



STEPHEN E. SANDHERR, Chief Executive Officer

June 8, 2022

Ms. Kim Stille, Director
Directorate of Enforcement Programs
Occupational Safety & Health Administration
200 Constitution Ave., N.W.
Washington, D.C., 20001

RE: National Emphasis Program – Outdoor and Indoor Heat-Related Hazards¹

Dear Ms. Stille:

On behalf of the Associated General Contractors of America (AGC) and its more than 27,000 members, I am writing to express our concerns regarding the recently issued National Emphasis Program (NEP) – Outdoor and Indoor Heat-Related Hazards. These concerns include but are not limited to:

- I. The NEP’s implication that an employer’s compliance with the core principles of the U.S. Occupational Safety and Health Administration (OSHA) “Heat Illness Prevention Campaign” may not be sufficient in protecting workers and avoiding citation(s) under Sec. 5(a)(1) of the Occupational Safety and Health (OSH) Act, the General Duty Clause; and
- II. The absence of specific guidance clarifying how compliance safety and health officers (CSHOs) will evaluate employer implementation of the NEP. The lack of such clarity will impact fair and consistent enforcement across all regions and may ultimately put workers at further risk.

AGC puts forth its concerns below to ensure that the construction industry implements effective heat injury and illness programs that both “comply” with the NEP and are in sync with existing OSHA rules and standards.

I. AGC’s Concern with the NEP’s Implication that the Water. Rest. Shade. Principles under OSHA’s “Heat Illness Prevention Campaign” may not be Sufficient in Protecting Workers and Meeting OSH Act Compliance

Since 2011, OSHA has raised awareness about the dangers associated with working in heat through its “Heat Illness Prevention Campaign.” The campaign’s primary principles - Water. Rest. Shade. - have highlighted the importance of providing adequate water, shaded rest/break areas, and a sufficient number of and/or time for breaks to allow workers to cool down. In fact, the webpage for this year’s 2022 campaign contains: “Our safety message comes down to three key words: Water. Rest. Shade.”

Based on AGC’s review and analysis of the NEP, however, it is unclear if following the tenets of Water. Rest. Shade. will be deemed acceptable. It also raises questions as to whether current best practices that go above and beyond these tenets meet NEP requirements.

For example, in addition to following Water. Rest. Shade., construction contractors often take further precautions related to heat. AGC members may schedule work earlier or later in the day to avoid performing tasks during times of extreme heat. Many also take a total wellness approach to educating employees on the importance of managing health, diet, and

¹ On April 8, 2022, OSHA released a [National Emphasis Program – Outdoor and Indoor Heat-Related Hazards](https://www.osha.gov/enforcement/directives/cpl-03-00-024), which provides the Agency’s policies and procedures with respect to targeted enforcement of heat hazards - <https://www.osha.gov/enforcement/directives/cpl-03-00-024>.

hydration to mitigate heat impacts.

II. AGC's Concerns with the Absence of Specific Guidance Clarifying How CSHOs Evaluate Employer Implementation of the NEP

Using the enforcement guidance provided in the NEP, OSHA compliance officers will be expected to review certain key facets of an employer's heat illness program to determine whether there may be a violation of OSHA's General Duty Clause. Throughout the NEP, the language provides prescriptive elements of a heat illness and injury program that must be considered during enforcement proceedings. These elements range from monitoring ambient temperature(s) and levels of work exertion to implementing a buddy system on "hot" days.² Additionally, the NEP directs CSHOs to identify activities relevant to heat-related hazards. For example, CSHOs shall identify:

- The use of heavy or bulky clothing or equipment, including personal protective equipment (PPE); and
- Estimate workload exertions by observing the types of job tasks performed by employees and whether those activities can be categorized as moderate, heavy, or very heavy work, while considering both average workload and peak workload.

The NEP still leaves many unanswered questions as to what enforcement position OSHA will take when evaluating employer heat illness programs. For example, what training will be provided to compliance officers to be able to determine the proper "workload" for each particular employee and job task?

What is more, existing OSHA standards govern how and when employees must wear PPE and how particular activities must be performed to avoid injuries and illnesses. OSHA's failure to provide guidance to CSHOs to determine how or when an employer's compliance with an existing OSHA standard or rule places employers in a position of perhaps complying with the NEP at the expense of an existing standard or rule. Consequently, in the absence of a clear set of parameters that CSHOs can use to gauge an employers' efforts, AGC holds that OSHA enforcement of the NEP will at best be arbitrary and capricious and at worst set the stage for workplace hazards unrelated to heat that lead to non-heat related injuries or illnesses.

Clear communication of what employer heat program elements are acceptable and sufficient—while also in line with existing OSHA rules and standards—is key to achieving the desired result of the NEP: ensuring a workplace free of hazards related to heat. This information must be shared across OSHA and made available to the regulated community. Construction contractors must be provided with some level of confidence that their good faith efforts are effective and "compliant" with OSHA's expectations.

Furthermore, without a federal standard, under the General Duty Clause, one could always assume that more could have been done to protect workers, especially in the aftermath of a heat-related incident. The guidance informing CSHOs how to issue citations is consistent with the agency's Field Operations Manual (FOM). The FOM states that General Duty Clause citations are not intended to allege that the violation is a failure to implement certain precautions, corrective actions, or other abatement measures, but rather address the failure to prevent or remove a particular hazard. As previously stated, it would benefit contractors to clearly understand what measures could have been implemented to better protect workers and avoid citations.

Due process requires that the procedures by which laws are applied must be evenhanded so that individuals are not subjected to the arbitrary exercise of government power. OSHA's NEP for heat illness "set[s] forth a targeted enforcement component" and through the program, OSHA will conduct heat-related workplace inspections.³ The Agency's policies and procedures with respect to targeted enforcement of heat hazards create great challenges for construction firms, given its ambiguity and the great uncertainty of how it will be applied on any one construction jobsite. AGC is committed to promoting and ensuring worker safety and health and has a significant interest in ensuring that OSHA provides construction contractors, like AGC members, with fair notice of the regulated community's legal requirements.

AGC maintains that OSHA's new emphasis program for heat illness is vague insofar as it requires construction contractors to demonstrate "reasonable care" to detect, address and prevent heat-related illness and injuries – but provides OSHA with

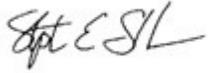
² For example: How did the employer monitor ambient temperature(s) and levels of work exertion at the worksite? Was a "buddy" system in place on hot days? See [National Emphasis Program – Outdoor and Indoor Heat-Related Hazards](#) at page 14.

³ National Emphasis Program – Outdoor and Indoor Heat-Related Hazards at page 1 - <https://www.osha.gov/enforcement/directives/cpl-03-00-024>.

broad discretion to cite contractors for not doing enough.

AGC and its members value the longstanding partnership we share with OSHA to advance safety and health in the construction industry, including the desire to protect construction professionals from exposure to heat-related hazards. Our efforts and those of our members, however, are challenged in this instance because it remains unclear what OSHA will deem as acceptable, effective measures for an employer to protect employees from these types of exposures, while also meeting existing rules and standards and avoiding heat-related citations under the General Duty Clause. AGC appreciates this opportunity to provide our thoughts on the National Emphasis Program (NEP) – Outdoor and Indoor Heat-Related Hazards for your consideration. At your convenience, we would like to schedule a meeting, in-person or virtually, to further this conversation as to how we can better inform the construction industry regarding their obligations under the NEP.

Sincerely,

A handwritten signature in black ink, appearing to read "Stephen E. Sandherr".

Stephen E. Sandherr

cc: Scott Ketcham, Director, Directorate of Construction, OSHA
Andrew Levison, Director, Directorate of Standards and Guidance, OSHA