



JUN 07 2012

Sidney Wolfe, Director
Public Citizen's Health Research Group
1600 20th Street, NW
Washington, D.C. 20009

Dear Dr. Wolfe:

This letter is in response to your correspondence dated September 1, 2011, in which Public Citizen's Health Research Group (Public Citizen) petitioned the Occupational Safety and Health Administration (OSHA) to promulgate an emergency temporary standard (ETS) for a heat stress threshold and a subsequent permanent heat stress standard. Other petitioners, in addition to Public Citizen, are Farmworker Justice; United Electrical, Radio and Machine Workers of America; and Dr. Thomas Bernard of the University of South Florida. OSHA provided you with an interim response on January 5, 2012.

After a thorough review of the materials submitted in support of the petition, OSHA is denying your petition for the reasons discussed below. I assure you, however, that OSHA takes your concerns very seriously, is aware of the hazards associated with extreme heat exposure, and is taking action to address them.

Background

Section 6(c) of the Occupational Safety and Health Act of 1970 (OSH Act) authorizes OSHA to issue an ETS when it finds both that employees are exposed to a grave danger from exposure to substances or agents determined to be toxic or physically harmful, and that issuance of an ETS is necessary to protect employees from that danger. As you may know, an ETS becomes effective immediately upon publication in the Federal Register, without the benefit of notice and public comment. The ETS remains in effect until superseded by a standard promulgated under the OSH Act's regular Section 6(b) rulemaking procedures. The OSH Act requires the Secretary to complete these proceedings and issue a permanent standard within six months of issuing the ETS. The test for issuing an ETS under Section 6(c) of the OSH Act has a high threshold to meet and courts have applied it rigorously, resulting in several successful challenges to ETSs promulgated by OSHA in the past. See *Asbestos Information Ass'n v. OSHA*, 727 F.2d 415 (5th Cir. 1984).

The "grave danger" finding required for an ETS includes compelling evidence of a serious health impairment involving incurable, permanent or fatal consequences. See *Fla. Peach Growers Ass'n Inc. v. United States Department of Labor*, 489 F.2d 120, 132 (5th Cir. 1974). "Grave

danger” also involves a degree of risk that is higher than the “significant risk” that is required to statutorily support a permanent standard under Section 6(b) of the OSH Act.

OSHA agrees exposure to extreme heat can lead to death; however, the majority of workers with adverse health effects from heat exposure experience dehydration, cramps, exhaustion, and other effects and are able to recover fairly quickly when the appropriate measures are taken¹. As you mentioned in your petition, the Morbidity and Mortality Weekly Report (MMWR) stated that the annual rate of heat-related deaths among crop workers from 1992 to 2006 was 0.39 per 100,000 workers. While OSHA acknowledges that these deaths are most likely underreported, and therefore the true mortality rate is likely higher, the mortality rate reported in the MMWR does not exceed those of other hazards OSHA has deemed to be “significant” (e.g., benzene) and therefore, would likely not meet the legal requirement of “grave.”

Furthermore, if OSHA were to determine that a grave danger was present, OSHA must have adequate evidence that an ETS is necessary because no existing OSHA requirements can substantially reduce the grave danger. Additionally, OSHA must show that the ETS would be technologically and economically feasible.

Enforcement Activity

Although OSHA has no specific heat hazard standard, the OSH Act’s General Duty Clause, Section 5(a)(1), requires employers to provide their employees with a workplace free of recognized hazards likely to cause death or serious physical harm. OSHA may cite an employer for violating the General Duty Clause if the employer has exposed employees to serious, recognized heat hazards, among other criteria. In the past 25 years, OSHA has enforced Section 5(a)(1) for environmental heat exposures in the following sectors (the number of inspections are in parentheses): landscaping (5); roofing (6); farming (9); construction/paving (20); tree cutting (2); and garbage collection (1).

Other pertinent OSHA regulations and standards may include:

- The Recordkeeping regulation at 29 CFR 1904.7 (b)(5) requires the employer to record injuries and illnesses that meet general recording criteria. One criterion distinguishes between medical treatment and first aid. In the case of a worker who is experiencing adverse effects of heat stress, if the worker is administered intravenous fluids, which is considered medical treatment, then the case is required to be recorded on the OSHA 300 Log. However, if a worker is only instructed to drink fluids for relief of heat stress, then hydration is considered first aid, and the case is not recordable. (See 29 CFR 1904.7(b)(5)(i)).
- The Sanitation standards at 29 CFR 1910.141, 29 CFR 1915.88, 29 CFR 1917.127, 29 CFR 1926.51 and 29 CFR 1928.110 require employers to provide potable water readily accessible to workers.

¹ DHHS (NIOSH) Publication Number 86-112. Working in Hot Environments.

- The Medical Services and First Aid standards at 29 CFR 1910.151, 29 CFR 1915.87, 29 CFR 1917.26 and 29 CFR 1926.50, require that persons be adequately trained to render first aid in the absence of medical facilities within close proximity.
- The Safety Training and Education standard at 29 CFR 1926.21 requires employers in the construction industry to train employees in the recognition, avoidance, and prevention of unsafe conditions in their workplaces.
- The Personal Protective Equipment standard at 29 CFR 1910.132(d) requires every employer in general industry to conduct a hazard assessment to determine the appropriate PPE to be used to protect employees from the hazards identified in the assessment. See also 29 CFR 1915.152 (shipyard), 29 CFR 1917.95 (maritime) and 29 CFR 1926.28 (construction).

Additionally, OSHA has increased enforcement by emphasizing to its Regional Administrators the importance of conducting heat inspections and how to draft and support general duty clause citations when conditions warrant such action or issue a hazard alert letter for circumstances when all of the elements for a general duty clause citation are not present. As a result, OSHA has increased its focus on heat as a hazard during its inspections.

Similarly, North Carolina, an OSHA State Plan state, issued a news release in June 2011 urging employers to protect workers from heat. Dehydration was highlighted as a leading cause of heat illness. The news release further stated that the North Carolina Agricultural Safety and Health Act requires growers to provide water and drinking cups in the field and inspectors conducting field sanitation inspections will be specifically monitoring whether the growers have provided the water.

Education and Outreach Campaign

Although OSHA is not planning on promulgating a standard to address the risks associated with exposure to extreme heat in outdoor workers anytime soon, the Agency has recently taken a number of actions to protect workers from this hazard. On May 7, 2012, OSHA launched a nationwide education and outreach campaign to educate workers and their employers about the hazards of working outdoors in the heat and steps needed to prevent heat related illnesses. The 2012 Heat Illness Prevention Campaign builds on last year's successful campaign to raise awareness about the dangers of working in extreme heat. The Agency created a smart phone application adopting a practical and public index based on the National Weather Service's heat index to help employers know when and how to incrementally implement precautions as the temperature rises. OSHA significantly expanded the number and variety of resources on occupational heat exposure. OSHA worked closely with the California Occupational Safety and Health Administration and adapted materials from that state's successful heat illness prevention campaign. These new materials target hard-to-reach populations at risk, especially workers with limited English proficiency, adapting a pictorial fact sheet and workplace poster. In addition, OSHA is partnering with the National Oceanic and Atmospheric Administration for the second year to incorporate worker safety precautions when heat alerts are issued across the nation.

OSHA is using all of the tools it has available to reach outdoor workers and employers—its website, its field staff, its state and local partners, its consultation programs, as well as

employers, trade associations, unions, community and faith based organizations, consulates, universities, health care and safety professionals. In addition to local partnerships, at the OSHA National Office, we are partnering with over 100 national or regional organizations to get the word out. In 2011, as part of the campaign, OSHA and the Department of Labor incorporated heat awareness into over 500 national and local conferences, training sessions and events, including radio and television interviews, and disseminated over 180,000 new resources nationally, reaching well over 2 million employers and workers directly. In addition, OSHA's heat campaign website received over 101,000 visitors through September and the heat smart phone application was downloaded by close to 10,000 users. We expect to reach even more workers and employers this summer with our simple life saving message: Water- Rest -Shade.

OSHA continues to monitor this issue, with an increased focus on enforcement, while engaging in a robust outreach and education campaign on heat illness prevention.

Thank you for raising this important issue.

Sincerely,

A handwritten signature in dark ink, appearing to read 'David Michaels', with a long, sweeping horizontal stroke extending to the right.

David Michaels, PhD, MPH

cc: Sammy Almashat, M.D., M.P.H.
✓ Staff Researcher
Public Citizen's Health Research Group
1600 20th Street NW
Washington, DC 20009

Thomas Bernard, Ph.D.
Professor and Chair of Environmental and Occupational Health
University of South Florida
13201 Bruce B. Downs Blvd.
Tampa, Florida 33612-3805

Virginia Ruiz
Senior Attorney
Farmworker Justice
1126 16th Street, NW, Suite 270
Washington, DC 20036

John Hovis
General President
United Electrical, Radio and Machine Workers of America
1090 Vermont Avenue, NW
Suite 800
Washington, DC 20005