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Catherine H. Reheis-Boyd
President

April 3, 2017

Ms. Marley Hart
Executive Officer
Occupational Safety and Health Standards Board
2520 Venture Oaks Way, Suite 350
Sacramento, CA 95833

VIA EMAIL: oshsb@dir.ca.gov

Re: **Proposed Emergency Regulation to Address *Augustus v. ABM Security Services* (2016) 2 Cal.5th 257**

Dear Ms. Hart:

The Western States Petroleum Association (WSPA) is a non-profit trade association representing companies that explore for, produce, refine, transport and market petroleum, petroleum products, natural gas and other energy supplies in California and four other western states. WSPA's members operate petroleum refineries, marine terminals, onshore bulk marketing terminals, gas plants and many other types of petroleum facilities in California where the safety of employees and the public is of paramount importance.

A recent California Supreme Court decision interpreting an IWC Wage Order similar to that applicable to petroleum facilities raises a significant concern that we believe must be addressed through the emergency rulemaking process. See, *Augustus v. ABM Security Services* (2016) 2 Cal. 5th 257. Accordingly, WSPA is formally submitting a request to the Occupational Safety and Health Standards Board to adopt emergency regulations pursuant to Government Code section 11346.1 to address the Court's decision. The attached petition provides proposed regulatory language and explains the necessity, authority, purpose, and process for this request.

Thank you very much for your consideration of this request.

Sincerely,

A handwritten signature in blue ink that reads "Catherine H. Reheis-Boyd".

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Petition for Adoption of Emergency RegulationsOCCUPATIONAL SAFETY AND HEALTH
STANDARDS BOARD**Introduction**

In December 2016, the California Supreme Court decided in *Augustus v. ABM Security Services* (2016) 2 Cal.5th 257, that unless otherwise provided by law, non-exempt employees must be relieved of all duties during rest breaks, including the duty to remain on-call and/or carry radios. While the Court's decision interpreted a different wage order than the wage order applicable to petroleum facilities, there is a significant risk that the ruling could be applied broadly, beyond the facts of the case. The Supreme Court denied rehearing on March 15, 2017, heightening the urgency for regulatory resolution of this issue. The Court's ruling creates a potential hazard and present danger for operations at petroleum facilities, where on-shift employees in safety-sensitive positions must be reachable at all times in order to effectively protect employee and public health, safety, and welfare and to avoid endangering local and national security due to events at these critical facilities.

Because of the nature of the processes at petroleum facilities, the chemicals stored on-site, and the critical nature of these facilities' infrastructure, it is necessary to enable an immediate and effective response to any emergencies or breaches of security that may occur at petroleum facilities. As part of the energy sector, petroleum facilities are considered critical infrastructure and key resources in relation to homeland security.¹ By hindering the instant communications that are necessary for a petroleum facility to respond effectively to serious emergencies such as process upsets, leaks or even the unlikely fires or explosions, the Court's ruling – were it applied to petroleum facilities – would prevent these facilities from being able to effectively prevent and curtail emergencies or security incidents, creating both workplace, public safety and national security concerns.

As explained below, California law allows the Occupational Safety and Health Standards Board (OSHSB) to remedy this dangerous situation by adopting an emergency regulation to allow petroleum facilities, as defined herein, to require safety-sensitive employees to be on-call during rest breaks in order to prevent the harms described above.

Threat to Employees, Public Safety and National Security

Petroleum facility operations require extreme attention to safety and security considerations at all times. The possibility of potentially catastrophic consequences due to emergency events or security breaches at these facilities cannot be ignored, even during mandated rest periods. For this reason, petroleum facility personnel must remain alert at all times in order to be ready to respond immediately to any incidents at the facility.

To deal with the particular risks that petroleum facilities face, employees receive specialized training that enable them to address various problems that could arise at the facility. But to respond effectively to these safety dangers, employees must be in a position to receive

¹ See The Department of Homeland Security's "Energy Sector-Specific Plan" (2015), available at <https://www.dhs.gov/sites/default/files/publications/nipp-ssp-energy-2015-508.pdf>, for examples of potential physical security threats at petroleum facilities. The Plan also sets as one goal for the sector hastening response and recovery at facilities.

emergency communications regarding safety and security incidents as soon as they arise. Without the ability to communicate in real time with the facility's workforce, response time could be delayed and the safety of the employees, as well as the surrounding community and potentially the nation, could be endangered, possibly requiring an evacuation, causing health impacts, or other impacts on the larger energy sector and nationwide economy.

Emergency Regulation Adoption Process

Under Government Code section 11346.1, OSHSB may adopt an emergency regulation if it finds that an emergency exists. "Emergency" is defined as "a situation that calls for immediate action to avoid serious harm to the public peace, health, safety, or general welfare." Gov. Code § 11342.545.

As explained above, requiring employees at petroleum facilities to be on-call during rest breaks clearly fits the definition of emergency, as set forth in the Government Code. Under *Augustus*, petroleum facilities could be barred from requiring employees to carry radios or pagers or otherwise remain on-call during rest breaks. This severely weakens the facilities' ability to respond promptly and effectively to potential emergencies that endanger public safety. The inability to reach employees on a rest period if an emergency were to occur at a petroleum facility severely weakens those facilities' emergency response efforts and could present an immediate and stark risk to employees at the facility and to public health and safety. For this reason, the current situation calls for immediate action to protect public health and safety and national security.

In order to adopt an emergency regulation, OSHSB must first make a finding of emergency supported by substantial evidence that demonstrates the existence of an emergency and the need for immediate regulation. Gov. Code § 11346.1(b)(2).² The finding must include a statement of the time of adoption, reference to the authority under which the regulation is proposed, an informative digest giving a summary of current laws and regulations, any potential conflicts with state or federal laws, and a policy statement explaining the broad objective of the regulation and specific benefits of it, among other things.³ Under the Labor Code, OSHSB has authority to

² Gov. Code § 11346.1(b)(2) states: Any finding of an emergency shall include a written statement that contains the information required by paragraphs (2) to (6), inclusive, of subdivision (a) of Section 11346.5 and a description of the specific facts demonstrating the existence of an emergency and the need for immediate action, and demonstrating, by substantial evidence, the need for the proposed regulation to effectuate the statute being implemented, interpreted, or made specific and to address only the demonstrated emergency. The finding of emergency shall also identify each technical, theoretical, and empirical study, report, or similar document, if any, upon which the agency relies. The enactment of an urgency statute shall not, in and of itself, constitute a need for immediate action.

A finding of emergency based only upon expediency, convenience, best interest, general public need, or speculation, shall not be adequate to demonstrate the existence of an emergency. If the situation identified in the finding of emergency existed and was known by the agency adopting the emergency regulation in sufficient time to have been addressed through nonemergency regulations adopted in accordance with the provisions of Article 5 (commencing with Section 11346), the finding of emergency shall include facts explaining the failure to address the situation through nonemergency regulations.

³ Gov. Code § 11346.5(a) states: The notice of proposed adoption, amendment, or repeal of a regulation shall include the following:

adopt occupational safety and health standards. Section 142.3(a)(1) of the Labor Code provides: "The board by an affirmative vote of at least four members, may adopt, amend or repeal occupational safety and health standards and orders. The board shall be the only agency in the state authorized to adopt occupational safety and health standards." Adopting an emergency regulation requiring petroleum facility safety-sensitive employees to be on-call during rest periods is within OSHSB's authority and jurisdiction to make employees and places of employment as safe as possible.

Such a finding of emergency would not be based upon "expediency, convenience, best interest, general public need, or speculation. *See* Gov. Code § 11346.1(b)(2). Instead it would be based on an actual and imminent (though inchoate) threat to public safety and welfare, as described above, and would allow petroleum facilities to most effectively and immediately respond to emergency situations and security breaches.

If the situation identified in the finding of emergency existed and was known by the agency adopting the emergency regulation in sufficient time to have been addressed through nonemergency regulations, the finding of emergency must include facts explaining the failure to address the situation through nonemergency regulations. *Id.*

As the Supreme Court's ruling in *Augustus* is now final, it is clear that the issue cannot be addressed on a timely basis through regular rulemaking procedures. Given the possibility – if not likelihood – that the Court's decision will be broadly applied to facilities where employee and public health and safety, as well as national security, considerations dictate the need for employees to remain on call during rest periods, an emergency condition exists that warrants immediate attention. In fact, the OSHSB has declined to address this issue as part of the broader

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- (1) A statement of the time, place, and nature of proceedings for adoption, amendment, or repeal of the regulation.
 - (2) Reference to the authority under which the regulation is proposed and a reference to the particular code sections or other provisions of law that are being implemented, interpreted, or made specific.
 - (3) An informative digest drafted in plain English in a format similar to the Legislative Counsel's digest on legislative bills. The informative digest shall include the following:
 - (A) A concise and clear summary of existing laws and regulations, if any, related directly to the proposed action and of the effect of the proposed action.
 - (B) If the proposed action differs substantially from an existing comparable federal regulation or statute, a brief description of the significant differences and the full citation of the federal regulations or statutes.
 - (C) A policy statement overview explaining the broad objectives of the regulation and the specific benefits anticipated by the proposed adoption, amendment, or repeal of a regulation, including, to the extent applicable, nonmonetary benefits such as the protection of public health and safety, worker safety, or the environment, the prevention of discrimination, the promotion of fairness or social equity, and the increase in openness and transparency in business and government, among other things.
 - (D) An evaluation of whether the proposed regulation is inconsistent or incompatible with existing state regulations.
 - (4) Any other matters as are prescribed by statute applicable to the specific state agency or to any specific regulation or class of regulations.
 - (5) A determination as to whether the regulation imposes a mandate on local agencies or school districts and, if so, whether the mandate requires state reimbursement pursuant to Part 7 (commencing with § 17500) of Division 4.
 - (6) An estimate, prepared in accordance with instructions adopted by the Department of Finance, of the cost or savings to any state agency, the cost to any local agency or school district that is required to be reimbursed under Part 7 (commencing with Section 17500) of Division 4, other nondiscretionary cost or savings imposed on local agencies, and the cost or savings in federal funding to the state. For purposes of this paragraph, "cost or savings" means additional costs or savings, both direct and indirect, that a public agency necessarily incurs in reasonable compliance with regulations.

Process Safety Management for Petroleum Refineries rulemaking, which addresses many highly technical and complex issues that cannot be categorized as “emergencies” and which will require time and deliberation before finalizing new rules. For this reason an emergency regulation can and should be adopted in order to quickly rectify the emergency situation currently in existence.

Legal Authority

Labor Code section 226.7(e) provides that the governing wage orders “do[] not apply to an employee who is exempt from . . . rest . . . period requirements pursuant to other states laws, including but not limited to a statute or regulation. . .” This provision of the Labor Code authorizes the OSHSB to adopt or clarify, by regulation, limitations on rest period requirements for non-exempt employees, such as the necessary safety measure provided in the proposed emergency regulation.

Proposed Regulation

We request that Division 1, Chapter 4, Subchapter 15, Article 25 of Title 8 of the California Code of Regulations (Petroleum Safety Orders – Refining, Transportation and Handling, Miscellaneous Safety Practices) be amended by adding a new section 6897, as follows:

(a) To promote public and employee safety, employers shall ensure that employees holding safety-sensitive positions at petroleum facilities shall remain vigilant to potential safety or health hazards at all times and shall be required to be on-call and carry instant communication devices during rest periods pursuant to OSHSB’s and the industry’s long-standing best practices. Pursuant to section 226.7 of the Labor Code, employees holding safety-sensitive positions shall not be relieved of the duty to carry and respond to potential emergencies transmitted via radios, pagers, or other forms of instant communication during rest periods; provided that if such an employee is affirmatively required to interrupt his or her rest period to respond to the needs of the employer to address a perceived safety or health hazard issue, another rest period shall be authorized and allowed reasonably promptly after the circumstances that led to the interruption have passed. In the event that circumstances do not allow for the safety-sensitive employee to take a rest period, the employer shall pay the employee one hour of pay at the employee’s regular rate of pay per workday that the rest period was not provided.

(b) For purposes of this section, “petroleum facilities” means a petroleum refinery, marine and onshore terminals handling crude oil and petroleum products, bulk marketing terminals, gas plants, catalyst plants, carbon plants, and any other facility involved in the processing, refining, transport, or storage of crude oil or petroleum products. Employees holding “safety-sensitive positions (or “safety-sensitive employees”) means any non-exempt employee trained in emergency response and expected to respond in the event of an emergency at a petroleum facility, including without limitation, operators, maintenance personnel, firefighters and other first responders.