



January 17, 2025

The Honorable Douglas L. Parker  
Assistant Secretary of Labor for Occupational Safety and Health  
Occupational Safety and Health Administration  
U.S. Department of Labor  
200 Constitution Avenue, NW  
Washington, DC 20210

Legal Comments: Docket ID: “Emergency Response Standard” (Emergency Response) Rule [Docket No. OSHA-2007-0073] (RIN 1218-AC91)

Dear Assistant Secretary Parker,

On behalf of the National Volunteer Fire Council (NVFC) and the Center for Individual Rights (CIR) we offer the following legal comments regarding the proposed rule the Occupational Safety and Health Administration (OSHA) published in the Federal Register entitled “Emergency Response Standard.” As both of our organizations have stated in previous comments we believe there are a number of issues within the proposed standard that leave it open to legal challenges. Among these issues are economic infeasibility and the incorporation by reference of industry consensus standards.

The NVFC serves as the national voice for the over 676,000 volunteer firefighters comprising 65% of the nation’s fire service. The NVFC formulates this national voice via our Board of Directors, which are appointed by state firefighter associations from 48 states. Since 1976, the NVFC has been the leading nonprofit membership association representing the interests of the volunteer fire, EMS, and rescue services. The NVFC provides critical resources, programs, education, and advocacy to support the interests of volunteer first responders across the nation.

CIR is a national nonprofit public interest law firm that litigates to defend constitutional protections for individual rights. To that end, CIR represents individuals *pro bono* in courts throughout the United States. CIR has seven appearances and five victories in the Supreme Court of the United States and numerous victories in other courts throughout the United States. CIR focuses on constitutional guarantees for civil liberties that protect individual rights and promote human flourishing. Those guarantees come in part from structural limits on government, such as the separation of powers and federalism.

### **Economic Infeasibility**

As we have stated in previous public comments on this proposed standard, both CIR and NVFC find the proposed standard economically infeasible for many small and volunteer fire departments to comply with and could result in some shutting down. This economic infeasibility results from the proposed standard’s substantial burdens of documentation, training, time,

equipment, and medical requirements for individual firefighters, as well as increased risks of civil liability for fire departments.

As stated in the notice of proposed rulemaking (NPRM) for the proposed rule, OSHA generally considers a rule to be economically feasible for an affected industry when the annualized costs of compliance are less than one percent of annual revenues for an average firm in that industry. As the NVFC has previously stated, we believe OSHA's estimated annual cost of approximately \$14,000 for implementing the proposed Emergency Response Standard is significantly underestimated, due to the true cost of the physicals and administrative requirements that would be required by the proposed standard. The NVFC conducted a budget survey of their members and received 2,400 responses. 86% of respondents indicated their budget was less than \$1 million. This means even if the \$14,000 annual cost estimate is correct, the proposed standard would be economically infeasible for at least 86% of the respondents to the NVFC's budget survey.

OSHA's assumption that the localities associated with volunteer fire departments could alleviate the economic burden of this proposed standard is fundamentally flawed. Many volunteer fire departments are 501(c) nonprofits that are not affiliated with municipalities. Additionally, for those departments that are affiliated with municipalities, as OSHA has heard in both written and oral comments and testimonies, leaders of these departments already struggle to get their municipal leaders to fund essential PPE or to replace a decades-old apparatus. There are also many states with caps on how much department /local budgets can be raised.

### **Incorporation By Reference of Industry Consensus Standards**

The incorporation by reference of numerous private industry consensus standards that are not practically available violates both statutory and constitutional protections. CIR and The NVFC also agree with the Small Business Administration's (SBA) Office of Advocacy's comments stating: "While the materials do reflect "consensus," that consensus is only among those who participated in the standard development process, which were generally large, well-funded organizations (who are able to voluntarily follow them) and others with an interest in the outcome. They do not reflect what most small entities can do, and most small entities were not included in the process."

As CIR previously stated in their comments on the proposed standard, incorporation of industry consensus standards violates the Freedom of Information Act (FOIA). Both the NVFC and CIR agree that the proposed rule violates both the letter and spirit of the statute. Here, OSHA has locked up legal obligations behind nearly two-dozen individual consensus standards (themselves incorporating many more standards), each at a significant cost to the regulated public.

It requires first responders, including volunteer organizations on which large numbers of rural populations depend for vital public services, to pay for the privilege of complying with legal mandates. And even if some, but not all, can be viewed online in a read-only format, it can hardly be said that they are "reasonably available" to emergency services workers, who lack the administrative capacity to pore over complex technical requirements in dozens of voluminous sources. Additionally, many rural fire departments lack access to reliable internet to access these

standards in a read-only format. Congress designed the Code of Federal Regulations and the related FOIA provisions to avoid precisely this outcome.

The NVFC also agrees with CIR's analysis and conclusion in their previous comments on the proposed Emergency Response Standard that this standard would force emergency responders and the public to pay for the law and it is therefore unconstitutional. We agree that if OSHA adopts the Emergency Response Standard without addressing these problems, it will be vulnerable to a challenge under the Administrative Procedures Act. 5 U. S. C. §706(2)(A). A regulation is arbitrary or capricious within the meaning of the APA if it is not "reasonable and reasonably explained." *FCC v. Prometheus Radio Project*, 592 U. S. 414, 423 (2021). such as reliance on private standards inaccessible to the regulated public. In short, the proposed rule should be withdrawn.

**Conclusion**

The proposed standard is economic infeasible, arbitrary, capricious and incorporates by reference limitedly available industry consensus standards. For these reasons, among other legal and feasibility related matters raised in these and other comments filed by the CIR and NVFC in this docket, we urge OSHA to withdraw the proposed Emergency Response Standard as written.

Sincerely,

/s/ Steven W. Hirsch

/s/ Caleb Kruckenberg

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