CONN MACIEL CAREY

Andrew J. Sommer
asommer@connmaciel.com
(415) 268-8894

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VIA EMAIL

California Occupational Safety and Health Standards Board
2520 Venture Oaks Way, Suite 350
Sacramento, CA 95833
Submitted to: oshsb@dir.ca.gov

Re: Comments on General Industry Safety Orders, Proposed New Section 5141.1 Protection from Wildfire Smoke

Dear Sir or Madam:

On behalf of the Wildfire Smoke Rule Industry Coalition ("Industry Coalition" or "Coalition"), we are pleased to submit comments addressing the California Occupational Safety and Health Standards Board's ("Board" or "the agency") April 3, 2020 proposed permanent rule entitled "Protection from Wildfire Smoke" ("Proposed Rule").

The Industry Coalition is composed of a broad array of industries potentially impacted by the Board's April 3, 2020 Proposed Rule. The Coalition represents companies from a variety of industries with a workforce comprised of over 70,000 employees in California. Included among its members are companies representing manufacturing, retail, airline operations, construction, power generation, field services and building materials industries. The Coalition's membership includes segments of the regulated community most significantly impacted by the Board's proposed rule. Given the number of members potentially impacted by the Board's proposal, the Industry Coalition has a substantial interest in the outcome of this rulemaking.

SPECIFIC COMMENTS

I. The Scope and Application of the Proposed Rule Should Be Narrowed and Clarified

As currently drafted, the scope of the Proposed Rule is unclear and ambiguous. According to § 5141.1(a)(1), the Proposed Rule applies to "workplaces" where two criteria are met: (1) the current Air Quality Index ("AQI") for PM2.5 is 151 or greater, and (2) the

employer "should reasonably anticipate that employees may be exposed to wildfire smoke." The criteria should be clarified and narrowed to ensure greater certainty in determining whether the Proposed Rule applies to any given workplace and to eliminate application of this Proposed Rule where it is unnecessary.

For example, the first prong of the application criteria (when the current AQI for PM2.5 is 151 or greater) should clarify that it applies only to *outdoor* workplaces, as there are specific exemptions for indoor workplaces. Given that Petition 573 – which started the rulemaking process and led to the emergency rule currently in place – sought an emergency standard to protect so-called "outdoor occupations," including agriculture, construction, landscaping, maintenance and commercial delivery, the Proposed Rule should expressly limit its application to such outdoor occupations. This revision would be consistent with the Board's intent, as described in the Board's "Informative Digest of Proposed Action," which states, "the scope of proposed regulation limits its application to workers with direct, immediate exposure to *outdoor air*." (emphasis added). Thus, the Proposed Rule and its obligations should be limited to employers that regularly employ a sufficient number or percentage of employees in "outdoor occupations" – that is, employees with direct, immediate exposure to outdoor air occurring regularly during the majority of their scheduled workday. (This revision would also help clarify the second prong of the application criteria, where the employer "should reasonably anticipate that employees may be exposed to wildfire smoke.")

Additionally, the Proposed Rule should account for the fact that wildfire conditions vary and change rapidly based on wind patterns and other factors. Because of this, a measure of air quality in one area at one particular moment may be quite different from another area relatively close by, or not representative of the steady-state conditions in that area. Thus, the Proposed Rule should include both a baseline proximity of the AQI measurement to the affected workplace, as well as some minimum duration of readings at that level, before triggering the first prong of the application criteria.

Likewise, the Proposed Rule lacks any temporal restriction or precision and thus is not clear as to the point in time in which the second prong of the application criteria is triggered. For example, does the Proposed Rule apply when an employer should reasonably anticipate that *at some point in the future* its outdoor employees might be exposed to wildfire smoke? Or does it apply only when an employer recognizes that its outdoor employees are *currently* likely to be exposed to wildfire smoke? In this respect, the Proposed Rule should track the Board's "Informative Digest of Proposed Action," which, as described above, indicates the Board's intent to limit the rule's application to "workers with direct, immediate exposure to outdoor air."

Turning to the exemptions from the Proposed Rule, the Proposed Rule properly exempts from its scope enclosed buildings and vehicles. The Board now wisely seeks to clarify that buildings and vehicles are generally exempt where windows, doors, bays, and other openings are kept closed "except when it is necessary to open doors to enter or exit."

Clarifying this exemption is a welcome improvement. The Industry Coalition suggests, however, that the purpose and meaning of the building exemption would be made even clearer through the addition of language that recognizes doors and other openings may normally be opened for a limited duration for reasons other than individuals entering and exiting. For example, loading bays may be kept closed throughout the working day by rolling doors preventing entry of outdoor air except when trucks need to pull up and connect to the bay for purposes of loading or unloading. The Proposed Rule would be strengthened if the building exemption under § 5141.1(a)(2)(A) were further amended to account for this and other permissible circumstances, by stating "except when it is necessary to open doors, bays and other openings to enter or exit, or for purposes of receiving freight, loading or unloading, or other similar, short duration purposes in the operation of the business."

II. The Obligations for Determining Employee Exposure Should be Clarified

Under the Proposed Rule, an employer is tasked with determining employee exposure to PM2.5 for covered workplaces "at the start of each shift and periodically thereafter." This language places many employers in a conundrum as, pursuant to the Scope portion of the Proposed Rule, a workplace is not covered unless and until the current AQI is 151 or greater and the employer reasonably anticipates that employees may be exposed to wildfire smoke. Because a worksite will not be covered until the employer already knows the current AQI, this requirement is redundant and unnecessary, and, as described below, creates a significant burden for employers.

To this end, if the redundant requirement should remain in the final standard, it should be required only for those worksites within any geographic area covered by an official wildfire smoke advisory issued by a recognized local, state or federal governmental agency (*i.e.*, indicating PM2.5 of 151 or greater). Accordingly, the only employers with an obligation to regularly identify possible exposure would be those that have outdoor employees, at an outdoor workplace, and within the geographic area included in an official wildfire smoke advisory.

The Proposed Rule also should clarify the extent of such an obligation. The existing language requiring that the employer determine exposure "at the start of each shift" is ambiguous, particularly where an employer has employees with overlapping or staggered work shifts. In workplaces where employees start work at different times throughout the day, this language could be read as placing the employer in the untenable position of having to determine exposure continuously throughout the day, as each employee arrives to work, even though the conditions involving wildfire smoke have not materially changed. Thus, the standard should include language clarifying that during the effective period of any wildfire smoke advisory issued by a recognized governmental agency, an employer with worksites within the geographic region covered by that advisory will have an obligation to determine the current AQI for PM2.5 at least once daily, and when necessary thereafter due to observed changed conditions at the specific worksite.

Lastly, the Proposed Rule does not address the monitoring obligation of employers in industries such as field service and construction where their employees travel to different locations in a single day. In circumstances where employees visit buildings of third parties, it is not feasible for the employer to evaluate the air filtration systems at each and every building the employee enters for the purpose of determining whether the building is exempt from the standard. Only the building owner or operator can realistically verify that the mechanical ventilation system is adequately performing, and the employer whose employees are entering a finished commercial or office building can reasonably assume the building's air is being adequately filtered. Accordingly, the Industry Coalition suggests that the Proposed Rule clarify that an employer has no obligation to determine the AQI for finished buildings of third parties since the employer would not reasonably anticipate that its employees would be exposed to wildfire smoke there.

Another challenge with the existing standard is that it does not address how an employer is expected to monitor air quality when its employee work outdoors at different locations throughout the day. Clearly, the employer should not be expected to determine the AQI at each location repeatedly throughout the day, especially where the locations are in geographic areas subject to the same or similar AQI forecast and the employee is moving from one site to another. The Industry Coalition recommends that the Proposed Rule be clarified to recognize that an employer may, in identifying potential harmful exposures, rely upon the current or forecasted AQI for the general geographic area where an employee is expected to work in a given day.

III. The Obligation that Employers Provide "a Sufficient Number of Respirators" to Employees Is Impractical and Infeasible Given Shortages During the COVID-19 Pandemic and Past Wildfires

The Proposed Rule requires employers to provide "a sufficient number of" NIOSH-approved respirators such as N95 respirators any time the AQI for PM2.5 is 151 or more. As the current COVID-19 pandemic has demonstrated, this blanket requirement is not practical or feasible during a pandemic or at other times when the available supply is limited, such as during past wildfire seasons. In fact, federal OSHA has issued important guidance recognizing that during pandemic conditions, when the supply of N95 respirators is limited, employers that are unable to obtain a sufficient supply of N95 respirators may consider other filtering facepiece respirators, such as N99, N100, R95, R99, R100, P95, P99, and P100. *See* April 3, 2020 Enforcement Guidance for Respirator Protection and the N95 Shortage Due to the Coronavirus Disease 2019 Pandemic ("Enforcement Guidance"). This Enforcement Guidance also recognizes that where extended use of a respirator becomes necessary, "the same worker is permitted to extend use of or reuse the respirator as long as the respirator maintains its structural and functional integrity and the filter material is not physically damaged, soiled, or contaminated (e.g., with blood, oil, paint)." Likewise, federal OSHA has issued companion guidance recognizing that when the supply of N95 respirators

is limited, employers unable to obtain a sufficient supply of N95 respirators may consider other N95 equivalent masks certified under the standards of other countries, such as KN95 masks from China. *See* Enforcement Guidance for Use of Respiratory Protection Equipment Certified under Standards of Other Countries or Jurisdictions During the Coronavirus Disease 2019 Pandemic.

As history has taught, and is currently teaching, employers need flexibility in the type and quantity of respirators provided during shortages of N95 respirators. Compounded by the COVID-19 pandemic, without flexibility in the type of respirator permitted under this rule, any concurrent wildfire could effectively shut down major sectors of California's economy that are unable to source N95 respirators.

Accordingly, the Industry Coalition suggests incorporating a permanent level of flexibility, similar to the federal OSHA Enforcement Guidance, permitting employers during such times of shortage – even a local supply shortage – to provide other types of respirators similarly effective in reducing employee exposure as an alternative to N95 respirators.

Likewise, the rule should clarify the circumstances when an employee may reuse the same respirator provided it maintains its structural and functional integrity. As currently drafted, the Proposed Standard states, "[r]espirators shall be cleaned or replaced as appropriate, stored, and maintained, so that they do not present a health hazard to users." The "as appropriate" language is vague and ambiguous. The Industry Coalition suggests that the Board clarify this language in a manner consistent with the reasonable federal OSHA guidance that during shortages "the same employee may be permitted to reuse or otherwise extend the use of the respirator as long as the respirator maintains its structural and functional integrity."

IV. The Control of Harmful Exposures Unnecessarily Elevates Engineering Controls over Administrative Controls

While the Industry Coalition recognizes that the traditional hierarchy of controls prioritizing engineering controls over administrative or workplace controls and PPE is appropriate in many circumstances, this controls hierarchy should not be rigidly mandated in this fairly unique situation of protecting against wildfire smoke. In fact, the Board provides no indication that engineering controls can tangibly or more effectively than other types of controls eliminate wildfire smoke risk for employees whose regular job duties require that they work outdoors, such as construction workers and airport ramp agents. Thus, employers should have flexibility to employ an array of various types of controls to most effectively and efficiently protect against this potential hazard.

Yet, the Proposed Rule imposes a rigid hierarchy preventing employers from relying on administrative controls unless engineering controls "are not feasible or do not reduce employee exposures…" Unlike a workplace chemical exposure, there is no legitimate rationale for requiring an employer to first exhaust all feasible engineering controls before relying on effective administrative controls to mitigate the risk of wildfire smoke.

For example, easily administered administrative controls such as relocating work to another location not impacted by wildfire smoke may be more effective and desirable than implementing time-and labor-intensive engineering controls at the current work location, which may delay the start of work for days. This type of administrative control actually eliminates the hazard altogether, and, therefore, is the type of control most effective in an hierarchy of controls analysis. Administrative controls such as work relocation, work intensity reduction or the provision of additional rest breaks all work to effectively reduce employee exposure.

Moreover, the cost to implement engineering controls will be significantly higher than the cost of various administrative controls that will be just as or more effective in risk mitigation.

For these reasons, the Industry Coalition suggests that subsection (f) of the Proposed Rule be modified to allow an employer to reduce employee exposure by "engineering controls, where practicable, or alternatively administrative controls, or a combination of the two."

V. The Communication and Training Requirements are Overbroad and Should Be Modified to Apply Only to Potentially Exposed Outdoor Workers

The Proposed Rule is overbroad in its mandate for employee communication and training/instruction. As outlined above, the Rule is intended to apply to "outdoor occupations." As a result, any training, instruction and other communication requirement regarding wildfire smoke hazards should be limited to outdoor workers who may actually be exposed to wildfire smoke. Accordingly, the Industry Coalition suggests that the Proposed Rule be modified to reflect that this requirement applies only to affected employees; *i.e.*, "employees working in outdoor occupations or who are otherwise expected to encounter non-incidental exposure to wildfire smoke in the regular course of their work duties."

VI. The Appendix B Information Required for Training and Instruction Purposes Creates Confusion Over the Available Respiratory Protection Options and Can Be Read to Impose Obligations Not Required by Law

The Proposed Rule requires that an employer provide employees "effective training and instruction" that at a minimum contains the information in Appendix B. Appendix B in turn contains the following troublesome instruction (in bold below) on the use of respirators by persons with facial hair:

> (h) How to properly put on, use, and maintain the respirators provided by the employer.
>
> To get the most protection from a respirator, there must be a tight seal around the face. A respirator will provide much less protection if facial hair interferes with the seal. ***Loose-fitting powered air purifying respirators may be worn by people with facial hair since they do not have seals that are affected by facial hair.***

This mandatory language inaccurately implies that employers may be required to provide "powered air purifying respirators" to employees who cannot create a tight seal around their face due to facial hair. But powered air purifying respirators typically cost more than $1,000 each and are not required under this Proposed Rule or any other relevant Cal/OSHA standard. An employee reading this information could easily become confused and erroneously conclude that he is entitled to a powered respirator.

The Appendix B summary does not indicate what an employer may do where an employee cannot effectively wear an N95 respirator due to facial hair. Under circumstances where an employer is required to provide respirators for mandatory use, may the employer require the employee to shave his beard, or send that employee home if he refuses to do so?

Absent clarity over the employer's obligation in this situation, an employee could very well claim that he is being unlawfully discriminated against because the beard is worn for religious reasons or associated with his ethnicity. California's Fair Employment and Housing Act makes it unlawful to engage in discriminatory employment practices based on certain protected characteristics and bans grooming policies prohibiting natural hair that has a disparate impact on any racial, ethnic or religious group. For example, an employer requiring an employee who wears a beard due to religious beliefs to shave his beard for purposes of wearing a respirator could conceivably run afoul of California law. Unfortunately, this Appendix B language muddies the water as to an employer's obligation when an employee's beard interferes with his ability to effectively wear the respirator.

At a minimum then, Appendix B should clarify that an employer is not required to provide a powered respirator, or allow an employee to continue work when the current

AQI for PM2.5 is equal to or greater than 151 and the employee refuses to shave his beard thereby preventing a complete seal for the N95 respirator.

We therefore request that to resolve this ambiguity the language of Appendix B be revised (as noted in bold) as follows:

> (h) How to properly put on, use, and maintain the respirators provided by the employer.
> To get the most protection from a respirator, there must be a tight seal around the face. A respirator will provide much less protection if facial hair interferes with the seal, ***and shaving facial hair will provide the best fit.*** A loose-fitting powered air purifying respirator may be worn by people with facial hair since they do not have seals that are affected by facial hair **but the employer is not required to provide employees powered air purifying respirators. An employer may deny work to an employee with facial hair who refuses to shave facial hair under circumstances where respiratory protection controls apply.**

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The Wildfire Smoke Rule Industry Coalition is pleased to have the opportunity to provide comment on the Board's Proposed Permanent Wildfire Smoke Rule and respectfully asks the agency to carefully consider its comments before issuing a final rule.

Sincerely yours,

Andrew J. Sommer
Conn Maciel Carey LLP
Counsel to the Wildfire Smoke Rule Industry Coalition