

September 3, 2020

The Honorable Gavin Newsom  
Governor of California  
State Capitol  
Sacramento, CA 95814

**RE: Wildfire Smoke Regulation – Request for Immediate Relief**

Dear Governor Newsom:

We appreciate your leadership in these unprecedented times, and the swift actions you have taken to mitigate the personal and economic ravages of COVID-19 upon the great State of California. Particularly, we appreciate your administration's attempts to locate and procure scarce medical resources and personal protection equipment (PPE), such as N95 respirators.

We write as representatives of the diversity of California's businesses – essential and non-essential, large and small – across all industries and regions of California. We also write as stakeholders who participated in the regulatory process surrounding the Wildfire Smoke Protection Emergency Regulation (Section 5141.1, the "Wildfire Smoke Protection Regulation" or the "Regulation"). Because it has become logistically impossible for most of California's non-medical employers to comply with the Regulation's requirement of acquiring and stockpiling N95 masks, we write to seek your help. Without new sources of N95s or alternative compliance methods, both essential and non-essential employers may be forced to shut down when wildfires occur in their area.

We again need your swift action. As more fully discussed below, we urge you to take the following actions as short-term solutions to this urgent problem: (1) Allow access to the state stockpile of non-medical grade N95's; (2) Via Executive Order, waive the Regulation in the AQI range where N95 respirators are optional, but preserve its requirements at higher pollution levels; (3) Via Executive Order, authorize alternative compliance such as other available forms of respiratory protection.

**Background: The Regulation Requires Employers to Stockpile N95 Respirators**

When the Regulation came before the Health and Safety Standards Board (Board) last year for approval, we worked exhaustively with Board staff and the Division of Occupational Safety and Health (the "Division") to ensure the Regulation provided protection to workers and employer compliance was feasible. After numerous rounds of comments and revisions to the Regulation, we were pleased to have reached a feasible compliance solution where we did not oppose the Regulation's passage by the Board. That critical compliance mechanism is the N95 respirator.

Pursuant to the Regulation, employers are required to have stockpiles of N95 respirators on hand, which employees may choose to wear if the Air Quality Index (AQI) for the pollutant as associated with wildfire smoke (PM<sub>2.5</sub>)<sup>1</sup> rises above 150. To be clear – employees have the option of wearing an N95 respirator but are not required to do so. If the AQI rises to 500 for PM<sub>2.5</sub>, employees must be provided N95 respirators and must be provided medical evaluation and fit testing. If an employer cannot maintain a stockpile of these respirators for optional use at AQI 151 and above, worksites must shut down until the AQI has dropped below the threshold.<sup>2</sup> As a benchmark, employers were advised to have a supply of N95 masks equal to one mask per shift per worker for 14 days of shifts (the approximate average of potential duration of a wildfire). This means that, for an employer who was only open 8 hours a day with 10 employees at any given time, that employer was required to stockpile approximately 140 respirators

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<sup>1</sup> Particulate Matter measured at 2.5 micrometers and smaller, of "PM<sub>2.5</sub>".

<sup>2</sup> Although the Regulation theoretically allows for alternative compliance via engineering or administrative controls, these measures were widely acknowledged to be inapplicable to the majority of workplaces during the regulatory discussion of the Wildfire Smoke Protection Regulation.

As various groups highlighted during the 2019 advisory process, the availability and cost of N95 respirators 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. As a benchmark, employers were advised to have a supply of N95 masks equal to one mask per shift per worker for 14 days of shifts (the approximate average of potential duration of a wildfire).

### **COVID-19 and Wildfire Season – Competing Demands for N95 Respirators**

However, none of us could have anticipated what 2020 would bring. COVID-19 overwhelmed the world's supply of N95 respirators almost immediately. Countries and medical facilities scoured the globe for every last mask. To help our healthcare system cope with this unprecedented demand, many non-medical employers donated their N95 stockpiles to hospitals earlier this year, believing that the present danger of COVID-19 should take precedence over the potential occurrence of a wildfire at their workplace later in the year. Many of us even hoped that the shortage – and COVID-19 itself – would be resolved by this point in the year. However, that has not been the case – wildfire season is upon us and N95 respirators remain difficult if not impossible to purchase commercially.

The last few weeks provide a perfect example of the broad reach and supply issues that were hypothetical last year but are very real at present. For the past three weeks, AQI's across the state have repeatedly risen above 150, including in downtown Sacramento. In fact, most of the state, stretching from Oakland to Santa Clarita, has seen AQI's breaking 150 routinely over the last few weeks. Pursuant to the Regulation, delivery drivers, census workers, restaurant waitstaff, and every other worker who was outside for even a part of their shift should have been provided the option to wear N95s - and, if they could not be given this option, their employers would have been required to shut down.

However, with this COVID-19 driven shortage, employers cannot prepare to comply, so they are left with only one option: shut down if a wildfire occurs and the AQI touches the Regulation's lower threshold, 150 AQI. This is true even though, under the terms of the Regulation, employees would not even be required to wear the N95 respirators at this threshold.

### **Essential Industries Need a Feasible Path to Compliance Without N95 Respirators**

Without a pathway to compliance, essential industries will be forced to shut down – which may harm both the worker and our state's essential industries. When industries that have outdoor or non-sealed workplaces – including construction, agriculture,<sup>3</sup> warehouses, mass transit, retail, power generation stations, and the suppliers who support all of those industries – are forced to shut down because they cannot stockpile N95 respirators, the employees will not benefit. Instead, those employees will go back home where they may continue to breathe the same air, while simultaneously losing wages needed to pay the rent and put food on their tables. Similarly, the industries that shut down cannot deliver their services to the economy. Time-sensitive crops cannot be harvested and distributed. Delivery services, which have grown considerably during COVID-19 and are critical in maintaining social isolation, cannot send their employees to make deliveries if they cannot provide the option of N95 respirators. Though COVID-19 has pushed all restaurant seating outside, restaurants will not be able to send their waitstaff outside and will be forced to shut down. These are just a few examples of the effects of the potential shutdowns which will result because employers are literally unable to provide the option of N95 respirators to their employees pursuant to the Regulation.

### **Immediate Action is Needed**

We are in the midst of a heat wave and, as of the date of this letter, you have declared a state of emergency due to this wildfire crisis. Over the past three weeks, we have seen AQI's above 150 across much of California, though generally nowhere near the Regulation's threshold for mandatory N95 respirator use of 500. Because the Regulation remains in effect, theoretically all employers that do not have sealed indoor spaces (which COVID-19 makes problematic because many businesses have moved outdoors) should have shut down. This theoretical shutdown would have stretched, on some days, from Oakland to San Luis

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<sup>3</sup> Notably, we appreciate the recent announcement of intent to distribute respirators from the state stockpile to agriculture, but believe the volume released appears too small to fully resolve the shortage facing California's agriculture industry, depending on the length of the present wildfires.

Obispo to Santa Clarita, covering the majority of the State's population. Obviously, that is a dramatic and unforeseen result, and we urge you to order the following potential solutions immediately:

**1) Make Available Non-Medical Grade N95 Respirators from the State Stockpile**

One solution to the infeasibility of complying with the Regulation would be to distribute a portion of the state stockpile of N95 respirators to local counties, which could act as distribution centers in the event of a significant wildfire in the area. This would appropriately utilize existing state resources to address a public health issue – an unexpected and uncontrollable change in air quality in the region.

We acknowledge the logistical issues that this distribution would pose, including allocating respirators to different counties based on population and likelihood of fire, as well as the physical difficulty of organizing the transportation and storage of the respirators. However, it should be noted that California has already taken similar action for other comparable requirements, including distributing N95 respirators and surgical masks to County Agriculture Commissioners for distribution to agricultural workplaces. We appreciate this recent assistance to California's agriculture community – but we believe the amount of N95 respirators released for county distribution is too small, and the industries effected too narrow, to really address the scale of this shortage.

**2) Issue an Executive Order to Temporarily Suspend Part of the Regulation until N95 Respirators Are Again Available.**

The second alternative is to issue an executive order suspending part of the Regulation until N95 Respirators are again available. Specifically, we ask that the Regulation's application be suspended for a portion of the lower AQI range (151-499), where N95 usage is voluntary,<sup>4</sup> but that the AQI 500 threshold where N95 usage is necessary is maintained. This would allow businesses to operate if a smaller wildfire nearby sent smoke over a worksite or region but would ensure that operations were ceased when a larger wildfire was underway and sending considerable smoke over the worksite.

**3) Temporarily Allow Use of Alternative Compliance Measures**

Third, we ask that you provide an alternative compliance method to providing N95 respirators, such as KN95 or another alternative. We have raised this possibility with Cal/OSHA's Division already and understand they have completed some testing – but have not yet identified suitable alternatives. We would urge this testing to be broadened until a feasible, available alternative can be identified. To be clear – we do not ask for a permanent revision of the Regulation. Instead, we only seek to identify some alternative compliance method that may be utilized until N95 respirators are available once again. This could be accomplished either by an Executive Order, or via an Emergency Rule at Cal/OSHA.

**Conclusion**

We recognize the complicated and multi-faceted demands which COVID-19 has placed upon the great State of California – and appreciate your leadership in these difficult times. We hope that, with the above context in hand, you will help us find a feasible path to compliance such that California's businesses can continue to function outdoors during this unprecedented time.

Thank you for your consideration.

Sincerely,



Robert Moutrie  
Policy Advocate  
California Chamber of Commerce

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<sup>4</sup> Notably, when the Standards Board approved the Regulation, the Board implicitly recognized that short term exposure to AQI between 150 and 500 does not present an immediate, short-term threat to public health because the regulation provided that use of the N95 masks is voluntary in this range of AQI.

African American Farmers of California  
Agricultural Council of California  
American Forest & Paper Association  
American Pistachio Growers  
Bay Area Builders Exchange  
California Apple Commission  
California Association of Breakfast & Boutique Inns  
California Association of Health Facilities  
California Association of Joint Powers Authorities  
California Association of Sheet Metal & Air Conditioning Contractors, National Association  
California Association of Winegrape Growers  
California Attractions & Parks Association  
California Bankers Association  
California Beer & Beverage Distributors  
California Blueberry Association  
California Blueberry Commission  
California Broadcasters Association  
California Builders Alliance  
California Construction & Industrial Materials Association  
California Farm Bureau Federation  
California Farm Labor Contractors Association  
California Framing Contractors Association  
California Fresh Fruit Association  
California Grocers Association  
California Hotel & Lodging Association

California League of Food Producers  
California Professional Association of Specialty Contractors  
California Restaurant Association  
California Retailers Association  
California Sweet Potato Council  
California Trucking Association  
California Waste Haulers Council  
CalTravel  
Construction Employers' Association  
Family Business Association  
Flasher Barricade Association  
Hotel Association of Los Angeles  
Long Beach Hospitality Alliance  
Nisei Farmers League  
Painting and Decorating Contractors of California  
Pesticide Applicators Professional Association  
Plumbing-Heating-Cooling Contractors Association  
Residential Contractors Association  
Sacramento Regional Builders Exchange  
SLO County Builders Exchange  
The Kings County Farm Bureau  
Valley Contractors Exchange  
Western Electrical Contractors Association, Inc.  
Western Growers Association  
Western Steel Council  
Western Wood Processors Institute

cc: Julie Su, Secretary, Labor and Workforce Development Agency  
Karen Ross, Secretary, Department of Food and Agriculture  
Chris Dombrowski, Director, GO-Biz