INLAND EMPIRE DISPOSAL ASSOCIATION

L.A. COUNTY WASTE MANAGEMENT ASSOCIATION

SOLID WASTE ASSOCIATION OF ORANGE COUNTY

June 30, 2017

Via email to: aneidhardt@dir.ca.gov
and First Class Mail

Amalia Neidhardt, MPH, CSP, CIH
Research and Standards
Division of Occupational Safety and Health
California Department of Industrial Relations
1515 Clay Street
Oakland, CA 94612

Re: Heat Illness Prevention in Indoor Places of Employment

Dear Ms. Neidhardt:

Each of the organizations listed above is a non-profit trade association representing solid waste and recycling companies with operations in California. Our members are responsible for the development and operation of much of the solid waste handling programs and infrastructure in the state, including waste collection, transfer, disposal, processing, recycling, conversion, and composting facilities. Millions of Californians receive solid waste handling services from our members.

With respect to this action, our association members are employers subject to the eventual subject regulation and have a beneficial interest in this matter. We are submitting these preliminary comments on the revised Discussion Draft presented at the May 25, 2017 advisory meeting.

We have also reviewed the comments submitted after the initial February 28, 2017 meeting, and appreciate the fact significant changes have been made in response to comments submitted by important employer and industry organizations, including the California Chamber of Commerce and others.

We generally endorse these organizations' comments, which present a solid consensus that indoor heat illness prevention, accomplished through the IIPP or a separate standard is both necessary and appropriate. At the same time, it must be practical, cost-effective and must consider the vast differences between workplaces in this state, and be based on the experiences learned from implementation of the outdoor heat illness prevention standard.

There is no doubt the outdoor standard has made working in high ambient temperature conditions safer for employees, and has likely prevented many serious injuries and illnesses—and probably lives. While Senate Bill 1167 requires the adoption of an *indoor* heat illness prevention standard, we believe that there is sufficient latitude in the statute to adopt a standard protecting employees not already covered by the outdoor standard through a combination of expanding the coverage of the *outdoor* standard, adopting similar practices for appropriately-defined indoor work, and application of the IIPP standard to fill gaps.

Even with the recent changes that have been incorporated, the revised Discussion Draft remains problematic to the extent that it would impose a complicated and extraordinarily expensive burden on many employers by not adequately addressing the many different types of workplaces that exist.

Conceptual Comments

1. The concepts of the outdoor heat illness prevention standard should be the starting-point for an indoor standard

   The current § 3395, which has substantially improved safety of outdoor work is relatively simple, and employers have generally found the means to implement it. The basic requirements of providing shade, drinking water, acclimatization, rest periods, training and emergency response procedures, if applied to indoor workplaces that already have shade (based on the definition of *indoors* in subsection (b) of the draft), would improve heat illness prevention dramatically over what is currently in the Division's Safety Orders. Based on review of comments submitted thus far, employer groups indicate that such a requirement could be readily implemented. In the absence of data indicating an across-the-board occurrence of heat-related illnesses associated with indoor work, it is reasonable to consider that the measures deemed appropriate for protecting outdoor workers, if applied to indoor work, would not only meet the Legislature's call for a standard, it would improve safety with a minimal regulatory burden.

   In fact, this process is already in effect due to the Division's enforcement practices, coupled with the IIPP standard, and recognition by employers that it is the right thing to

do, once they became aware of the necessary elements of heat illness prevention in the absence of specific federal OSHA regulation.

The October 5, 2015 Occupational Safety and Health Appeals Board (OSHAB) Decision After Reconsideration in *National Distribution Center, L.P.*; *Tri-State Staffing* held that these employers, not otherwise subject to the outdoor standard, were required to implement comparable procedures for indoor employment. When viewed simply and logically, the intent of SB 1167 was to codify this Appeals Board decision.

Instead, except for the provision in the Discussion Draft at (e) Heat Illness Prevention Plan accepting that documentation can be maintained within the employer's § 3203 IIPP, the draft is an extremely complicated command and control rule with black-letter intricacies serving no purpose other than as a basis for citations. One of the most glaring examples of this is the "exception" in subsection (a) allowing employers to apply the outdoor standard where "employees work less than one hour per day." This provision is not only complicated in that it will be difficult to administer, but also requires two separate compliance programs. The obligation under IIPP at § 3203(a)(4) to identify and evaluate workplace hazards, and correct them at (a)(7), is recognized as a sufficient mandate for employers to assure safety for virtually every other workplace hazard; it should not be necessary to adopt a standard so meticulous as to challenge reasonable regulatory policy. There are many examples where employees move in and out of indoor and outdoor work areas—there must be flexibility afforded for employer judgment in such cases.

The need for identification, evaluation and correction of hazards on a situation-by-situation basis is particularly acute in the refuse industry, where employees are engaged in a myriad of activities that defy classification as indoors versus outdoors. For example:

- Refuse transfer facilities, which are large, roofed and often open on several sides.
- Vehicle maintenance facilities, which, due to vehicle size, are roofed, but open work areas.
- MRFs, which are refuse and recyclable sorting facilities that are roofed, but open to receive refuse.
- Automated refuse collection vehicles and equipment at transfer and disposal sites (which are under the definition of *indoors* in the draft) are considered indoor places of employment.
- Manual refuse collection vehicles requiring the operator to exit the vehicle to collect refuse are probably indoor based on the Draft's one-hour criterion.

- Manual refuse collection with helper employees, which is mostly outdoors.

Unlike the typical Safety Orders applying to a defined occupational activity or piece of equipment that can be objectively regulated by a specification standard, the extent of variability within the refuse collection and processing industry requires that the standard called for by SB 1167 must be a performance standard, similar to IIPP.

2. The threshold for applicability based on Heat Index and Appendix A may be appropriate as a threshold for applicability, but not as criteria for specific control measures

The current Discussion Draft includes a general applicability threshold of a dry-bulb temperature equal to or exceeding 95° F. Although this value may or may not be the appropriate initial threshold (as there is little employer experience in taking such measurements and evaluating the effect on employees), we accept that there needs to be an initial applicability criterion. However, the secondary criteria of the Discussion Draft—the Heat Index determination in (b) Definitions, which in turn specifies control measures in subsection (h), is inappropriate due to the lack of recognition of the varied workplaces that could be subject to a specific control measure and the need for situation-by-situation evaluation of need for controls, and extent of controls.

Although this issue is not particularly acute with respect to Levels I and II, it becomes critical with respect to triggering Level III and its mandatory engineering controls. Based on reasonable interpretation of the Appendix A (mandatory) Heat Index Table, a dry-bulb temperature of 92° F, coupled with 40% humidity—both of which are quite common in this state—would trigger feasible engineering controls or air conditioning. As a result, the number of facilities, especially those that cannot be effectively closed or pressurized to prevent excessive infiltration of hot air, would be substantial, resulting in an enormous cost impact.

Given the number of establishments affected, clearly this economic impact would exceed the $50 million threshold for a major regulation, requiring a Standardized Regulatory Impact Analysis (SRIA) before review of the regulation by the Office of Administrative Law and its approval. We understand that proposed legislation, SB 772, would exempt any occupational safety and health standard from this requirement.

Elimination of mandatory engineering controls for Heat Index Level III would significantly reduce the cost impact of the standard. The next version of the Discussion Draft would benefit from a selection of "control measures" that would include engineering controls (air conditioning), but also, as equal alternatives, such measures as cooling-off rooms, personal cooling devices, fans and other practical controls. It should be noted that the two references cited in the Standards Board's Notice: the ACGIH Heat Stress TLV (specified by SB 1167 as guidance for the standard) and the OSHA Technical Manual, Chapter 4, Heat Stress both list various control measures such as those above, and indicate they should be considered by the employer.

3. Senate Bill 1167 provides guidance for flexibility in the standard, which has not been applied

An important provision of SB 1167 is the language in California Labor Code § 6720:

> "This section does not prohibit the division from proposing, or the Standards Board from adopting a standard that limits the application of high heat provisions to certain industry sectors."

This guidance indicates the Legislature's recognition of differences between industries and indoor working conditions, and was obviously intending to provide flexibility to the standard writers. As of the second Discussion Draft, such industry sector-based flexibility has not been incorporated into the impending proposed standard. Regarding the refuse industry and its varied workplaces and situations, such flexibility is essential.

One key issue is operators of vehicles and related employees who are either partially inside the cab of a vehicle or primarily outside of the vehicle. The current Discussion Draft considers the space inside a vehicle as *indoors* in subsection (b) Definitions. This determination was forced by the Appeals Board DAR in *AC Transit* (June 13, 2013), which held work inside a bus was indoors, and exempt from the outdoor standard. What this means in the context of the refuse collection industry is that an employer will need to comply with the indoor standard, the outdoor standard, and both standards for employees who both operate a vehicle and leave it to manually collect refuse. This situation is illogical and precisely why the statute provides for relief.

We recognize that granting a wholesale exemption for the solid waste industry would open the floodgates to a slew of industry exemptions, and believe that a better approach is to afford employers with employees in such situations to comply with basic heat illness prevention methods, and then customize their controls based on a requirement to identify, evaluate and control the hazard under (d) Assessment of Heat Illness Rule and (h) Control Measures, similar to the IIPP process. The additional measures can be set forth in the standard as acceptable alternatives, if effective.

Finally, there can be a trigger for additional controls in the event the workplace conditions change or a heat illness occurs.

Specific Comments

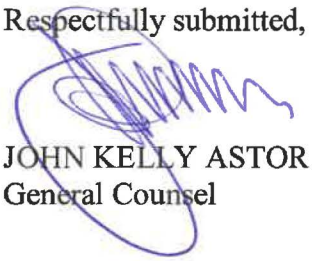
The associations have no specific comments or proposed language to offer at this time, as the most recent Discussion Draft is still being reviewed and evaluated by our members. We also foresee that there may be a need to refer the draft to experts for any recommendations or suggestions they may wish to provide.

At such time as we have additional, supplemental, or more specific suggestions or comments to offer to you, we will be pleased to provide them. In the interim, please know that we appreciate this opportunity to comment, and look forward to working together with your office to develop

an appropriate set of requirements/standards that will ensure that employees in the solid waste and recycling industries are adequately protected from heat illness.

Please feel free to contact the undersigned at any time regarding the contents of this letter. My office telephone number is (714) 245-0995, and email address is jka@astor-kingsland.com.

Respectfully submitted,



JOHN KELLY ASTOR
General Counsel