

**OCCUPATIONAL SAFETY  
AND HEALTH STANDARDS BOARD**

2520 Venture Oaks Way, Suite 350  
Sacramento, CA 95833  
(916) 274-5721  
FAX (916) 274-5743  
Website address [www.dir.ca.gov/oshsb](http://www.dir.ca.gov/oshsb)

**PROPOSED PETITION DECISION OF THE  
OCCUPATIONAL SAFETY AND HEALTH STANDARDS BOARD  
(PETITION FILE NO. 535)****INTRODUCTION**

On May 31, 2013, the Occupational Safety and Health Standards Board (Board) received a petition from Larry Crabtree, the Interim Fire Chief of Mi-Wuk/Sugar Pine Protection District. The petition is to update California Code of Regulations, Title 8, Section 3408(c) relating to turnout boots. According to the Petitioner, the requirement that turnout boots meet "MIL-B-2885D (5-23-73) and amendment dated 12-31-75" is outdated. The Petitioner recommends a reference to NFPA 1977, 2011 edition, instead.

Labor Code Section 142.2 permits interested persons to propose new or revised regulations concerning occupational safety and health and requires the Board to consider such proposals and render a decision no later than six months following receipt of such a proposal. Further, as required by Labor Code section 147, any proposed occupational safety or health standard received by the Board from a source other than the Division of Occupational Safety and Health (Division) must be referred to the Division for evaluation, and the Division has 60 days after receipt to submit a report on the proposal.

**REASON FOR THE PETITION**

The Petitioner states that revision of Section 3408(c) is necessary, because MIL-B-2885D (5-23-73 and amendment dated 12-31-75) is unavailable, and local fire districts, therefore, cannot ascertain whether they are in compliance with the safety order.

**NATIONAL CONSENSUS STANDARDS**

A Google search for "MIL-B-2885D (5-23-73) and amendment dated 12-31-75" produced three results, all of which are quotations of Section 3408(c). That search result is an indication of the lack of relevance and availability of that standard and its 1975 amendment.

The 2011 version of NFPA 1977, the standard the Petitioner urges California to reference, is the latest version of that NFPA 1977, which concerns, among other things, footwear used in wildland fire fighting. The 2013 version of NFPA 1971 concerns, among other things, footwear used in structural firefighting.

### FEDERAL OSHA STANDARDS

The Federal OSHA standards that relate to fire fighting do not include public firefighters. Section 1910.156 applies to fire brigades, industrial fire departments and private or contractual type fire departments. Personal protective equipment requirements apply only to members of fire brigades performing interior structural fire fighting. The requirements of this section do not apply to airport crash rescue or forest fire fighting operations.

### DIVISION OF OCCUPATIONAL SAFETY AND HEALTH (DIVISION) EVALUATION

The Division recommends that the words “or NFPA 1977-2011” be added to the end of Section 3408(c). By doing so, a more easily-obtainable national consensus standard could be used, but presently-used equipment meeting the requirements of the old standards could be retained.

### BOARD ANALYSIS

As provided at California Code of Regulations, Title 8, Section 3401(a), Section 3408(c) applies to structural fire fighting. A separate provision, Section 3410(f), sets requirements for foot protection in wildland fire fighting. Therefore, it might not be appropriate to update a structural fire fighting standard, Section 3408(c), in accordance with a wildland fire fighting national consensus standards, such as NFPA 1977, as the Petitioner requests.

More importantly, any update of Section 3408(c) might be problematic, and for the Petitioner, unnecessary. In 1979, the Board of Control determined that Section 3408, along with several other fire fighter standards in Title 8, was a reimbursable State mandate. In *Carmel Valley Fire Protection District v. the State of California* (2001), 25 Cal. 4<sup>th</sup> 287, 309, the California Supreme Court stated words to the effect that local fire districts did not have a duty to comply with the regulations at issue in that case. Section 3408(c) was one of those regulations. Therefore, the Petitioner needs to determine whether it actually must comply with “MIL-B-2885D (5-23-73) and amendment dated 12-31-75” and whether it is precluded from complying with NFPA 1977 if it chooses to do so.

In its 2003 publication, “Guide to the State Mandate Process,” the Commission on State Mandates states the basic concept of State mandates as follows:

“WHENEVER THE CALIFORNIA STATE LEGISLATURE passes a law or the Governor or a state agency issues an executive order or regulation that constitutes a new program or higher level of service, California law requires the state to reimburse local agencies and school districts for increased costs.” (capitalization in original)

The Administrative Procedure Act, at Government Code Section 11346.5(a)(5), requires that regulatory notices, of the sort that must accompany most Standards Board rulemaking, state whether the proposed regulation imposes a mandate on local agencies or school districts, and

if so, whether the mandate is reimbursable. It is noted that not all safety orders that impact local government are State mandates: the Commission on State Mandates publication refers to court decisions that have honed the concept of State mandate, most notably to exclude programs that apply generally to all residents and entities in the State, as opposed to programs that impose unique requirements on local governments.

The Standards Board has striven to avoid the adoption of regulations that impose State mandates, because the result may be either a moribund regulation, such as the present Section 3408(c), or an obligation to reimburse local governments. While the final word must come after-the-fact from the Commission on State Mandates or the courts, it might reasonably be concluded that amending Section 3408(c) to require compliance with a newer national consensus standard would impose a higher level of service on local government and that the requirement would uniquely impact local government, in which case, the amendment might well constitute a new reimbursable State mandate.

The actual scope and application of Section 3408(c) is hard to determine. If one follows a convoluted and ambiguous series of cross-references, it may be reasonable to conclude that Section 3408(c) applies to structural fire fighting done by certain local government agencies (in stating the scope and application of the group of safety orders that includes Section 3408(c), Section 3401(a) refers to the definition of "Fire Fighting, Structural" in Section 3402, which, in turn, refers to provisions of the Government Code that, at the time of the adoption of that definition, appear to have concerned fire fighting by local government). Thus, it may be reasonable to conclude that Section 3408(c) applies to local government and does not apply generally to all residents and entities in California.

In addition to local fire districts, such as the Petitioner, there are other types of fire fighting entities in California. CalFire and private fire brigades come to mind, and neither is subject to the State mandate provisions of California law, because neither is a local agency or school district. Based on the wording of Section 3411(f), it appears that Section 3408(c) applies to private fire brigades when those brigades are engaged in structural, as opposed to wildland, fire fighting (it is not suggested that the applicability of Section 3408(c) to private fire brigades precludes the safety order from being a State mandate, since making the safety order applicable to a small number of non-local-government entities might be very different from making the safety order generally applicable to all residents and entities in the State). It is not apparent that Section 3408(c) even applies to CalFire.

It is important to state that any assertions in this petition decision regarding the scope and application of any safety order are for discussion only and are not dispositive. The Division is charged with enforcing the safety orders, and the Board does not intend any statement in this petition decision to in any way constrain the Division from construing and applying any safety order in the manner the Division deems appropriate.

### CONCLUSION AND ORDER

Some key considerations in formulating the Board's Order are as follows:

- It is never optimum to require compliance with out-of-date, hard-to-find national consensus standards.
- The Board does not wish to create a new State mandate.
- NFPA 1977, a wildland fire standard, might not be the best point of reference for a structural fire fighting safety order.
- At a minimum, an update should be considered for private fire brigades engaged in structural firefighting.

With these considerations in mind, Petition No. 535 is GRANTED, to the extent that Board staff is directed to do the following:

Examine the efficacy of developing a proposal to update the fire fighter protective footwear requirements in a way that does not give rise to a new State mandate, and if doing so appears appropriate, draft such a proposal for the Board's consideration. The proposal does not have to involve amendment of Section 3408(c), nor must the proposal involve or be limited to NFPA 1977.