



August 29, 2019

Department of Industrial Relations  
Division of Occupational Safety and Health  
1515 Clay Street, Suite 1901  
Oakland, CA 94612

**RE: Proposed Regulations Regarding Protection from Wildfire Smoke – August 13, 2019 Draft**

Dear Division of Occupational Safety and Health:

The California News Publishers Association (CNPA) represents the interests of newspapers in California, in legislative, regulatory, and judicial processes. More than 400 newspapers, including all of the major daily newspapers published in this state, are CNPA members.

The California Broadcasters Association (CBA) is the trade group representing the interests of the over 1000 radio and television stations in California.

As the voice of the newspaper and broadcasting industries in California, CNPA and CBA respectfully request the Division to consider their concerns with respect to the proposed protection from wildfire smoke regulations. CNPA and CBA share the concerns of the California Chamber of Commerce (CalChamber) stated in their letter dated August 26, 2019, and have accordingly limited the concerns expressed in this letter to those that are additional to or different from the concerns raised by CalChamber.

### **I. Section 5141.1(a) – Scope**

#### *a. Lowering the Applicability Threshold to an AQI of 100*

The most recent draft text proposes to lower the AQI threshold for when the regulation's requirements apply from 151 to 101. CNPA and CBA strongly oppose this change as it will needlessly increase the cost burden on employers.

The emergency regulation currently only applies when the AQI for PM<sub>2.5</sub> is 151 or greater, which is the point at which the air is considered unhealthy for all groups. As CNPA understands it, the Division's rationale for lowering the threshold to 101 – the point at which the air is considered unhealthy for sensitive groups – is that the Division's mandate is to protect all workers, not just healthy workers.

While CNPA and CBA certainly do not believe that only “healthy” workers are deserving of protection, they also believe that existing law already provides a mechanism for workers in “sensitive groups” to be provided respiratory protection at a lower threshold. Specifically, an employee with a health condition, such as asthma, could request a reasonable accommodation for the employer to take extra steps, such as providing a respirator or relocating work, when wildfire smoke is in the air but the AQI for PM2.5 has not reached 151. Under the California Fair Employment and Housing Act, an employer is required to engage in an “interactive process” when an employee requests a reasonable accommodation, and is prohibited from denying a request that is necessary to accommodate the employee’s health condition unless granting the request would pose an undue hardship.

In addition to being unnecessary, expanding the scope of the regulation by lowering the AQI threshold to 100 would significantly increase the cost on employers because it would increase the likelihood of the regulation’s requirements being triggered. As mentioned during the advisory committee meeting on August 27, 2019, the cost of providing respirators is not the only cost imposed on employers when the regulation is triggered. As discussed below, the administrative burden of monitoring the AQI at each worksite and communicating that information to employees is significant.

#### *b. Minimum MERV Filtration Levels*

The August 13, 2019 draft text includes a note about what minimum level of MERV filtration should be required for buildings and vehicles. CNPA and CBA strongly oppose the requirement for a minimum MERV filtration level as it would be extremely difficult, if not impossible, for employers to know and/or control the MERV level for each worksite.

As discussed during the August 27, 2019 advisory committee meeting, the regulation seems to assume that the employees: (1) work at a fixed worksite, and (2) that the worksite is controlled by the employer. In reality, neither of these are the case for many employers, including newspapers and broadcasters.

Newspapers and broadcasters employ reporters, photographers, and news crews to cover events and stories in their communities, which necessitates these employees travel to different locations in their communities on a daily basis – often to more than one location in a day. It is simply not possible for an employer to monitor, let alone control, the MERV filtration level for every building and vehicle their employees enter. As a result, employers will have to assume that any employee who works away from a building controlled by the employer for an hour or more per day is an “outdoor worker.” This result will significantly expand the class of workers to which the regulation applies, and will greatly increase the compliance burdens and costs on employers without a clear benefit for workers’ safety.

## **II. Section 5141.1(c) – AQI Between 101 and 151**

As discussed above, CNPA and CBA oppose the reduction in the applicability threshold from 151 to 101. Given this, CNPA and CBA also oppose the addition of new subsection (c), which creates a new tier of obligations for the employer to follow when the AQI for PM2.5 is between 101 and 151. In addition to being unnecessary, creating this third tier of obligation will cause confusion and result in non-compliance.

## **III. Section 5141.1(d) – AQI Monitoring**

CNPA and CBA continue to be concerned about Section 5141.1(d) (subsection (c) in the emergency regulation), which requires the employer to determine employee exposure to PM2.5 at covered worksites before each shift and periodically thereafter by one of the methods provided for in the regulation. While CNPA and CBA understand that AQI monitoring is an important part of the regulation, they are

concerned about the workability of the requirement to monitor the air quality at each location at which an employee will work as well as the requirement to check AQI before each shift and periodically thereafter.

*a. Monitoring AQI at Each Worksite*

As discussed above, the regulation incorrectly assumes that worksites are static and that all employees are working in the fixed locations.

To report the news, reporters, photographers, and news crews must go out into the communities they cover to observe events, attend meetings, and conduct interviews. This involves travelling to multiple locations, which in many cases may not be known in advance. For example, a newspaper or broadcaster cannot anticipate when and where the next breaking news development, such as a car accident or natural disaster, will occur.

Even in situations in which employees' locations can be anticipated, it is not feasible for a newspaper or broadcaster to keep track of the locations to which each staff journalist and photographer will travel and check the AQI for each location both before the employee begins work and periodically thereafter.

CNPA and CBA recommend that rather than require AQI monitoring for each worksite, that the regulation only require the employer to monitor AQI for individual worksites in the event an employer can reasonably anticipate that an employee will be working at a covered worksite outside of a specified radius of the established business location of the employer, such as the newspaper office or broadcasting station studio.

*b. Checking AQI Before Each Shift and Periodically Thereafter*

The emergency regulation currently requires the employer to check the AQI for covered worksites "before each shift and periodically thereafter." The August 13, 2019 draft would change this language to "at the start of each shift and periodically thereafter." CNPA and CBA believe that this requirement is problematic for two reasons.

First, the language does not seem to account for the fact that different segments of an employer's workforce may work different hours depending on the type of work they perform. For example, a journalist who covers local government is likely to work different hours than a journalist who covers a crime beat or an employee who operates a printing press. In many cases, the employee's hours may vary depending on what is happening in the news – a journalist is likely to work different hours when they are reporting on a natural disaster than when reporting on the local school board. This means that the employer may be constantly checking the AQI and communicating that information to employees, which creates a significant administrative burden.

Second, the requirement to monitor the AQI "periodically" is insufficient to put an employer on notice of how often they must re-check the AQI.

To resolve these issues, CNPA and CBA recommend that the regulation specify the frequency with which an employer must check the AQI. For example, a requirement that the employer check the AQI at least once every 12 hours on days employees are performing work would provide better guidance to employers, and thus would promote compliance.

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#### **IV. Section 5141.1(f) – Training**

CNPA and CBA continue to be concerned with Section 5141.1(f) (subsection (e) in the emergency regulation), the requirement that the employer provide training to employees. CNPA and CBA believe that the requirement of Section 5141.1(f) should be limited to the employer being required to provide Appendix B to employees. This change would not only reduce the cost and administrative burden on employers, but will also ensure that all employees receive consistent information.

#### **V. Section 5141.1(g)(4) – Use of Respirators**

Paragraph (B) of Section 5141.1(g)(4) (subsection (f)(4) in the emergency regulation) proposes to lower the AQI for PM 2.5 at which respirator use becomes mandatory from 501 to 301. CNPA and CBA oppose this change.

Because the cost to employer for providing medical evaluations and fit testing (required for mandatory respirator use) is significant, the likely outcome in most situations is that employers will send workers home rather than proactively ensuring that their entire workforce is medically evaluated and fit tested. It's unclear how this increases worker safety in light of the fact that workers will still be subjected to wildfire smoke (assuming they live in a reasonable proximity to their place of work) when they are not working, yet they will no longer be given respirators for voluntary use because they won't be working. In other words, lowering the threshold for mandatory respirator use is likely to result in workers having less respiratory protection rather than more.

In addition, even with an AQI threshold of 501, CNPA and CBA are concerned that newspapers and broadcasters will be prevented from providing coverage of wildfires until they can have their reporters, photographers, and news crews who will cover the fire fit tested and medically evaluated. It is simply not feasible for newspapers and broadcasters, and particularly smaller community newspapers and broadcasters, to keep all of their staff medically evaluated and fit tested at all times to account for the chance that a wildfire may break out in their area.

The result of newspapers and broadcasters being prevented from providing timely coverage of wildfires is inconsistent with the California Legislature's mandate in Penal Code Section 409.5(d) that the news media be provided access to disaster areas notwithstanding the safety risk posed by such areas. CNPA and CBA believe that preventing the news media from providing full coverage of wildfires, the regulations will ultimately harm the public because it will not be provided with accurate and timely reports about wildfire activity.

To ensure the news media can continue to fulfill its role to inform the public, and consistent with Penal Code Section 409.5(d), CNPA and CBA recommend that the following provision be added to paragraph (4)(B):

“This paragraph shall not be construed to prevent an employer from requiring a duly authorized representative of any news service, newspaper, or radio or television station or network to use a respirator as provided for in this paragraph notwithstanding the fact that the representative has not been fit tested or medically evaluated.”

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**IV. Conclusion**

CNPA and CBA appreciate the Division's consideration of its concerns, which CNPA and CBA believe will make the final regulation clearer, more workable, and thus, more effective.

Sincerely,

California News Publishers Association  
California Broadcasters Association