NATIONAL LIME ASSOCIATION

Sept. 11, 2023

Mine Safety and Health Administration
Office of Standards, Regulations, and Variances
1100 Wilson Blvd., Room 2350
Arlington, Virginia 22209-3939

(Submitted electronically to
Regulations.gov and by e-mail)

RE: Lowering Miners' Exposure to Respirable Crystaline Silica and Improving Respiratory Protection, Proposed Rule (RIN 1219-AB36)

The National Lime Association (NLA) is pleased to present its response to the proposed rule on respirable crystalline silica.

NLA is the industry trade association for the manufacturers of high calcium quicklime and dolomitic quicklime (calcium oxide) and hydrated lime (calcium hydroxide), which are collectively and commonly referred to as "lime." Lime is used in a wide array of critical applications and industries, including for environmental control and protection, metallurgical, construction, chemical and food production. With plant operations located in 24 states, NLA's members produce greater than 99 percent of the United States' calcium oxides and hydroxides. Because NLA's members operate both surface and underground mines under the jurisdiction of MSHA, NLA and its members have a substantive interest in this rulemaking.

NLA's members are committed to safety as a core value of the lime industry, and NLA's Health and Safety Committee has worked with MSHA staff to improve the overall safety of the lime industry workforce. NLA stands ready to continue to work with MSHA as new rules and legislation are implemented.

NLA commends MSHA for addressing the risks to miners from exposure to crystalline silica, and provides comments on the proposal below.

GENERAL COMMENTS

1. MSHA Should Consider an Alternative with a Revised PEL But No Action Level

MSHA considered and discussed several alternatives to the proposed rule approach, but it did not consider the alternative of setting a new PEL only, without establishing an accompanying action

level. MSHA should give careful consideration to such an alternative. Due to significant differences between the regulatory and enforcement schemes of OSHA and MSHA, there is less need for an action level for the mining industry than for OSHA-regulated industries. Some of these differences are explained below.

First, existing regulations already place the responsibility on mine operators to survey respirable dust at mines. MSHA's preamble notes:

> Under 30 CFR 56.5002 and 57.5002, MNM mine operators must conduct respirable dust "surveys . . . as frequently as necessary to determine the adequacy of control measures." Mine operators can satisfy the survey requirement through various activities, such as respirable dust sampling and analysis, walk-through inspections, wipe sampling, examining dust control system and ventilation system maintenance, and reviewing information obtained from injury, illness, and accident reports.
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> MSHA encourages MNM mine operators to conduct sampling for airborne contaminants to ensure a healthy and safe work environment for miners because sampling provides more accurate information about miners' exposures to harmful airborne contaminants and the effectiveness of existing controls in reducing such exposures. When a mine operator's respirable dust survey indicates that miners have been overexposed to any airborne contaminant, including respirable crystalline silica, the operator is expected to adjust its control measures (e.g., exhaust ventilation) to reduce or eliminate the identified hazard.
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> After doing so, the mine operator is expected to conduct additional surveys to determine whether these efforts were successful. Resurveying should be done as frequently as necessary to ensure that the implemented control measures remain adequate. MSHA's determination of whether a mine operator has surveyed frequently enough is based on several factors, including whether sampling results comply with the permissible exposure limit, whether there have been changes in the mining operation or process, and whether controls such as local exhaust ventilation systems need routine or special maintenance.

88 Fed. Reg. 44861. Accordingly, there is already an enforceable requirement for operators to perform surveys as necessary.

In addition, MSHA performs regular inspections of all mines either semi-annually or quarterly, often including exposure sampling. MSHA inspectors can also observe conditions likely to result in overexposures (such as a miner working in a dusty area), and can issue citations, and set follow-up sampling. This is in sharp contrast to the OSHA regulatory scheme, which does not include such regular inspections.

The rule preamble notes that MSHA takes thousands of dust samples each year. In 2019, the last year for which data is provided in the preamble, MSHA took 3485 dust samples at MNM mines, and 145 of those (or 4.2%) were above the existing PEL. 88 Fed. Reg. 44864. MSHA can and does take enforcement action when the PEL is exceeded, requiring operators to undertake corrective action.

MSHA should consider whether these factors make an action level unnecessary.

2. Medical Surveillance Should Be Required Only for Mines with a Significant Risk of Silica Exposure

MSHA's proposed rule would require all metal/non-metal mine operators to provide medical surveillance to all miners at all metal/non-metal mines. It is not clear why this surveillance is required for all miners, as opposed to those with a significant risk of silica exposure. NLA suggests that the requirement for medical surveillance should be triggered by exposure monitoring showing repeated exceedances of the PEL.

3. Mines Above the Action Level but Below the PEL Should Not Be Required to Test Every 3 Months in Perpetuity

There may be many mines with stable findings of exposure levels higher than the action level, but consistently below the PEL. These mines should not be required to perform exposure testing every three months in perpetuity. Instead of doing repetitive and unnecessary testing, operators could use those resources to improve miner health and safety in other ways. The rule should allow less frequent testing if repeated tests show such stable findings. NLA suggests that if baseline exposure testing and three subsequent 3-month tests show levels below the PEL, then testing would only be required annually thereafter.

4. MSHA Should Provide a Longer Compliance Period

A compliance period of 120 days is much too short for this rule, especially given the extensive exposure and medical testing that is required. More time will be needed to make this testing available across the mining industry.

5. MSHA Should Explain Its Proposed Restriction of Rotation of Miners

MSHA should provide a better explanation for why rotation of miners is not an acceptable administrative control for reducing exposure. MSHA approves of rotation in other situations, such as avoidance of heat stress. MSHA should also make it clear that there is no prohibition on rotation of miners who are performing temporary tasks (such as confined space entry) that may require respiratory protection. Furthermore, MSHA should make it clear that rotation of miners that occurs for legitimate reasons (such as avoidance of heat stress or reduction of strain from difficult physical tasks) is not prohibited if it incidentally reduces exposure to silica.

6. MSHA Should Clarify Requirements Relating to Respirator Use

MSHA should make clear that the provision requiring alternate work for a miner who cannot wear a respirator applies only to the situation in which respirator use is required on an interim basis while corrective action is being taken after an overexposure to silica levels above the PEL. This requirement should not apply to respirator use that is part of a miner's regular job description (i.e., a miner who periodically is required to perform confined space entry using a respirator).

7. MSHA Should Extend the Comment Period

Although NLA appreciates MSHA's willingness to extend the comment period by 15 days, it is still much too short for commenters, especially small associations like NLA, to gather information and prepare appropriate comments. By contrast, OSHA provided about five months (150 days) for its comment period, over three times the number of days that MSHA is providing. Finally, allowing for additional time will benefit the agency because it will result in better and more thoughtful comment responses by all stakeholders, and thus, a better regulation. MSHA should extend or reopen the comment period.

RESPONSE TO ENUMERATED QUESTIONS IN THE PREAMBLE

MSHA requested responses to specific questions listed in the preamble. Below are NLA's responses to selected questions.

Questions 4 and 5 address technological feasibility of sampling, engineering controls, and medical surveillance.

NLA believes that MSHA has underestimated the difficulty in obtaining sampling, engineering, and medical surveillance equipment, personnel, and expertise, especially in the short time period proposed for compliance. NLA notes that mine operators that are small businesses, and those located in remote geographic areas, will face extreme difficulty in developing these programs in a short period of time.

Question 7, Regulatory Alternatives

As noted above, NLA believes that MSHA should evaluate an alternative in which it sets a revised PEL as proposed, but does not set an accompanying action level, considering MSHA's existing requirements and inspection scheme.

Question 8, Impact on Small Mines

NLA believes that compliance with the proposed rule will be difficult for small mines, especially those located in remote geographic areas, because of the costs and challenges in obtaining equipment, personnel and expertise needed to establish more extensive sampling and medical surveillance programs. Small businesses often find themselves at the "back of the line" in obtaining materials and technical assistance, as compared to large companies who can buy and contract for large amounts of materials and services. MSHA should ensure that small mines have sufficient time to comply with the new requirements of the rule.

Question 10, Compliance Period

MSHA is proposing a compliance period of 120 days after the publication of the final rule in the *Federal Register*. This amount of time is woefully inadequate for compliance with a rule with such significant changes and requirements, again especially for small mines and those located in

remote geographic regions. NLA recommends that the compliance period for this rule be at least six months.

Question 11, Action Level

As noted above, MSHA should consider an alternative of establishing a proposed PEL, but not creating an action level, taking into account differences between OSHA and MSHA regulatory schemes. Use of an action level will impose significant costs on mines that have levels above the action level but below the PEL, particularly if they consistently detect such levels. Additional testing, especially every three months over extended periods of time, is not only costly and disruptive, but unnecessary and wasteful of resources.

However, if MSHA chooses to impose an action level, it should be the same as the OSHA level to avoid confusion at companies that have operations regulated by both agencies.

Question 12, Objective Data

NLA supports the proposal to use objective data (other than additional testing) to confirm baseline testing showing silica levels below the action level. Use of such data will significantly reduce the testing burden on operators with low silica levels.

Question 13, Permissible Exposure Limit

NLA believes that if MSHA sets a new PEL for silica, it should be the same as the PEL set by OSHA to prevent confusion and to prevent different PELs within a single site or across multiple sites.

Question 14, Actions Triggered by Action Level

As noted above, NLA believes that MSHA should consider not setting an action level, because existing requirements already trigger actions where necessary. If MSHA is to set an action level, NLA believes that no actions beyond further testing should be required.

Question 15, Rotation of Miners

As noted above, NLA does not believe that the proposed rule adequately explains a proposed prohibition of rotation of miners for compliance and does not adequately address miners who rotate through work assignments for reasons other than silica compliance. NLA asserts that any measures that can be shown to reduce exposure levels should be permitted. This rotation question will also cause considerable enforcement uncertainty.

Question 18, Conditions for Exposure Testing

NLA agrees that exposure testing should generally be performed under normal or typical operating conditions. However, it should be noted that lime plants operate all year long, in all forms of weather, so there is no single “typical” environmental condition. Similarly, many

miners perform multiple tasks (especially such persons as maintenance workers), and may not perform the same tasks every day. Accordingly, some flexibility should be allowed for determining whether conditions for testing are appropriate on any particular day.

Question 20, Baseline Testing

MSHA proposed baseline testing within 180 days of "each miner who is or may reasonably be expected to be exposed to respirable crystalline silica." NLA believes that it will be extremely difficult for many mines, especially small operations in remote geographical locations, to meet this requirement in such a short period of time. As MSHA notes, satisfying this requirement will require "service providers used by mines such as industrial hygiene suppliers and consultants, and accredited laboratories that conduct respirable crystalline silica analysis." Mine operators will be scrambling (and competing) to obtain these resources, and small mines are likely to have the greatest difficulty in finding these resources in a short period of time. NLA recommends that MSHA allow a period of at least one year to complete baseline testing.

Question 23, Baseline Testing and Confirmation

NLA supports MSHA's proposal that mine operators would not be required to conduct periodic sampling if the baseline sampling result, together with another sampling result or objective data confirms miners' exposures are below the proposed action level. NLA believes that this data, coupled with the requirement to consider changes that could increase exposure, provide sufficient assurance that silica levels are below the PEL.

Question 24, Periodic Sampling

As noted above, NLA does not believe that a mine with consistent test results above the action level but below the PEL should be required to test every three months in perpetuity. If consistent test results are shown, the frequency should be reduced to annual testing.

Question 32, Medical Surveillance

MSHA does not explain why medical surveillance is required for all M/NM miners, and not just those at risk for significant silica exposure. This is an expensive and unnecessary component of the rule. NLA suggests that medical surveillance only be required when test results above the PEL have been identified, or at most only for any "miner who is or may reasonably be expected to be exposed to respirable crystalline silica," to match the exposure testing requirements.

As far as whether medical monitoring should be mandatory, mine operators are concerned that it may be difficult to hire and retain workers if medical examinations are mandatory, especially for the existing workforce, in the current situation of labor shortages – in particular for heavy industry such as the lime industry.

Questions 33 and 34, Medical Surveillance Technology

NLA is concerned that the medical surveillance technology and expertise required in the proposed rule may be difficult to arrange, especially for small mines in remote geographical regions. MSHA should make clear that appropriate telehealth can be used for portions of the medical examination where applicable.

Question 43, OSHA Table 1

MSHA asks whether it should consider including provisions analogous to "Table 1" in OSHA's silica regulations, identifying procedures that ensure that persons performing certain tasks are not exposed to significant amounts of crystalline silica. NLA believes that a similar table would be helpful to the mining industry, reducing unnecessary sampling. However, because MSHA did not propose such a table, it is impossible for a small association such as NLA to create a draft table in the extremely short period of time MSHA has allowed for comments. Hopefully other commenters with more resources will be able to provide a draft table that would be helpful to all mines.

NLA appreciates the opportunity to comment on these important issues.

Respectfully submitted,

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