

May 28, 2019

Christina Shupe, Executive Officer
Occupational Safety & Health Standards Board
2520 Venture Oaks Way, Suite 350
Sacramento, California 95833
oshsb@dir.ca.gov

RE: Emergency Regulation re Wildfire Smoke Protections

We, the undersigned organizations (“Coalition”) thank the staff of the Division of Occupational Health and Safety (“Division”) and of the Standards Board (“Board”) for the work that went into preparation of the revised May 21, 2019 draft text¹ (“Draft Rule”). Many of the changes to the Draft Rule from the prior version were agreeable and helpful to clarify its application, and we appreciate your attention to detail in their crafting. Though we have other outstanding concerns which we hope to revisit in final rulemaking, this letter will focus only on a few critical issues in the present Draft Rule due to the time constraints of this emergency rulemaking process.

I. Section (c) – Station-Level Monitoring Isn’t Feasible Via Existing Resources

We are not opposed to monitoring government websites or utilizing their daily updates – but the required information must be accessible via those sources. In other words, employers should not be asked to monitor at a level of detail which will not be feasible given the tools available online.

We are concerned that Section (c)(1) of the Draft Rule requires employers to check not just the AQI for the area where a worksite is located, but to check the closest monitoring station (“The employer shall use the monitoring station that is closest to the worksite.”), which does not appear to be feasible via easily accessible government websites. To do so, employers would need a clear map of the location of each monitoring station, and a station-by-station breakdown of AQI results, to which they could compare their worksites for the day and compute the distances between those points. However, this station-by-station breakdown does not appear readily available via the identified online tools.

For example, utilizing a zip code at AirNow.gov results in regional reports, but does not clearly indicate the report of each internal monitoring station.² Similarly, the “AirAlert” forecasts – which are provided if an employer signs up online, pursuant to subsection (3) – appear to provide only the AQI for the area and not the station-by-station breakdown.³

The only tool which appears capable of providing data even close to that which would be necessary is a report generated via arb.ca.gov,⁴ but this tool does not identify the location of the

¹ The initial draft text of the regulation, which has not yet been revised, is available at: <https://www.dir.ca.gov/dosh/doshreg/Protection-from-Wildfire-Smoke/Discussion-Draft-2019-05-08.pdf>

² For example, see the following regarding Sacramento: https://www.airnow.gov/index.cfm?action=airnow.local_city&zipcode=95814&submit=Go

³ Notably, (c)(3) does not specify monitoring-station level review, unlike (c)(1) – which raises the question of why this level of monitoring would be required for checking of AQI forecasts on websites, but not for telephone calls, texts, or emails from government sources. Regardless, we have tested the “AirAlert” forecast system, and are working on testing what appears to be an alternate system, “EnviroFlash.”

⁴ For example, utilize: <https://www.arb.ca.gov/aqmis2/aqdselect.php>

monitoring station such that employers can quickly determine which station is closest to a worksite, making its use impractical, particularly for employees who will be traveling among multiple sites within a given day.

As a result, we would ask that Section (c) be altered as follows, to clarify that monitoring must cover the area of the worksite, but that employers' need not determine the AQI at a level which is not plainly ascertainable from existing online resources, i.e., on a monitoring station level.

(c) Identification of harmful exposures. The employer shall determine employee exposure to PM_{2.5} **for the worksite(s) affected** before each shift and periodically thereafter, as needed, by any of the following methods:

(1) Check AQI forecasts and the current AQI for PM_{2.5} from any of the following: U.S. EPA AirNow website, U.S. Forest Service Wildland Air Quality Response Program website, California Air Resources Board website, local air pollution control district website, or local air quality management district website. ~~The employer shall use the monitoring station that is closest to the worksite.~~

We do not believe this weakens the regulation, as it directs employers to determine the AQI at the worksite, but removes the requirement that employers reach a level of review (station-level monitoring) which is not feasible given the present online tools.

II. Section (e)'s Text Creates New Training Obligations Beyond Appendix B

Section (e), as drafted, requires employers to provide "effective training and instruction on the information contained in Appendix B."

This language is a significant departure from the statements made at the Division's May 8th Advisory Meeting, where staff indicated that Appendix's B's intention was to assist employers by providing a clear document which could be distributed (potentially along-with respirators) to meet employers' training obligations in an emergency situation.

Instead of this clarity and simplicity for employers, Section (e) and Appendix B now create an additional requirement of vaguely defined "effective training and instruction" on all of the information Appendix B. Notably, this training would include, among others, the following topics:

- Health consequences of wildfire smoke (which could include both long-term and short-term consequences, as discussed at the May 8th advisory meeting)
- How to use various websites to check for the AQI (which is irrelevant if the employer is providing AQI data periodically)
- How to choose a proper respirator for wildfire smoke (which is irrelevant if the employer is providing respirators)

We are concerned that this requirement is vaguely defined and negates the intent of Appendix B, which was to meet the Draft Rule’s training requirement. As a result, we would ask that Section (e) be altered as follows:

(e) Training and Instruction. The employer shall provide employees with effective training and instruction **by providing employees with** ~~on~~ the information contained in Appendix B.

III. Appendix B – Substantive Concerns

As Division staff indicated in prior advisory meetings, Appendix B was intended to clarify and meet employers’ educational obligations. As a result, we do not believe it should be a vehicle to create new obligations for employers that are not contained in the regulation or have not been discussed previously.

A. Inconsistent Fit Testing/Medical Evaluation Requirements

Though the Draft Rule expressly notes that fit testing and medical evaluations are not necessary under (f)(4)(A) when the AQI for PM2.5 is between 150 and 500, Appendix B’s terms appear to inadvertently contradict these provisions. Specifically, Appendix B, Section 7, identifies one of the necessary “precautions” of respirator use is to “read and follow all instructions provided by the manufacturer on use . . .” The user instructions for 3M Particulate Respirator N95 provides fit testing and medical evaluations are necessary.⁵ As a result, Appendix B appears to instruct, inadvertently, that fit testing remains required. We believe this is not the intent of the Draft Rule, as the entire purpose of Section (f)(4)(1) is to allow employers to distribute respirators for voluntary use without such burdens in emergency situations. As a result, we would ask that Appendix B, Section 7, No. 2 be altered as follows:

Employees should r~~Read~~ and follow all instructions provided by the manufacturer on use, maintenance, cleaning and care, and warnings regarding the respirators limitations.

This clarifies that employees should heed the manual, while removing any implication that employers are obligated to provide fit testing. We also view this as consistent with the intent of Appendix B, which is to advise employees of the nature of wildfire smoke, its dangers, employers’ obligations, and their options regarding utilizing respiratory protection – but not to create new obligations for employers that are not in the Draft Rule.

⁵ See <https://multimedia.3m.com/mws/media/921310/3m-8000-series-n95-particulate-respirator-user-instructions.pdf>, page 1 (“In the U.S., before occupational use of this respirator, a written respiratory protection program must be implemented meeting all the requirements of OSHA 29 CFR 1910.134, such as training, fit testing, medical evaluation, and applicable OSHA substance specific standards.”)

B. Inconsistent Requirement to Provide Treatment

Appendix B appears to create a new obligation for employers to provide medical treatment that was not in prior versions or the present Draft Rule. Presently, Appendix B provides: “Employers must have effective provisions made in advance for prompt medical treatment of employees in the event of serious injury or illness caused by wildfire smoke exposure.”

In contrast, the prior version of the regulation, dated April 12, 2019, provided that employees would have “[t]he right to obtain medical treatment in the event of injury or illness without fear of reprisal.”⁶ We are in favor of this text, which would forbid employers from punishing employees for seeking medical help.

However, the present text goes far beyond this, creating affirmative duties to prepare to provide medical care, which we are not equipped to provide. Treatment of smoke inhalation is not a simple matter. Assuming employers can fully diagnose smoke inhalation and determine which harmful chemicals were inhaled (which is questionable), immediate treatment may include providing pure oxygen and the use of drugs, including antidotes to specific substances inhaled, steroids, antibiotics, or pain medication.⁷ In extreme cases, a hyperbaric chamber may even be necessary. Employers are not prepared to provide such medical treatment, and an emergency regulation is not the proper vehicle to create such medical treatment obligations. Moreover, such broad requirements should be reflected in the regulation, not a training document, if they were to be proper at all.

To bring the present text in line with its intent – protecting employees from reprisal for seeking treatment – we would amend Appendix B, Section (2) as follows:

(2) The right to obtain medical treatment without fear of reprisal.

Employers must **allow employees who show signs of serious injury or illness due to wildfire smoke exposure to seek medical treatment, and may not punish affected employees for seeking such treatment.** ~~have effective provisions made in advance for prompt medical treatment of employees in the event of serious injury or illness caused by wildfire smoke exposure.~~

IV. Inclusion of Emergency Personnel & Services

Unlike the prior draft, this Draft Rule does not exempt emergency services under Section (a) Scope, and instead allows utilities to skip engineering and administrative controls and proceed directly to use of respirators under Section (f). This change is troubling, as gas or electric utility

⁶ This prior language, regarding preventing punishment for seeking medical treatment, is maintained in the headings of Appendix B, but not the substantive text.

⁷ <https://www.jems.com/articles/print/volume-39/issue-10/features/treating-smoke-inhalation-and-airway-bur.html>; <https://uhs.berkeley.edu/health-topics/smoke-inhalation-injury>;

workers may be compelled to accompany firefighters and yet, if the AQI has risen quickly to above 500, those same workers may be prevented from accompanying firefighters until they can be fit tested and medically evaluated. This could create a critical delay in shutting off dangerous gas or electric utility lines while firefighters attempt to combat the wildfire.

As a result, we would ask that the prior exemption for emergency response personnel be re-added to the regulation for limited purposes, as follows:

(F) Emergency response personnel involved in disabling electrical or gas hazards as necessary for firefighting activities.

Thank you for your time and attention to detail in this process. Please don't hesitate to reach out if you have any questions regarding the above comments.

Signed



Robert Moutrie
California Chamber of Commerce

California Building Industry Association
California Construction and Industrial Materials Association
California Framing Contractors Association
California Farm Bureau Federation
California Forestry Association
California Professional Association of Specialty Contractors
California Retailers Association
Residential Contractors Association
Western Steel Council
Wine Institute

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