residential Contractor's Association, Sacramento Regional Builders Exchange, Society for Human Resource Management, UnitedAg, United Contractors (UCON), Walter & Prince, LLP, Western Electric Contractors Association (WECA), Western Agricultural Processors Association, Western Growers Association, Western Steel Council commented that the proposed regulatory changes are unnecessary because California has numerous tools to enforce its policies such as orders prohibiting use and strict abatement requirements, and because the Proposed Rulemaking will divert state resources from underground activities to large and not necessarily noncompliant employers.

Response: The Director disagrees with this comment. As set forth in the Initial Statement of Reasons ("ISOR"), the proposed changes are necessary to ensure that California's state program remains at least as effective as the federal program with respect to Repeat citations. The other enforcement tools Ms. Fisher referenced in her comment, such as orders prohibiting use and abatement requirements, do not specifically address Repeat violations and do not create a sufficient disincentive to prevent them. Also, changing the definition of a Repeat violation will likely somewhat increase the number of Repeat citations the Division issues, but will not result in a meaningful reallocation of the Division's resources from underground economy enforcement activities.

Comment A.1.2: Ms. Fisher commented that the proposed regulatory changes are unnecessary because California's state program is more effective overall than the federal program as demonstrated by California's stronger and more innovative regulations addressing hazards not covered by Federal OSHA.

Response: The Director disagrees with Ms. Fisher's comment that the changes are unnecessary. Section 18 of the Federal Occupational Safety and Health Act of 1970 authorizes California and other states to administer their own occupational safety and health programs. Federal OSHA approves and monitors these "State Plans" and provides up to 50 percent of an approved State Plan's operating costs. California Labor Code section 50.7(d) requires the Governor and the Director to take all steps necessary to prevent withdrawal of Federal OSHA's approval for the California state plan. To maintain federal approval, California must enforce job safety and health standards that are "at least as effective as" the federal counterparts. (See 29 US Code § 667.) The Proposed Rulemaking is therefore necessary to ensure that California's criteria for classifying Repeat violations remain as effective as the federal criteria in identifying Repeat violations for the reasons set forth in the ISOR. On October 1, 2015, Federal OSHA revised its

FOM to formally amend the federal look-back period to five years.[2] Given that, the Director must either adopt the federal five year look-back period or a Repeat policy "at least as effective as" the federal Repeat policy within six months of the publication of the October 1, 2015 FOM revisions.[3] Further, in its 2013 and 2014 Federal Annual Monitoring and Evaluation (FAME) Reports of California's state plan, Federal OSHA stated that California's enforcement program's rate of repeat violations was lower than the federal average and recommended that California consider employer history statewide when citing repeat violations.[4]

It is true, as Ms. Fisher commented that some California standards are more stringent than their federal counterparts, but these differences do not obviate the requirement that California's Repeat regulation, which applies to the enforcement of all California occupational safety and health standards, be at least as effective as the federal policy.

Comment A.1.3: Ms. Fisher commented that the proposed regulatory changes are unnecessary because California's program is more effective than the federal program as demonstrated by California's higher penalties.

Response: The Director disagrees with Ms. Fisher's comment that the changes are unnecessary because California's program is more effective than the federal program as demonstrated by California's higher penalties. Even assuming that California's civil penalty regulations result in higher civil penalties, California's state occupational safety and health program must be at least as effective as the federal program in all respects, including its criteria for finding a Repeat violation.

Comment A.1.4: Ms. Fisher commented that the ISOR does not provide evidence that the Proposed Rulemaking will lead to more workplace protections for employees.

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[2] *Id*.

[3] *See* Memorandum from David Michaels, Assistant Secretary of Labor for the Occupational Safety and Health Administration ("OSHA"), to Regional Administrators and State Designees (March 27, 2012) *accessible at* https://www.osha.gov/dep/enforcement/admin_penalty_mar2012.html, *accessed* August 3, 2016 (discussing the affect Federal OSHA's modified interim administrative penalty policy will have on state plans).

[4] OSHA, FY 2013 Comprehensive Federal Annual Monitoring and Evaluation (FAME) Report for the California Division of Occupational Safety and Health (Cal/OSHA), pages 3, 12 and A-2 (Appendix A), *accessible at* https://www.osha.gov/dcsp/osp/efame/2013/ca_report.pdf, *accessed* August 3, 2016.; OSHA, FY 2014 Comprehensive Federal Annual Monitoring and Evaluation (FAME) Report for the California Division of Occupational Safety and Health (Cal/OSHA), pages 12, 14 and A-1 (Appendix A), *accessible at* https://www.osha.gov/dcsp/osp/efame/2014/ca_report_2014.pdf, *accessed* August 3, 2016.

Response: The Director disagrees with this comment. The "Purpose and Necessity" section of the ISOR explains how the Proposed Rulemaking will enhance worker safety and health. Currently, the abatement of many cited hazards is delayed because some employers appeal citations for the primary purpose of running out the current look-back period set forth in section 334(d) in order to avoid the possibility of receiving a Repeat citation. The Director believes that extending the look-back period will mitigate the existing incentive to appeal citations for the sole purpose of running out the look-back period. The ISOR also explains that removing the geographic restrictions for Repeat citations encourages itinerant employers and employers who have work sites in more than one location in this state to abate hazardous conditions which are cited at one work site but which may exist at the employers' other work sites, as well.

Comment A.2.1: Dan Leacox, on behalf of California Solar Energy Industry Association, Rooftop Solar, commented that to maintain consistency with the federal standard, the scope of the Repeat violation criteria in the Proposed Rulemaking should be limited to exclude violations of the same standard involving different hazardous conditions that are not substantially similar.

Response: The Director has accepted this comment, and has added language to section 334(d) to clarify that Repeat violations other than those classified as Repeat Regulatory must be based on "a violation of a substantially similar regulatory requirement" involving "essentially similar conditions and hazards." This amendment was the subject of the Second Notice of Modification published on May 6, 2016.

Comment A.2.2: Mr. Leacox commented that to maintain consistency with the federal standard, the measurement of time between the two events giving rise to a Repeat citation must be based on the final order of the first violation and the issuance of a citation on the second violation as opposed to the date of the inspection.

Response: The Director has accepted this comment, and has added language to section 334(d) to clarify that Repeat violations must be based on the finding of a violation *and* the issuance of a citation. This amendment was the subject of the First Notice of Modification published on November 25, 2015.

Comment A.3.1: Elizabeth Treanor, Director of Phylmar Regulatory Round Table and the OSH Forum, commented that Federal OSHA's Repeat penalty language as set forth in the FOM makes it optional for Federal OSHA to issue a Repeat citation through the use of the word "may" whereas the Proposed Rulemaking allows the Division no such discretion.

Response: The Director declines to further amend the Proposed Rulemaking based on this comment. Section 344(d) defines a Repeat violation in California. When considering whether to issue a Repeat citation, the Division will exercise its prosecutorial discretion to determine whether it has sufficient admissible and credible evidence to establish not only the existence of a violation, but also of its potential Repeat classification. To specifically allow the Division further discretion by specifying that the Division "may" (and therefore may *not*) issue a Repeat

citation when a violation meets the definition for Repeat would make the regulation less clear, might falsely suggest the existence of criteria for the issuance of Repeat citations that exist outside of the four corners of the regulation, and could lead to disparate treatment of similarly-situated employers.

Comment A.3.2: Ms. Treanor commented that she supported Ms. Fisher's comment that state resources should be used on the underground economy and the bad actors, and not the employers that are genuinely trying to provide a safe workplace.

Response: For the reasons discussed above in her response to Comment A.1.1, the Director disagrees with this comment.

Comment A.3.3: Ms. Treanor commented that she does not believe that the Proposed Rulemaking will decrease the number of appeals as stated in the ISOR.

Response: The Director disagrees with this comment. Currently, the requirement to abate/correct a violation is stayed when an employer files an appeal with the Appeals Board, and remains stayed until withdrawal of the appeal, filing of an order or decision by an administrative law judge of the Appeals Board affirming the hazards (for violations classified as serious, repeat serious, or willful serious), or final disposition of the proceeding by the Appeals Board (for other types of violations). Because a Repeat citation is based on a prior "corrected" violation occurring within the preceding three years, an employer can reduce its chances of receiving a "Repeat" citation by appealing each and every citation issued to it. By the time a citation has been adjudicated in a final order of the Appeals Board (thereby triggering the requirement to "correct" the underlying violation), the three-year window of liability for a "Repeat" citation will likely already have closed. The Director anticipates that the five-year look-back period will further assist in reducing unmeritorious appeals.

Comment A.4.1: Bryan Little on behalf of the California Farm Bureau Federation, a signatory to the California Chamber of Commerce's September 30, 2015 letter ("Chamber letter"), commented that the elimination of the establishment/geographic restriction would negatively affect many large farming organizations that are organized under a large corporate umbrella even though there are many different operations that face different occupational safety and health hazards.

Response: The Director has declined to further amend the Proposed Rulemaking in response to this comment. The elimination of the establishment/geographic restrictions is necessary to make California's state program as effective as the federal program. Moreover, one of the beneficial effects of removing the geographic restrictions under existing section 334 is that employers with multiple work sites in California who receive a citation at one of their facilities will abate the cited hazards in all of the work sites they control throughout the State in order to avoid receiving a Repeat citation. Further, in its 2013 and 2014 Federal Annual Monitoring and Evaluation (FAME) Reports of California's state plan, Federal OSHA stated that California's enforcement

program's rate of repeat violations was lower than the federal average and recommended that California consider employer history statewide when citing repeat violations.[5]

Comment A.4.2: Mr. Little commented that the Director has not demonstrated any benefit to worker safety and health, operational efficiency of the Division, or any criteria that measures workplace safety and health or agency performance.

Response: For the reasons discussed above in her response to Comments A.1.2 and A.1.4, the Director disagrees with this comment.

Comment A.5.1: Cindi Sato on behalf of Construction Employers Association, a signatory to the Chamber letter, commented that she was concerned that the Division's resources will be focused on large compliant employers, thereby redirecting the limited resources away from pursuing the underground economy.

Response: For the reasons discussed above in her response to Comment A.1.1, the Director disagrees with this comment.

Comment A.6.1: David Jones, on behalf of Associated General Contractors of California, a signatory to the Chamber letter, commented that he shared all of the concerns expressed in the Chamber letter.

Response: The Director will respond to the Chamber's written comments below.

Comment A.7.1: Christopher Lee on behalf of United Contractors, a signatory to the Chamber letter, commented that the proposed changes are misplaced because California's program need not mirror the federal program.

Response: For the reasons discussed above in her response to Comment A.1.2, the Director disagrees with this comment.

Comment A.7.2: Mr. Lee also commented that the Division should focus its enforcement resources on combatting the underground economy instead of citing employers for additional Repeat violations.

Response: For the reasons discussed above in her response to Comment A.1.1, the Director disagrees with this comment.

Comment A.8.1**:** Steven Phillips, Director of Safety and Health with Henzel Phelps Construction Company, and a member of the Cal-OSHA Advisory Committee, commented that

[5] OSHA, FY 2013 Comprehensive Federal Annual Monitoring and Evaluation (FAME) Report for Cal/OSHA, *supra*; OSHA, FY 2014 Comprehensive Federal Annual Monitoring and Evaluation (FAME) Report for Cal/OSHA, *supra*.

the 2013 FAME report did not require California to extend its look-back period from three to five years, or change the start and end date of a Repeat violation.

Response: For the reasons discussed above in her response to Comment A.1.2, the Director disagrees with this comment.

Comment A.8.2: Mr. Phillips commented that the Proposed Rulemaking would encourage employers to not appeal to exhaust the look-back period and would thus deny employers due process.

Response: For the reasons discussed above in her response to Comment A.3.3, the Director disagrees with this comment. Further, removing the incentive for employers to file an appeal for the sole purpose of "waiting out" the look-back period does not constitute a denial of due process. Employers may always appeal a citation on other grounds, including existence of the violation, the classification of the citation, the existence of an affirmative defense, or any other ground allowed by law.

Comment A.9.1: Terry Thedell on behalf of San Diego Gas & Electric commented that the proposed language should provide for discretionary as opposed to mandatory enforcement of the Repeat criteria.

Response: For the reasons discussed above in her response to Comment A.3.1, the Director disagrees with this comment.

Comment A.10.1: Vicky Wells, Director of Health & Safety for the City and County of San Francisco, Department of Public Health, commented that Repeat violations should be based on the same hazard as opposed to the same violation.

Response: For the reasons discussed above in response Comment A.2.1, the Director modified the proposed text in the Second Notice of Modification published on May 6, 2016, to address this issue.

Comment A.10.2: Ms. Wells commented that the Proposed Rulemaking should define what constitutes an employer for purposes of issuing a Repeat citation.

Response: The Director has decided not to further modify the Proposed Rulemaking in response to this comment. The term "employer" is defined in Labor Code section 6304. Regulation and case law also further define "employer" in the context of dual-employer and multi-employer work sites. Further definition in the context of Repeat violations does not appear to the Director to be necessary.

Comment A.11.1: Mike Meuter on behalf of California Rural Legal Assistance, Inc. ("CRLA") commented that the Director should change the three year look-back period in the Proposed

Rulemaking to a five-year look-back period to make the regulation as effective as the federal plan.

Response: The Director has accepted this comment, and amended the language of section 334(d) to read "five years" instead of "three years." This amendment was the subject of the First Notice of Modification published on November 25, 2015.

Comment A.11.2: Mr. Meuter commented that the Director should change the Repeat citation criteria to mirror the federal standard which allows Repeat citations for violations of the same or substantially similar violation.

Response: The Director has accepted this comment, and amended the language of section 334(d) to reflect the federal standard. This amendment was the subject of the First Notice of Modification published on November 25, 2015.

Comment A.11.3: Mr. Meuter commented that he opposed the removal of the current five-year look-back period for Repeat citations for field sanitation violations, and that such removal violated Labor Code section 6712(c).

Response: The Director has accepted this comment. The language of the Proposed Rulemaking has been amended to provide a look-back period of five years for all cited violations. Therefore, additional language specifying that the look-back period for field sanitation violations is five years became redundant, and was removed.

Comment A.12.1: Michael Herges, Director of Health & Safety for Granite Rock, and Co-Chair of CalCIMA (California Construction and Industrial Materials Association), a signatory to the Chamber letter, commented that the Director must take into consideration the increased risk of Repeat citations for industries that are faced with mandated annual inspections.

Response: The Director has declined to further amend the Proposed Rulemaking in response to this comment. Exempting employers who are subject to annual investigations from the requirements of the Repeat regulation would make California's program less effective than the federal program with respect to such employers. Furthermore, by providing such employers some form of exemption from the regulation's requirements, the Director would potentially allow their employees to be exposed to hazards which should otherwise be abated.

Comment A.13.1: Jora Trang, Managing Attorney at Worksafe, Inc, commented that the proposed Repeat criteria should be changed to include "substantially similar" hazards because factually identical occurrences do not always lead to the same violation or hazard, whereas the same violation can have different hazards.

Response: For the reasons discussed above in response to Comment A.2.1, the Director modified the proposed text in her Second Notice of Modification published on May 6, 2016 and

her First Notice of Modification published on November 25, 2015, respectively, to mirror the federal standard. That modification addresses Ms. Trang's comment.

Comment A.13.2: Ms. Trang commented that the Director should change the three year look-back period in the Proposed Rulemaking to a five-year look-back period to make the regulation at least as effective as the federal plan.

Response: For the reasons discussed in response to Comment A.11.1, the Director modified the proposed text in her First Notice of Modification published on November 25, 2015.

Comment A.13.3: Ms. Trang commented that the proposed language measuring the three different look-back periods was not clear, and that the third measure, "date of final abatement," created an incentive for an employer not to abate a hazard because the employer would be immunized from Repeat citations during an extended abatement period.

Response: For the reasons discussed above in response to Comments A.1.2 and A.2.2, the Director modified the proposed text in her First Notice of Modification published on November 25, 2015.

Comment A.14.1: Anne Katten on behalf of CRLA, commented that the proposed Repeat criteria should be changed to include "substantially similar" language because, under the federal standard, a violation of two different standards is a Repeat violation if the hazardous conditions in each case are substantially similar.

Response: For the reasons discussed above in response to Comment A.2.1, the Director modified the proposed text in her Second Notice of Modification published on May 6, 2016 and her First Notice of Modification published on November 25, 2015, respectively, to mirror the federal standard.

B. Written Comments Received in Connection with October 2, 2015 Public Hearing:

The Director received written comments from fourteen commenters during the 45-day comment period; six of whom provided oral comments at the October 2, 2015 Public Hearing.

Comment B.1.1 & Response: By electronic mail dated September 30, 2015 at 11:14 AM, Marti Fisher of the California Chamber of Commerce made the comments she presented orally the next day at hearing. Her comments are summarized above as Comments A.1.1, A.1.2, A.1.3 and A.1.4, followed by the Director's responses. Michael Soli of the California Chamber of Commerce submitted the same written comments by electronic mail dated September 30, 2015 at 4:47 PM. The Director's responses to his comments are the same as those provided to Ms. Fisher above.

Comment B.1.2: California Chamber of Commerce's written comments also stated that to maintain consistency with the federal standard, the measurement of time between the two events

giving rise to a Repeat citation must be based on the final order of the first violation and the issuance of a citation on the second violation as opposed to the date of the inspection as indicated in the proposed changes.

Response: The Director agrees for the reasons discussed above in response to Comment A.2.2.

Comment B.2.1 & Response: On September 25, 2015, by electronic mail and facsimile, Charles L. Rea, Director of Communications for CalCIMA, made the same comment CalCIMA's Co-Chair Michael Herges presented orally the next day at the hearing. CalCIMA's comment is summarized above as Comment A.12.1, followed by the Director's response.

Comment B.3.1 & Response: On October 1, 2015, by electronic mail, Elizabeth Treanor, Director of Phylmar Regulatory Round Table and the OSH Forum made the same comments she presented orally the next day at hearing. Ms. Treanor's comments are summarized above as Comments A.3.1, A.3.2 and A.3.3, followed by the Director's response.

Comment B.4.1 & Response: On October 1, 2015, by electronic mail, C. Bryan Little, Director of California Farm Bureau Federation made the same comment he presented orally the next day at hearing. Mr. Little's comment is summarized above as Comment A.4.1, followed by the Director's response.

Comment B.4.2: Mr. Little's written comments also stated that the Division has not demonstrated that the proposed change is necessary because it has not demonstrated that its program is not "at least as effective" as the federal program.

Response: The Director disagrees with this comment for the reasons discussed above in her response to Comment A.1.2.

Comment B.4.3: Mr. Little's written comments also stated that the implementation of the new Repeat violation criteria will divert agency resources from basic enforcement.

Response: The Director disagrees with this comment for the reasons discussed above in her response to Comment A.1.1.

Comment B.4.4: Mr. Little's written comments also stated that broadening the applicability of Repeat violations will not improve safety because California already has tools to enforce its policies such penalties unnecessary.

Response: The Director disagrees with this comment for the reasons discussed above in her response to Comment A.1.1.

Comment B.4.5: Mr. Little's written comments also stated that the Repeat criteria based on a finding of the "same violation" as opposed to a "substantially similar condition or hazard" would result in a Repeat violation under California but not under the Federal OSHA policy.

Response: The Director agrees for the reasons discussed above in response to Comment A.2.1.

Comment B.4.6: Mr. Little's written comments also stated that by setting the end date of a Repeat look-back period at the date of the second inspection as opposed to date the citation is issued, the Proposed Rulemaking arbitrarily lengthens the "look-back" time frame for issuing Repeat violations, giving Cal/OSHA an extra six months to issue the citation beyond the specified look-back period.

Response: The Director agrees for the reasons discussed above in response to Comment A.2.2.

Comment B.5.1: On October 1, 2015, by electronic mail, Michael Meuter and Anne Katten on behalf of CRLA made the same comments Mr. Meuter presented orally the next day at hearing. Mr. Meuter's comments are summarized above as Comments A.11.1, A.11.2, A.11.3, A.11.4, and A.2, followed by the Director's responses.

Comment B.6.1 & Response: On October 1, 2015, by electronic mail, Jora Trang on behalf of Worksafe, Inc., made the same comments she presented orally the next day at hearing. Ms. Trang's comments are summarized above as Comments A.13.1, A.13.2, and 13.3 followed by the Director's response.

Comment B.6.2: Ms. Trang's written comments also stated that the proposed language contained a grammatical inconsistency, in that the term "violations" in the last sentence should be changed to "violation."

Response: The Director decided not to address Ms. Trang's comment in its First Notice of Modification published on November 25, 2015. However, this point became moot with the publication of the Second Notice of Modification on May 6, 2016, because the sentence Ms. Trang complained of was removed from the proposed regulatory text.

Comment B.7.1: On October 2, 2015, by electronic mail and U.S. mail, Mitch Seaman, Legislative Advocate for California Labor Federation AFL-CIO iterated Comments A.1.2, A.13.1 and A.14.1 made at the October 2, 2015 public hearing by CRLA and Worksafe concerning changing the text of the Repeat citation criteria to mirror the federal standard to provide Repeat citations for violations of the same or substantially similar violation.

Response: The Director agrees for the reasons discussed above in response to Comments A.11.2 and A.2.1.

Comment B.7.2: Mr. Seaman, like CRLA and Worksafe, also commented that the Director should change the three-year look-back period in the Proposed Rulemaking to a five-year look-back period to make the regulation as effective as the federal plan.

Response: The Director agrees for the reasons discussed above in response to Comment A.11.1.

Comment B.8.1: On October 2, 2015, by facsimile, Shane A. Gusman on behalf of California Teamsters Public Affairs Council iterated the comments voiced by CRLA and Worksafe concerning changing the text of the Proposed Rulemaking to (1) set the look-back period at five instead of three years; (2) to allow Repeat citations for "substantially similar violations," and (3) to eliminate "date of final abatement" look-back period measure because it immunizes employers from Repeat citations during an extended abatement period.

Response: The Director agrees for the reasons discussed above in response to Comments A.11.1, A.11.2, and A.13.3, respectively.

Comment B.9.1: On October 2, 2015, by electronic mail, Eric Frumin, Health and Safety Director for Change to Win iterated the comments voiced by CRLA and Worksafe concerning changing the text of the Proposed Rulemaking to (1) set the look-back period at five instead of three years; (2) to allow Repeat citations for "substantially similar violation," and (3) to eliminate "date of final abatement" look-back period measure because it immunizes employers from Repeat citations during an extended abatement period.

Response: The Director agrees for the reasons discussed above in response to Comments A.11.1, A.11.2, and A.13.3, respectively.

Comment B.10.1: On October 2, 2015, by electronic mail, Jorge Cabrera, Director for Southern California Coalition for Occupational Safety and Health (SoCalCOSH,) iterated the comments voiced by CRLA and Worksafe concerning changing the text of the Proposed Rulemaking to (1) set the look-back period at five instead of three years; (2) to allow Repeat citations for "substantially similar violation," and (3) to eliminate "date of final abatement" look-back period measure because it immunizes employers from Repeat citations during an extended abatement period.

Response: The Director agrees for the reasons discussed above in response to Comments A.11.1, A.11.2, and A.13.3, respectively.

Comment B.11.1: On October 2, 2015, by electronic mail, Michael J. Wright, Director of Health, Safety and Environment for United Steelworkers, iterated the comments voiced by CRLA and Worksafe concerning changing the text of the Proposed Rulemaking to (1) set the look-back period at five instead of three years; (2) to allow Repeat citations for "substantially similar violation," and (3) to eliminate "date of final abatement" look-back period measure because it immunizes employers from Repeat citations during an extended abatement period.

Response: The Director agrees for the reasons discussed above in response to Comments A.11.1, A.11.2, and A.13.3, respectively.

Comment B.12.1: On October 2, 2015, by electronic mail and U.S. mail, Frances C. Schreiberg on behalf of the Labor & Employment Committee of the National Lawyers Guild iterated the

comments voiced by CRLA and Worksafe concerning changing the text of the Proposed Rulemaking to (1) set the look-back period at five instead of three years; (2) to allow Repeat citations for "substantially similar violation," and (3) to eliminate "date of final abatement" look-back period measure because it immunizes employers from Repeat citations during an extended abatement period, and (4) to clarify the start and ending points of the proposed look-back period.

Response: The Director agrees for the reasons discussed above in response to Comments A.11.1, A.11.2, A.13.3, and A.2.2, respectively.

Comment B.13.1: On October 2, 2015, by electronic mail and U.S. mail, Steve Kazan on behalf of past and future clients of Kazan, McClain, Satterley & Greenwood, iterated the comments voiced by CRLA and Worksafe concerning changing the text of the Proposed Rulemaking to (1) set the look-back period at five instead of three years; (2) to allow Repeat citations for "substantially similar violation," and (3) to eliminate "date of final abatement" look-back period measure because it immunizes employers from Repeat citations during an extended abatement period, and (4) to clarify the start and ending points of the proposed look-back period.

Response: The Director agrees for the reasons discussed above in response to Comments A.11.1, A.11.2, A.13.3, and A.2.2, respectively.

Comment B.14.1: On October 2, 2015, by electronic mail, Manish Gooneratne, Safety Professional at Vigilant, commented that a low score on the FAME study does not mean that Cal/OSHA is not effective and enforcing and preventing accidents, thereby making the Proposed Rulemaking unnecessary.

Response: The Director disagrees with this comment for the reasons discussed above in her response to Comment A.1.2.

Comment B.14.2: Mr. Gooneratne also commented that General violations should be excluded from the Repeat definition because the state and federal focus is only on Serious violations.

Response: The Director disagrees with this comment, and sees no justification for limiting proposed changes to the definition of "Repeat" to Serious violations. The justification and public policy for amending the Repeat definition for Serious violations also apply to General violations.

Comment B.14.3: Mr. Gooneratne also commented that multi-site employers should be given additional opportunities for correction before they are designated as Repeat violators.

Response: The Director has decided not to accommodate this request because it would make California's Repeat enforcement policy inconsistent and less effective than the federal policy.

Comment B.14.4: Mr. Gooneratne also commented that the proposed multi-site Repeat violation rule would deter business expansion.

Response: The Director disagrees with this comment because, as discussed in the ISOR, the Director concluded that the economic impact, including the ability of California businesses to compete in other states, will not be significant under the Proposed Rulemaking.

Comment B.15.1: On October 1, 2015, by electronic mail, Jora Trang on behalf of Worksafe, Inc., asked whether the removal of the "substantially similar" language was intention or a clerical error, and if it was intentional, the reason why it was removed.

Response: The original proposed text noticed on August 14, 2016 did not include the "substantially similar" language. However, this point became moot with the publication of the Second Notice of Modification on May 6, 2016, because the Director modified the proposed text to include the "substantially similar" language.

C. Summaries of and Responses to Comments Received During the First 15-Day Comment Period of November 25, 2015 through December 15, 2015.

The Director received sixty-seven written comments during the November 25, 2015 through December 15, 2015 comment period. Many of the comments were substantively identical. Substantively identical comments from different individuals and organizations will be grouped together below.

Comments C.1.1 to C.40.1: From December 2, 2015 to December 15, 2015, either by electronic mail or U.S. mail, the Division received written comments from the following forty individuals and organizations ("Robert D. Peterson et al.") stating that the "similar hazards or conditions" should not constitute a basis for a Repeat violation because the terms "similar," "hazard" and "condition" are not defined in the current or Proposed Rulemaking and interpretation of such terms would be in the hands of individual enforcement officers and thus violate the Constitutional due process rights of employers: (1) Robert D. Peterson of Robert D. Peterson Law Corporation; (2) David Donnell of Robert D. Peterson Law Corporation; (3) Andrew Cardin of SVP Operations; (4) Rick Maursettter of Duininck; (5) Mark Christiansen of Wooden Window; (6) Adriana Ramirez; (7) Joe Brooks of Old Castle Precast; (8) Terri Willrodt of Old Castle Precast; (9) John Iles of Pacific Boring; (10) Terry Cleveland of Antelope Valley Community College District; (11) John Dang of Polynt Composites USA Inc.; (12) Paul Cocotis of Shimmick Construction; (13) David DeBlasio of Gayle Manufacturing Company; (14) Stephen Brooks, CSP; (15) Kevin Smith of dck worldwide, LLC; (16) Mike Stelmasek of Bernards; (17) Mike Fisher of Therma; (18) Jason Rivera of Preston Pipelines; (19) Fred Gerlinger of Gerligner Steel & Supply Co.; (20) Mike Hazen of Tilton Pacific Construction, Inc.; (21) Thomas Lindsey of Tricorp Construction; (22) Brian McCord of California American Water; (23) Denise Robson of Golden Parkway Inc.; (24) Nick Zwetsloot of Nichelini General Engineering Contractors Inc.; (25) Gary Albert of Capitol Mechanical, Inc.; (26) Mobley Gade of Flatiron Corp.; (27) Steve Christian of Southgate Glass Carmichael; (28) Kevin Prosch of McClone Construction; (29) John Gordon of Decker Electric Co., Inc.; (30) Kevin Fuchino of

Central Valley Screen & Supply; (31) Mike Nelson of Structure Works NW LLC; (32) Brian Vandenburgh, P.E. of The Structures Group; (33) Gregg Brady of Brady Company/Central California, Inc.; (34) Joe Lawrence of Probuild; (35) Mary Rotelli of Teichert; (36) Daniel Garza of Harris Rebar Northern California; (37) Michael Walbrect of Warner Bros. Entertainment Inc.; (38) Jo Gerlinger, Secretary for Construction Employers' Association; (39) Dave K. Smith, Managing Consultant at Dave Smith & Company; and (40) Michael Walton, Secretary for Construction Employers' Association.

Response: For the reasons discussed above in response Comment A.2.1, the Director modified the proposed text in the Second Notice of Modification published on May 6, 2016, to address this issue.

Comments C.1.2 to C.40.2: From December 2, 2015 to December 15, 2015, either by electronic mail or U.S. mail, Robert D. Peterson et al. also commented that the proposed amendments would inappropriately treat two completely unrelated activities as the same.

Response: The Director agrees with this comment for the reasons discussed above in response to Comment A.2.1.

Comments C.39.3 to C.40.3: On December 11, 2015 and December 14 2015, by electronic mail, Dave K. Smith, Managing Consultant of Dave Smith & Company, and Michael Walton, Secretary for Construction Employers' Association, respectively, also commented that Employers who violate the same section of title 8, California Code of Regulations should be subject to a Repeat classification.

Response: The Director disagrees with this comment for the reasons discussed above in her response to Comment A.2.1.

Comment C.40.4: Michael Walton, Secretary for Construction Employers' Association also commented that the look-back period should remain at three years.

Response: The Director disagrees with this comment for the reasons discussed above in her response to Comment A.3.3.

Comments C.41.1 to C.42.1: From December 3, 2015 to December 7, 2015, by electronic mail, (41) Mike Walker of Walker Lumber, and (42) Kirk Huffman of Bomel Construction commented that the "similar hazards or conditions" should not constitute a basis for a Repeat violation because the terms "similar," "hazard" and "condition" are not defined in the current or Proposed Rulemaking and interpretation of such terms would be in the hands of individual enforcement officers, and thus violate the Constitutional due process rights of employers.

Response: The Director disagrees with this comment for the reasons discussed above in her response to Comments C.1.1 to C.40.1.

Comments C.43.1 to C.46.1: From December 3, 2015 to December 15, 2015, by electronic mail the following four individuals and organizations ("Philip Lee et al.") commented that the expansion of the look-back period from three to five years is unnecessary: (43) Philip Lee of Granite Construction; (44) Nancy Moorhouse, Consultant; (45) Jack Molodanof of Moladanof Government Relations on behalf of the Automotive Service Councils of California (ASCCA); and (46) collectively, Emily Cohen of United Contractors (UCON), David Jones of Associated General Contractors (AGC), Eddie Bernachhi of National Electrical Contractors Association (NECA) and California Legislative Conference of Plumbing, Heating and Piping Industry (CLC), and Bret Barrow of Western Line Constructors.

Response: The Director disagrees with this comment for the reasons discussed above in her response to Comments A.1.2 and A.3.3.

Comments C.43.2 to C.46.2: Phillip Lee et al. also commented that the establishment/geographic restrictions should not be eliminated from the Repeat definition.

Response: The Director disagrees with this comment for the reasons discussed above in her response to Comments A.1.4 and A.4.1.

Comments C.43.3 to C.46.3: Phillip Lee et al. also commented that the terms "similar," "hazard" and "condition" are not and are susceptible to different interpretations among field enforcement officers which may negatively impact small employers.

Response: The Director disagrees with this comment for the reasons discussed above in her response to Comments C.1.1 to C.40.1.

Comment C.47.1: On December 3, 2016, Vicky Wells, Director of Health & Safety for the City and County of San Francisco, Department of Public Health, commented that the Proposed Rulemaking should include a definition of "Employer."

Response: The Director disagrees with this comment for the reasons discussed above in her response to Comment A.10.2.

Comment C.48.1: On December 15, 2016, Jora Trang, Managing Attorney at Worksafe, Inc. (1) thanked the Director for amending the definition to mirror the FOM, and noted that the "substantially similar" language is firmly established in federal case law citing *Caterpillar v. Sec'y of Labor*, 154 F.3d 400 (7th Cir. 1998); (2) applauded the amendment to expand the look-back period from three to five years; (3) supported the deletion of the "date of final abatement" as look-back period trigger; and (4) commented that the proposed language contained a grammatical inconsistency in that the term "violations" in the last sentence should be changed to singular form.

Response: The Director thanks Ms. Trang for her comments but did not accommodate her latter request for the reasons discussed in response to Comment B.6.2.

Comment C.49.1: On December 15, 2016, Anne Katten, Migrant Project Director at CRLA commented that it supported (1) the increased look-back period from three years to five years for all violations; (2) the addition of the substantially similar hazards and conditions language to the Repeat violation definition; (3) and the elimination of the "date of final abatement of the violation in the underlying citation" as a start date for the look-back period.

Response: The Director thanks Ms. Katten for her comments.

Comment C.50.1: On December 4, 2016, Garlon Prewitt, a retired safety manager, commented that the Director should not enact the new changes because most employers have their own internal punishments for Repeat violations.

Response: The Director disagrees with the comment for the reasons discussed above in her response to Comment A.1.2.

Comment C.51.1: On December 8, 2016, Ricardo Beas, Safety & Loss Control Representative for Paychex, Inc., commented that the changes are unnecessary and that Federal OSHA pressure does not justify such an overwhelming change.

Response: The Director disagrees with the comment for the reasons discussed above in her response to Comment A.1.2.

Comment C.52.1: On December 3, 2016, Mark Suden of Mining Construction Inc. commented that the extension of the look-back period to five years should be stricken.

Response: The Director disagrees with the comment for the reasons discussed above in her response to Comments A.1.2 and A.3.3.

Comment C.52.2: Mr. Suden also commented that the "similar hazards or conditions" should not constitute a basis for a Repeat violation because the terms "similar," "hazard" and "condition" are not defined in the current or Proposed Rulemaking and interpretation of such terms would be in the hands of individual enforcement officers and thus violate the Constitutional due process rights of employers

Response: For the reasons discussed above in response Comment A.2.1, the Director modified the proposed text in the Second Notice of Modification published on May 6, 2016, to address this issue.

Comment C.52.3: Mr. Suden also commented that the proposed amendments would inappropriately treat two completely unrelated activities as the same.

Response: The Director agrees with this comment for the reasons discussed above in response to Comment A.2.1.

Comment C.53.1: On December 10, 2015, by electronic mail, Charles L. Rea, Director of Communications for CalCIMA commented that the proposal is vague as to the terms "similar," "hazard" and "condition."

Response: For the reasons discussed above in response Comment A.2.1, the Director modified the proposed text in the Second Notice of Modification published on May 6, 2016, to address this issue.

Comment C.53.2: Mr. Rea also comment that the proposed changes make it possible to issue a Repeat citation for the same standard, even though the violation or hazardous condition may be different and the Director should clarify that a violation of the same standard is not a Repeat violations when the hazardous conditions of each case were not substantially similar.

Response: For the reasons discussed above in response Comment A.2.1, the Director modified the proposed text in the Second Notice of Modification published on May 6, 2016, to address this issue.

Comment C.53.2: Mr. Rea also comment that the removal of the establishment and geographic limitations penalize businesses with different types of operations and should be stricken.

Response: The Director disagrees with this comment for the reasons discussed above in her response to Comments A.1.4 and A.4.1.

Comment C.53.2: Mr. Rea also comment that the removal of the establishment and geographic limitations penalize businesses subject to annual inspections such as the mining industry and thus, the look-back period for the mining industry should be reduced to one year.

Response: The Director disagrees with this comment for the reasons discussed above in her response to Comments A.1.2, A.1.4, A.3.3, A.4.1 and A.12.1.

Comment C.54.1: On December 15, 2015, Amy Blankenbiller and Kevin Brinkman on behalf of National Elevator Industry, Inc. commented that by expanding "violations" to "violations hazard or condition" the Director is broadening the Repeat definition to implicate any situation.

Response: For the reasons discussed above in response Comment A.2.1, the Director modified the proposed text in the Second Notice of Modification published on May 6, 2016, to address this issue.

Comment C.54.2: Ms. Blankenbiller and Mr. Brinkman also commented that the Repeat definition lacks provisions to protect employers from an employee's deliberate disregard of established and audited safety programs.

Response: The Director disagrees with this comment. The proposed regulation does not strip employers from their right to assert affirmative defenses related to an employee's deliberate

disregard of established and audited safety programs, including, but not limited to the independent employee action defense.

Comment C.54.3: Ms. Blankenbiller and Mr. Brinkman also commented that the phrase "or substantially similar" opens the doors to allow inspectors to make judgment calls about what is similar and broadens the scope.

Response: The Director agrees with this comment for the reasons discussed above in response to Comment A.2.1.

Comment C.54.4: Ms. Blankenbiller and Mr. Brinkman also commented that there is no justification for extending the Repeat look-back period to five years.

Response to 54.4: The Director disagrees with this comment for the reasons discussed above in her response to Comments A.1.2 and A.3.3.

Comment C.55.1: On December 15, 2015, by electronic mail, the California Chamber of Commerce, Agricultural Council of California, Air Conditioning Trade Association, American Fire Sprinkler Association, American Pistachio Growers, Associated Builders and Contractors of California, Associated Builders and Contractors – San Diego Chapter, Associated General Contractors of California, Associated Roofing Contractors of the Bay Area Counties, Inc., California Attractions and Park Association, California Professional Association of Specialty Contractors, California Assoc. of Sheet Metal and Air Conditioning Contractors National Association, California Chapter – American Fence Association, California Construction and Industrial Materials Association, California Cotton Growers Association, California Cotton Ginners Association, California Farm Bureau Federation, California Fence Contractors Association, California Framing Contractors Association, California Fresh Fruit Association, California Hotel and Lodging Association, California League of Food Processors, California Lodging Industry Association, California Retailers Association, California Solar Energy Industry Association, Construction Employer's Association, Family Business Association of California, Flasher Barricade Association, Golden State Builders Exchange, Nisei Farmers League, Plumbing-Heating-Cooling Contractors Association of California, Residential Contractor's Association, Sacramento Regional Builders Exchange, Society for Human Resource Management, UnitedAg, United Contractors (UCON), Walter & Prince, LLP, Western Electric Contractors Association (WECA), Western Agricultural Processors Association, Western Growers Association, Western Steel Council ("California Chamber of Commerce et al.") commented that the proposed regulation is unnecessary because California imposes higher penalties, has stronger regulations, and covers more hazards than Federal OSHA.

Response: For the reasons discussed above in response to Comments A.1.2 and A.1.3, the Director disagrees with this comment.

Comment C.55.2: The California Chamber of Commerce et al. also commented that the proposed regulation will undermine larger California employer's good-faith efforts to comply with the regulation and redirect limited resources away from pursuing the underground economy.

Response: For the reasons discussed above in response to Comment A.1.1, the Director disagrees with this comment.

Comment C.55.3: The California Chamber of Commerce et al. also commented that the proposed regulation is unnecessary because California's program is not required to be the same as the federal program.

Response: For the reasons discussed above in response to Comment A.1.2, the Director disagrees with this comment.

Comment C.55.4: The California Chamber of Commerce et al. also commented that the modified proposed regulation is unclear as to whether a "Repeat" violation will be based on a similar violation or similar citation.

Response: The Director agrees for the reasons discussed above in response to Comment A.2.2.

Comment C.55.6: The California Chamber of Commerce et al. also commented that the scope of the modified proposed regulation is broader than the federal scope as stated in the FOM, and that clarifying language to conform to the federal approach should be added.

Response: For the reasons discussed above in response Comment A.2.1, the Director modified the proposed text in the Second Notice of Modification published on May 6, 2016, to address this issue.

Comment C.55.7: The California Chamber of Commerce et al. also commented that the sentence requiring that violation be based on "prior violations cited within the state" in the proposed text is inconsistent with the first sentence which requires that a Repeat violation be based on a citation that has become a final order.

Response: The Director has accepted this comment. The Director also deleted the second sentence requiring that a Repeat violation be based on "prior violations cited within the state" because it was inconsistent with the first sentence requiring that a Repeat violation be based on a citation that has become a final order. The Director amended the first sentence of section 334(d) to clarify that a repeat citation must be based on an earlier violation "occurring within the State" for which a citation issued resulting in a final order. This amendment was the subject of the Second Notice of Modification published on May 6, 2016

Comment C.55.8: The California Chamber of Commerce et al. also commented that they oppose the elimination of the establishment/geographic restrictions.

Response: For the reasons discussed in her response to Comments A.1.4 and A.4.1, the Director disagrees with this comment.

Comment C.55.9: The California Chamber of Commerce et al. also commented that the proposed changes are unnecessary, confusing, and more stringent than the federal rule.

Response: For the reasons discussed above in response to Comment A.1.2, the Director disagrees with this comment.

Comment C56.1: On December 3, 2015, by electronic mail, Rob Neenan, President CEO of California League of Food Processors (CLFP) commented that each food processing facility should be held accountable for its own actions.

Response: The Director disagrees with this comment for the reasons discussed in her response to Comments A.1.2, A.1.4., A.3.3., A.4.1 and A.12.1.

Comment C.56.2: Mr. Neenan also commented that the proposed regulation does not establish that the elimination of the establishment/geographic limitation is necessary make California's Repeat standard as effective as the federal standard.

Response: The Director disagrees with this comment for the reasons discussed in her response to Comments A.1.2, A.1.4., A.3.3., A.4.1 and A.12.1.

Comment C.56.3: Mr. Neenan also commented that the proposed regulation does not clearly define what constitutes a "substantially similar" violation.

Response: For the reasons discussed above in response Comment A.2.1, the Director modified the proposed text in the Second Notice of Modification published on May 6, 2016, to address this issue.

Comment C.56.4: Mr. Neenan also commented that the changes in the modified text constitute major changes requiring an additional public comment period and workshop to address the issues raised by CLFP.

Response: The Director disagrees with this comment. The proposed changes are sufficiently related to the original proposed text.

Comment C.56.5: Mr. Neenan also commented that the proposed changes to increase the number of Repeat citations are unnecessary and will do little to make workplaces safer.

Response: For the reasons discussed above in response to Comments A.1.2 and A.1.4, the Director disagrees with this comment.

Comments C.57.1 to C.58.1: On December 14 and 15, 2015, by electronic mail, (57) Terry L. Tyson, Regional Director Safety and Health Lehig Hanson Region West, and (58) Brian Bigley,

Safety Manager for Lehigh SW Cement, respectively, ("Mssrs. Tyson and Bigley") commented that the proposed regulation will adversely impact and penalize businesses with multiple types of operations and facilities and thus, the Repeat criteria should be limited to "same type of facility."

Response: The Director disagrees with this comment for the reasons discussed above in her response to Comments A.1.2, A.1.4, A.3.3, A.4.1 and A.12.1.

Comments C.57.2 to C.58.2: Messrs. Tyson and Bigley also commented that the proposed regulation will adversely impact and penalize businesses subject annual and biannual inspection that are under a different federal-state regulatory structure, and thus, such businesses should be subject to a 1-year instead of a 5-year look-back period.

Response: The Director disagrees with this comment for the reasons discussed in her response to Comments A.1.2, A.1.4., A.3.3., A.4.1 and A.12.1.

Comments C.57.3 to C.58.3: Messrs. Tyson and Bigley commented that the definitions for "similar," hazard" and "condition" are unclear and will make unrelated actions subject to "Repeat" violations in California that are not Repeat violations under Federal OSHA.

Response: For the reasons discussed above in response Comment A.2.1, the Director modified the proposed text in the Second Notice of Modification published on May 6, 2016, to address this issue.

Comment C.57.4: On December 14 2015, by electronic mail, Terry L. Tyson, Regional Director Safety and Health Lehig Hanson Region West commented that the proposed regulations can detract from the efforts of safety and may result in resources being directed to other areas to defend company interests in the event that a Repeat violation is written under the proposed regulation.

Response: The Director disagrees with this comment for the reasons discussed above in her response to Comment A.3.3.

Comment C.59.1: On December 2, 2015, by electronic mail, John McCullough, Assistant Vice President of Wells Fargo commented that changing the look-back time and Repeat violation definition are major changes which should result in additional public hearings and a revision to the ISOR.

Response: The Director disagrees with the comment for the reasons discussed above in response to Comment C.56.4.

Comment C.59.2: Mr. McCullough also commented that the major change from three to five years exceeds the published federal regulation/standard on Repeat violations look-back period and should be deleted.

Response: The Director disagrees with the comment for the reasons discussed above in her response to Comments A.1.2, A.3.3 and C.56.4.

Comment C.59.3: Mr. McCullough also commented that a five year look-back period was not found in the 2013 FAME report listed in the ISOR and should be fully explained.

Response: The Director agrees that there was no recommendation to extend the look-back period from three to five years in the 2013 FAME report; the Director's reasons for amending the look-back period from three to five years are discussed in her response to Comment A.1.2.

Comment C.59.4: Mr. McCullough also commented that there is no definition of "substantially similar" which will result in interpretations being made by compliance officers and district managers and additional citations and appeals.

Response: For the reasons discussed above in response to Comment A.2.1, the Director modified the proposed text in her Second Notice of Modification published on May 6, 2016 to mirror the federal standard.

Comment C.59.5: Mr. McCullough also commented that the addition of "substantially similar" to the Repeat criteria was not identified in the 2013 FAME report and should be deleted.

Response: The Director agrees that there was no recommendation to adopt the federal "substantial similarity" language in the 2013 FAME report. The Director's reasons for including the "substantially similar" language to the Repeat criteria are discussed in her response to Comment A.2.1.

Comments C.60.1 to C.64.1: From December 7, 2015 to December 15, 2015, either by electronic mail, the Division received written comments from the following individuals and organizations ("Mark McClone et al.") stating that the "similar hazards or conditions" should not constitute a basis for a Repeat violation because the terms "similar," "hazard" and "condition" are not defined in the current or Proposed Rulemaking and interpretation of such terms would be in the hands of individual enforcement officers and thus violate the Constitutional due process rights of employers: (60) Mark McClone of McClone Construction; (61) Dorothy Ormsby and Jeffrey A. Larson of Harris Rebar Northern California; (62) Jeffrey A. Larson of Harris Rebar Northern California; (63) Scott Elliott of Haley, Bros. Inc.; (64) Bib Giraudo, Safety Manager for Alten Construction;

Response: For the reasons discussed above in response Comment A.2.1, the Director modified the proposed text in the Second Notice of Modification published on May 6, 2016, to address this issue.

Comments C.60.2 to C.64.2: Mark McClone et al. also commented that the proposed amendments would inappropriately treat two completely unrelated activities as the same.

Response: The Director agrees with this comment for the reasons discussed above in response to Comment A.2.1.

Comments C. 64.3: On December 15, 2016, Bib Giraudo, Safety Manager for Alten Construction also commented that many employees, especially the construction industry, work in constant changing environment and the proposed amendment does not take into account the number of projects a company might have and would become more stringent for them, and that three minor violations would be more severe for the company and their employees.

Response: The Director disagrees with this comment for the reasons discussed above in her response to Comments A.1.4 and A.4.1.

Comments C. 64.4: Mr. Giraudo also commented that many times repeat violations are not in the direct control of the Employer's supervision.

Response: The Director agrees with this comment for the reasons discussed above in response to Comment C.54.2.

Comment C.65.1: On December 9, 2015, by U.S. mail, on behalf of United Contractors, collectively, Emily Cohen of United Contractors (UCON), David Jones of Associated General Contractors (AGC), Eddie Bernachhi of National Electrical Contractors Association (NECA) and California Legislative Conference of Plumbing, Heating and Piping Industry (CLC), and Bret Barrow of Western Line Constructors ("United Contractors").

Response: The Director disagrees with this comment for the reasons discussed above in her response to Comments A.1.2 and A.3.3.

Comment C.65.2: United Contractors also commented that the establishment/geographic restrictions should not be eliminated from the Repeat definition.

Response: The Director disagrees with this comment for the reasons discussed above in her response to Comments A.1.4 and A.4.1.

Comment C.65.3: United Contractors also commented that the terms "similar," "hazard" and "condition" are not and are susceptible to different interpretations among field enforcement officers which may negatively impact small employers.

Response: The Director disagrees with this comment for the reasons discussed above in her response to Comments C.1.1 to C.40.1.

Comment C.66.1: Wilson M. Yancey, Jr., of Quanta Services, Inc., and Robert B. Humphreys, of Akin Gump Strauss Hauer & Feld LLP ("Mssrs. Yancey and Humphreys") commented that the proposed definition remains unconstitutionally and unenforceably vague.

Response: The Director disagrees with this comment for the reasons discussed in her response to Comment D.4.1.

Comment C.66.2: Messrs. Yancey and Humphreys commented that the proposed definition is inconsistent with Labor Code section 6429(a).

Response: The Director disagrees with this comment. The proposed definition is consistent with Labor Code 6429(a)'s requirement that the second violation be based on a "particular safety or health standard, order, rule, or regulation," because substantially similar regulatory requirements can relate to "a particular safety or health standard."

Comment C.66.3: Messrs. Yancey and Humphreys commented that the proposed definition will foster more litigation.

Response: The Director disagrees with this comment for the reasons discussed in her response to Comment C.3.3.

Comment C.66.4: Messrs. Yancey and Humphreys commented that the proposed definition will likely result in a greater issuance of Repeat citations making compliance prohibitively expensive, thereby causing companies to leave California.

Response: The Director agrees that the proposed definition will likely somewhat increase the number of Repeat citations the Division issues; however, the Director disagrees with this comment because, as discussed in the ISOR, the Director concluded that the economic impact, including the ability of California businesses to compete in other states, will not be significant under the Proposed Rulemaking.

Comment C.66.5: Messrs. Yancey and Humphreys commented that the proposed changes will benefit the underground economy sector.

Response: For the reasons discussed above in her response to Comment A.1.1, the Director disagrees with this comment.

Comment C.67.1: Bradley D. Closson of CRAFT Forensic Services commented that the proposed regulation is unworkable because it does not define the term "substantially similar."

Response: The Director disagrees with this comment; the term "substantially similar" is not so vague and ambiguous that it denies employers the right of Constitutional due process. The proposed definition which is based on a finding of a "substantially similar regulatory requirement" and "essentially similar conditions and hazards" is not unconstitutionally vague because it places employers on notice that a second violation of a substantially similar regulatory requirement under essentially similar conditions or hazards constitutes a Repeat violation. (See *Caterpillar v. Sec'y of Labor*, 154 F.3d 400 (7th Cir. 1998) (stating that "substantial similarity" must be defined in a manner that will "distinguish between Repeated violations that reflect

simply the scale of a company's operations and those that indicate a failure to learn from experience . . . the citation for the first violation [must] place the employer on notice of the need to take steps to prevent the second violation.").) The Director's reasons for including the "substantially similar" language to the Repeat criteria are discussed in her response to Comment A.2.1.

Comment C.67.2: Mr. Closson also commented that if the term "substantially similar" is not defined, then a Repeat violation must be based on the same codified regulation section.

Response: The Director disagrees with this comment for the reasons discussed above in her response to Comment A.2.1.

Comments C.68.1: On December 7, 2016, by electronic mail, Richard from Mega Biz sent a copy of a message likely from Robert D. Peterson Law Corporation commenting that the terms "similar," "similar hazard," and "conditions" are not defined in the current or Proposed Rulemaking and interpretation of such terms would be in the hands of individual enforcement officers.

Response: For the reasons discussed above in response Comment A.2.1, the Director modified the proposed text in the Second Notice of Modification published on May 6, 2016, to address this issue.

Comment C.68.2: The message from Richard also commented that the proposed amendments would inappropriately treat two completely unrelated activities as the same.

Response: The Director agrees with this comment for the reasons discussed above in response to Comment A.2.1.

Late Comments C.69.1 to C.70.1: After the comment period had expired, by electronic mail, at 5:08 p.m. on December 15, 2015, and 11:35 a.m., on December 17, 2016, Michael Walbrecht, Vice President of Public Affairs at Warner Bros. Entertainment Inc. and Doug Shorey, Vice President/Human Resources of American Building Supply, respectively, ("Mssrs. Walbrecht and Shorey") commented that the terms "similar," "similar hazard," and "conditions" are not defined in the current or Proposed Rulemaking and interpretation of such terms would be in the hands of individual enforcement officers.

Response: For the reasons discussed above in response Comment A.2.1, the Director modified the proposed text in the Second Notice of Modification published on May 6, 2016, to address this issue.

Late Comments C.69.2 to C.70.2: Mssrs. Walbrecht and Shorey also commented that the proposed amendments would inappropriately treat two completely unrelated activities as the same.

Response: The Director agrees with this comment for the reasons discussed above in response to Comment A.2.1.

Late Comment C.71.1: On December 21, 2015, by electronic mail, Dan Leacox, on behalf of California Solar Energy Industry Association, Rooftop Solar, commented that to maintain consistency with the federal standard, the scope of the Repeat violation criteria in the Proposed Rulemaking should be limited to exclude violations of the same standard involving different hazardous conditions that are not substantially similar.

Response: The Director agrees with this comment for the reasons discussed above in response to Comment A.2.1.

Nonresponsive Comment C.72.1: By electronic mail dated December 10, 2015, Greg Severson of Duke Pacific sent a copy of the Notice of Modification to Text of Proposed Regulations without comments.

D. Summaries of and Responses to Comments Received During the Second 15-Day Comment Period of May 6, 2016, through May 24, 2016.

Comment D.1.1: By electronic mail dated May 24, 2016, Mitch Seaman of the California Labor Federation, AFL-CIO, thanked the Director/Division for developing the proposed new and significantly improved standard.

Response: The Director thanks Mr. Seaman for commenting.

Comment D.2.1: By electronic mail dated May 11, 2016, Kirk Huffman of Bomel Construction Company, Inc., commented that the words "substantially similar" included in the Proposed Rulemaking were vague and ambiguous and difficult to enforce from a compliance point of view.

Response: The Director disagrees with this comment for the reasons discussed above in her response to Comments A.2.1 and C.67.1.

Comment D.3.1: By electronic mail dated May 19, 2016, Vicky Wells, Director of Health & Safety for the City and County of San Francisco, Department of Public Health, commented that the Proposed Rulemaking is unnecessary.

Response: For the reasons discussed above in response to Comments A.1.2 and A.1.4, the Director disagrees with this comment.

Comment D.3.1: Ms. Wells commented that the Proposed Rulemaking should include a definition of "Employer."

Response: The Director disagrees with this comment for the reasons discussed above in her response to Comment A.10.2.

Comment D.4.1: By electronic mail dated May 24, 2016, Robert D. Peterson, of The Robert D. Peterson Law Corporation, commented that the terms "essentially similar hazard" should be stricken from the Proposed Rulemaking because they appear to be inconsistent with the first underlined phrase reading "substantially similar regulatory requirement," over-expansive, unnecessary and vague and ambiguous.

Response: The Director disagrees with this comment. The Director added language to section 334(d) to clarify that Repeat violations must be based on "a violation of a substantially similar regulatory requirement" involving "essentially similar conditions and hazards" instead of "same, or a substantially similar, violation, hazard or condition." The terms "essentially similar conditions and hazards" are not inconsistent with the first underlined sentence, or "over-expansive, unnecessary and vague and ambiguous" because such language places employers on notice that a second violation of a substantially similar regulatory requirement under essentially similar conditions or hazards constitutes a Repeat violation. (See *Caterpillar v. Sec'y of Labor*, 154 F.3d 400 (7th Cir. 1998) (stating that "substantial similarity" must be defined in a manner that will "distinguish between Repeated violations that reflect simply the scale of a company's operations and those that indicate a failure to learn from experience . . . the citation for the first violation [must] place the employer on notice of the need to take steps to prevent the second violation.).) The Director further disagrees with this comment for the reasons discussed above in her response to Comments A.1.2 and A.2.1.

Comment D.4.2: Mr. Peterson also commented that the terms "essentially similar hazard" should be stricken from the Proposed Rulemaking because they would inappropriately treat two completely unrelated activities as the same.

Response: The Director disagrees with this comment. The terms do not treat two completely unrelated activities as the same. The Director added the "essentially similar conditions or hazards" terms to the Second Notice of Modification published on May 6, 2016 to clarify that the proposed regulatory text requires that a Repeat violation be based on "substantially similar regulatory requirements" *and* with the exception of regulatory violations, involve "essentially similar conditions or hazards." The latter requirement constitutes one of the elements on which a Repeat violation must be based on under current Occupational Safety and Appeals Board precedent. (See *The Herrick Corporation*, Cal/OSHA App. 97-2604 DAR (Mar. 28, 2001) and *National Steel and Shipbuilding Company*, Cal/OSHA App. 10-3791-3792 DAR (Nov. 17, 2014).) Under the proposed two-part test, the Repeat standard only captures violations involving substantially similar regulatory requirements, conditions and hazards. Mr. Peterson's example that a violation involving misuse of a ladder and a violation involving failure to use fall protection would constitute a Repeat violation because the two violations involve "similar hazard" is inapposite because it does not take into account that the two examples involve different regulatory requirements. On the other hand, a violation of two different regulations would constitute a Repeat violation of they both involved substantially similar regulatory requirements (e.g., a failure to provide drinking water (regulatory requirement) under the field

sanitation standard could serve as a basis for a subsequent violation involving a failure to provide drinking water under the heat illness standard).

Comments D.5.1 to D.6.1: Wilson M. Yancey, Jr., of Quanta Services, Inc., and Robert B. Humphreys, of Akin Gump Strauss Hauer & Feld LLP ("Mssrs. Yancey and Humphreys") commented that the proposed definition remains unconstitutionally and unenforceably vague.

Response: The Director disagrees with this comment for the reasons discussed in her response to Comment D.4.1.

Comments D.5.2 to D.6.2: Messrs. Yancey and Humphreys commented that the proposed definition is inconsistent with Labor Code section 6429(a).

Response: The Director disagrees with this comment for the reasons discussed in her response to Comment C.66.2.

Comment D.5.3 to D.6.3: Messrs. Yancey and Humphreys commented that the proposed definition will foster more litigation.

Response: The Director disagrees with this comment for the reasons discussed in her response to Comment C.3.3.

Comment D.5.4 to D.6.4: Messrs. Yancey and Humphreys commented that the proposed definition will likely result in a greater issuance of Repeat citations making compliance prohibitively expensive, thereby causing companies to leave California.

Response: The Director disagrees with this comment for the reasons discussed in her response to Comment C.66.4.

Comment D.5.5 to D.6.5: Messrs. Yancey and Humphreys commented that the proposed changes will benefit the underground economy sector.

Response: For the reasons discussed above in her response to Comment A.1.1, the Director disagrees with this comment.

Late Comment D.7.1: On August 5, 2016, after the expiration of the comment period, Jora Trang, Managing Attorney at Worksafe, Inc. submitted comments via electronic mail regarding the second proposed modified text. The Director did not respond to these untimely comments.

Nonresponsive Comment D.8.1: By electronic mail dated May 10, 2016, Mitch Seaman, Legislative Advocate for California Labor Federation AFL-CIO asked to be added to the email list regarding this Proposed Rulemaking, and attached the October 2, 2015 letter referenced in Comment B.7, which the Director responded to above.

E. Summaries of and Responses to Comments Received During the 15-Day Comment Period of July 21, 2016, through August 5, 2016 in Response to the Notice of Addition of Documents and Information to Rulemaking File.

The Director received written comments from two individuals and organizations during the July 21, 2016 through August 5, 2016 comment period in response to the Notice of Additional Documents and Information to Rulemaking File. Both comments were nonresponsive.

Nonresponsive Comment E.1: On July 22, 2016, by electronic mail, Vicky Wells, Director of Health & Safety for the City and County of San Francisco, Department of Public Health, commented that the Proposed Rulemaking should define what constitutes an employer for purposes of issuing a Repeat citation. This comment is nonresponsive to the Notice of Additional Documents; however, the Director responded to this comment above in her response to Comment A.10.2.

Nonresponsive Comment E.2: On August 5, 2016, Jora Trang, Managing Attorney at Worksafe, Inc, commented that the 2015 Federal Annual Monitoring Evaluation (FAME) Report for California also supports the Proposed Rulemaking, and iterated the comments expressed in her August 5, 2016 untimely comments concerning the second proposed modified text. Such comments are nonresponsive to the Notice of Additional Documents. Given that, the Director did not respond.

ALTERNATIVES THAT WOULD LESSEN ADVERSE ECONOMIC IMPACT ON SMALL BUSINESS

No alternatives were proposed to the Director that would lessen any adverse economic impact on small business.

ALTERNATIVES DETERMINATION

The Director has determined that at a minimum, she must amend the look-back period from three to five years, pursuant to the federal mandated discussed above. The Director has determined that under Labor Code section 50.7(d), she may not reject Federal OSHA's recommendation to eliminate establishment/geographic restrictions, because doing so would make California's Repeat enforcement policy less effective than the federal policy, thus jeopardizing future state plan funding. The Director has determined that employers and labor organizations are familiar with the federal Repeat violation criteria as it applies to each, respectively. Incorporating the federal criteria into section 344(d) puts employers and labor groups on notice of the Repeat requirements, while ensuring that California's Repeat enforcement policy is as effective as the federal policy. The Proposed Rulemaking increases worker safety state and nationwide by creating stronger penalty deterrents for Repeat violators.

Given the above, there is no alternative the Director considered or that was otherwise identified and brought to her attention that would be (1) more effective in carrying out the purpose for which the action is proposed, (2) as effective as and less burdensome to affected private persons than the proposed action, or (3) more cost-effective to affected private persons an equally effective in implementing the statutory policy or other provision of law.

The proposed amendments closely track the reference statute in the Labor Code and are therefore consistent with the statutory mandate.

Except as set forth and discussed in the summary and responses to comments, no other alternatives have been proposed or otherwise brought to the Director's attention.