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VIA REGULATIONS.GOV

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

RE: Comments on the Report of the Small Business Advocacy Review Panel on OSHA's Potential Standard for Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings and Reopening of the Rulemaking Docket (Docket No. OSHA-2021-0009-1059)

Dear Assistant Secretary Parker:

On behalf of the National Association of Home Builders of the United States (NAHB), I am pleased to submit these comments in response to the U.S. Department of Labor's (DOL) reopening of the comment period¹ on its proposed standard for Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings. In addition, NAHB welcomes the opportunity to provide feedback directly to the Occupational Safety and Health Administration (OSHA) regarding the report on the potential rulemaking submitted by the Small Business Advocacy Review Panel (SBAR Panel or the Panel) in accordance with the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA or the Act).

NAHB is a Washington, D.C.-based trade association that represents more than 140,000 members who are involved in home building, remodeling, multifamily construction, property management, subcontracting, design, housing finance, building product manufacturing and other aspects of residential and light commercial construction. NAHB's builder members construct about 80 percent of the new housing units built each year, making housing a large engine of economic growth in the country.

NAHB remodeler member Paul Criner with Criner Remodeling served as a Small Entity Representative (SER) during the Sept. 7, 2023, meeting with the SBAR Panel and expressed concerns not only on behalf of his own company but also on behalf of many businesses who would be impacted by a potential standard. Therefore, NAHB incorporates by reference his letter dated and submitted to the docket on Sept. 29, 2023.² Additionally, as a member of the Construction Industry Safety Coalition (CISC), NAHB incorporates by reference the letter submitted by the CISC in response to the OSHA's reopening of the docket to gather additional public input on the SBAR Panel.

NAHB strongly supports sensible regulations that prioritize worker safety and health; however, a standard regulating heat hazards on jobsites does not achieve this goal more effectively or successfully than the

¹ Memorandum from Andrew Levinson, MPH, Directorate of Standards and Guidance, U.S. Department of Labor, Reopening of the Comment Period on Docket No. OSHA-2021-0009 to Allow for Submission of Documents and Comments (Aug. 21, 2023) (Available at <https://www.regulations.gov/document/OSHA-2021-0009-1059>) (Memo Reopening Comment Period).

² <https://www.regulations.gov/comment/OSHA-2021-0009-1070>.

precautions employers already take to protect workers from extreme temperatures. Instead, this rulemaking will place further compliance burdens on businesses already facing significant regulatory costs that exacerbate the nation's housing affordability crisis.³ However, should OSHA move forward in the rulemaking process, NAHB offers several recommendations – many of which are included in the Panel report – that recognize the compliance capabilities of the various sized businesses within the residential construction industry and minimize the burdens that would result from a heat injury and illness prevention standard.

I. Background

According to the OSHA's October 2021 Advance Notice of Proposed Rulemaking (ANPRM), heat is the leading cause of death among all weather-related phenomena in the United States, and workers across hundreds of industries are at risk for hazardous heat exposure and resulting health impacts.⁴ Additionally, the agency identified concerns of excessive heat exacerbating existing, or creating chronic health problems among workers and underreporting of heat-related injuries, illnesses and fatalities, among others, as the impetus for the creation of a federal standard. OSHA believes a standard specific to heat-related injury and illness prevention would more clearly set forth employer obligations and the measures necessary to protect employees more effectively from hazardous heat, with the ultimate goal of preventing or reducing the number of occupational injuries, illnesses, and fatalities caused by exposure to hazardous heat.

As a result, and in accordance with the Small Business Regulatory Enforcement Fairness Act of 1996, OSHA convened an SBAR Panel in August 2023 for the purposes of providing comment on the potential rulemaking mentioned above. The Panel conducted six meetings involving 82 Small Entity Representatives (SERs) throughout September.⁵ It is important to note that not only did the Panel conduct a meeting focused on the construction industry, but more than one-quarter of the 82 SERs (21) were representatives from the construction industry – the highest count of all industries represented.

Shortly before convening the Panel, the agency issued a memorandum reopening the comment period to allow for additional feedback on the regulatory framework for a potential rule addressing heat injury and illness prevention in outdoor and indoor work settings. In reopening the docket, OSHA announced it is also seeking additional comments on the alternatives and options that OSHA is considering, preliminary

³ According to a 2022 NAHB report, estimates show that regulations imposed by government at all levels account for 23.8 percent of the final price of a new single-family home built for sale and more than 40 percent of multifamily development costs. See Paul Emrath, Ph.D., National Association of Home Builders, and Caitlin Sugrue Walter, National Multifamily Housing Council, *Regulation: 40.6 Percent of the Cost of Multifamily Development* (June 2022) (Available at <https://www.nahb.org/-/media/NAHB/news-and-economics/docs/housing-economics-plus/special-studies/2022/special-study-regulation-40-percent-of-the-cost-of-multifamily-development-june-2022.pdf>) (Accessed Nov. 28, 2023).

⁴ 86 Fed. Reg. 59,309; see also, *Report of the Small Business Advocacy Review Panel on OSHA's Potential Standard for Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings* at pp. 1-2 (Nov. 3, 2023) (Available at <https://www.osha.gov/sites/default/files/Heat-SBREFA-Panel-Report-Full.pdf>) (Accessed Nov. 30, 2023).

⁵ See *Report of the Small Business Advocacy Review Panel on OSHA's Potential Standard for Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings* at pg. i, (Nov. 3, 2023).

analysis of the unit costs of the framework, or any other aspect of the materials presented during the SBAR's deliberations.⁶

II. NAHB's Response to the Regulatory Framework and Final Panel Report

As part of its final report, the Panel offers a series of 14 findings and recommendations to OSHA that stem from the concerns raised by the SERs throughout the six Panel meetings. Looking specifically at this list, NAHB agrees with many of the recommendations and strongly urges OSHA to consider the Panel's suggestions –in particular, the following suggestions as they relate to residential construction – as the agency drafts a proposed rule. NAHB has gathered this input from member companies of varying sizes and within different sectors within the industry, including remodeling, single-family and multifamily home building, specialty trade contractors, insurance, and more.

A. Flexibility and Scalability for Engineering and Administrative Controls

In its report, the Panel recommends a final standard include “performance-based provisions where practical to allow employers to tailor their heat injury and illness prevention program to their setting and situations” and “multiple methods of compliance” with respect to a heat standard.⁷ NAHB strongly supports this approach and allowing businesses to select multiple compliance options and the ability to choose the best method(s) for protecting their employees from extreme heat hazards in ways that are workable, flexible and cost-effective.

Within residential construction, and largely for all of construction, prescriptive requirements are rarely the best way to protect workers, hence, OSHA should not follow a “one-size-fits-all” approach to reducing risks of heat hazards, as the feasibility of certain methods can greatly differ from occupation to occupation and from person to person on any given jobsite. For example, a remodeler working on a project within an enclosed home where the work primarily takes place indoors or a landscaper working in close proximity to air-conditioned vehicles may find artificially shaded areas unnecessary and would instead opt to use the vehicles or indoor space as potential cooldown areas. On the other hand, those same options would not be feasible and could pose a greater hazard to a roofer working on a four-story multifamily project where he or she may need to repeatedly descend and ascend four stories to reach a cooldown area.

Given the vast spectrum of business sizes, the need to provide flexibility in using different control methods is even greater. Residential construction is far from an industry dominated by large companies; instead, close to 80 percent of homebuilders and specialty trade contractor firms are self-employed independent contractors.⁸ Examining the industry's makeup even further, an annual census conducted by NAHB shows that the typical NAHB builder member was a relatively small business in 2022, with medians of \$3.3 million

⁶ See Memo Reopening Comment Period, at pg. 1 (Available at <https://www.regulations.gov/document/OSHA-2021-0009-1059>).

⁷ See *Report of the Small Business Advocacy Review Panel on OSHA's Potential Standard for Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings* at pg. 44 (Nov. 3, 2023).

⁸ Natalia Siniavskaia, Ph.D., National Association of Home Builders, Home Building Censes (July 1, 2021) (Available at <https://www.nahb.org/-/media/NAHB/news-and-economics/docs/housing-economics-plus/special-studies/2021/special-study-home-building-census-july-2021.pdf>) (Accessed Nov. 30, 2023).

in gross revenue, six housing starts, and five payroll employees.⁹ In fact, more than 95 percent of NAHB's builder members are small entities as defined by the U.S. Small Business Administration (SBA) and the most effective standard will be one that fully embraces the size and capabilities of these small businesses.

For example, the technology, equipment and methods that large-scale builders use may not be as easily available or the cost justifiable for small – and many times self-employed – contractors and subcontractors. The nation's home builders take safety seriously, but that doesn't mean they need to use state of the art technologies or equipment. Many have found workable solutions that rely, for instance, on improved communication, timed check-ins and common sense. OSHA should not thwart those efforts by putting into place a rigid set of practices that must be followed across the board. Instead, OSHA should establish "reasonable care" for workers so that employers have the flexibility referenced in the report regardless of their industry, business size or capabilities. Therefore, NAHB strongly urges the creation of a standard that establishes "reasonable care" for the reasons listed above. NAHB also recommends a clear, concise definition of the term "reasonable care," along with guidance, such as realistic examples within the final rulemaking, to assist employers in meeting their compliance obligations.

Additionally, the agency must allow for flexibility when employers develop heat-related training and practices for their respective industries, jobsites, etc. Several NAHB members expressed concern over the need to draft and maintain written heat injury and illness prevention programs (HIIPP). Because many of their businesses employ only a handful of employees, they believe the cost of creating and maintaining a written HIIPP is unreasonable when the provisions can be more easily communicated through other methods, such as incorporating practices and procedures into existing safety plans, at a significantly lower cost. Further, when discussing the frequency of reviewing HIIPPs, NAHB members noted the vagueness of language such as "whenever necessary" as opposed to a set annual requirement, as listed in the regulatory framework document. Many members, for example, stated they already provide "refresher training" on identifying heat-related hazards as the temperatures begin to rise and steps to be taken to reduce exposures. Therefore, because employers are already required to have safety plans that address all risks—although they are not required to be written—NAHB does not believe a heat-specific plan is necessary, as it can simply be incorporated into a businesses' existing safety plan. However, if OSHA plans to include HIIPP requirements into any potential standard, NAHB recommends that employers review these on an annual, not an "as-needed" basis. Further, if OSHA intends to require businesses to create a written plan, the agency is strongly urges to provide an exemption from the written HIIPP requirement for small and very small businesses.

B. Heat Triggers, Temperature Measurement and Hazard Assessment

A key consideration within the proposed regulatory framework is the temperature at which certain requirements related to heat injury and illness prevention must be practiced on jobsites – otherwise known as temperature triggers or heat triggers. NAHB believes OSHA's suggested temperature triggers – 78°F and 86°F for initial and high-heat triggers, respectively, when measuring ambient temperature are impracticable in some regions of the country and setting a nationwide threshold makes little sense. SBAR

⁹ Eric Lynch, National Association of Home Builders, Who Are NAHB's Builder Members? (Aug. 11, 2023) (Available at <https://www.nahb.org/-/media/NAHB/news-and-economics/docs/housing-economics-plus/special-studies/2023/special-study-who-are-nahb-builder-members-august-2023.pdf>) (Accessed Nov. 30, 2023).

participants and NAHB's members raised equal concern with the proposed temperatures of 78°F and 86°F using the heat index.

The appropriate heat trigger was raised and discussed during several of the Panel meetings, with many SERs voicing concerns about tracking temperatures and the challenges that a set threshold could create in areas where higher temperatures are routine. Several NAHB members who primarily perform work in the southwestern United States, for example, indicated the proposed temperatures are reached during a majority of days throughout the year; likewise, businesses operating in the southeastern region may work in areas with temperatures lower than the triggers but routinely experience high humidity which can contribute to heat stress. Further, microclimates can be created by weather patterns, geography, manmade structures and other phenomena, causing temperature to fluctuate widely within relatively small areas, creating uncertainties and making monitoring and measuring difficult. Because of these and other factors, OSHA should not adopt nationwide temperature triggers that are the same throughout the country because the proposed temperature triggers do not consider the climatic differences across regions.

Moreover, NAHB firmly believes heat triggers alone should not determine whether or not certain requirements must be met. As mentioned above, heat hazards can exist outside of a set temperature trigger and to best protect workers, it is important to also consider the task involved and allow the employer to determine the necessary precautions to take. While a plumber or painter could be working outdoors, the level of physical exertion and potentially increased temperatures that result from performing the activities within those occupations as compared to roofers or those who pour concrete, for example, will likely be significant. That level of effort must play a role determining which workers should and should not be subject to certain compliance obligations. Likewise, because conditions could vary based on the individual workers within those job functions, their overall health, and other personal risk factors unknown to the employer, NAHB strongly recommends allowing employers the flexibility to determine the best methods for providing "reasonable care" to their workers. This flexibility would allow employers to focus their resources on protecting workers who face higher risks based on the conditions that are known and/or within the control of the employer while minimizing the costs associated with compliance for workers who have significantly less risk of heat-related injury or illness.

If OSHA moves forward with one or more heat triggers, the agency must recognize different methods of measuring these temperatures that are easy to use and simple to understand. Many residential jobsites often have workers from several different subcontractors reporting on the same day, and in many cases, a representative of the general contractor is not on site. In these situations, and considering the agency's multi-employer citation policy, the contractor relies on its subcontractors to know their compliance obligations and, just as importantly, understand how to use any technology needed to meet those requirements. NAHB members who served as SERs discussed the need to use consistent, impartial data sources to determine whether heat triggers have been reached at their jobsites and specifically pointed to the heat index and local temperature reports from any one of the widely available mobile applications as potential options.¹⁰ While NAHB does not prescribe one specific method over another, these are good

¹⁰ In addition to the generic weather mobile application that may come pre-downloaded on all Apple and Android phones, other weather-tracking mobile applications include the applications created by [AccuWeather](#) and [The](#)

examples of the types of temperature measurement systems OSHA must consider as it moves forward with the creation of a standard.

C. Water and Rest Breaks

Many NAHB members already provide cool water to their employees where appropriate, and these methods range from providing shared water jugs, bottled water in coolers containing ice, drinking water from a plumbed source (assuming one is available on the jobsite), and more. Like many of the provisions discussed by the Panel, when a plumbed source of water is not available on a jobsite, employers must rely on a different, cost-effective method that achieves the same goal of keeping their workers hydrated. NAHB agrees. Regarding the possibility of having to keep records of the water intake of each employee, however, NAHB members stated any such requirement – much like tracking rest breaks – would be virtually impossible to implement in a useful or meaningful way. Water bottles and cups come in different sizes, and intake needs can vary greatly from person to person. At the same time, workers may not like water and prefer alternatives such as sports drinks, soda or juice, while others may prefer to chew on ice. And what happens if an employee does not drink any water, even if it is available? Recording water intake would be especially problematic due to the ever-changing characteristics of residential construction sites that could vary from large-scale multi-employer worksites with many workers present to small projects that may only have one worker at a site, or even work sites that have no employees present on a given day. In these scenarios, it is challenging enough to keep track of the full account of activities of workers on a daily basis. To add another requirement that is based on worker choice and volition, yet unlikely to impact the safety of the jobsite, makes little sense.

Additional complications regarding water availability and intake arise on those residential construction jobsites that have workers employed by different contractors and/or an abundance of subcontractors on the site at one time. The question of responsibility then arises regarding who must supply water for these multi-employer jobsites. OSHA has not clarified its authority whether or not to cite a contractor if a subcontractor fails to provide water to his or her respective workers, as the contractor has no obligation to the subcontractor. The agency must consider and account for these types of situations. NAHB strongly urges OSHA, in any heat-related standard, to establish that each employer on site is responsible for providing water to its own workers.

At the same time, OSHA should not establish a set amount of water employers must provide or require employees to record water intake as proposed in the regulatory framework. Instead, OSHA should put into place the recommendations found in the Panel report regarding water so that employers have the flexibility to provide a reasonable amount of water to employees.

Similarly, the agency should not require a certain duration for rest breaks or mandate breaks within a certain timeframe during a worker's shift, nor should it use vague language that could leave employers confused as to where these breaks must occur on jobsites and what activities can and cannot be performed during the break period. Employers are best equipped to assess the needs of their workers and should be given the flexibility to encourage rest breaks for their workers as needed. The Panel report

[Weather Channel](#), as well as the [OSHA/NIOSH Heat Index](#) application, all of which are available on the Google Play or Apple app stores.

includes several common examples in construction where scheduled breaks would interrupt certain processes on a jobsite. Likewise, workers engaged in specific tasks, such as roofing or work performed while wearing certain personal protective equipment, may opt not to take a break if they feel as though they do not need it and would prefer to complete the task in less time. OSHA must let them do so.

When the California Division of Occupational Safety and Health enacted California's statewide heat standard, it opted not to implement mandatory breaks. OSHA is encouraged to take this same approach. In California, if a worker is experiencing symptoms of heat illness, employees shall be "allowed and encouraged to take a preventative cool-down rest in the shade when they feel the need to do so to protect themselves from overheating."¹¹ Given that many symptoms of heat-related illness are not visibly detectable by others, a mandated 10- or 15-minute rest break may not allow a worker to fully recover from potential signs of illness, so that worker may return in a condition that is at greater risk of harm to themselves and the workers around them. Workers must be responsible for recognizing the signs of heat stress within themselves and take the necessary steps to abate these symptoms. At the same time, employers should permit access to water and rest areas as needed, train workers on these signs and symptoms of illness and provide first aid and/or emergency services in response to heat illness.

The Panel report also discusses which activities workers are able to perform while taking a rest break. The purpose of breaks should be to prevent heat illness or give time for symptoms of illness to subside, and NAHB agrees strenuous activity should not be performed during these breaks, as it significantly decreases the effectiveness of resting. However, tasks that involve minimal physical exertion and/or could be accomplished in a cool, shaded or air-conditioned area should be considered rest breaks under the rulemaking. The report includes examples of these activities,¹² but for many of the reasons explained above, OSHA should simply extend the responsibility of determining what activities could and could not be considered rest breaks to employers as a means of providing additional flexibility and creating processes that meet the needs of each business and jobsite.

D. Acclimatization

When determining the best practices for acclimatizing new and returning workers, NAHB recommends the agency allow for employers to handle this issue on a worker-by-worker basis. The list of FAQs issued by OSHA directly states workers who are absent for one week or longer should be placed in a heat acclimatization program.¹³ However, NAHB believes other factors should be considered when deciding to initiate an acclimatization program (for example, if, during that absence, a worker is in a warm or hot environment, as well as the differences in workers' fitness and heat tolerance levels). Much like the

¹¹ Cal. Code of Regs. § 3395(d).

¹² Specifically, the report references "pouring concrete" as an activity that would be "unworkable" if OSHA would require giving 15-minute breaks every two hours. Similarly, SERs reported workers who wear "complex PPE" would "sometimes prefer to finish their work rather than stop for a break which would require removing and redonning their PPE." See *Report of the Small Business Advocacy Review Panel on OSHA's Potential Standard for Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings* at pg. 46 (Nov. 3, 2023).

¹³ See *AGC Heat NEP Questions/OSHA Responses* at pg. 1 (June 12, 2023) (Available at <https://www.osha.gov/sites/default/files/agc-heat-questions-2023.pdf>) (Accessed Dec 1, 2023).

implementation of temperature thresholds to trigger compliance requirements, this approach ignores the nuances of the issue.

For instance, if it is determined that an employee should work no more than 20 percent of his or her work shift as part of acclimatization procedures, yet that employee has expressly indicated their willingness to work more than the maximum limit without showing signs of heat illness, the employer should have the ability to allow it. Additionally, workers that perform tasks that may last longer than the mandated workload as part of an acclimatization plan; must be performed in order to allow the next step in a project to move forward; or must be performed in order to reduce the risk of unforeseen situations, such as weather delays, should be given the opportunity for flexibility. These tasks include, but are not limited to, pouring and setting concrete, removing lead paint and framing a home. Whether efficiency with these tasks results in a higher quality product and/or the safety of workers as well as the residents of a home, the agency must approach new and returning worker acclimatization with these distinctions in mind.

Implementing requirements such as a “buddy system” to assist with worker acclimatization also ignores the lack of resources available to very small businesses. As discussed, many of these small builders lack enough capital – whether that be financial resources, labor, etc. – to follow many of the recommendations and requirements proposed in the regulatory framework, including the buddy system. For jobsites with as few as one employee, supervisors are typically equipped to provide frequent check-ins but not constantly oversee the work being performed at any particular site. While these employers should have a system in place for these periodic check-ins in response to potential heat stress hazards, a potential standard can include, but should not be limited to, regular communication with employees working alone by mobile phone or radio and encouraging employees to self-report symptoms of heat illness.

E. Recordkeeping

Within all of the issues discussed during the SBAR Panel meetings, NAHB's members noted the common issue of documenting and keeping records of their activities and/or methods of compliance, with some members having stated that many of the suggested approaches to recordkeeping in the regulatory framework would be unworkable when put into practice. For many of the reasons already discussed, NAHB firmly believes businesses would not be able to consistently provide an accurate record of documented rest breaks, water intake, daily weather temperature reports, etc. Additionally, and similar to many other recordkeeping requirements from OSHA and other agencies, maintaining records of daily weather temperatures over the course of several years, for example, is an unnecessary burden that should not be included as part of the agency's standard. Moreover, it is important to re-emphasize that even through there are extreme differences between the characteristics of large-scale projects and projects that simply have multiple subcontractors performing work at the same time, documenting rest breaks, weather fluctuations, and other site and/or worker-related efforts and actions is challenging and burdensome. NAHB agrees with the Panel's recommendations to implement simplified weather monitoring with limited obligations to maintain these records and not require documentation of rest breaks and water intake. Should the agency decide these records are necessary for the protection of workers, the reasoning must be clearly explained in the potential rulemaking and supported by evidence justifying the agency's position.

III. Conclusion

NAHB urges OSHA to consider the suggestions discussed above as it evaluates whether to issue a federal standard regulating employers' heat injury and illness prevention practices. Additionally, NAHB and its members welcome the opportunity to further engage with the agency on this issue and achieve the agency's goal of protecting workers while providing employers with the needed flexibility to ensure the safety and health of their employees.

Please contact Brad Mannion, NAHB's Director of Labor, Safety & Health, at (202) 266-8265 or via email at bmannon@nahb.org if you have any questions or require any additional information.

Sincerely,

A handwritten signature in black ink, appearing to read "Susan Asmus".

Susan Asmus
Senior Vice President, Regulatory Affairs
National Association of Home Builders