"UPDATED"

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California Labor and Workforce Development Agency
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RE: Feasibility Concerns - Wildfire Smoke Protection Emergency Regulation Compliance

Dear Chief Parker:

We write as stakeholders who have participated in the regulatory process surrounding the Wildfire Smoke Protection Emergency Regulation (Section 5151.1, the "Wildfire Smoke Protection Regulation" or the "Regulation"), and subsequently attempted to comply with this regulation since it went into effect on July 29, 2019. We collectively represent more than 14,000 businesses and members of every size, industry, and region of California. As many of us have stated in the advisory process with the Division of Occupational Safety and Health (the "Division") and in public comments at the Cal/OSHA Standards Board ("Standards Board"), we recognize the dangers of wildfires in our state and the difficulties in addressing them.

We also recognize the ravages of COVID-19 upon our friends, our employees, and our economy. Many of us have been shut down or been forced to cut back our operations and staff for months. This has been traumatic to our financial health, as well as that of our employees – but we understand and acknowledge the necessity of such action. COVID-19 deserves prioritization. Now, as Governor Newsom leads our state into a careful re-opening, we are eager to get back to work and bring our employees back into the workplace safely and thoughtfully.

We write because we anticipate that it may be logistically impossible for California's non-medical employers to comply with the Wildfire Smoke Protection Regulation's requirement of acquiring and stockpiling N95 masks, and thus they may be forced to shut down when wildfires occur. This letter will detail the issues and suggests two potential solutions.

Notably, we do not take issue with all provisions of the Regulation in this letter. Though we have ongoing concerns about many specific provisions of the Regulation (and will raise them in discussions with the Standards Board), we are limiting our comments here to the most immediate concern – the competition between the Regulation and COVID-19 for N95 respirators.

The N95 Respirator Was the Central Compliance Mechanism for the Wildfire Smoke Protection Regulation

The central safety precaution of the Wildfire Smoke Protection Regulation is the N95 respirator. As we pointed out during the advisory committee process and subsequently with the Standards Board – engineering controls and administrative controls are difficult (if not impossible) to apply to a hazard of unpredictable location, duration, and intensity such as a wildfire. Most businesses can only be certain of compliance by stockpiling N95 respirators prior to any potential wildfire. As a result, businesses across California attempted to stockpile N95 respirators so that they were prepared any wildfire smoke in their area.

As various groups highlighted during the 2019 advisory process, the availability and cost of N95's was a serious concern for the regulated community, even before the events of this year. The California Chamber Commerce, as well as other signatories to this letter, highlighted those concerns repeatedly.

Many Businesses Cannot Comply with The Present Wildfire Smoke Protection Regulation Because of COVID-19-Related N95 Shortages

Now, this year, those concerns have grown beyond measure. In March of this year, COVID-19 exploded across the world, sickening millions and killing hundreds of thousands. In California alone, more than 140,000 confirmed cases have been recorded, and approximately 4,900 have been killed.[1] Healthcare systems across the world struggled to meet this crisis. Almost overnight, a world-wide shortage of personal protective equipment, including N95 respirators, became international news. The federal government, California, and other states, competed to find and purchase what scarce PPE could be found in order to provide it to the healthcare industry. Governor Newsom himself acknowledged this shortage with daily briefings discussing the amount of PPE available and whether California had located sufficient supplies. In addition, the shortage and drastic price increase were acknowledged by both the Standards Board and the Division at the May Standards Board meeting, which Mr. Parker attended.

To help our healthcare system, many businesses and citizens donated their own N95 stockpiles. For some, these N95's were required for their day-to-day work, but extras were on hand. For others, they had purchased N95 respirators in order to be ready for fire season - but, when facing the immediate risk of COVID-19, they made a laudable decision that doctors, and nurses needed that gear *right now and* donated. Regardless of the circumstance, what few N95's were in circulation were transferred to, or purchased by, the healthcare system.

That brings us to the present – 2020 wildfire season. On June 3rd, a wildfire in Suisun City burned over 300 acres – and drove the AQI in Davis and some surrounding areas up above the 150 AQI trigger for the Regulation.[2] The Quail had burned more than 1800 acres in Solano County as of June 7th, and three other fires sprung up the same weekend.[3]

As wildfires continue to occur, many businesses across California will not have stockpiles of N95 respirators, and will be unable to purchase them to provide to employees. Because of the infeasibility of compliance, many businesses will be forced to shut down when the AQI rises above 151. This applies even to businesses which maintained some small stockpiles of N95's, as they will not be able to re-stock and a multi-day fire may outlast their stockpile.

The implications of these widespread shutdowns cannot be understated. Shutdowns could prevent critical deliveries, harvesting of crops, construction projects, and every other form of work that our state performs that relies (even partially) on brief time being spent outdoors. Such work can be time sensitive and, even if not, will certainly slow down the recovery of our state's economy.

Just as this result is not ideal for businesses, it is also not ideal for workers. Obviously, if shutdowns occur, workers will potentially lose out on wages. However, more importantly, workers may not have any form of protection from wildfire smoke at their homes, such as air filtration or PPE. As a result, they will potentially receive no protection at home while also receiving less income unless a more feasible compliance method is identified.

Because the Regulation Remains in Effect, Businesses Are Being Forced to Purchase N95 Respirators and Compete with Doctors and Nurses.

Public policy demands that there be a prioritization of supplies – and the most urgent dangers should be given the most urgent attention. Here, though we recognize the importance of protecting workers from wildfire smoke, we believe that COVID-19 should be given priority. Healthcare workers and others facing

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[1] This data is recent as of the LA Times reporting on the date of this letter. https://www.latimes.com/projects/california-coronavirus-cases-tracking-outbreak/

[2] In Davis, according to aqicn.org, the AQI for PM2.5 peaked at 159 in the early morning on June 4th, 2020.

[3] According to https://www.fire.ca.gov/incidents/, the Bitterwater Fire, Hunters Fire, and Gulch Fire, respectively, all began over the weekend of June 6th, 2020. All ranged between 2020 and 100 acres burned.

immediate and ongoing respiratory hazards should be given available N95 respirators until we are through this crisis. We emphatically *do not* want to compete for those supplies.

However, because the Regulation is in effect, businesses *must* attempt to comply during the wildfire season. That means that, unless businesses intend to shut down whenever the AQI for PM2.5 rises to 151 this season, they *must* compete to purchase and stockpile N95 respirators. We have no other choice.

Temporary Solutions Must Be Found

Just as there is no easy solution to the shortage of personal protective equipment for healthcare workers, there are no easy solutions here. However, we believe temporary solutions can make compliance with this regulation feasible while still providing some protection to workers. Below we propose two potential solutions below. We hope that each will be considered and one or more will be adopted with all possible haste, as wildfire season has begun and we are eager to have viable pathways to compliance with the Regulation.

Option 1: Provide Guidance Re Temporary Use of Alternative Respirators

Permitting the use of alternative respirators, such as KN95[4] respirators, under the Regulation (in lieu of N95 respirators) would allow us to provide either equivalent or partial protection to our employees while N95's remain scarce. We appreciate that Standards Board staff acknowledged the potential of KN95 respirators to serve as a substitute at the May Standards Board meeting. There, Division staff shared the Division's intention to test KN95 respirators and hopefully determine which offer the best equivalent protection to N95's. The Division did not share a timeline for this testing or publication of results – which is understandable, given the extreme pressures which COVID-19 and recent civil disturbances have placed on the Division as well as other state agencies. However, we cannot sit idle and wait for such publication.

Presently, regardless of the timeline for testing of KN95's or the Division's findings, we remain obligated to comply whenever a wildfire should occur – *and wildfire season is already underway.* Moreover, we must have lead-up time prior to a wildfire in order to acquire and distribute such protection to the locations where it will be needed. As such, even if the Division's testing is completed in two weeks and suitable KN95's are identified, it will take our members weeks to acquire and distribute the identified protection.

To facilitate the use of an *immediate* alternative, we ask that Cal/OSHA consider issuing an advice letter or similar guidance to address this issue. Specifically, we ask that this advice letter specify that all or certain[5] KN95 respirators will be considered compliant with Section (f)(4)(A) of the Regulation, until such time as either: (1) the Division publishes its list of approved KN95 respirators, or (2) N95 respirator supplies grow to the point that healthcare and other critical industries have sufficient supply, and purchase for compliance with this regulation is feasible.

This would allow us a feasible method to comply with the regulation and provide at least partial protection to employees – instead of simply shutting down worksites whenever the AQI rises to 151 for PM2.5.

Option 2: Suspend the Regulation Under the Governor's Emergency Powers

In this state of emergency, Governor Newsom can temporarily waive regulatory requirements that are not feasible or productive. Notably, he did so in Executive Order N-55-20, waiving compliance with certain provisions of the Welfare & Institutions Code related to the Department of Health Care Services and Medi-

[4] KN95 respirators are respirators that meet Chinese manufacturing standards for 95% filtration, as opposed to N95 respirators, which meet federal standards for US National Institute for Occupational Safety and Health.

[5] "Specific" KN95 identification would allow for Cal/OSHA to identify certain brands or models of KN95 respirators that provide appropriate protection. For example, as Eric Berg, Deputy Chief for Research and Standards, noted at the May Standards Board meeting, respirators with "ear loops" appear to provide minimal protection according to Cal/OSHA's testing at this point.

Cal providers. Such action could, depending on its phrasing, remove or alter compliance requirements for the Regulation.

Such an executive order could take multiple forms. One potential form would allow for a similar course of action as described above – promotion of KN95 use as a stopgap method. Alternatively, the Governor could provide requirements for employers to demonstrate the infeasibility of purchase and, if so demonstrated, provide a short period of non-enforcement. We do not have specific text to propose at this time, and we are glad to support such an effort and work with you to develop workable, clear, and safe language.

Conclusion

These solutions are obviously not ideal. We wish that there were sufficient N95 respirators available for healthcare and for the population – but that is not the case. As such, California's employers are facing a regulation which requires us do the impossible. We cannot stockpile N95 respirators that do not yet exist. Moreover, this result is not ideal for the economy, which is struggling to re-start after months of shutdown.

We hope that the above options will be seriously considered. We remain eager to work with you to address the dangers of wildfire smoke and find solutions that improve safety while simultaneously allowing us to comply with the Regulation.

Sincerely,

Robert Moutrie
Policy Advocate
California Chamber of Commerce

African-American Farmers of California
American Composites Manufacturers Association
American Pistachio Growers
California Association of Health Facilities
California Association of Joint Powers Authorities
California Association of Sheet Metal and Air Conditioning Contractors, National Association
California Association of Winegrape Growers
California Attractions and Parks Association
California Bankers Association
California Beer & Beverage Association
California Building Industry Association
California Business Properties Association
California Citrus Mutual
California Construction and Industrial Materials Association
California Cotton Ginners and Growers Association
California Farm Bureau Federation
California Forestry Association
California Framing Contractors Association
California Fresh Fruit Association
California League of Food Processors
California Professional Association of Specialty Contractors
California Restaurant Association
California Retailers Association
Construction Employers' Association
National Elevator Industry, Inc.
Nisei Farmers League
PCI West – a chapter of the Precast/Prestressed Concrete Institute
Residential Contractors Association
Western Agricultural Processors
Western Electrical Contractors Association
Western Steel Council
Wine Institute

RM:ldl

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