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July 22, 2024

Mr. Douglas Parker
Assistant Secretary of Labor for OSHA
Occupational Safety and Health Administration
U.S. Department of Labor - OSHA
200 Constitution Avenue, N.W.
Washington, DC 20210

Re: Comments on Notice of Proposed Rulemaking for Emergency Response Standard; Occupational Safety and Health Administration; Docket No. OSHA-2007-0073

Dear Assistant Secretary Parker,

On behalf of the Employers Emergency Response Rulemaking Coalition ("Coalition"), I am submitting the following comments on the Occupational Safety and Health Administration's ("OSHA") Notice of Proposed Rulemaking ("NPRM") for a new "Emergency Response Standard," to replace the existing "Fire Brigades Standard," 29 C.F.R. § 1910.156, Docket No. OSHA-2007-0073, published in the Federal Register on February 5, 2024.

INTRODUCTION

The Employers Emergency Response Rulemaking Coalition is composed of a broad array of industries impacted by OSHA's proposed rule. The Coalition is comprised of multiple organizations, including trade associations, representing thousands of facilities located across the United States. Included among its members are companies in petroleum refining, chemical and petrochemical manufacturing, liquid terminal operations, agriculture, aerospace and defense, and other industries. Coalition members are leaders in safety and privately embedded emergency response programs that have a substantial interest in the outcome of OSHA's rulemaking, as it will have a significant impact on how they manage such programs.

For years, Coalition members have voluntarily implemented effective emergency response programs. In that time, our members learned valuable lessons about the practices and policies that most effectively prevent and mitigate risks to our emergency responders. The comments we share represent the collective wisdom of employers and the employees who respond to emergencies. Our objective is to ensure that OSHA's Emergency Response Standard effectively protects the safety and health of employees, volunteers, and the surrounding community, utilizing the most reasonable set of requirements possible.

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GENERAL COMMENT

The Coalition appreciates the intent of OSHA's emergency response rulemaking and endeavors to meaningfully contribute to the effort. In crafting a final rule, Coalition members encourage OSHA to consider the guiding principles that are proven effective in controlling and mitigating the hazards presented by responding to emergencies at their facilities. By creating plans, policies, and training programs and maintaining equipment and materials for emergency response that are tailored to the specific hazards at their facilities, Coalition members effectively protected their employees, facilities, and their surrounding communities, and advise OSHA, based on this experience, that no one set of policies or procedures fits all. Accordingly, the Coalition urges OSHA to adopt a reasonably tailored performance-oriented standard for emergency response.

A prescriptive rule would require a complete and unnecessary overhaul of very successful existing emergency response programs without effectively reducing or mitigating risk. For example, OSHA proposes a vocational training requirement based primarily upon National Fire Protection Association ("NFPA") standards that are almost entirely inapplicable to the Coalition and many entities that will be covered by the standard. By mandating compliance with these NFPA standards, OSHA is imposing significant legal obligations on employers for which the NFPA standards were never intended to cover. Instead, the Coalition urges OSHA to implement a more performance-based standard that allows employers to tailor their training to reasonably foreseeable conditions based on facility or locality vulnerability assessments of reasonably foreseeable hazards.

Coalition members and a substantial portion of the regulated community have mature and effective written emergency response programs. Indeed, many Coalition members have programs that, in practice, exceed many of the requirements of the proposed rule. A performance-based standard will allow employers with established programs to have the flexibility to incorporate any new or additional requirements of the finalized rule into their existing programs.

SPECIFIC COMMENTS

1. The Proposed Rule Creates Vague Compliance Requirements.

It is unclear how the proposed rule fits with existing OSHA standards related to emergency response. In the preamble to the proposed rule, OSHA states:

> "[T]here are a number of other general industry OSHA standards that impose requirements on employers concerning emergency-type or related services. These include 29 CFR 1910.38, Emergency action plans; 29 CFR 1910.157, Portable fire extinguishers; 29 CFR 1910.151, Medical services and first aid; 29 CFR 1910.119, Process safety management of highly hazardous chemicals; and 29 CFR 1910.272, Grain handling facilities. While employees are engaged ***solely*** in activities subject to one or more of these other OSHA standards, OSHA intends that the protections of those standards apply instead of the protections of the proposed rule. So, if an emergency

> response employer limits its activities exclusively to activities covered by those other standards, it may not be subject to any provisions of this proposed rule. ***OSHA notes, however, that most employers engaged in activities covered by those other standards are likely to also engage in other emergency response activities and would therefore need to comply with the proposed standard in order to prepare for and respond to covered emergency incidents.***"

See 89 FR 7774, 7804 (February 5, 2024) (emphasis added). This language does not provide clear compliance requirements, from either a textual or practical perspective. Examples where it would be difficult to determine coverage by an existing standard or by this new emergency response rule include incipient stage firefighting[1] and activities that are not necessarily covered under the HAZWOPER Standard at 29 C.F.R. § 1910.120 but are HAZWOPER-like.[2] To be clear, the Coalition believes incipient stage firefighting should be excluded from the scope of any final emergency response standard, as it does not warrant the types of protections contemplated by the proposed rule. Additionally, OSHA should clarify the applicability of any standards for responding to site emergencies such as spills and releases not covered by HAZWOPER.

To the extent that the proposed rule becomes a final standard, Coalition members advise OSHA to be explicit as to the applicability of other general industry OSHA standards (i.e., OSHA should provide a clear breakdown of the specific circumstances for which each relevant OSHA standard applies) and that the breakdown should not overwhelm covered employers. For example, OSHA program applicability could follow this model:

- Response Preparedness
  - Exit / Egress (29 C.F.R. § 1910.36 and 29 C.F.R. § 1910.37)
  - Emergency Action Plan (29 C.F.R. § 1910.38) (limiting applicability to employee alarm/alert and site evacuation criteria)
  - Fire Prevention Plan (29 C.F.R. § 1910.39)
  - Medical Services and First Aid (29 C.F.R. § 1910.151)
  - Emergency Alarm Systems (29 C.F.R. § 1910.165)

- Incipient Response
  - Portable Fire Extinguishers and Standpipes (29 C.F.R. § 1910.157)
  - As applicable, Process Safety Management ("PSM") Emergency Operating Procedures (29 C.F.R. § 1910.119(f)(1)(i)(E))

[1] OSHA defines "incipient stage fire" as "a fire which is in the initial or beginning stage and which can be controlled or extinguished by ***portable fire extinguishers, Class II standpipe or small hose systems*** without the need for protective clothing or breathing apparatus." *See* 29 C.F.R. § 1910.155(c)(26) (emphasis added). It does not appear that OSHA is planning to modify this definition in the proposed rule. Accordingly, these fires should be regulated under 29 C.F.R. § 1910.157 (which covers portable fire extinguishers) or 29 C.F.R. § 1910.158 (which covers standpipes and hose systems) and exempt from the coverage of any final Emergency Response Standard.

[2] The Coalition recognizes that OSHA is proposing to exclude from coverage "[a]ctivities covered by [29 C.F.R.] § 1910.120 (Hazardous Waste Operations and Emergency Response (HAZWOPER))[.]" *See* 89 FR 7774 at 8013.

- Operations Escalating Response
    - Fire Brigades, or, if promulgated, Emergency Response (29 C.F.R. § 1910.156)

- Specific Operations
    - As applicable, PSM (29 C.F.R. § 1910.119)

The final rule should make clear that any of these activities, workplaces, or conditions are covered by the above standards and only those standards, and not some hybrid approach with these standards and OSHA's new Emergency Response Standard.

Coalition members also express concerns about whether the proposed rule applies to office buildings; it should clearly state that it does not. Although the NPRM is clear that the definition of "responder" does not include employees or volunteers who do not have emergency response duties, such as administrative staff who do not perform duties at emergency incident scenes, it does not appear to specifically exclude office buildings from coverage. *See* 89 FR 7774 at 7808. Local government floor/fire warden requirements govern these types of emergencies; thus, OSHA should expressly exclude office buildings from coverage under the standard.

2. The Proposed Rule is Duplicative of Existing OSHA and Other Standards.

Many of the requirements in the proposed rule are duplicative of one another and/or requirements in existing OSHA standards. For example, the proposed rule's training provisions include numerous requirements regarding training on personal protective equipment ("PPE"). *See id.* at 8017. However, OSHA already has a standard that includes PPE training requirements that address the same hazards associated with use and maintenance of PPE. *See* 29 C.F.R. § 1910.132(f). Also, as described below, Coalition members highlight the duplicative nature of the proposed rule's Standard Operating Procedure ("SOP") requirements since OSHA's Emergency Action Plan Standard at 29 C.F.R. § 1910.38 already requires SOPs for evacuation and personnel accountability. The same is true of OSHA's PSM Standard at 29 C.F.R. § 1910.119(n), which references emergency action plans, and certain HAZWOPER Standard provisions.

Coalition members also note that there is a confusing cross reference to 29 C.F.R. § 1910 Subpart L – Fire Protection in the proposed rule. Specifically, for both WERE and ESO facility preparedness, the proposed rule states, "Ensure that fire detection, suppression, and alarm systems, and occupant notification systems are installed, tested, and maintained in accordance with manufacturer's instructions and subpart L of this part." *See* 89 FR 7774 at 8018. While a straight cross-reference is fine, the additional verbiage in the proposed rule can become problematic and more confusing. The Coalition believes this should be rewritten without any additional verbiage.

Additionally, many of the requirements in the proposed rule are duplicative of other regulatory requirements, such as the Environmental Protection Agency's Risk Management Program ("EPA's RMP") Rule. For example, Coalition members note that the following Emergency Response Standard RMP requirements appear to be duplicative:

- 40 C.F.R. § 68.90 – Applicability
    - Emergency Action Plan (PSM) and responding stationary source criteria
- 40 C.F.R. § 68.93 – Emergency Response Coordination Activities
- 40 C.F.R. § 68.95 – Emergency Response Program
    - Duplicative effort with 29 C.F.R. § 1910.38
- 40 C.F.R. § 68.96 – Emergency Response Exercise

Indeed, Coalition members that use Integrated Contingency Plans ("ICP") remark that there is duplication of information or requirements since current ICPs cover existing regulations, including:

- U.S. Coast Guard / 33 C.F.R. § 154 – Subpart F
- EPA / 40 C.F.R. § 112 – Oil Pollution Prevention – Subpart D Facility Response Plans
- EPA / 40 C.F.R. § 264 – Standards for Owners and Operators of Hazardous Waste Treatment, Storage, And Disposal Facilities – Subpart D
- EPA / 40 C.F.R. § 279 - Standards for The Management of Used Oil – 279.52(b) Contingency Plan and Emergency Procedures
- OSHA / 29 C.F.R. § 1910.38 – Emergency Action Plan

Additionally, OSHA should not have conflicting and/or overlapping regulations regarding Emergency Medical Services ("EMS") activities since those are already covered via applicable jurisdiction requirements, as acknowledged by OSHA in the NPRM. *See id.* at 7824. Rather, OSHA should include a straight, generalized cross-reference to applicable jurisdictional requirements and state that compliance with them meets OSHA's requirements under the proposed rule.

As is clear, there is already a complicated web of duplicative requirements, each carrying their own nuances, related to emergency response both from within governing bodies and between governing bodies. The proposed rule only serves to further complicate that tangled web. A streamlined approach is necessary.

3. The Proposed Rule Violates the Paperwork Reduction Act.

The Paperwork Reduction Act ("PRA") requires the White House's Office of Management and Budget ("OMB") Office of Information and Regulatory Affairs ("OIRA") to evaluate whether proposed collection of information by an agency meets three qualifications. First, it must be necessary for the proper performance of the functions of the agency, including whether the information has practical utility. Second, it must minimize the federal information collection burden, with particular emphasis on those individuals and entities most adversely affected. Finally, it must maximize the practical utility of and public benefit from information collected by or for the federal government. As discussed below, OSHA's proposed Information Collection Request ("ICR") for the proposed rule fails on all three counts.

The PRA requires that agencies demonstrate the practical utility of a proposed information collection and its individual elements. "Practical utility" is defined as "the actual, not merely

the theoretical or potential, usefulness of information to or for an agency, taking into account its accuracy, validity, adequacy, and reliability, and the agency's ability to process the information it collects (or a person's ability to receive and process that which is disclosed, in the case of a third-party or public disclosure) in a useful and timely fashion." *See* 5 C.F.R. § 1320.3(1). In evaluating "practical utility," OMB considers "whether the agency demonstrates actual timely use for the information either to carry out its functions or make it available to third-parties or the public, either directly or by means of a third-party or public posting, notification, labeling, or similar disclosure requirement, for the use of persons who have an interest in entities or transactions over which the agency has jurisdiction." *See id*. "In the case of recordkeeping requirements or general purpose statistics, [']practical utility[’] means that actual uses can be demonstrated." *See id*.

As discussed in detail above, several provisions in the proposed rule and its ICR duplicate efforts, resulting in no additional practical utility derived from these provisions and the imposition of additional burdens. A few examples of duplication in the proposed rule include:

The "Risk Management Plan" or "RMP": The RMP requirement in the proposed emergency response rule is substantially duplicative of EPA's RMP Rule. *See generally* 40 C.F.R. § 68.10 *et seq*. Coalition members already have plans/procedures that include extensive lists of hazards/risks and controls, consistent with EPA's RMP, which vary depending on the size and characteristics of the facilities. Accordingly, this provision should be deleted. In the alternative, the Coalition urges OSHA not to require them to overhaul their existing plans, and to allow for the flexibility that the performance-based nature of EPA's RMP Rule permits.

The "Post-Incident Analysis" or "PIA": The requirement of a PIA is largely duplicative of requirements of OSHA's PSM Standard (29 C.F.R. § 1910.119(m)) and the EPA's RMP Rule (40 C.F.R. § §§68.60 and 68.81) relative to incident investigation. Thus, this requirement should be eliminated from the rule.

In addition, although facilities differ in their inherent complexity and resulting hazard potential, OSHA does not tailor the information collection requirements to this reality. Despite having the authority to scale requirements based on different facilities' inherent hazards, both the ICR and the proposed rule fail to employ this option to minimize unnecessary burdens. For example, the requirement for an Emergency Response Plan ("ERP") does not account for the fact that, for larger facilities, ERPs typically link to other plans. Larger private employers are challenged by the need to ensure consistency and standardization across all similar operating entities, while smaller private employers may need to only address a single facility. Similarly, the number of hours needed to communicate and train emergency response team members on the program will vary considerably depending upon the size and purpose of the facility.

4. The Proposed Rule Relies to an Impermissible Extent on Voluntary Consensus Standards.

OSHA proposes to incorporate by reference ("IBR") more than 20 NFPA standards, many of which relate to requirements for PPE and professional qualifications. As discussed in further

detail below, first and foremost, federal agencies are required by the Administrative Procedure Act ("APA") to engage in open rulemaking and provide opportunities for public comment. *See* 5 U.S.C. § 553(c). However, the incorporated standards are so detailed and voluminous that the notice and comment period afforded by this rulemaking is insufficient, arguably in violation of the APA. Additionally, incorporating this number of NFPA standards is excessive and unnecessary to address emergency response. Many Coalition members implement some aspects of those NFPA standards; however, they do so voluntarily and at their discretion. None of the members have adopted all of the requirements and prohibitions of those standards because, for example, adopting such requirements and prohibitions might not be feasible for their operations or because doing so might result in greater hazards. In many instances, NFPA standards are used as guides. For example, some members use the standards as a training roadmap (e.g., using Pro Board accreditation for NFPA 1081 for fire fighters). But transitioning from voluntary guidelines to mandatory, legally enforceable requirements is a major shift that will overburden even those employers that have historically chosen to comply with some of these NFPA provisions.

As discussed below, OSHA's proposal to incorporate so many NFPA standards poses multiple challenges:

- Impermissible rulemaking
- Contradictory and confusing obligations
- Excessive and unnecessary paperwork burdens
- High costs with minimal additional return on safety enhancement
- Rigid application of the requirements
- Disincentives to innovation

Coalition members advise that adherence to consensus standards are a form of continuous improvement. If they become regulatory requirements, that will have a chilling effect on employers making process safety improvements. And troublingly, OSHA's move to transform such a broad array of standards into a sweeping set of regulations will jeopardize Industry's support of consensus standard revisions in the future. The unintended consequence could be that companies will endeavor to influence consensus standard setting bodies to develop more flexible consensus standards out of concern that OSHA will enshrine those standards into law. Coalition members therefore urge OSHA to IBR only the most salient, critical NFPA standards that will maximize employee safety or, better yet, construct a more tailored standard of its own that directly and materially addresses the targeted potential hazards.

a. <u>Considerations Regarding the Rulemaking Process</u>

OSHA's decision to convert more than 20 NFPA standards into law by rulemaking, rather than to draft its own provisions, raises serious concerns about whether this practice comports with the APA, as well as a critical question: has OSHA sufficiently analyzed the data underpinning NFPA's standards? First, with respect to the APA, federal agencies are required to engage in open rulemaking and provide opportunities for public comment. *See* 5 U.S.C. § 553(c). While OSHA is permitted to incorporate outside standards by reference into its own standards, such incorporation by reference also has its limits: only mandatory provisions of standards (those

containing "shall" language) incorporated by reference are adopted under the Occupational Safety and Health Act ("OSH Act"), and the edition of the standard incorporated by reference is "fixed" – that is, to enforce an edition other than the one specified in the rulemaking, OSHA must begin the notice and comment rulemaking process anew. *See* 29 C.F.R. § 1910.6(a)(1) and (3).

In contrast, the NFPA standards process is not open to the general public. Rather, stakeholder organizations must nominate individuals with the appropriate expertise to code-making or technical panels. These representatives then engage in a multi-round balloting process that takes several years before finalizing any updates or changes to the NFPA standard. It is reasonable that, as a different organization with different goals than OSHA, NFPA would engage in a process that allows for more limited stakeholder input. The Coalition does not contest that the experts at NFPA – which, in some cases, include Coalition member companies – develop robust technical material that can be valuable to employers in developing or improving safety programs across a variety of disciplines. However, the limited amount of stakeholder input in the development of NFPA standards is not equivalent to the notice and comment requirements of the APA. NFPA standards are not designed to have the force of law, and they have not been subjected to the economic, risk, and benefit analyses required by the APA and the OSH Act. Further, here, the incorporated standards are so detailed and voluminous that the notice and comment period afforded by this rulemaking is insufficient. It is unclear why OSHA has chosen this approach rather than generating its own standards or allowing employers the flexibility to determine what training / PPE is necessary for their employee's health and safety.

Additionally, with respect to an analysis of the data underpinning NFPA's standards, in *Am. Fed'n of Lab. & Cong. of Indus. Organizations v. Occupational Safety & Health Admin., U.S. Dep't of Lab.*, 965 F.2d 962 (11th Cir. 1992), the court vacated OSHA's proposed standard regulating exposure limits on 212 substances. This case is instructive as to the way in which courts view OSHA's reliance on standards set by non-governmental consensus standard setting organizations. The petitioners argued that "OSHA did no more than adopt wholesale the [American Conference of Governmental Industrial Hygienists ("ACGIH")] recommendations without independently analyzing the evidence supporting those recommendations." *See id*. at 984. The court found that there was a "dearth of explanation" by OSHA as to why it set the permissible exposure limits as it did, making it "difficult to determine how the agency arrived at its conclusions." *See id*. at 985. The court's expression of public policy consideration applies here: OSHA cannot wholesale IBR more than 20 consensus standards without a thorough evaluation of the basis and technical support for every provision of each standard.[3]

Also, for purposes of IBR, 5 U.S.C. § 552(a) provides, in part, "Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register."

[3] While the Coalition acknowledges that OSHA has included a description of the various NFPA standards that it is proposing to IBR, that in no way demonstrates the level of thorough evaluation of each provision of each standard, as required by the APA and as envisioned by the courts. *See* 89 FR 7774 at 7793.

Pursuant to 1 C.F.R. § 51.7(a)(3), a publication is eligible for incorporation by reference under 5 U.S.C. § 552(a) if it "[i]s reasonably available to and usable by the class of persons affected." Anecdotally, the Coalition understands that purchasing the NFPA standards OSHA proposes to IBR can cost hundreds or thousands of dollars for an annual subscription.[4] This is a significant cost just to be able to determine a regulated entity's compliance obligations, especially for small businesses. And although OSHA may make the standards available for inspection at any OSHA Regional Office, the OSHA Docket Office in Washington, DC, and/or the National Archives and Records Administration, practically, many employers simply do not have the resources to travel to these locations, again, simply to be able to read their compliance obligations. *See* 29 C.F.R. § 1910.6(a)(4).

OSHA's overreliance on NFPA standards also arguably violates the non-delegation clause of the United States Constitution. Article II, Section 1 of the Constitution ("Vesting Clauses") vests the President with exclusive executive power. It cannot be delegated to private entities. *See Dep't of Transp. v. Ass'n of Am. Railroads*, 575 U.S. 43, 61(2015). As Justice Thomas stated in his concurring opinion in *Ass'n of Am. Railroads*, "When the Government is called upon to perform a function that requires an exercise of legislative, executive or judicial power, only the vested recipient of that power can perform it." *See id.* at 68. Accordingly, the Vesting Clauses "categorically preclude" a private entity or party from "exercising the legislative, executive, or judicial powers of the Federal Government." *See id.* at 88. Here, the OSH Act grants the Secretary of Labor sole authority to promulgate, modify, or revoke occupational safety or health standards. *See* 29 U.S.C. § 655(b). Thus, the Secretary – an executive department official – cannot redelegate this authority to a private entity.

Imposing potentially thousands of requirements – significantly affecting private employers and volunteer organizations alike – by incorporating by reference standards drafted by a private organization would run afoul of the non-delegation doctrine. It is beyond the scope of authority provided by Congress for OSHA to delegate rule-writing to the NFPA. On this point, in particular, OSHA should proceed cautiously, given the current Supreme Court's open hostility to the delegation of regulatory authority, not to mention, its recent overruling of the 40-year precedent to defer to agencies' reasonable interpretations of ambiguous statutory terms established by *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984). *See Loper Bright Enters. v. Raimondo*, No. 22-451, and *Relentless, Inc. v. Department of Commerce*, No. 22-1219 (June 28, 2024).

b. Incorporation by Reference Imposes Contradictory and Confusing Obligations

Coalition members have also noted the inherently contradictory and confusing obligations that will exist if OSHA were to IBR so many NFPA standards. For example, some of the NFPA

[4] While the Coalition acknowledges that OSHA states that NFPA standards can be viewed online without cost, these free, view-only, online versions are exceedingly cumbersome at best to access and navigate. *See e.g.*, 89 FR 7774 at 7774. For example, assuming users have online access, they must first register for an account, read through and agree to numerous terms and conditions, familiarize themselves with the limited functionality of the system, etc. Given the number of NFPA standards that OSHA is proposing to incorporate by reference, such access is not meaningful access.

standards incorporated by reference mandate training frequencies that differ from those outlined in OSHA's proposed rule. It is unclear how employers, especially smaller and modest organizations, can reasonably identify and understand which provisions of which standard to follow.

Similarly, various NFPA standards that OSHA proposes to IBR mandate that the employer follow other cross-referenced NFPA and other voluntary consensus standards not explicitly incorporated into OSHA's proposed rule. For example, although OSHA is proposing to IBR NFPA 1951 (2020 edition), Standard on Protective Ensembles for Technical Rescue Incidents, NFPA 1951 includes mandatory language regarding following American Society for Testing Materials ("ASTM") F2413, Standard Specification for Performance Requirements for Protective (Safety) Toe Cap Footwear; however, OSHA has not proposed to IBR ASTM F2413. *See* 89 FR 7774 at 8010; *see also* NFPA 1951 § 6.1.4.13 (2020 edition). OSHA has failed to address whether employers will be expected to also abide by those cross-referenced consensus standards that are ***not explicitly incorporated by reference***. If so, OSHA would then undoubtedly be improperly circumventing the rulemaking process.

c. Incorporating So Many Consensus Standards by Reference Makes Compliance Technologically and Economically Infeasible

Compliance with the more than 20 NFPA standards incorporated by reference – or potentially thousands of mandatory provisions – would be virtually impossible to achieve for even the largest, most sophisticated employers. Coalition members estimate that simply conducting a gap assessment against this number of incorporated mandatory provisions would easily require more than 2,000 hours of work. That's not an investment into actually coming into compliance with those provisions, but rather, just evaluating what actions and investments would be needed to comply with them. By legally mandating each of those requirements, each affected employer will need to draft, implement, and enforce programs, amend or adopt new training programs, and conduct that training, and invest in substantial physical changes to workplaces and equipment. This has the unintended consequence of miring employers in a massive paperwork exercise. The financial and administrative burden of creating and maintaining such paperwork outweighs any practical effect on improving safety for frontline emergency responders. As it is, many emergency response organizations make a good-faith effort to meet the spirit of those NFPA standards. But converting them to law is unrealistic and counterproductive, especially when the only material change is a significant increase in paper and cost, without a proportional decrease in employees' exposure to potential hazards.

Moreover, compliance with so many NFPA standards at once comes with an exceedingly steep price tag. For example, under certain conditions, NFPA 1582 requires medical evaluations to include stress tests with imaging of at least 12 Metabolic Equivalents. *See* NFPA 1582 § 7.7.7.3.1.1 (2022 edition). Such tests can cost hundreds, if not thousands, of dollars each. This is a significant cost, especially for small employers and volunteers. Moreover, Coalition members have preexisting medical and fitness for duty programs in place. Thus, the rule's medical evaluation requirement should be eliminated or rewritten as a performance-based standard.

An even simpler consideration is the unreasonable cost of merely acquiring copies of these NFPA standards. As set forth above, to be eligible for incorporation by reference, a publication must be "reasonably available to and usable by the class of persons affected." *See* 1 C.F.R. § 51.7(a)(3). Purchasing copies of the consensus standards incorporated by reference would cost thousands of dollars, while digital subscription could cost more than $1,000 ***per year***. Of course, that's before incurring the costs of analyzing which new provisions apply to the employer, then implementing and administering the numerous requirements contained in the standards. And again, although OSHA may make the standards available for inspection at various government offices, many employers simply do not have the resources to travel to these locations to read what their compliance obligations are. *See* 29 C.F.R. § 1910.6(a)(4).

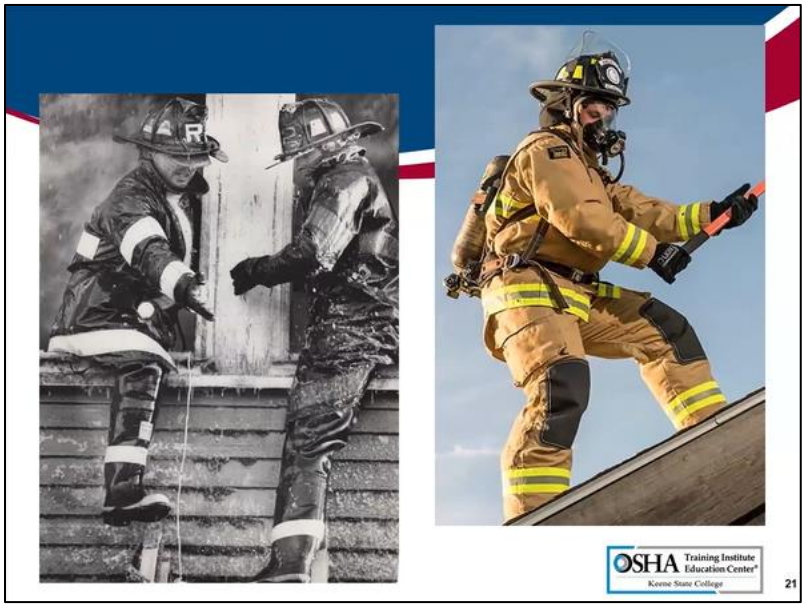
d. <u>Inflexible Application of NFPA to Different Employers</u>

Incorporating by reference so many consensus standards will create significant confusion about which standards apply to which employers under various circumstances. For example, while by no means an exhaustive list, Coalition members note that the following standards do not apply to their operations and therefore were not crafted with any consideration for the unique aspects of their workplaces: standards on wildland fire; NFPA 1140, 1953, 1977, 1984, and 1987; and ANSI/ISEA 207. Although OSHA states that employers need only follow applicable mandatory NFPA standard provisions, descriptions of applicability within these standards are often extremely confusing or overly broad. A performance-based standard would permit employers to adopt the appropriate consensus standard(s) for their facilities and/or a more protective set of internal policies.

e. <u>Challenges Surrounding Current and Future PPE Selection</u>

Another problem arising from OSHA's proposal to IBR so many consensus standards is the impact on employers' current and future PPE selection and usage. OSHA proposes requiring employers to ensure that existing PPE complies with the requirements of the edition of the respective, listed voluntary consensus standard incorporated by reference that was current when it was manufactured. *See* 89 FR 7774 at 8018-8019. This amounts to a retroactive requirement. However, Coalition members advise that some PPE currently in use does not comply with the requirements of the specific edition of the applicable NFPA standards in effect when the PPE was manufactured. In some instances where Coalition members respond with industrial PPE (e.g., a self-contained breathing apparatus ("SCBA")), those might have been evaluated for fitness and determined to be perfectly suitable for the emergency situations at their workplaces, but might not necessarily be NFPA compliant. For example, while such PPE is not marked "non-compliant" with applicable NPFA standards, they might lack tags that affirmatively designate them as NFPA compliant. The Coalition recommends that if an employer evaluates and concludes that certain PPE is suitable for emergency situations reasonably expected at the workplace, then OSHA should deem such PPE an acceptable equivalent to NFPA-compliant PPE. Relatedly, Coalition members note that the NFPA standard "rule" of retiring PPE ten years after the date of manufacture is unnecessary and misguided. *See* 89 FR 7774 at 7828-7829. Rather, a PPE retirement period should be based on fitness-for-service inspections.

OSHA's proposal to IBR so many standards also hamstrings employers' ability to voluntarily employ the most technologically advanced PPE. Instead, employers will be relegated to abiding by the approved PPE from the version of the NFPA standard incorporated reference by OSHA when it issued a final rule, which will most likely already be outdated at that time. For example, OSHA's current Fire Brigade Standard, 29 C.F.R. § 1910.156, incorporates by reference the 1975 edition of NFPA 1971 for fire-resistive coats and protective trousers – a consensus standard published nearly ***fifty years ago***. Meanwhile, NFPA has amended that 1975 consensus standard at least eight times and is now undergoing a consolidation effort. Since OSHA initially incorporated that standard, improvements in PPE have resulted in dramatic changes to, for example, rubber coats and leather helmets, as depicted in the slide below from the OSHA Training Institute Education Center's training session on "OSHA's New Proposed Rule 1910.156 Emergency Response" (uploaded January 31, 2024).



OSHA's inability to IBR the most current versions of consensus standards is not a concern limited to the effects of consensus standard changes in the distant future. There is also a more immediate issue. As mentioned above, NFPA is actively consolidating numerous standards that OSHA is proposing to IBR. Indeed, many of the NFPA standards that OSHA seeks to IBR are already under review and likely to be consolidated. OSHA has noted that it will "review the consolidated standards during development of a potential final rule," (*see* 89 FR 7774 at 7795), but NFPA's final, consolidated standards will not be released prior to OSHA's deadline for public comment on this NPRM. For example, per a summary of NFPA's Emergency Response and Responder Safety ("ERRS") consolidation project, NFPA states that, at its August 2023 meeting, the Standards Council approved moving NFPA 1986 and NFPA 1987 – two standards that OSHA is proposing to IBR – into ERRS Annual ***2026*** Custom revision cycle to align with and accomplish consolidation into NFPA 1990. *See* NFPA Emergency Response and Responder Safety Consolidation Project (last accessed on July 18, 2024). So, although OSHA might "review" the consolidated standards prior to issuing a final rule, the public will not have had any opportunity to comment on the effects of such consolidation. With this rule, OSHA is thus: 1) mandating that employers outlay significant resources to comply with numerous standards

that could soon be obsolete; and 2) intending to IBR newly consolidated consensus standards without affording the public a meaningful opportunity for notice and comment, as required by the APA.

5. The Scope of the Proposed Rule is Unclear and Overly Broad.

The proposed rule applies to Workplace Emergency Response Employers ("WERE") and Emergency Service Organizations ("ESO"); however, it is unclear which facilities and work groups are covered by the proposed rule. WEREs are defined as employers who have workplace emergency response teams and whose employees on the team, as a collateral duty to their regular daily work assignments, respond to emergency incidents to provide service such as firefighting, EMS, and technical search and rescue. *See* 89 FR 7774 at 8014. ESOs are defined as organizations that provide one or more of the following emergency response services as a primary function: firefighting, emergency medical service, and technical search and rescue; or the employees perform the emergency service(s) as a primary duty for the employer. *See id.* at 8013.

As a threshold matter, OSHA's use of the phrase "such as" in the definitions of "WERE" and "ESO" is highly problematic. Clearly, firefighting, EMS, and technical search and rescue fall within the scope of the standard (though, those terms, even as defined, can be confusing and/or overly broad), but what other activities is OSHA contemplating to come within the scope of the standard? This open-endedness leaves the scope of the standard impermissibly broad. While many of the Coalition's comments center around flexibility and a performance-orientated approach, employers would undoubtedly benefit from a more detailed, specific, prescriptive scope section that is more tailored in its application and coverage.

And even where defined, the breadth of activities covered by the proposed rule is unnecessary. For example, OSHA states that the term "team member" encompasses "all employees who serve roles as part of the WERT [Workplace Emergency Response Team] in emergency operations, from the firefighter holding a hose to the facility engineer who, for example, closes a sprinkler valve at the direction of the IC [Incident Commander], ensures the fire pump is operating properly, or adjusts the control switches for the heating/ventilating/air conditioning system to provide full exhaust of smoke." *See id.* at 7809. Again, this language is highly problematic. Coalition members ask whether firefighting includes a situation in which an employee who is not trained in firefighting activates an emergency shutdown device. Based on the expansive definition of "team member," it sounds like anyone who has any responsibility – no matter how remote – would fall under the scope of the proposed rule. Electricians who are required to be automated external defibrillator ("AED") and cardiopulmonary resuscitation ("CPR") certified, temporary emergency medical technicians, and on-site nurses who may respond to medical emergencies represent just a handful of the countless employees who could be deemed "team members." The proposed rule encompasses a huge blanket of personnel, not all of whom require the protections meant to be afforded by the standard.

Additionally, the scope of the proposed standard is unclear in that there is no definition for "emergency." While the proposed standard does include a definition for "incident," it is vague and circular at best. *See id.* at 8013. The proposed rule defines this term as any situation to

which a WERE or an ESO responds to perform services, such as firefighting; emergency medical service; technical search and rescue; other situations such as responses to downed electrical power lines, and outside propane or natural gas leaks. *See id.* Although OSHA explains that its definition of "incident" is based on NFPA 1561 and National Incident Management System ("NIMS"), and that incidents may be the result of a natural or human-caused occurrence, the regulated community needs more clarity on the types of events that would qualify as covered emergencies or incidents under any final rule. *See id.* at 7806.

Relatedly, the Coalition notes that OSHA has rightly proposed to exclude activities covered by 29 C.F.R. § 1910.120, HAZWOPER, and 29 C.F.R. § 1910.146, Permit-Required Confined Spaces in general industry. However, with respect to HAZWOPER, as discussed above, the Coalition believes that any final rule must explicitly describe the circumstances under which an emergency/incident transitions from one covered by the new rule to one covered by HAZWOPER. Otherwise, covered employers are left with unclear compliance requirements.

While it is also unclear whether the proposed rule impacts offshore facilities and if so, to what extent, OSHA should exclude offshore facilities. First, the NPRM defines "technical search and rescue/technical rescue" as: "a type of service that utilizes special knowledge and skills and specialized equipment to resolve complex search and rescue situations, such as … technical water rescue." *See id.* at 8014. "Technical water rescue," however, is undefined. Without additional specificity regarding "technical water rescue," offshore emergency responders cannot determine whether the proposed rule applies to their work.

Additionally, whether, and to what extent, OSHA intends to supersede Bureau of Safety and Environmental Enforcement ("BSEE") offshore safety regulations is unknown. The Coalition urges OSHA to explicitly exclude offshore facilities from the scope of any final emergency response standard. This is at least in part because BSEE regulations are specifically tailored to the unique hazards posed by offshore operations, and thus, are just as (if not more) protective as the proposed rule from an emergency response perspective. For example, BSEE regulations include extensive requirements regarding firefighting systems, including chemical and foam firefighting systems, as well as offshore-specific safety and environmental management system ("SEMS") programs, which must address, among other things, the elements described in American Petroleum Institute's Recommended Practice for Development of a Safety and Environmental Management Program for ***Offshore*** Operations and Facilities. *See* 30 C.F.R. § 250.859-861 and 1900-1933. SEMS programs are structured much like OSHA's PSM Standard, and like PSM, specifically include requirements for emergency response and control. *See* 30 C.F.R. § 250.1913. Thus, assuming *arguendo* that OSHA even has jurisdiction, it is not necessary for OSHA to regulate offshore facilities, and indeed, would be unwise for OSHA to do so given the unique hazards associated with such facilities that BSEE, not OSHA, has specifically been authorized to govern.

Accordingly, the scope of the proposed rule is unclear and overly broad. As an additional concern, the Coalition urges OSHA to more reasonably tailor the scope of the standard, in part because many employees volunteer to help protect their fellow employees, facility, neighbors, and community. In this regard, employers can have difficulty with healthy volunteer membership numbers. Very specific and thoughtful consideration should be made by OSHA as

to how this proposed rule may be felt at the volunteer level. If volunteers feel bureaucracy is impacting them or that immediate supervisors and/or management do not support them, the result will be a disincentivized program, and volunteers will quit. Volunteers do not give their free time to be internally or externally overburdened.

6. The Administrative Requirements of the Proposed Rule Will Not Enhance Safety.

a. <u>Required Programs, Plans, Policies, Procedures, Etc.</u>

The proposed rule includes requirements related to myriad written programs, plans, policies, procedures, etc., such as requirements to develop, implement, and regularly review and update ERPs, Vulnerability Assessments, RMPs, Incident Action Plans ("IAP"), Pre-Incident Plans ("PIP"), SOPs, PIAs, etc. The paperwork burden alone is extreme, and vastly underestimated in the NPRM. The excessive amount of prescribed paperwork will not yield a proportionate level of risk reduction to emergency response activities; rather, it will divert resources from more effective measures to protect emergency responders.

i. Emergency Response Programs

Coalition members have mature and effective ERPs/ICPs in place that reflect assessments of their individual facilities and the risks that they present. Although existing facility response plans may include some of the information required by the proposed rule, it will take a significant amount of time and resources to retrofit them to align with the proposed rule's prescriptive requirements, diverting critical resources. Indeed, Coalition members expressed concerns that one large, all-inclusive plan would be so cumbersome that it would detract from the robust, successful programs that they already have in place.

Coalition members also believe there is a fundamental issue in the proposed rule related to the differences between programs and plans. Specifically, per the NPRM, the ERP is a compilation of all documents required by the proposed rule, except for PIPs. *See* 89 FR 7774 at 7810-11. Rather, OSHA should craft any final standard so that ERPs or vulnerability assessments dictate when all-hazard plans, such as Emergency Action Plans ("EAP") or Facility Response Plans ("FRP"), are appropriate, then set the five-year or appropriate document retention period for those plans.

As to the substance of ERPs, the Coalition understands that, per the proposed rule, WEREs and ESOs would be required to define the services they need, but are unable to provide, and develop mutual aid agreements with WEREs or other ESOs as necessary to ensure adequate resources are available to safely mitigate foreseeable incidents. *See id.* at 8015. OSHA defines "mutual aid agreement" as "a written agreement or contract between WEREs and ESOs, or between ESOs, that they will assist one another upon request by furnishing personnel, equipment, materials, expertise, or other associated services as specified." *See id.* at 8014. However, this definition is more limited than the mutual aid arrangements that exist in the real-world. For example, OSHA should clarify that mutual aid agreements can be made between WEREs, as OSHA states elsewhere in the NPRM. *See e.g., id.* at 7811 ("For example, if a WERE identifies that its facility has tall structures that need an aerial ladder or elevated

platform vehicle for firefighting or rescue, but its WERT does not have such a vehicle, the WERE would need to establish a mutual aid agreement ***with a neighboring WERE*** or ESO with an aerial ladder or elevated platform vehicle to provide it when needed.") (emphasis added). OSHA should also expand the definition to establish that mutual aid agreements can be entered with parties that might not be WEREs or ESOs.

ii. Risk Management Plans

As discussed above, OSHA's proposed RMP is substantially similar to and duplicative of EPA's RMP. The final rule should be revised to explicitly state that compliance with EPA's requirements for Risk Management Plans satisfies OSHA's emergency response standards. To the extent that OSHA includes the requirement in the final rule anyway, the Coalition urges the adoption of a performance-based approach.

Additionally, as to OSHA's questions on whether it should include a minimum list of required hazards and also whether OSHA should cite consensus standards, the answer is no to both. Again, a performance-oriented standard is the best approach, and OSHA can provide these as examples.

iii. Incident Action Plans

The proposed rule calls for an IAP for each individual incident, that must be updated as needed during the incident, and utilizes the information contained in the PIP. Coalition members have found that a systems-based approach that focuses on higher consequence scenarios (that is, having one procedure with appendices listing specific equipment or areas of concern such as separate boiling liquid expanding vapor explosions ("BLEVE"), overfill, boil over, toxics, general gas release, liquid fire, spill fire, tank fire, etc.) is the more effective approach to emergency response planning. A response "system" should be activated the same way in every scenario with the same general rules for activation, scene size-up and assessment, accountability, safety, and internal and external notifications should be the same for every scenario. This approach minimizes the need for complicated IAPs for every individual event. Unit procedures must be very specific and overarching response procedures need to complement those unit immediate actions.

Coalition members advise that, historically, written IAPs have only been developed when the Emergency Operations Center ("EOC") has been activated or multiple incident operation periods are required. The time to develop a written IAP depends on the type of incident and conditions.

Additionally, while the Coalition believes that it would be ideal to be able to conduct so many planning activities right after being called on for an emergency, the reality is that time is not a luxury. Accordingly, IAPs must be fit for purpose. That is, an IAP need only model the complexity of the emergency response given the wide range of IAPs. For example, simply as an example and only where appropriate, the Coalition provides that the Federal Emergency Management Agency's ("FEMA") ICS 201-1 – 201-5 could be used as a basic IAP. Additionally, it should be made clear that IAPs need not be required for incipient stage incidents. Again, this is

yet another reason why incipient stage fires should be excluded from any final rule. Crucially, this does not mean that responders are putting themselves at risk of greater harm. To the contrary, it simply means that flexibility is key in developing an appropriate response.

iv. Pre-Incident Plans

With respect to PIPs, Coalition members state that, depending on operational settings (e.g., a storage terminal with four storage tanks), it could take approximately 1.5 months, including conducting site visits, validating with operations personnel, presenting to municipal resources, etc., before fully implementing each plan. For a chemical plant or petroleum refinery, it could take years to fully implement plans unique to all the site's processing and storage capabilities.

v. Standard Operating Procedures

As for SOPs, Coalition members state that the majority of affected sites maintain detailed and effective SOPs already, many of which are developed to generally align with expectations of internal management systems (e.g., International Organization for Standardization ("ISO") 9001, 14000 and 45000 standards). Here again, a performance-based rather than prescriptive rule would permit employers to design SOPs appropriate to their facilities and the risks that they present.

Coalition members also highlight the duplicative nature of the proposed rule's SOP requirements as, for example, OSHA's Emergency Action Plan Standard at 29 C.F.R. § 1910.38 already establishes SOP requirements for evacuation and personnel accountability. (The Coalition acknowledges that OSHA intends, while employees are engaged solely in activities subject to one or more of its existing OSHA standards, that the protections of those standards apply instead of the protections of the proposed rule. However, as discussed, there are numerous problems associated with the way OSHA has framed its intentions.)

vi. Post-Incident Analysis

The proposed rule calls for a PIA that is intended to serve as a systematic review of incident operations and activities, and determine whether programs, plans, and procedures developed by the WERE or ESO performed as intended. As discussed above, this is a duplicative requirement that should not be included in the rule.

Should OSHA retain the requirement in the final rule, the Coalition states that not all employers will be able to conduct PIAs at the proposed prompt frequency. *See* 89 FR 7774 at 8022. This is especially true for small businesses. As for completing any recommendations based on lessons learned, Coalition members state that those should be completed in time frames that depend on risk-based recommendations, where higher risk-based solutions dictate priority for mitigation over lower risk items (i.e., timelines should be prioritized based upon associated potential risks). Coalition members further state that facilities should be evaluated on their ability to steward lessons learned with defined action plans vs. when completed.

Additionally, with respect to time frames, Coalition members state that many sites are advancing digital solutions, which require significant investment, site/facility programming, equipment deployment, training, and continuous modifications or sustainment efforts. The proposed rule should not supersede other larger safety and health benefits such as these. Coalition members also remark that, while they appreciate OSHA's attempt to integrate flexibility into the time frame requirements, problems may arise when requirements include "promptly" or "as soon as feasible" language, as these phrases are open to interpretation.

b. Review Frequency of Programs, Plans, Policies, Procedures, Etc.

The programs, plans, policies, procedures, etc. and other elements of the proposed rule must be reviewed and/or conducted on certain schedules. *See e.g.*, Table 1 below, with red text describing, to the extent that these requirements are maintained in any final standard, proposed alternatives. Complying with several of these demanding timelines would be resource intensive to the point of being infeasible for some employers and will further divert resources from actions that have more significant impacts on safety. Further details are discussed elsewhere in these comments.

Table 1. Review Frequencies and Proposed Alternatives for Various Elements of the Proposed Emergency Response Standard

Emergency Response Program	Evaluate the effectiveness of the ERP at least ***annually***, and ***upon discovering deficiencies***, and document when the evaluation(s) are conducted. The ERP would be ***revised as required written plans and procedures (except PIPs) are updated***. Proposed Alternative: Evaluate the effectiveness of the ERP at least every five years.
Risk Management Plan	Review the RMP ***when review is required by [the PIA or ERP provisions]***, but ***not less than annually***, and update it as needed. Proposed Alternative: Review the RMP at least every five years.
Medical Evaluation	Repeat ***biennially (every two years)*** unless the PLHCP [physician or other licensed health care professional] deems more frequent evaluations are necessary with the exception of spirometry which will be repeated when deemed appropriate by the PLHC. Proposed Alternative: The standard should use performance-based language.

Behavioral Health and Wellness	Inform each team member and responder, on a ***regular and recurring basis***, and ***following each potentially traumatic event***, of the resources available. Proposed Alternative: Remind team members and responders of the resources available.
Fitness for Duty	Establish and implement a process to evaluate and reevaluate ***annually*** the ability of team members and responders to perform essential job functions. Proposed Alternative: The standard should use performance-based language.
Training	Provide initial training, ***ongoing*** training, ***refresher*** training. Provide ***annual*** skills checks to ensure each team member and responder maintains proficiency. Proposed Alternative: Provide skills checks at least every three years.
Pre-Incident Plans	Review ***annually*** and, for WEREs, ***when conditions or hazards change at the facility.*** Update as needed. Proposed Alternative: Review at least every three years.
Post-Incident Analysis	***Promptly*** conduct a PIA to determine the effectiveness of the response to an incident ***after a significant event.*** Review and evaluate the RMP, IMS [Incident Management System], PIPs, SOPs, and IAPs for accuracy and adequacy. ***Promptly*** identify and implement changes needed to the RMP, IMS, PIPs, IAPs, and SOPs based on the lessons learned as a result of the PIA; or if the changes cannot be promptly implemented, develop a written timeline for implementation ***as soon as feasible.*** Proposed Alternative: The standard should delete the references to "promptly" and "as soon as feasible," and use performance-based language.

i. Emergency Response Programs

Per the proposed rule, ERPs must be evaluated annually, and upon discovering deficiencies, as well as revised as required written plans and procedures (except PIPs) are updated. *See e.g., id.* at 7810; *see also id.* at 8022.

To demonstrate the infeasibility of yearly ERP review frequencies, the Coalition highlights the experience of Coalition members that employ ICPs, since ICPs are already required to be evaluated and updated yearly. Historically, this requires subject matter experts ("SME") to review their respective areas and designate, with supporting documentation, any material that will need to be updated. Employers spend about 40 to 80 hours per site annually to update ICPs ***after*** SMEs have provided their feedback and supporting documentation. Additionally, in years where ICPs are submitted for U.S. Coast Guard or EPA re-certification, this can add another 40+ hours. Particularly for small businesses, which may not have personnel, let alone SMEs, it simply may not be possible to keep up.

Coalition member sites already receive external ERP assessments based on their prior assessment outcome and identified potential risks, ranging from every three to five years (reassessment cycle). Based on their collective experience, Coalition members recommend that a frequency of every three to five years is appropriate to achieve the proposed rule's ERP review frequency requirements.

ii. Risk Management Plans

For purposes of RMP review cycles, the proposed rule requires employers to review the RMP when review is required by the PIA or ERP provisions, but not less than annually. *See id.* at 8016. In reviewing the totality of their experience, Coalition members state that a more appropriate review frequency is every three to five years (akin to analogous PSM and EPA RMP review cycles) based on prior assessments, current safety and health performance, lack of significant events, etc.

iii. Pre-Incident Plans

Per the proposed rule, PIPs must be reviewed annually and, for WEREs, when conditions or hazards change at the facility. *See id.* at 8020. Based on their collective experience, Coalition members generally agree that a triennial or "no longer than three years" cycle to review and update PIPs, breaking the total number of PIPs up in thirds per year, is more appropriate. This would be similar to the Oil Pollution Act of 1990 drill guidance of a triennial cycle for full review of all documents. Other Coalition members provide feedback that OSHA should recognize that, for employers regulated under OSHA's PSM and EPA's RMP Standards, these PIP reviews are in addition to existing OSHA PSM and EPA RMP program reviews, making review cycles, again, incredibly onerous.

c. Conclusion

As set forth above, the administrative requirements of the proposed rule are either duplicative or demanding to the point of being infeasible. Even larger Coalition members find the administrative burdens extreme; even though they already meticulously oversee record review/retention requirements for their voluntary programs, plans, policies, procedures, etc., the proposed rule will require even greater record review/retention oversight that does nothing to improve safety. Rather than providing prescriptive "one size fits all" requirements, OSHA should allow compliance with existing regulations (e.g., EPA's RMP) to satisfy OSHA requirements and, to the extent OSHA needs to promulgate new standards, focus on a performance-based approach.[5]

7. The Proposed Rule is Unnecessarily Lengthy and Confounding.

Further complicating matters is the fact that the proposed rule is unnecessarily lengthy and confounding, which will make compliance, particularly for smaller and medium-sized businesses, extremely difficult. For example, anecdotally, on or around February 24, 2024, the Coalition is aware that long-serving municipal fire chiefs/commissioners stated that they devoted hours upon hours reviewing the NPRM since the unofficial version was released right before Christmas 2023, and still do not understand the proposed rule. More recently, in May 2024, the Coalition is aware of anecdotal feedback from such fire chiefs/commissioners that the more they learn about the proposed rule, the more confused they become. Indeed, these chiefs and commissioners stated that they intend to file comments to address the substantial issues and concerns they have with the proposed rule.

While the list is extremely long and potentially limitless, Coalition members remark that some of the more perplexing aspects of the proposed rule include, but are not limited to:

- As discussed below, ESO/WERE criteria, and how having a single full-time emergency response resource (e.g., a Fire Chief) would require ESO categorization. If this was not OSHA's intent, OSHA should be explicit that a blended option is available, or be explicit about the number of emergency response resources that would trigger ESO categorization.
- In situations where a private employer has a Fire Chief and a shift Fire Department Operator, these individuals should fall under "team member." Even though their titles and positions are emergency-services based, their job functions are very different than municipal fire fighters. Their daily work can include security, safety inspections, isolation of fire water lines, hydrant repairs, air monitoring and permit writing, etc. The activities that an Industrial Fire Chief, Supervisors and Operators conduct are more incidental in nature, and they should be classified as "team members."

[5] Coalition members also point out that OSHA needs to update its OSHA 3122-06R, 2004 Principal ER&P Requirements and Guidance document. Many remark that this is a helpful, though outdated, guidance document that sets forth both OSHA requirements and relevant voluntary standards and guidelines. Rather than promulgating a final rule, OSHA could and should focus on compliance assistance.

- As set forth above, the overlap between existing OSHA standards (e.g., Emergency Action Plans, 29 C.F.R. § 1910. 38) and the proposed rule.
- The required content of PIPs for WEREs is more than what is needed (e.g., requirements related to identifying the locations of fire pumps, control valves, etc.).
- The requirement for reviewing PIPs annually, especially if conditions have not changed, is a redundant records review/retention and administrative burden because sites have Management of Change processes that address these concerns.
- Vague definitions/terminology, including "exposure," "type, level, and tier," and "behavioral health and wellness."
- Unclear guidance and associated burden regarding annual reviews to determine which employees may have exceeded the action level ("AL") for purposes of exposure to combustion products.
- Unnecessary exercise program requirements that are not performance-based, can be infeasible due to resource constraints, and particularly difficult for private employers to mandate.
- Applicability of training requirements for those who fulfill emergency response duties on a part time, limited basis (e.g., a facility engineer who closes a sprinkler valve at the direction of the IC).
- As discussed above, the unrealistic nature of adopting so many NFPA standards.

Additionally, meeting the proposed compliance timeline is infeasible for most employers. For certain larger employers in the Coalition, they estimate that, if they assigned someone the responsibility of ensuring compliance with the proposed rule, overall, it would take six to 12 months for that person to sort out all the applicability aspects associated with the various corporate facility structures (e.g., industrial, commercial, warehouse, assembly occupancy and other private entities). That is, it could take at least a year to understand the rule, assuming resources exist, which often will not be the case for smaller or medium-sized employers. Once employers have learned the rule, they will need additional time to implement its requirements. Accordingly, Coalition members agree that, should a final rule be promulgated, there should be a phased implementation approach that allows employers time to address each of these tasks.

Indeed, because of all this, the Coalition is aware of feedback from private businesses that they may opt against establishing or dismembering existing emergency response teams altogether and instead rely on 9-1-1 services because complying with the proposed rule might be too expensive and/or complex. This could of course overwhelm community emergency response organizations (not to mention, result in significant increases to local taxes and insurance rates). Taking that one step further, what would happen if 9-1-1 service personnel cannot respond because they close/consolidate or cannot respond due to lack of expertise, funding, training, certifications, personnel, equipment, etc.? (As an aside, the Coalition is aware that many traditional ESOs are concerned that the proposed rule, if promulgated, will become a standard/duty of care for liability purposes, and they may face significant, costly legal challenges.) This could result in catastrophic consequences to the safety of not only employees but also to the safety of the public at large. And notably, some industrial fire brigades provide mutual aid to their surrounding communities and municipal fire departments. One specific example is wildland fires. Industrial facilities have wildland fire equipment, are trained on said equipment, and exercise and work with their local community. The additional burden placed

on Industry for wildland fires (through incorporated NFPA standards) on these already qualified individuals may hinder their ability to provide this critical service.

Based on these legitimate concerns, the Coalition questions whether all of the provisions in the proposed rule are justified under the "significant risk" standard and whether they are economically feasible, as discussed further below, assuming that they are technologically feasible. The Coalition also has significant concerns from an enforcement standpoint. Emergencies are always different, and while Coalition members already conduct effective pre-planning exercises, by their nature, it is difficult, if not impossible, to foresee every challenge that will arise in emergency situations. OSHA should not be able to use hindsight in case PIPs do not capture every possible potential hazard. At the very least, additional clarity is needed in this regard. In sum, the Coalition believes that OSHA can certainly craft a more reasonable, less lengthy/confusing, alternative standard.

8. The Proposed Rule is Misguided in its Characterization of Facility ESOs.

By way of background, the Coalition includes many employers that would be characterized as WEREs under the proposed rule, but also includes private employers that have some employees whose primary duties could be characterized as emergency response. Employers in the latter category employ a small number of employees (less than 10% of the employee population) whose job is to respond to emergencies and perform related duties such as fire line maintenance and isolations for repairs, conduct hydrant repairs, fresh air and respiratory protection, safety audits, etc. The remaining employees (90% or more) are operators, engineers, maintenance professionals, etc. who may on occasion perform some emergency response tasks and clearly meet the "collateral duty" criteria. None of these private employers' employees participate in emergency response full time like municipal firefighters do. Even those few employees whose duties could be characterized as primarily emergency response spend almost no time actually responding to emergencies.

Nonetheless, per the NPRM, it appears that OSHA is planning to consider such employers as ESOs, not WEREs, and thus subject them to heightened ESO compliance requirements. OSHA states that ". . . . if an employer has workers who meet the definition of responder (providing emergency service(s) is their primary duty for the employer), ***then the employer is an ESO, not a WERE***." *See* 89 FR 7774 at 7809 (emphasis added). This is misguided. Such employers (e.g., those that currently have fire brigades) operate more like WEREs than ESOs. When asked about differences between traditional ESOs (e.g., local fire departments) and private employers that might, per the NPRM, qualify as ESOs, numerous examples were provided. For example, private employer employees who conduct emergency response as their primary duty work the same 8-12 hour shifts as other employees. However, most municipal department employees work 24-hour shifts, thus prompting a need, as also reflected in the NPRM, for living accommodations. This is another difference between the two.

Additionally, employees responding to emergencies on private employer sites inherently have more insight into the nature of the emergencies that they will be called upon to handle, and thus, the nature of the hazards that might be present. This is part of their initial training when employed with the company, and part of their job. An example is the unique firefighting

germane to petroleum refineries with the use of firefighting foams to combat hydrocarbon fires. Unlike municipal department employees who, even though community vulnerability assessments, are unfamiliar with the locations to which they must respond, private employer employees know their sites, and thus, the specific hazards they might face. Relatedly, and importantly, another key distinction between traditional ESOs and private employers is the sheer volume of calls. Private employer employees do not respond to anywhere near the number of incidents that municipal department employees do. This point is crucial because it means that private employer employees do not fit the same hazard profile as do municipal department employees. Per the NPRM:

> During the SBREFA [Small Business Regulatory Enforcement Fairness Act] teleconferences, SERs [Small Entity Representatives] commented that the ***employees of employers whose primary business is emergency response are exposed to more hazards more frequently than the employees of employers that are not in the business of providing emergency services*** but require their workers to perform emergency response activities as a collateral duty to their primary work assignments. ***There was consensus from the SERs that OSHA should have fewer and/or less stringent requirements for the latter employers because of the less frequent exposure of their employees to emergency response related hazards*** and should clearly differentiate between the requirements for the two types of employers (Document ID 0115, p. 27). ***OSHA agrees*** and, to the extent appropriate, has provided separate requirements in the proposed rule.

See id. at 7803 (emphasis added). Although OSHA acknowledges the hazard nature/frequency distinction between employers whose – as set forth in the quoted language above – "primary business" is emergency response and those whose primary business is not, OSHA nonetheless appears to be grouping employers in the latter group in the former group, even though there is no evidence that such employers "are exposed to more hazards more frequently." This should not be the case, and OSHA should explicitly recognize such employers as WEREs, regardless of the number of employees with primary emergency response duties. The defining characteristic should be the primary business of the employer.

Nonetheless, to the extent that OSHA does not adopt the "primary business" definition, further complicating matters is the fact that OSHA seems to suggest, but does not clearly state, the percentage of emergency response duties that would shift an employee's duties from being collateral to primary. For example, certain sites maintain resources that partially (50/50) meet WERE and ESO definition criteria (e.g., a site Fire Chief and Fire Department Operator that perform emergency response but also perform other activities such as security coordination, supervisory oversight, business / administrative tasks, fire water line maintenance, equipment checks, etc.). It seems that "primary duty" would reasonably mean 100% emergency response duties. However, OSHA does not state. Is it 51% primary? 75%? What is the threshold? The definition of "primary duty" at the very least needs to be clarified.

Indeed, Coalition members are baffled by the fact that having even a very small portion of an employer's population, or an employee having anything less than 100% emergency response

duties, could cause the employer to be an ESO rather than a WERE. Ideally, to the extent that OSHA decides it should change the way it regulates private employer emergency response activities, OSHA should propose two separate standards to reflect the significant differences between municipal[6] and private employer responders. To the extent that OSHA does not do so though, the Coalition believes that such employers should rightly be characterized as WEREs. Alternatively, at a minimum, the proposed rule needs to offer a blended option, and provide clarity on how certain emergency response team models (e.g., Fire Chief, EMS Supervisor, Oil Spill/Hazmat Supervisor, etc.) fit within the criteria of the ESO/WERE definitions.

In sum, these are significant differences that demonstrate the misguided nature in categorizing private employers with employees who conduct emergency response as a primary duty as ESOs. Such employers are more like WEREs, and should be treated as such in the proposed rule.

9. The Proposed Rule is Economically Infeasible for Volunteers.

As related to volunteers, although the proposed rule should have little to no ***direct*** effect on volunteers in federal OSHA states, its impact on OSH State Plan states will be inconsistent but significant.[7] Volunteers in OSH State Plan states will likely be covered by the rule if they are deemed employees in their respective states (e.g., New York). This will have a substantial impact on volunteer services. Per the National Volunteer Fire Council ("NVFC"), of the total estimated 1,041,200 firefighters across the country, 676,900 are volunteer, meaning that volunteers comprise 65% of firefighters in the United States. *See* NVFC Volunteer Fire Service Fact Sheet (December 2022) (internal citations omitted). The proposed rule will therefore have far-reaching implications for volunteers and their organizations, which are often small and work under tight budgets.

The economic cost of abiding by the proposed rule will be insurmountable for many volunteer organizations. Based on their experience as private employers, while acknowledging that cost estimates vary significantly depending on the size of the organization, Coalition members estimate that it costs approximately $25,000 in up-front costs (e.g., PPE, training, etc.), plus an additional $5,000 per year per discipline (firefighting, rescue, HAZMAT, etc.) ***per responder***. Indeed, for one site, it was estimated that the 2023 total planned budget for all branches of emergency response was approximately $4,000,000. To be clear, these figures are likely underestimates since they do not account for the proposed rule's heightened ESO compliance requirements like living/sleeping areas. Cash-strapped, small volunteer organizations cannot afford that. The result: many volunteer organizations will be ***forced to stop operating entirely***. Private employers who otherwise rely on those volunteer ESOs may then essentially be forced to organize their own emergency response teams, if they can afford to do so.[8] That

[6] For purposes of this requirement, Coalition members urge that private entities in the business of emergency response should be treated as ESOs.
[7] The Coalition notes that ***indirect*** impacts on volunteer organizations may be extremely significant. For example, as discussed, the proposed rule may establish a standard of care by which all volunteer organizations, even those in federal OSHA states, may be held.
[8] This is despite the fact that OSHA explicitly states, "Nothing in this proposed rule would require an employer to establish a WERT." *See* 89 FR 7774 at 7809.

means that, if they cannot afford to do so, in areas where there are no non-volunteer services, there will be no emergency response services at all, putting both employees and the public at risk.

The Coalition would also like to make OSHA aware of currently established relationships between private employers and volunteer departments. Certain private employers, including those in agriculture, cover the cost of emergency responder training and equipment for their employees who volunteer for ESOs in their free time. These employers subsidize the training and equipment costs in the interest of supporting their workers and local communities. But the significant cost increase under the proposed rule will force private employers to reduce the number of workers they subsidize or reduce the overall proportion of the costs they subsidize, or far worse, eliminate the programs they have established altogether. The unfortunate effect will be a reduction in the overall number of people willing and financially able to serve critically needed ESOs. OSHA should revisit the proposed rule in this regard to ensure that it does not disincentivize people from serving in volunteer organizations.

10. OSHA Should Remove the Proposed Rule Provisions Related to Vehicles.

OSHA proposes to require ESOs and WEREs to regulate the operation, design, and maintenance of vehicles in emergency response operations. The Coalition believes this is the first time that OSHA has attempted to regulate the operation of vehicles on public roads and cautions OSHA that these provisions may exceed OSHA statutory authority and encroach on the authority of other federal agencies such as the Department of Transportation. Also, the extremely detailed provisions of this are not appropriate for WEREs as they may be for ESOs. Once again, the Coalition suggests that OSHA take greater care to assess the needs and risks of WEREs apart from those of full-fledged fire departments and other ESOs.

11. Training Requirements Should Relate to Site-Specific Hazard Assessments.

The Coalition certainly supports the provision of robust training and education to its employees who perform emergency response activities. Indeed, Coalition members already provide such training. However, certain training requirements in the proposed rule are not appropriately tailored to the hazards at varying worksites. As a result, Coalition members estimate that completing all the training requirements in the proposed rule would require each affected employee to undergo 200 hours of training each year – much of which would be irrelevant. This again diverts resources from more effective safety efforts.

While vocational training is of course critical to the success of emergency response activities, OSHA's proposal to impose vocational training requirements that rely almost exclusively on NFPA standards is unnecessary. By mandating that WEREs and ESOs follow NFPA standards, OSHA is imposing significant legal obligations on employers for whom those standards might be only tangentially relevant. Instead, the Coalition prefers that OSHA implement a performance-based standard that allows employers to tailor its training to reasonably foreseeable conditions based on facility or locality vulnerability assessments of reasonably foreseeable hazards. As set forth above, the breadth of NFPA standards incorporated by reference will impose significant burdens on employers. Not to mention, the application

sections of NFPA standards can be exceedingly difficult to understand. Rather than require employers to provide vocational training on a panoply of NFPA requirements, OSHA should allow employers to provide vocational training that compliments the findings of their hazard assessments.[9]

Coalition members also express concerns about the financial and logistical burdens of conducting annual skill checks, which are unlikely to produce a better trained workforce. For example, larger Coalition members have around-the-clock operations employing four shifts daily. Simply to meet the requirements of the annual skills check, those employers would need to ***add an entire fifth shift of full-time personnel***. This would be an onerous demand on such employers and likely impossible for smaller ones. Employers need flexibility to assess and address their unique site-specific hazards.

Another concern regarding annual skills checks is OSHA's use of the language "ensure each team member and responder maintains proficiency in the skills and knowledge commensurate with the safe performance of expected duties and functions, based on [his/her] type and level of service(s)." *See* 89 FR 7774 at 8018. This is vague and open to interpretation. The Coalition requests that OSHA provide non-mandatory examples of how this can be accomplished for purposes of compliance. As set forth above, Coalition members also believe that it is unnecessary to conduct skill checks on an annual basis as they currently conduct a three-year requalification cycle period for purposes of skills checks, which have proven effective. The Coalition urges OSHA to adopt this approach.

12. The Proposed Rule Contains Overly Prescriptive Medical Requirements.

The proposed rule includes prescriptive "medical" and "physical" fitness for duty requirements. *See id.* at 8016-17. As a preliminary matter, while Coalition members acknowledge that OSHA has carved out medical requirements for support tier employees, we believe additional exceptions and/or clarifications are necessary. That is, the application of medical requirements should be more appropriately tailored.

Additionally, employers need more flexibility with respect to these requirements. For example, not all employers will be able to comply with biennial medical evaluation requirements due to resource constraints. Similar sentiments were expressed by Coalition members with respect to annual fitness for duty requirements. A better option is to allow for a more performance-oriented approach, whereby employers can make minor modifications to the processes they already have in place for conducting physicals. Additionally, Coalition members note the extreme economic burden that will be placed on ESOs (including certain members themselves if, as discussed above, private employers with any employees who conduct emergency service

[9] The Coalition acknowledges that OSHA appears to provide employers some flexibility through equivalency and duty-specific language in the NPRM. OSHA states, "Paragraphs (h)(2)(i) through (viii) each reference a specific NFPA standard and require that team members and responders be trained to a level that is at least equivalent to the job performance requirements (JPR) of the identified standard, for the duties to which they are assigned." *See* 89 FR 7774 at 7823. However, to the extent that OSHA does not change the proposed rule, the Coalition urges OSHA to provide non-mandatory examples of alternative methods employers can use for purposes of compliance. Otherwise, such equivalency language is open to interpretation.

activities as a primary duty are inappropriately characterized as ESOs) to meet the heightened medical surveillance requirements of NFPA 1582 in case their employees are exposed to combustion products 15 times or more per year. Indeed, our understanding is that certain annual physicals have cost around $300, but that the amount could be multiplied by a factor of five for the service to rise to the level of the NFPA 1582 standard.

The Coalition also raises concerns about requirements on ESOs to provide health and fitness programs. Particularly for private employers (assuming any final standard inappropriately maintains the proposed rule characterization of private employers with any employees who conduct emergency service activities as a primary duty as ESOs), this should not be a requirement as it is particularly difficult for private employers to dictate mandatory exercise. Moreover, unlike municipal responders who may work multiple 24-hour shifts, employees in private industry work on/off several hours a day and can exercise when off shift. Indeed, many private employers incentivize their employees' personal fitness programs through subsidies or reimbursement. Accordingly, requiring employers to force their employees into exercise programs is unnecessary and unworkable.

13. The Proposed Rule Contains Unclear and Unsupported Action Level Triggers.

For ESO employees who are, or, based on experience, may be, exposed to combustion products 15 times or more a year without regard to the use of respiratory protection, additional medical surveillance must be provided per the proposed rule. *See e.g.,* 89 FR 7774 at 7818. As a preliminary matter, although OSHA provides that it reviewed its existing chemical specific standards, particularly OSHA's Methylenedianiline ("MDA") Standard, as a model for the proposed rule's action level of 15 or more exposures per year, there appears to be a disconnect between the MDA Standard and its focus on dermal exposure, and the proposed rule and its focus on inhalation exposure. *See id.* at 7819. Accordingly, the Coalition believes that OSHA should provide, to the extent possible, background and scientific data to support the inclusion of this requirement.

Practically, other concerns associated with counting exposures to combustion products include, but are not limited to:

- Ambiguous definition of "exposure."[10]
- Reliance on self-reporting.
- Tracking burden.
- Nature of the exposure (e.g., one significant exposure could be worse than 15 minimal exposures).[11]

[10] For example, although OSHA provides some guidance in the NPRM regarding the exposure incidents that would count towards the action level trigger, other important details, such as whether each training exercise exposure, or off-duty/outside exposures, would count as an exposure incident, are not discussed. *See* 89 FR 7774 at 7819.

[11] The Coalition acknowledges that OSHA addresses this to some extent in the NPRM; however, OSHA seems to base its conclusion on administrative ease, if anything, rather than on data and science. *See* 89 FR 7774 at 7819 ("OSHA is aware that not all exposure incidents are equal and that some of the exposure incidents [] involve a low level of exposure while others involve a higher level of exposure. While some of the individual

With respect to OSHA's request for input on whether an action level of 15 exposures to combustion products within a year to trigger medical surveillance consistent with NFPA 1582 is too high, too low, or an appropriate threshold, Coalition members generally believe that the number is too low, especially given the extremely broad guidance that OSHA provides in the NPRM regarding events that would constitute an exposure. For example, OSHA states that examples of exposure incidents include fires in residential homes, cars, dumpsters, kitchens, and training scenarios, among other similar incidents. *See id.* at 7819. Ideally, OSHA should delete its metric of a number of exposures and instead provide a list of performance-based criteria for when medical surveillance is triggered. However, to the extent that OSHA maintains an action level in any final rule, OSHA should, at a minimum, increase the action level threshold, and provide much more detailed guidance regarding covered exposures.

14. OSHA Should Clarify its Requirements for Behavioral Health and Wellness.

OSHA proposes to require that behavioral health and wellness resources be provided or identified for covered workers, and that these resources should include a diagnostic assessment, short-term counseling, crisis intervention, and referral services for behavioral health and personal problems that could affect their performance of emergency response duties. *See* 89 FR 7774 at 8017. OSHA would require employers to inform workers on a regular and recurring basis, and following each potentially traumatic event, of the resources available. *See id.* While Coalition members are certainly supportive of their employees' overall wellbeing, the Coalition has concerns regarding the prescriptive nature of the proposed provisions, and of the subjective language regarding providing resources "following each potentially traumatic event."

First, it is not clear what OSHA means by "diagnostic assessment." There are a wide variety of different diagnostic assessments and criteria for various mental health conditions, including those mentioned by OSHA in the preamble such as anxiety, depression, or substance abuse. For example, the Diagnostics and Statistical Manual of Mental Disorder ("DSM-5") contains one cross-cutting symptom assessment, eight additional diagnostic assessments for various conditions such as depression and anxiety, and then further contains disorder-specific severity measure assessments.[12] While the Coalition appreciates that OSHA likely did not specify a particular diagnostic test in order to provide flexibility to employers, the broad range of mental health conditions and possible diagnostic tools makes this requirement unclear.

Second, the difference between "short-term counseling" and "crisis intervention" is not clear, as short-term counseling would presumably also include crisis intervention. OSHA has not

components in combustion products have PELs [permissible exposure limits], there are no PELs for combined combustion products. The nature of combustion products, being a combination of any number of potentially hazardous substances, often unknown and changing with each emergency incident, as well as the difficulty in measuring such exposures in the emergency response context, would make establishing any such PEL very difficult. Nonetheless, OSHA has determined that despite the varying levels of exposure, both low and high exposure incidents contribute in the aggregate to a responder's overall exposure to toxic combustion products. Thus, on balance, OSHA has determined that any incident resulting in exposure to toxic combustion products while in the incident hot zone, regardless of the level of exposure, should be counted towards the total number of exposure incidents triggering the action level . . .").

[12] https://www.psychiatry.org/psychiatrists/practice/dsm/educational-resources/assessment-measures.

proposed definitions for these terms, nor can the Coalition find consensus definitions from reputable sources that would provide the needed clarity. OSHA should remove these requirements.

Rather than require a prescriptive list of what behavioral and mental health resources should be available to employees, the Coalition instead suggests that OSHA remove this provision and instead simply require that employers provide behavioral health and wellness resources through an existing health care plan or EAP, or identify where such resources are publicly or may otherwise be available at no cost, provide referral services as needed, and inform employees that resources are available to them. This would still provide employees with necessary resources to take care of their mental health, while eliminating the concerns associated with OSHA's prescriptive requirements.

Finally, the Coalition urges OSHA to remove any requirement that employers inform workers of the resources available following each potentially traumatic event. Whether an event is traumatic is highly subjective. Is a minor finger laceration traumatic? Is a near miss traumatic? To require employers to inform workers after each ***potentially*** traumatic event could render the requirement so frequent that its purpose is nullified. OSHA should delete this frequency requirement from the proposed rule. It should be sufficient for employers to remind employees that resources exist and that they can take advantage of them if needed and leave it at that.

15. The Proposed Rule Should Exempt Home Responses From Recordkeeping Requirements.

It appears that OSHA would require covered employers to record injuries and/or illnesses that occur while employees are en route to an emergency while off duty (i.e., home response) on their OSHA 300 logs. *See* 89 FR 7774 at 7832 ("... OSHA does not consider this sort of home response to be a commute to the workplace as described in 29 CFR 1904.5(b)(2)(vii), which is not treated as work-related for purposes of recordkeeping and injury and illness reporting requirements under 29 CFR part 1904."). The Coalition believes that such a requirement is misguided. When a private employer calls in employees who are members of its emergency response team to come to the facility to respond to an emergency, the trip from home to the facility is the same as it is on a normal workday; it is, therefore, a commute and OSHA should explicitly provide that such home responses qualify for the exception at 29 C.F.R. § 1904.5(b)(2)(vii).

16. The Proposed Rule Includes Unworkable Emergency Incident Operations Requirements.

The proposed rule calls for several unworkable emergency incident operations requirements. A non-exhaustive list of examples is provided below. Given the unique operational conditions employers face during emergency incidents and the flexibility needed with respect to these requirements, the Coalition believes that the emergency incident operations requirements would generally be better written as guidelines, not requirements.

a. Control Zones

The proposed rule requires that control zones be established at every emergency incident to identify the level of risk to team members and responders and the appropriate protective measures needed. *See* 89 FR 7774 at 8020. As an initial matter, OSHA already limits access to "point of release" in the HAZWOPER standard. This requirement is sufficient to manage potential risks to team members. Further, it can be extremely difficult, if not impossible, to ensure control zones are established during an active, ongoing emergency. Under certain circumstances, and in consideration of the fact that employees are already in heavy PPE, demarcating controls zones is not realistic. Nor is the marking of control zones always necessary so long as control zones are effectively communicated and controlled.

b. Incident Commander / Unified Command

As to IC / Unified Command ("UC") requirements, Coalition members point out that small responses (e.g., responses to incipient stage fires) will not need IC/UC support. This should be made explicit in the proposed rule. (Again, this is another reason that incipient stage fires should be excluded from any final rule.) Additionally, with respect to any requirement that the IC conduct a risk assessment based on size-up before actively engaging the incident, the Coalition emphasizes that any such risk assessment need only be simple and informal. As OSHA states, "Size-up is an ongoing process that includes a continuing evaluation of information received and observations made at the incident scene. Based on the size-up, strategy and tactics may change depending on whether the changing conditions of the incident are improving or deteriorating." *See id.* at 7808. Accordingly, it would be unrealistic to expect formalized, detailed risk assessments based on scene size-up.

c. Staffing

Although OSHA states that it not requiring staffing levels in the NPRM, it does require identification of staffing levels required to ensure incidents are mitigated safely and effectively and ensure that operations are limited to those that can be safely performed by team members and responders available on the scene. *See id.* at 7836. Additionally, as OSHA admits, it is requiring staffing levels so far as the 2-in, 2-out rule, per OSHA's current Respiratory Protection Standard, is concerned. *See id.* Coalition members state that keeping minimum staffing levels could be problematic as employees on emergency response teams are on those teams voluntarily. Additionally, smaller employers may not have the resources to always maintain such levels.

Although OSHA seems to suggest that it will not enforce minimum staffing levels, the Coalition urges OSHA to develop explicit language, such as in an enforcement policy, to this effect. OSHA states, "To be clear, OSHA is not specifying, nor recommending minimum staffing levels for emergency response vehicles, or the minimum number of team members or responders needed on an incident scene for safe incident operations, except with respect to the ''2-in, 2-out'' requirement . . ." *See id.* It would be all too easy for OSHA Compliance Safety and Health Officers ("CSHO") to interpret the requirement to identify staffing levels as one to maintain

such levels. This should not be the case and explicit language, in an enforcement policy or otherwise, should be provided.

d. Immediately Dangerous to Life and Health Atmospheres

As for requirements related to entry into Immediately Dangerous to Life and Health ("IDLH") atmospheres, Coalition members state that their emergency responder employees are not trained to perform a rescue in a confined space with an IDLH atmosphere. If work is to be performed in these types of atmospheres, they typically contract this work out. The Coalition's understanding is that such activities would be covered by OSHA's Permit-Required Confined Spaces Standard, not the proposed rule, per an exception in the proposed rule. However, as set forth above, the way in which this proposed rule will interact with existing OSHA standards is not clear. Accordingly, OSHA should provide clarity on this topic.

e. Skilled Support Workers

Skilled support workers ("SSW") should be allowed to lead when asked to assist. The requirements in the proposed rule will essentially have WEREs or ESOs take lead or be primarily responsible for SSWs when SSWs are called upon to assist at the scene of an emergency incident. *See id.* at 8021. However, not only is that dangerous with respect to the safety of SSWs, but in reality, SSWs routinely, if not always, take lead anyway, with WEREs or ESOs primarily acting as traffic control. And this structure makes sense, given that SSWs are called upon specifically for their specialized skills and technical knowledge and expertise. It is critical that the proposed rule allow SSWs to take lead with respect to their operations at emergency incidents. Otherwise, as written, the proposed rule would establish a perverse control structure between WEREs/ESOs and SSWs.

f. Rapid Intervention Crews

As for a requirement that WEREs and ESOs implement a Rapid Intervention Crew ("RIC") at each structural fire incident where team members or responders are operating in an IDLH atmosphere, Coalition members state that mandating this could be problematic with site staffing and response capability. Again, any requirement should be fit for purpose and performance oriented.

g. National Incident Management System

While many Coalition members use ICS, Coalition members also state that they need to be able to remain compatible with federal and state agency requirements. To the extent that there is any conflict, OSHA should provide guidance on the applicable law employers must follow.

17. Workplace Violence Considerations Should be Kept Out of the Proposed Rule.

OSHA has requested comments on whether it should include requirements for SOPs regarding protections against workplace violence. *See id.* at 7800. But policies regarding workplace violence typically include provisions involving law enforcement. For example, Coalition

members include workplace violence as a topic in their security workplace violence response guidance documents, indicating that workplace violence is aligned with law enforcement activities. Indeed, one Coalition member remarked that, while it is actively working to raise awareness via training and drills involving employees, contractors, and local law enforcement, any workplace violence incidents would ultimately be handled by law enforcement. OSHA has expressly decided to exclude law enforcement activities from this rulemaking. *See id.* at 7803. Accordingly, to the extent that OSHA wishes to develop a rule related to workplace violence protections for general industry (there is already a rulemaking underway for such a rule for the healthcare industry), OSHA should do so through a separate rulemaking. But if workplace violence is incorporated into the rule, there should be an exemption for employers with pre-existing workplace violence programs and policies in place.

CONCLUSION

On behalf of our Coalition members, we respectfully request that OSHA give meaningful consideration to these comments and recommendations in the potential development of any Emergency Response Standard.

Sincerely,

Eric J. Conn
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