April 29th, 2019

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RE: Emergency Regulation re Wildfire Smoke Protections

Dear Eric Berg and Amalia Neidhardt,

On behalf of CBIA, my apologies for submitting these comments late.

This letter is to inform OSHA that CBIA shares the concerns outlined in the letter submitted last week by CalChamber and that we support their comments. (see below).

Thank you for your consideration.

Andrew Kosydar, PhD
Scientist & Legislative Advocate

April 26, 2019

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RE: Emergency Regulation re Wildfire Smoke Protections

We, the undersigned organizations (Coalition) have significant concerns regarding the draft regulatory text developed by the Division of Occupational Safety and Health (Cal/OSHA), dated April 12, 2019, regarding "Protection from Wildfire Smoke," numbered Section 5141.1 (Draft Rule) prepared in response to Petition No. 573.[1]

Our concerns primarily focus on the feasibility and scope of the Draft Rule so that employers can predict and comply with its requirements.

The Draft Rule's Scope is Unworkably Broad (§ 5141.1(a)(1))

Above all, the Draft Rule must be clarified as to its scope, so that employers can consistently and feasibly determine when the regulation will be in effect. To be clear – we are not opposed to the scope of the Draft Rule erring on the side of safety and overinclusion, but its scope *must* be clear, so that employers know when action must be taken.

However, as presently phrased, the Draft Rule is unmanageably vague. It is structured to be triggered when an Air Quality Index (AQI) "for PM2.5 [that] is greater than 150" is published by any potential source, and either of two factors is present:

> (A) A wildfire smoke advisory has been issued by a local, regional, state, or federal government agency; or
> (B) There is a realistic possibility that employees may be exposed to wildfire smoke.

As an initial matter, the use of AQI itself is problematic – though we appreciate the desire to tie the Draft Rule's jurisdiction to some objective measure of air conditions at the site. On a technical level, AQI is not measured over a time-weighted 8-hour average, as with the PEL's traditionally used by Cal/OSHA in other areas, which creates additional consistency issues. This creates issues with using it for smoke enforcement, as an AQI may rise and fall quickly, and therefore the applicable regulations must be drafted to recognize that exposure over time is considered. In addition, by relying on AQI, the Draft Rule appears to presume that employers in all work sites and at all times will have internet access and therefore be able to access a selection of different government websites, and will have the opportunity to check them on an ongoing basis in order to determine if the AQI in their location has changed. This is unrealistic, especially in the context of construction, where a worker may work at several worksites throughout the day and may not be in constant communication with the employer. However, as discussed below, we believe AQI can

[1] Unless otherwise identified, all references to any subsection, such as "Subsection (a)" refer to the Draft Text.

be made workable so long as the practical limitations on employers' ability to constantly check and re-check online resources and distribute that information are kept in mind.

Putting aside the AQI, both of subsequent triggers – an advisory or a "realistic possibility" – present concerns as phrased. As to Subsection (a)(1)(A), an "advisory" – the present language incorporates any advisories by any "local, regional, state or federal agency," *regardless of the location of the described fire*. This factor should be tied to the location of the fire and the proximity of the fire to the worksite. Otherwise, if a PM2.5 AQI reading occurs in any location in California and a smoke advisory is issued anywhere in the nation regarding a fire at any location, the Draft Rule will still be technically triggered. In addition, the present Draft Rule text obligates employers to check every government website which might include an advisory. To clarify what is expected of employers, a discrete list of sources should be identified.

As to Subsection (a)(1)(B), a "realistic possibility" – this language is unworkably broad. In California summers, the potential for a wildfire is ever present. Indeed, this very rulemaking is cognizant of that risk. Moreover, fires are unpredictable, as a change in the weather can propel a wildfire to a new location faster than even emergency personnel can react – let alone employers.

The Draft Rule's Scope & Issues with Indoor or Mixed Environments (§ 5141.1(a)(2))

The "enclosed" exemptions in subsection (a)(2)(A) & (B) reference that the air must be "effectively limited". Though the Draft Rule is not explicit, presumably this refers to the subsequent definition of "effective filtration of PM2.5" in subsection (b). If so – the requirement of a MERV 13 or comparable filter is infeasible. The requirement that newly constructed structures include MERV 13 level filtration is recent in California. As a result, virtually every structure in the state would fail to provide "effective filtration." The Coalition's concern is that this emergency rulemaking would be, unintentionally, mandating the costly installation of MERV 13 filters in all structures across the state if (or when) a fire occurred nearby. Due to the potential scale of the required upgrades, we would ask that the Draft Rule's scope be limited to outdoor employment, at least for the emergency rulemaking, and that the considerable implications of refitting every building near a wildfire with MERV 13 filters be left for more thorough consideration in subsequent non-emergency rulemaking. Similar concerns exist as to vehicle air filters. Though some vehicles, such as Tesla's model X, were widely discussed as including top-of-the line filtration, the factual issues underlying the quality of air filters in vehicles and whether they are able to reduce PM2.5 levels below an AQI of 150 needs further study, and should be approached in a subsequent non-emergency setting.

The Draft Rule also fails to discuss mixed indoor/outdoor environment. For example, a worker traveling between industrial buildings might be exposed to the outdoors for a few hours over the course of a workday – but it is unclear how the Draft Rule would apply to that worker.

To address all of these concerns regarding scope, we propose the following adjustments:

- **Requiring the fire advisory be regarding a fire within an identified distance of the worksite in order to trigger employer obligations.**
- **Clarify the potential wildfire advisory sources to be monitored.**
- **Changing the "or" in subsection (a)(1)(A) to an "and"** – this would ensure that the Draft Rule would only apply when: (1) the PM2.5 AQI reached 150, (2) a smoke advisory had been issued nearby, and (3) the fire was actually causing employees to be exposed to smoke.
- **Add a discovery period before triggering the employer obligations** – We would request a 12-hour period for employers to discover the triggering factors (wildfire advisory, PM 2.5 AQI of 150) and commence compliance with the Draft Rule.
- **Limit the Draft Rule to workers who are outdoors and clarify how mixed workspaces will be regulated under the Draft Rule.**

The Draft Rule's "Identification" provision is unhelpful regarding employers' obligations (§ 5141.1(c))

The triggering event under the "identification of harmful exposure" is too broad because it requires only that an employee "reasonably be expected to be exposed to an AQI greater than 150." As phrased, this language fails to include the key distinction related to smoke – that the PM2.5 AQI be elevated, as opposed to the general AQI – and we ask it be clarified to specify the triggering event related to the PM2.5 AQI. In addition, it remains unclear how an employer is to determine whether an employee would "reasonably be expected to be exposed to an AQI (PM2.5) greater than 150", except for regular checking of AQI at every worksite. As discussed above, this is not necessarily feasible in outdoor workspaces where, by their very nature, the online-access which offices take for granted simply isn't present. As a result, building in an acceptable time period for employers to become aware of hazards is necessary, regardless of whether it is discussed in "scope" (subsection (a)) or in "identification" (subsection (c)).

The Draft Rule's "Communications" provision needs clarification (§ 5141.1(d))

Subsection (d) of the Draft Rule requires that employees be informed of the "current PM2.5 levels." In addition, the Draft Rule requires that employees be advised of "changes in condition that may lead to worsening air quality." Beyond sharing information with employees, the Draft Rule also requires that the employer "encourage" employees to advise the employer of worsening conditions or symptoms.

We are not opposed to some form of dissemination of information to employees related to wildfire smoke hazards, as generally detailed in subsection (d)(1) of the Draft Rule. We are also not opposed to encouraging employees to inform the employer if they observe or experience worsening air quality or adverse symptoms, as generally described in subsection (d)(2). However, as drafted, the employers' communication obligations remain so vague that we cannot ascertain what is required or whether it is feasible.

The key issue is this – the Draft Rule seems to imagine an employer repeatedly checking multiple websites for AQI reporting and other updated weather information, then conveying this information to employees on an ongoing basis. For workers who are outdoors, particularly those who are both outdoors and mobile such as those in agriculture or construction, it is not feasible to provide minute-by-minute updates of weather via constant checking of websites. Moreover, employers are not equipped to monitor and project weather conditions, such as wind direction.

To clarify employers' obligations, we propose that employers be required to establish a system to inform employees of "current PM2.5 levels" and "*predicted* changes in conditions that may lead to worsening of air quality," with the clear limitation that this information is to be provided at a workable interval after subsection (a)'s requirements are triggered, such as "at the beginning of each shift." Practically speaking, for mobile or outdoor worksites, the beginning of a shift may well be the only time when employers are able to provide these advisements logistically.

The Draft Rule's "Training" provision (§ 5141.1(e))

As an initial matter, we believe stakeholders should have the opportunity to review the template "Appendix A", which is presently only a placeholder, in order to determine its feasibility.

Generally, we are concerned that this "training" creates yet another cumbersome annual obligation, which will be so distant from the occurrence of wildfires that it will be ineffective in ensuring workers' safety. We believe a more effective and efficient method would be to allow some employer flexibility as to the scheduling of training. Ideally, we view this training as best approached as employees receiving on-the-job instruction at regular intervals after the Draft Rule's application is triggered via subsection (a), such as the start of their shifts. This would also be efficient and simpler for workers, as they would simultaneously receive information about the conditions, the risks, and the remedy for those conditions, e.g., a respirator.

Regarding subsection (e)(4) – we are concerned this language implies that employers should provide employees with the tools and opportunity to check local AQI's online during their shift. We are not opposed to broadly advising employees that information is available online or identifying websites, but we are

strongly opposed to, via emergency regulation, requiring employers to provide every worker with an internet connection and opportunity to break from work to log on to multiple websites to research local air quality or weather. That is not practical and would pose considerable disruption to the workplace.

The Draft Rule's "Controls" provision (§ 5141.1(f))

We are concerned about the use of an unrealistic "hierarchy" structure in these emergency regulations. The engineering controls, contained in subsection (f)(1), seem to require that employers must prioritize providing structures or vehicles with MERV 13 equivalent filtration,[2] but this is plainly inapplicable to outdoor work contexts. Agricultural workers cannot move throughout a field while waiting for a structure to be built over them. Contractors working on multiple sites in a day cannot construct an airtight structure at each site to protect themselves. Simply put, employers cannot construct an airtight structure with a MERV 13 filter over their large and potentially mobile outdoor workplaces.

The administrative controls are similarly unrealistic. Outdoor workers cannot simply work at another location. Construction must take place *at the construction site*. Amusement parks cannot be relocated. Agricultural work *must* be done in the field. Moreover, unlike in the heat context, rest breaks in a smoky environment are of unclear value, and transporting a worker away from smoke is similarly infeasible when the worksite is outdoors and not necessarily near any indoor environment. Because both engineering and administrative controls appear facially infeasible in the outdoor context, we urge that they should not be given priority over respiratory protective equipment.

The only remaining option, and the only feasible option, is control by respiratory devices, discussed in subsection (f)(3). We are in agreement with a two-tiered system, as proposed by the Draft Rule, but believe it needs some clarification. The first tier, discussed in subsection (f)(3)(A), appears to allow for "voluntary" use of the respirator – i.e., respirators must be offered to employees, but employees are not compelled to use respirators and fit testing/medical evaluations are not compulsory as they would be under Section 5144.[3] We are in agreement with this method, as it allows employees access to masks, but avoids the cumbersome medical evaluation and fit testing requirements that might otherwise apply and slow the distribution of protection. The second tier, requiring masks in compliance with section 5144 once the AQI reaches 300, is also broadly agreeable. So long as when and how respirators must be distributed and trained on is clearly defined, we believe this is the most feasible method for protecting workers from wildfire smoke.

The only remaining concern regarding respirators is ensuring an adequate supply and not punishing employers for inadequate market supply. In recent wildfire scenarios, mask shortages have been widely reported. Given that this emergency regulation will go into effect quickly and just as fire season begins, we would urge the Draft Rule recognize that employers may be limited by logistics in acquiring sufficient masks in a timely manner.

Signed,

Robert Moutrie
California Chamber of Commerce

California Framing Contractors Association
Residential Contractors Association
Western Steel Council

RM:ldl

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[2] See above, page 2, regarding definition of "effective filtration" and use of MERV 13 filtration in indoor environments.
[3] This interpretation is based on Notes 1 & 2, following the section.