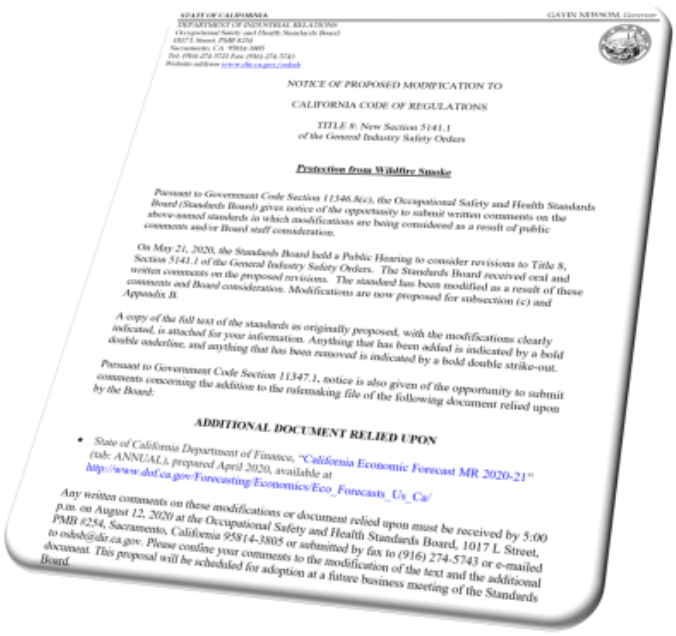
AUGUST 31, 2020 | CAL/OSHA RULEMAKING & STANDARDS

# Update on Cal/OSHA's Wildfire Smoke Rule

*By Andrew Sommer and Fred Walter*

In May of this year, Conn Maciel Carey's OSHA Practice submitted comments to the Cal/OSH Standards Board on behalf of the Wildfire Smoke Rule Industry Coalition about the agency's effort to make permanent what had been Emergency Temporary Standard to protect workers from the respiratory hazards of California wildfires.



STATE OF CALIFORNIA — GAVIN NEWSOM, Governor

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NOTICE OF PROPOSED MODIFICATION TO

CALIFORNIA CODE OF REGULATIONS

TITLE 8: New Section 5141.1
of the General Industry Safety Orders

**Protection from Wildfire Smoke**

Pursuant to Government Code Section 11346.8(c), the Occupational Safety and Health Standards Board (Standards Board) gives notice of the opportunity to submit written comments on the above-named standards in which modifications are being considered as a result of public comments and/or Board staff consideration.

On May 21, 2020, the Standards Board held a Public Hearing to consider revisions to Title 8, Section 5141.1 of the General Industry Safety Orders. The Standards Board received oral and written comments on the proposed revisions. The standard has been modified as a result of these comments and Board consideration. Modifications are now proposed for subsection (c) and Appendix B.

A copy of the full text of the standards as originally proposed, with the modifications clearly indicated, is attached for your information. Anything that has been added is indicated by a bold double underline, and anything that has been removed is indicated by a bold double strike-out.

Pursuant to Government Code Section 11347.1, notice is also given of the opportunity to submit comments concerning the addition to the rulemaking file of the following document relied upon by the Board:

**ADDITIONAL DOCUMENT RELIED UPON**

- State of California Department of Finance, "California Economic Forecast MR 2020-21" (tab: ANNUAL), prepared April 2020, available at http://www.dof.ca.gov/Forecasting/Economics/Eco_Forecasts_Us_Ca/

Any written comments on these modifications or document relied upon must be received by 5:00 p.m. on August 12, 2020 at the Occupational Safety and Health Standards Board, 1017 L Street, PMB #254, Sacramento, California 95814-3805 or submitted by fax to (916) 274-5743 or e-mailed to oshsb@dir.ca.gov. Please confine your comments to the modification of the text and the additional document. This proposal will be scheduled for adoption at a future business meeting of the Standards Board.

Last month, the Cal/OSH Standards Board issued a 15-day Notice of Proposed Modifications to what would become the permanent wildfire smoke rule. The proposed changes are not major, mostly clarifying that one of the methods for determining the Air Quality Index for particulate matter 2.5 is the Interagency Wildland Fire Air Quality Response Program.

Another change to be expected in the final rule is a revision to the Appendix B training instructions to address cleaning and maintenance of reusable respirators, purportedly to address critical shortages of N95 respirators exacerbated by the COVID-19 pandemic. While anything that extends the supply of N95 masks is welcome, that change alone is not nearly enough to solve a massive compliance problem created by the rule. With the Wildfire

Smoke Rule, DOSH requires workers exposed to wildfire smoke be supplied with N95 respirators, and it does not consider surgical masks to be acceptable substitutes. DOSH concedes that N95 respirators are generally not available to any but medical workers right now, but they have no recommended substitutes.

That was one of the primary points of emphasis in our coalition's comments — the rule needed to include some flexibility around the requirement for employers to supply N95 respirator masks for all potentially affected workers. There were already problems with N95 shortages even before the COVID-19 pandemic, but now, the shortage is extreme, and with the CDC's and OSHA's recommendations that all supplies of N95s should be reserved for the healthcare industry obviously makes compliance with a a rigid N95 requirement for wildfire smoke protection impossible for most employers. Now in the midst of another wildfire season in California, employers are continuing to experience N95 shortages.



Department of Industrial Relations
STATE OF CALIFORNIA

NEWS RELEASE

Release Number: 2020-71 August 20, 2020

**Cal/OSHA Reminds Employers to Protect Workers from Unhealthy Air due to Wildfire Smoke**

Oakland – Cal/OSHA is reminding employers that California's protection from wildfire smoke standard is still in effect, and they must take steps to protect their workers from harmful exposure to unhealthy air due to wildfire smoke.

"Employers are obligated to protect their outdoor workers and must evaluate the health hazards posed by wildfire smoke," said Cal/OSHA Chief Doug Parker. "If employers cannot move operations indoors where air is adequately filtered and they do not have access to respiratory protection, they may need to halt operations until the outdoor air quality improves."

Smoke from wildfires contains chemicals, gases and fine particles that can harm health. The greatest hazard comes from breathing fine particles in the air (called PM2.5), which can reduce lung function, worsen asthma or other existing heart and lung conditions, and cause coughing, wheezing and difficulty breathing. These types of respiratory conditions also make the effects of COVID-19 more severe.

If employers move operations indoors or into enclosed spaces, they should be sure to follow guidelines for prevention of COVID-19 transmission in the workplace.

When wildfire smoke affects a worksite, employers must monitor the air quality index (AQI) for PM2.5. Employers can monitor the AQI using the following websites:

- U.S. EPA AirNow website
- U.S. Forest Service Wildland Air Quality Response Program website
- California Air Resources Board website
- Local air pollution control district websites or local air quality management district website.

If the AQI for PM2.5 is 151 or greater, employers must take the following steps to protect employees:

- Communication – Inform employees of the AQI for PM2.5 and the protective measures available to

CMC's national OSHA Practice has been trying on its own and in coordination with the California Chamber of Commerce to facilitate some relief for California employers from the obvious tension between the Wildfire Smoke Rule's demand for supplying N95 respirators and the COVID-19 guidance from every entity that those respirators should be reserved for healthcare providers. In a recent press release from DOSH, DOSH Chief Doug Parker offered no solace to employers, in either relaxing enforcement over the respirator requirement or approving a suitable alternative respirator type, remarking:

**"Cal/OSHA is working diligently to identify viable available temporary alternatives that would provide workers with an acceptable alternative to a compliant respirator such as an N-95 mask."**

CMC signed on to a letter from the California Chamber of Commerce seeking acceptable alternatives to N95

masks and assurances that DOSH will not issue citations over this N95 requirement until supplies become available. As of now, we have heard nothing supportive yet from DOSH or the governor on this issue.

One potential solution employers should consider for interim compliance with the Wildfire Smoke Rule is use of N95 masks with exhalation valves. Supplies of N95 masks with exhalation valves are easier to access right now because they are not recommended for use in managing the pandemic; i.e., the exhalation valve runs counter to the source control benefit of N95 masks for reducing spread of the airborne virus from the wearer of the mask to others. That same concern does not exist for wildfire smoke protection. Since N95s for wildfire smoke protection would always be used outdoors, the potential for COVID-19 exposure is less and social distancing measures can be more easily employed to mitigate that risk.

The Standards Board has not yet announced what, if any, other changes will be made to the final rule. We will look out for the final rule, and will analyze any changes in it that were sought by our industry coalition or other employer groups. Note that although what we will see soon is a "permanent" rule, the Standards Board considers this to be a placeholder standard that will eventually be replaced by a set of wildfire smoke rules substantively incorporating feedback from DOSH and stakeholders such as our industry coalition. We will have another shot then at raising our concerns.