

CONSTRUCTION INDUSTRY SAFETY COALITION

September 11, 2023

Hon. Christopher J. Williamson
Assistant Secretary of Labor for Mine Safety and Health
Mine Safety and Health Administration
201 12th St. South, Suite 401
Arlington, VA 22202

Re: MSHA Notice of Proposed Rulemaking on Lowering Miners' Exposure to Respirable Crystalline Silica and Improving Respiratory Protection
Docket Number MSHA-2023-0001

Dear Assistant Secretary Williamson:

The Construction Industry Safety Coalition (“CISC” or the “Coalition”) respectfully submits the following comments on the Mine Safety and Health Administration (MSHA)’s proposed rule titled, “Lowering Miners’ Exposure to Respirable Crystalline Silica and Improving Respiratory Protection.” The CISC is comprised of several trade associations representing virtually every aspect of the construction industry. Workplace safety and health is paramount for all members of the Coalition, and each is committed to creating safer construction jobsites for workers. While the CISC supports MSHA’s efforts to protect mine workers from overexposure to crystalline silica, the coalition requests that MSHA exempt construction activities conducted on MSHA sites. Construction activities are currently covered under the Occupational Safety and Health Administration’s final rule addressing exposure to crystalline silica (“silica standard”).¹ Having to comply with two different sets of rules is confusing, duplicative, and unnecessary, especially when compliance with the OSHA silica standard has proven effective for construction operations. Our more specific comments are provided below.

About CISC

CISC members represent most industries involved in all manners of construction activities. A number of CISC members also represent the construction aggregates industry. Members include both stationary and portable mining operations that source materials used in various construction projects. Most importantly, these members represent ‘above-ground’ quarrying (mining) operations that support the construction industry. These mines are predominantly classified or categorized as: sand and gravel, crushed limestone, industrial sands, and hard-rock quarrying/mining operations. Often workers perform construction activities at the mine sites. Many of these mining operations are small businesses who utilize portable equipment to source necessary materials from the nearest quarry to a job site. Such surface mines are used for a very short time. For these businesses, mine identifications are associated with their portable crushing equipment and not the physical mine site itself. This creates a dynamic environment in which employees shift from one location to another over the course of a few months.

¹ Occupational Exposure to Respirable Crystalline Silica, 88 Fed. Reg. 16286, (March 25, 2016).

Background on the Proposed Rule

MSHA's proposed rule sets the PEL at 50 micrograms per cubic meter for a full shift exposure. This is calculated as an 8-hour time-weight average for all miners.² The proposed rule would take effect 120 days after finalization and would require that mines have specific engineering control features installed by the effective date to minimize miners' exposure to silica.³ Engineering control features are specific hardware that remove or place barriers between workers and a particular hazard such as an exhaust ventilation or machine guard. MSHA's rule does not consider rotating workers as a viable method for limiting exposure.⁴ The proposal would also require four types of quantitative sampling of employees to record and measure their levels of exposure.⁵

CISC Comments on the Proposed Rule

A. Compliance requirements must be bifurcated between underground and above-ground mines.

As mentioned, CISC's members operate above-ground, quarrying and mining operations. Such operations are very different from underground (below-ground) and/or coal mining. For example, on surface mines, dust from the breaking of aggregate is readily dispersed, diluted, and more effectively controlled than in underground mines. Exposure potentials for the two types of mines (above vs. below ground) are dissimilar. Surface mines, particularly hard rock, are more effectively covered using an approach consistent with the OSHA silica standard than the proposed MSHA rule. We request that MSHA consider bifurcating the rule with different provisions for underground and above-ground mines.

B. Surface mining activities should follow OSHA's existing silica standard.

In bifurcating MSHA's proposal, MSHA should also consider whether the rule is necessary for above-ground operations. Several of CISC's members who operate surface mines currently have assets similarly regulated under OSHA's silica standard. Compliance obligations associated with OSHA's silica standard are effective at reducing worker crystalline silica exposure below MSHA's proposed PEL in construction activities in surface mines. Furthermore, surface mining products are almost exclusively used in construction activities. During OSHA's silica standard rulemaking process, the construction industry worked closely with the agency to ensure typical construction activities were well-controlled. For example, road milling operations, spreading and mixing of aggregate, and even hammering or chipping of aggregate-containing concrete – are all effectively controlled by following OSHA's silica standard. While well-intentioned, MSHA's proposed rule will result in duplicative and unnecessary additional requirements to the construction industry that distract from the goal of eliminating workplace health hazards due to respirable crystalline silica. Because surface mine operators who have ancillary construction assets are well-versed in OSHA's silica standard requirements, MSHA should consider working with OSHA to ensure these activities are already covered under OSHA's silica standard. If MSHA does proceed with a rulemaking for surface mines, the standards should be the same as OSHA's.

² Lowering Miners' Exposure to Respirable Crystalline Silica and Improving Respiratory Protection, 88 Fed. Reg. 44852 at 44853 (July 13, 2023).

³ *Id.* at 44902.

⁴ *Id.* at 44904.

⁵ *Id.* at 44905.

C. OSHA's Table 1 controls are sufficient to provide protection from crystalline silica.

OSHA's silica standards follow guidelines included in Table 1, "Specified Exposure Control Methods When Working with Materials Containing Crystalline Silica."⁶ This table outlines engineering controls, work practices, and assigns the appropriate respiratory protection that employers are required to implement based on the specific equipment used and/or task undertaken by a particular employee at a job site. OSHA's Table 1 provides clear guidance on when these measures are necessary during construction activities. For CISC members that also operate on the construction-side of their surface mining operation, OSHA's silica standard requirements go into effect once they leave the quarry and cross over into construction operations. It is therefore more efficient to align surface mine operations more closely with OSHA's silica standard, especially when the MSHA standard requires additional information (sampling data etc.) and is fundamentally not aligned with OSHA's.

Decades of MSHA data illustrate that crystalline silica exposure is currently controlled well below the proposed PEL in almost all surface mining operations (e.g., sand and gravel, crushed limestone, industrial sands) with a possible exception for some job tasks in hard-rock quarrying operations. MSHA can therefore focus its rule on hard-rock mines, while still conforming with the OSHA silica standard. CISC explicitly requests the agency conduct a formal and rigorous review of crystalline silica exposure from all job-tasks associated with these types of quarrying operations (sand and gravel, crushed limestone, industrial sand etc.) and either exclude them from the proposed rule, or identify existing controls that are effective and proven to reduce individual exposures below the proposed PEL – akin to 'Table 1' in OSHA's silica standard.⁷ Our internal review of such exposure data indicates that most if not all job tasks in those surface quarrying operations are incapable of exceeding the proposed PEL. We therefore request MSHA review such data and produce a report for review and comment.

D. Construction performed at mine sites should fall under the OSHA silica standard.

When performing construction, maintenance, and renovation operations at mines, contractors who are not typically part of the mining operations should operate under the OSHA silica standard. They should not be required to comply with a conflicting MSHA rule. For over ten years, the construction industry has successfully protected its workers when performing tasks that can release respirable crystalline silica. Construction employers and employees are familiar with the OSHA silica standard and have developed processes to adequately control the hazards as needed. The MSHA rule is not developed to work with construction operations. Construction contractors should instead be required to comply with the OSHA regulations at mine sites to best protect workers using methods they are more familiar with and have demonstrated will keep employees safe while not distracting them from their work.

- i. If MSHA does not exempt construction performed at mine sites from this rule, significant modifications are needed.

Sampling and control methodology must mirror that of OSHA.

As-written MSHA's proposed rule requires four types of exposure sampling including baseline,

⁶ See 29 C.F.R. 1926.1153 (c)(1).

⁷ See 29 C.F.R. 1926.1153 (c)(1).

periodic, corrective actions, and post-evaluation.⁸ These samples are to be collected per employee, per job function and per location. These requirements are onerous for both stationery and portable mines, as this level of record keeping detracts from focusing on mine safety and operations. For portable mines in particular, these requirements are unobtainable.

Under the proposal, mine operators would need to accurately characterize the exposure of each miner who is or may reasonably be expected to be exposed to respirable crystalline silica. MSHA states that mine operators would be permitted to use representative sampling whenever sampling is required. Whether a mine operator would have to conduct periodic sampling under the proposal would depend on the results of the most recent sample, which could include a baseline sample, a corrective actions sample, or a post-evaluation sample, as well as samples taken by MSHA during its inspections. If operators are required to conduct periodic sampling, and periodic sampling results indicate that miner exposures are below the action level, a mine operator would be permitted to discontinue periodic sampling for those miners whose exposures are represented by these samples. If the most recent sample shows exposures at or above the action level but at or below the proposed PEL, periodic sampling every three months would continue until two consecutive sample analyses showed miners' exposures below the action level.

If the mine operator follows the periodic monitoring option, a reasonable assumption could be made that continued monitoring may not better characterize employee exposure. If that is the case and the air monitoring data continue to accurately characterize employee exposures, mine operators should be permitted to use the existing data to meet their exposure assessment obligations under the periodic sampling option without conducting additional monitoring. MSHA could require mine operators to reassess exposures if any changes occur that could reasonably result in new or additional exposures.

The number of aggregate quarries is nearly 10 times more than other mines including coal and other underground operations. Yet, the majority of injury data indicates that it is underground and coal mining operations where workers suffer the most harm due to crystalline silica. Current sampling data fails to adequately represent these mines. Most of these quarries are small businesses with few employees. Onerous sampling and monitoring requirements would not only be a heavy burden but may force these operations to reconsider whether to stay in business. Furthermore, small businesses do not have resources to employ sophisticated industrial hygienists and other professionals who could monitor silica concentrations. Instead, they must do so themselves.

MSHA should adopt an approach similar to OSHA with respect to Table 1. Miners who fully and properly implement the engineering and work practice control methods, and the required respiratory protection assigned for each task would be deemed in compliance with the PEL as well as any requirements for respiratory protection. Such an approach would significantly reduce the need for air monitoring while providing the necessary protections from silica exposure to miners. For example, MSHA could specify requirements based on job function. One job classification could be operators working in enclosed cabs with working ventilation systems and housekeeping measures in place. As-written MSHA's rule would require portable mines to reset the sampling requirement back to the baseline each time the mine moves to a new location. Instead, because both portable mining and construction work operate in dynamic work environments, changes in location should not mandate repeat testing, rather testing should be based on the employee's specific job function considering controls that are already in place.

⁸ 88 Fed. Reg. at 45012.

MSHA must allow additional controls to limit miners' exposure to silica.

MSHA's proposal requires mine operators to install and use specific engineering controls to minimize exposure to silica. MSHA states that rotation of workers is not considered an acceptable administrative control. CISC data shows that engineering controls alone may not be enough to achieve the permissible exposure level set out by MSHA. Since 1997, businesses have used a combination of engineering and administrative controls to achieve compliance with established exposure levels. Here, MSHA's rule prohibits worker rotation to achieve compliance with the rule. In the silica rule, OSHA initially proposed such a prohibition on employee rotation as an effective administrative control; however, after carefully reviewing the comments received on this issue, OSHA removed the prohibition. Several commenters argued that job rotation may be warranted as an alternative to burdensome engineering and other administrative controls for tasks that involve exposure to silica. Commenters also noted that since silica is a ubiquitous substance in the construction environment and present in many raw materials, very much like mining operations, virtually all employees would be exposed to some level of respirable crystalline silica. Therefore, a prohibition on rotation in these circumstances would not make sense. For these reasons, OSHA determined that a prohibition on employee rotation to achieve the PEL is not reasonably necessary or appropriate for their silica rule.

The Coalition urges MSHA to allow employer controls beyond just engineering measures that would achieve the necessary exposure limits. Such controls may include both administrative actions such as worker rotation, and the use of personal protective equipment, consistent with OSHA's silica standard. For example, respirators could be used in construction mines when engineering controls are not feasible or ineffective. Surface mine operations do not face the same challenges or constraints when utilizing respiratory PPE as underground mines (e.g., heat and difficult communication). Respirators are protective and used without incident in similar construction activities currently applicable to the OSHA silica standard. Administrative controls are well-suited for surface quarries, especially in small businesses where workers perform a variety of activities throughout the day.

E. The proposed rule must adequately address the use of portable crushing equipment, typical of small business surface quarrying operations.

The proposed rule appears to be written for large, stationary commercial quarrying operations and will disproportionately and adversely impact small portable operations. The proposal must be modified to recognize the unique compliance-related requirements associated with 'moving' or 'portable' operations. While representative sampling versus individual employee sampling to assess job tasks and categories is recognized as an option in the proposed rule, historically applying this sampling technique to portable operations has been rejected by local MSHA inspectors who require data that is specific to the physical mine location and individual employee. For example, because mine identifications are associated with the portable crushing equipment and not the mine location, tracking potential exposure by physical mine identification with a consistent aggregate morphology cannot be undertaken. Further, over the course of a year, employees in such portable operations will constantly be shifting their locations and it will be difficult, if not impossible, to establish a true baseline task-related exposure for a set physical mine location. MSHA's proposed rule must address this typical exposure scenario, common with portable surface quarrying operations especially in sand and gravel, crushed limestone, and industrial sand quarries. The proposal must also account for the transitory nature of such surface mining operations and not prescribe onerous compliance obligations that are better suited for permanent below-ground mines.

Conclusion

CISC members are committed to protecting miner health and safety from respirable silica. As outlined above, while well-intentioned, MSHA's rule will not ultimately provide any further protections for our members. There are significant differences between surface mines and underground mines. MSHA should include distinctions in any final rule that recognizes these differences. Furthermore, construction activities performed at a mine site should be exempt from the MSHA rule and covered under the existing OSHA silica standard. Finally, MSHA must develop a Table 1 like the one found in the OSHA silica standard so that industry has clear-cut standards and options for complying with the MSHA rule. We appreciate the opportunity to comment on MSHA's proposal and look forward to engaging with the agency as it continues to develop this regulation.

Sincerely,

American Road and Transportation Builders Association
American Society of Concrete Contractors
American Subcontractors Association
Associated Builders and Contractors
Associated General Contractors
Association of Equipment Manufacturers
Association of the Wall and Ceiling Industry
Concrete Sawing & Drilling Association
Construction & Demolition Recycling Association
Distribution Contractors Association
Independent Electrical Contractors
Interlocking Concrete Pavement Institute
International Council of Employers of Bricklayers and Allied Craftworkers
Leading Builders of America
Mason Contractors Association of America
Mechanical Contractors Association of America
National Asphalt Pavement Association
National Association of Home Builders
National Association of the Remodeling Industry
National Demolition Association
National Electrical Contractors Association
National Framers Council
National Roofing Contractors Association
National Utility Contractors Association
Natural Stone Council
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Tile Roofing Industry Alliance