

HUSCH BLACKWELL

1801 Pennsylvania Ave. N.W., Suite 10000
Washington, DC 20006-4675
(202) 378.2300
(202) 378.2319 (facsimile)

September 11, 2023

S. Aromie Noe
Director, Office of Standards, Regulations, and
Variances
Mine Safety and Health Administration
United States Department of Labor
201 12th Street South, Suite 4E401
Arlington, Virginia 22202-5452

Re: RIN 1219-AB36; Docket No. MSHA-2023-0001
*Lowering Miners' Exposure to Respirable Crystalline Silica and Improving
Respiratory Protection*
COMMENTS OF THE SILICA SAFETY COALITION

Dear Ms. Noe:

On behalf of the Silica Safety Coalition ("SSC" or "Coalition"), we are pleased to submit the following comments in response to the Mine Safety and Health Administration's ("MSHA") proposed rule, *Lowering Miners' Exposure to Respirable Crystalline Silica and Improving Respiratory Protection*, 88 Fed. Reg. 44852 (July 13, 2023).

The Silica Safety Coalition is an informal group of large, multinational companies engaged in metal/non-metal mining and milling, both underground and on the surface. The Coalition supports continuing safety and health improvements and sound standards and regulations. Together, the Coalition members employ more than 6,000 miners.

The members of the Coalition have extensive experience with the control of potential occupational exposures to respirable crystalline silica ("RCS") in a wide range of different mining environments. They have and continue to work with MSHA and the National Institute for Occupational Safety and Health ("NIOSH") to advance miner safety and health. Silicosis and respiratory diseases caused by RCS exposure are extremely rare in the metal/non-metal sector. The Coalition's members currently employ more than 6,000 miners. None of the members can recall even a single case of silicosis or respiratory disease caused by RCS exposure in this century.

EXECUTIVE SUMMARY

The Coalition appreciates MSHA's efforts to prevent potential overexposure of miners to RCS and shares this same goal. The comments below reflect our support for that goal. Specifically, the Coalition does not oppose a permissible exposure limit ("PEL") for RCS of 50 micrograms per cubic meter of air ($\mu\text{g}/\text{m}^3$). NIOSH has long recommended a PEL of 50 $\mu\text{g}/\text{m}^3$, and the Occupational Safety and Health Administration ("OSHA") adopted a 50 $\mu\text{g}/\text{m}^3$ PEL in 2016.

However, the Coalition's comments also reflect the grave concerns about the manner in which MSHA proposes to implement and enforce the PEL. Key aspects or elements of the proposed rule lack scientific support and/or are contrary to sound industrial hygiene practice. As proposed, compliance with certain aspects of the rule will not be technologically or economically feasible. Compliance with the rule, as proposed, would consume significantly greater resources than MSHA estimates, impose a tremendous, unnecessary burden on mine operators and miners and produce a raft of contentious enforcement disputes and litigation. MSHA itself is not prepared to enforce the proposed rule.¹

As is explained more fully below, the Coalition:

- does not oppose the adoption of a 50 $\mu\text{g}/\text{m}^3$ for coal and metal/non-metal;
- maintains that MSHA must develop separate standards for coal and metal/non-metal mines that provide for different methods of control, requirements for sampling and medical surveillance requirements;
- opposes the establishment of an Action Level;
- maintains that MSHA must recognize that the use of respiratory protection is necessary to protect miners performing certain tasks, including certain routine tasks, and expressly permit the use of respiratory protection as means of compliance in metal/non-metal mines;
- urges MSHA to take a risk-based approach to the exposure assessment (methods of compliance) and medical surveillance requirements for metal/non-metal mines and adopt a standard that is more in line with accepted industrial hygiene practice, NIOSH's guidance and recommendations and OSHA's RCS standard; and
- provide metal/non-metal mine operators with at least twenty-four months to comply with the final rule.

SECTOR SPECIFIC STANDARDS, A UNIFORM PEL AND THE ACTION LEVEL

At root, the Proposed Rule is animated by and aimed at addressing an alarming increase in the incidence of black lung disease (coal workers pneumoconiosis or CWP), specifically progressive massive fibrosis (PMF), in coal miners in certain geographic locations, including Kentucky, West Virginia and Virginia. We understand that the increase is attributable to the work

¹ R. Brian Hendrix, *Is MSHA Prepared to Enforce a New Silica Rule?*, Rock Products, May 10, 2023 (<https://rockproducts.com/2023/05/10/is-msha-prepared-to-enforce-a-new-silica-rule/>).

environment in certain underground coal mines, the tasks performed in those mines, and the presence of both coal dust and RCS well above the existing PELs for coal dust or RCA.

This is clearly and quite obviously a problem that is specific to coal mining in certain areas of the country. It is not a problem in or for metal/non-metal mines. It is not a problem at the mines operated by the Coalition's members or for the miners they employ. Miners working in mines or at facilities that MSHA regulates as "metal/non-metal mines" are typically not exposed to any coal dust, much less coal dust and RCS in combination and in excess of existing occupational exposure limits. Miners in metal/non-metal mines who haven't worked in coal do not develop CWP or PMF.

This means is that the problem that the proposed rule aims to address is not present at more than 90% of the mines in this country. According to MSHA, there are 12,162 mines in the United States, only 211 of which are underground coal mines. If we include surface coal mines, the total comes to 931. Thus, coal mining represents less than 8% of the mines in this country, and underground coal represents less than 2% of the mines.

PERMISSIBLE EXPOSURE LIMIT

The proposed rule would establish a PEL of 50 µg/m³ for a "miner's regular full-shift" and "during typical mining activities," calculated as an 8-hour time weighted average (TWA). While the Coalition does not oppose the promulgation of a "uniform proposed PEL," the Coalition does oppose MSHA's uniform implementation and enforcement of that PEL. Metal/non-metal mining includes a wide range of different types of mines and facilities, both underground and on the surface. For example, MSHA regulates cement plants, lime plants, alumina refineries, open pit copper mines, open pit gold mines, underground narrow-vein gold mines, oil mines, underground salt and trona mines and underground zinc mines as "metal/non-metal mines." The differences between metal/non-metal mines and facilities and underground coal mine are legion. A cement plant does not look (or operate) like a coal mine. An alumina refinery looks more like a chemistry set than a coal mine. An underground zinc mine has very little in common with an underground coal mine.

Underground metal/non-metal mines often have large entries and rooms. Surface operations in the metal/non-metal industry often look and function more like chemical plants and manufacturing facilities, which process raw materials in enclosed vessels and systems. Many miners in open pit metal/non-metal mines work in enclosed vehicle and mobile equipment cabs with filtered air.

Thus, the Coalition maintains that MSHA must develop different standards, one for metal/non-metal and one for coal. The Coalition does not oppose the promulgation of a uniform RCS PEL, MSHA must develop different standards for the implementation and enforcement of that PEL, e.g., standards that provide for different methods of control, requirements for sampling and medical surveillance requirements.

The Federal Mine Safety and Health Act (“Act”) recognizes the clear, obvious differences between coal and metal/non-metal mines when it comes to protecting miners from airborne contaminants. In Sections 201 and 202, for instance, the Act limits how coal mines may use respirators to protect workers while no such limits exist in the metal/non-metal industry.

Indeed, MSHA has promulgated different sets of regulations, one for coal and the other for metal/non-metal. Title 30 of the Code of Federal Regulations, Subchapter K applies to Metal and Nonmetal Mine Safety and Health. Subchapter O applies to Coal Mine Safety and Health. To be sure, MSHA has promulgated standards that apply to the entire industry, e.g., Part 47 (Hazard Communication) and Part 62 (Occupational Noise Exposure).

However, those standards address hazards that may be controlled in the same manner (with the same types of controls) at all mines. RCS is very different. Controls or solutions that work in one mine type may not be effective in another. That which is feasible in coal may not be in metal/non-metal.

Additionally, the Coalition is concerned that MSHA’s decision to establish a PEL for a full-shift exposure, calculated as an 8-hour time weighted average (TWA) does not reflect the fact that ten and twelve hour shifts are common in metal/non-metal mining.² It is also contrary to MSHA’s current practice, which counts or analyzes the total mass collected but uses 8 hours (480 minutes) in the denominator, irrespective of the actual sampling time. MSHA did not offer any real support for this decision. However, OSHA and NIOSH have addressed this issue in relation to potential RCS exposures, and we urge MSHA to follow their lead. More specifically, the Coalition maintains that MSHA should calculate exposure based on the actual sampling period so the result reflects the actual airborne concentration to which the miner may have been exposed.

ACTION LEVEL

The proposed rule would establish an Action Level (“AL”) of 25 $\mu\text{g}/\text{m}^3$ for a full-shift exposure, calculated as an 8-hour time weighted average (TWA) and require operators to sample every three months if any sample exceeds the AL. The Coalition opposes the establishment of an Action Level. First, we know that laboratories will struggle to provide precise and accurate results when analyzing RCS samples for compliance with a 25 $\mu\text{g}/\text{m}^3$ AL. In short, below 50 $\mu\text{g}/\text{m}^3$, we have

² As proposed, 30 C.F.R. § 6.12(f)(1) requires operators to sample “for the duration of a miner’s regular full shift and during typical mining activities.” MSHA also asked if it should specify environmental/weather conditions under which sampling should be performed. First, MSHA has not defined or explained what it means by the phrase “regular full shift.” If a miner is scheduled to work 8 hours but typically works 10 or 12 several times a week, what is the miner’s “regular full shift”? Second, weather and other environmental conditions may increase or decrease the concentration of RCS in the work environment and have an on impact on sampling. However, “typical mining activities” includes work in all sorts of weather and environmental conditions. There are mines in all fifty states and in every territory. What is “typical” at surface copper mine in Arizona would not be at all typical at an open pit granite mine in Vermont. Hot, very humid conditions are typical for East Tennessee in the summer. Rain is certainly typical throughout the year in Washington and Oregon. In the Dakotas, windy conditions are typical. Thus, the Coalition urges MSHA to strike the phrase “typical mining activities” and abandon any effort to define or describe what is “typical.”

little confidence in the reliability or accuracy of the results.³ Practically speaking, due to sampling and analytical errors, under the proposed rule mine operators would be required to conduct periodic sampling based on a single, unreliable and inaccurate sampling result.

We are also certain that keying periodic sampling to compliance with the Action Level will substantially increase the volume and frequency of sampling. From an industrial hygiene standpoint, there's little to no value in sampling every three months once the potential exposures have been properly characterized and are controlled. For example, if a mine operator, after an extensive period of sampling and evaluation, has established that the potential exposure for an Similar Exposure Group ("SEG")⁴ will not exceed the PEL but will remain above the AL, additional sampling would not tell mine operators or miners anything that they do not already know.

METHODS OF COMPLIANCE, SAMPLING & MEDICAL SURVEILLANCE

While MSHA relied on OSHA's 2016 RCS rule as a starting point in drafting the proposed rule, MSHA took a very different approach to compliance (controls), sampling, medical surveillance and a host of other issues. The Coalition's most significant concern is MSHA's apparent rejection of the hierarchy of controls, particularly its decision to bar the use of respiratory

³ For an extensive discussion of the many reasons to lack confidence in sample results indicating that RCS levels are at, above or below the AL (or the proposed PEL), the Coalition refers MSHA to the pre-hearing and post-hearing comments of the Chamber of Commerce ("Chamber") and the testimony of the Chamber's witnesses regarding OSHA's proposed RCS rule. See Comment from Chajet, Henry; U.S. Chamber of Commerce, OSHA-2010-0034-2288 (Feb. 19, 2014) (<https://www.regulations.gov/comment/OSHA-2010-0034-2288>) (including all addenda); Comment from Lieckfield, Robert; Bureau Veritas North America, Inc. on behalf of the United States Chamber of Commerce, OSHA-2010-0034-2259 (Feb. 11, 2014) (<https://www.regulations.gov/comment/OSHA-2010-0034-2259>); Comment from Hall, Thomas, on behalf of the U.S. Chamber of Commerce, OSHA-2010-0034-2285 (Feb. 11, 2014) (<https://www.regulations.gov/comment/OSHA-2010-0034-2285>); Comment from Sirianni, Greg; Jonathan Borak and Company, on behalf of the U.S. Chamber of Commerce, OSHA-2010-0034-2364 (Feb. 21, 2014) (<https://www.regulations.gov/comment/OSHA-2010-0034-2364>); Post Hearing Comment from Chajet, Henry, Jackson Lewis on behalf of Johnson, Randel K. and Freedman, Marc; U.S. Chamber of Commerce, OSHA-2010-0034-4194 (Jun 26, 2014) (<https://www.regulations.gov/comment/OSHA-2010-0034-4194>).

Additionally, the Coalition urges MSHA to consider more recent literature on the inability of laboratories to consistently and accurately measure concentrations of RCS at or below the proposed AL and PEL, e.g., Cox Jr., L.A., Popken, D.A., Sun, R.X. (2018). *Evaluation Analytics for Occupational Health: How Well Do Laboratories Assess Workplace Concentrations of Respirable Crystalline Silica?*. In: Causal Analytics for Applied Risk Analysis. International Series in Operations Research & Management Science, vol 270 (https://doi.org/10.1007/978-3-319-78242-3_11); Cox Jr. L.A., *How accurately and consistently do laboratories measure workplace concentrations of respirable crystalline silica?* (2016). *Regulatory Toxicology and Pharmacology*, vol. 81, pp. 268-274 (<https://doi.org/10.1016/j.yrtph.2016.09.008>); Lee RJ, Van Orden DR, Cox LA, Arlauckas S, Kautz RJ. *Impact of muffle furnace preparation on the results of crystalline silica analysis*. *Regul Toxicol Pharmacol*. 2016 Oct; 80:164-72 (<http://doi.org/10.1016/j.yrtph.2016.06.002>).

⁴ An SEG is a group of workers who have the same general exposure profile to potential hazards based on the similarity and frequency of the tasks they perform, the types of materials and processes they use to complete tasks, the way tasks are performed, location, etc.

protection to protect miners when engineering and administrative controls are not feasible and effective.

METHODS OF COMPLIANCE (HIERARCHY OF CONTROLS)

The hierarchy of controls is a fundamental concept in occupational safety and health. Every industrial hygienist is taught to use or apply the hierarchy of controls to minimize the risks of exposure. NIOSH, OSHA and (until now) MSHA all endorse the method. It is the industry standard; every member of the Coalition follows this method.

Per the *Fundamentals of Industrial Hygiene*, the “hierarchy of controls is used to determine the most effective and protective ways to prevent exposure risks.” It is the “method of identifying and ranking safeguards to protect workers from hazards,” arranged from most to least effective. It begins with elimination or substitution, followed engineering controls, administrative controls and then personal protective equipment (e.g., respiratory protection). While eliminating a potential hazard—removing the hazard from the workplace—may be the most effective means or method of protecting employees, it is often not a realistic or feasible option. Engineering controls may be more effective than administrative controls. Personal protective equipment is necessary “when eliminating occupational health hazards . . . is not feasible” and when engineering and administrative controls are not possible or sufficient.”

In the proposed rule, MSHA appears to reject the hierarchy of controls. The proposed rule limits the use of administrative controls in general, completely bars the use of a specific administrative control (rotation)⁵ and essentially bars the use of respiratory protection altogether. The proposed rule states that “the use of respiratory protection equipment, including powered air-purifying respirators (PAPRs), would not be permitted as a control to achieve compliance with the proposed PEL because engineering controls are more effective than respirators in protecting miners . . . [T]emporary non-routine use of respirators would be allowed under limited circumstances.”

Moreover, to whatever extent respiratory protection is allowed under the proposed rule, MSHA apparently intends that allowance to be cabined or otherwise limited in some unexplained fashion. In the proposed rule, MSHA states that “respiratory protection equipment could be used in specific and limited situations, as discussed in § 60.14 – Respiratory Protection, but the use of respiratory protection equipment would not be acceptable as a method of compliance.”

We do not know what that means, nor do know what MSHA means by “temporary” or “non-routine” use. MSHA has not explained or defined those terms. Indeed, MSHA has claimed that

⁵ The Coalition maintains that mine operators must, in appropriate circumstances, have the option to use rotation as a means or method of compliance. We note that, under certain circumstances, rotation may be used as a means of compliance with other MSHA standards, e.g., Part 62. MSHA has not explained how it expects an operator who rotates miners in order to comply with Part 62 to also comply with Part 60. If the rotation of a miner is necessary to comply with Part 62, but Part 60 prevents the rotation of that miner, will MSHA cite the operator under Part 62 if the miner is rotated?

it is not possible to provide a definition.⁶ Similarly, MSHA has not otherwise described the “limited circumstances” under which respiratory protection would be allowed under the rule.

We do know that, for certain tasks, including tasks that are performed regularly (e.g., preventative maintenance, housekeeping, etc.), respiratory protection is the *only* feasible means of protecting miners from potential overexposures. This holds for every member of the Coalition. For example, respiratory protection is required to protect miners assigned to housekeeping and preventative (routine) maintenance and repair tasks on engineering controls such as ventilation equipment, dust collectors, belts, chutes, wipers. Respiratory protection is often the *only* feasible means of protecting miners engaged in the installation, maintenance and repair of belts (including belt skirting), wipers, spray systems and wash pans.

The use of respiratory protection is necessary to protect miners performing certain tasks, including routine tasks. The Coalition urges MSHA to promulgate a rule that reflects this reality.⁷ OSHA’s 2016 RCS rule is a good example. It permits employers to use engineering and administrative controls (including rotation) to achieve compliance. It also permits—expressly—employers to use respiratory protection when engineering and administrative controls are not feasible and effective means of achieving compliance.⁸

⁶ During the hearing in Denver, CO on August 21, 2023, MSHA’s Deputy Assistant Secretary for Operations, Patricia Silvey, stated that:

some commenters asked the Agency to define temporary use. That is, for how long would a miner wear a respirator under the proposal. The proposal would require that the operator provide affected miners a respirator in the case of an overexposure and that respirators be worn for temporary, non-routine use. MSHA intends that temporary use would mean for a limited period of time. That is for a relative short time period. I cannot precisely define temporary as that would depend upon the facts and circumstances surrounding the overexposures as I’m sure some of you would understand.

⁷ The Coalition echoes the Essential Minerals Association in highlighting the American Industrial Hygiene Association’s (“AIHA”) comment on this specific issue. AIHA describes itself as “the association for scientists and professionals committed to preserving and ensuring occupational and environmental health and safety (OEHS) in the workplace and community.” AIHA agrees with MSHA “that feasible engineering and administrative controls be used to keep miners’ exposures to respirable crystalline silica below the proposed PEL,” but it recognizes that respiratory protection may be necessary. It states that “[r]espirators should only be used as a control method when data from baseline and periodic breathing zone air samples show that” the use of “feasible engineering or administrative controls” will not achieve compliance. AIHA also maintains that “[m]ine operators should have the flexibility to choose the ASTM F3387–19 elements that are appropriate for their mine-specific hazards because the need for different types of respirators (e.g., half face versus full face respirators) may vary due to the variability of mining processes, work activities, airborne silica hazards, and commodities mined.”

⁸ The Coalition also urges MSHA to promulgate a rule that permits the use of appropriate respiratory protection, including use N95 and 99 series respirators. NIOSH recommends “respirators with N95 or better filters for airborne exposure to crystalline silica at concentrations less than or equal to 0.5mg/m³” (NIOSH, 2008), and MSHA has not offered any explanation or basis for its rejection of NIOSH’s recommendation.

OSHA’S TABLE 1 APPROACH

Certain tasks, processes, and environments are at least somewhat similar or common across many metal/non-metal mines and may be characterized by the extent to which they may release RCS, mechanisms for doing so, and effective exposure controls. The Coalition maintains that MSHA should promulgate a rule that includes a task-specific list of acceptable exposure control methods (engineering and administrative controls) that is similar to the “Table 1” in OSHA’s construction silica rule, 29 C.F.R. § 1926.1153.

A Table 1 approach would provide mine operators with a choice between using their own controls and sampling (exposure monitoring) to evaluate the effectiveness of those controls (and compliance with the standard) or the controls listed in the table. A clear list of controls required for each type of task, exposure, or process would simplify compliance *and* enforcement. If a mine operator relied on the table and implemented or used all the engineering and administrative controls listed in the table to achieve compliance, they would know that, in so doing, they would achieve compliance.⁹

EXPOSURE MONITORING: BASELINE SAMPLING & PERIODIC SAMPLING

The members of the Coalition have long characterized the potential exposures at their mines based on quantitative and qualitative data and information, including sampling results. They all maintain comprehensive exposure monitoring and control plans and programs. In short, they all possess a comprehensive understanding of the the potential hazards at their mines and how best to control and limit exposure to those hazards.

From the proposed rule, MSHA seems to believe that mine operators should sample everyone, early, often and everywhere, regardless of risk. MSHA has also apparently decided that mine operators must start from scratch and characterize the potential RCS hazards in their mines based on new baseline sampling. Such an approach is counterproductive and completely contrary to standard industrial hygiene practice, as well as NIOSH’s, OSHA’s and (until now) MSHA’s guidelines and recommendations. The Coalition maintains that exposure monitoring required by any rule must be risk-based and consistent with standard industrial hygiene practice.

⁹ MSHA requested “comments on specific tasks and exposure control methods appropriate for a Table 1-approach for the mining industry that also would adequately protect miners from risk of exposure to respirable crystalline silica,” as well as “specific rationale and supporting information, including data on how such an approach would be implemented.” This is an important request, but MSHA must know that the unusually short comment period for the proposed rule would make it difficult to impossible to provide the detailed responses that this request truly deserves. However, the Coalition notes that the National Stone Sand and Gravel Association (NSSGA) submitted a draft Table 1 specific to certain mining related tasks to MSHA in response to MSHA’s *Request for Information* and will submit an updated version in response to the proposed rule. We urge MSHA to carefully consider the NSSGA’s work and spend the time necessary to develop a comprehensive table for the M/NM sector.

BASILINE SAMPLING

The proposed rule requires baseline sampling for *any* miner who is reasonably expected to be exposed to respirable silica at *any* level, which, MSHA admits, almost certainly includes *every miner* given the ubiquity of RCS in the ambient environment. Baseline sampling is not necessary for any task, position or SEG for which a mine operator has previously characterized exposure. Moreover, baseline sampling or exposure monitoring of any sort is only necessary for miners who are reasonably likely to be exposed to RCS in excess of the PEL.

It is also critically important to understand that it is not feasible—*it will not be possible*—for the Coalition members to conduct the baseline sampling required by the proposed rule in 180 days. At a minimum, it will take the Coalition members at 12-24 months to conduct the baseline sampling required by the proposed rule.

One Coalition member has identified between 125-150 SEGs. If sampling by SEG is permitted to comply with the baseline sampling requirements of the proposed rule, this member would need to collect and analyze of 3-7 samples for each SEG. In all, the member estimates that, baseline sampling requirements in the proposed rule would require it to collect and analyze more than 1000 samples. Currently, analysis of a single sample costs this member \$113, although we certainly expect that cost to increase substantially if the proposed rule is finalized in its current form. The member estimates that it would take 9-12 months to conduct the requisite sampling, assuming that there is no shortage of pumps, sampling trains, sampling media, etc. on the retail and rental markets and assuming that the laboratories are able to meet the radical increase in demand. Of course, no one should expect any of those assumptions to hold.

Another member of the Coalition estimates that, to comply with the baseline sampling requirements in the proposed rule, it will need to collect and analyze more than 2000 samples at several different locations. This would take at least 400 days (again, based on the current availability of equipment, materials and processing). The laboratory costs (the cost to analyze each sample) would be at least \$280,000. This figure does not include the cost of obtaining the necessary sampling equipment and media or the cost of the skilled labor necessary to collect/conduct the sampling and evaluate the results.

A third member of the Coalition estimates that the proposed rule's baseline sampling requirement would require it to collect approximately 1,200 samples at an approximate total cost of \$141,000, not including the cost of sampling equipment, labor costs, etc.

The Coalition's members have all properly characterized the potential exposures at their mines using objective (sampling results) and subjective methods, and there is no reason to require them to start over from scratch.

For an example of an acceptable risk-based approach to exposure monitoring, MSHA need only look to OSHA's 2016 RCS rule. OSHA's RCS standard allows employers to rely on quantitative and qualitative data from exposure monitoring (sampling) programs that have characterized exposure to workers. It also recognizes and endorses the use of Similar Exposure Groups.

Characterizing exposure by SEG eliminates the need to assess every worker and/or position individually. If the members of a group perform similar tasks and are exposed to similar risks, an employer (or, as here, a mine operator) may confidently rely on quantitative from a representative sample of those workers and a qualitative information to assess or characterize the exposure of the whole group. This is exactly the approach taken by the members of the Coalition. Indeed, it is the standard approach, the best practice.

PERIODIC SAMPLING

The proposed rule requires mine operators “to conduct periodic sampling within 3 months where the most recent sampling indicates miner exposures are at or above the proposed action level but at or below the proposed PEL and continue to sample within 3 months of the previous sampling until two consecutive samplings indicate that miner exposures are below the action level.” MSHA specifically “solicited comments on the proposed frequency for periodic sampling, including whether the consecutive samples should be at least 7 days apart.”

We detailed certain of our concerns about periodic sampling above. If MSHA establishes an Action Level, the Coalition urges MSHA to adopt a risk and performance-based approach to sampling consistent with OSHA’s rule (and with standard industrial hygiene practice). If sampling establishes that potential exposures are below the PEL but above the AL, sampling should not be required more frequently than once a year.

As for the time between samples, MSHA has not offered any reason or justification for requiring 7 days between consecutive samples. The members of the Coalition maintain that it is unnecessary to set a limit.

MEDICAL SURVEILLANCE

Most of the Coalition’s members have developed and implemented medical surveillance programs decades ago. The programs are all risk-based and provide screening to miners, both initially (when hired) and once every 1-3 years. The Coalition is not opposed to medical surveillance. However, medical surveillance must be risk-based and MSHA should not require miners to participate (voluntary participation).¹⁰

The proposed rule requires *all* new miners to participate in a medical surveillance program, regardless of their risk of exposure. The Act defines “miner” broadly. Office and administrative staff at a mine who are not exposed to the hazards of mining qualify as miners. The proposed rule would *require* them all to participate in the medical surveillance program. This does not make sense to us, and we strongly urge MSHA to adopt a risk-based approach and promulgate a rule that is consistent with OSHA’s RCS rule.

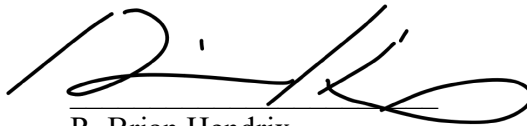
¹⁰ The proposed rule requires new employees to be screened within 30 days of employment. MSHA does not offer any basis or reasoning for this requirement, and we maintain that it is wholly unnecessary.

Finally, the Coalition urges MSHA to take a more realistic look that the technological and economic feasibility of the proposed rule's medical surveillance requirements. Medical professionals, including B-readers, are already very short supply, and it is logical to assume that the proposed rule will exhaust that supply almost instantly, making it difficult to impossible to comply and increasing the burden and costs of compliance substantially.

CONCLUSION

The Coalition appreciates the opportunity to submit these comments on the proposed rule.

Sincerely,

A handwritten signature in black ink, appearing to read 'R. Hendrix', with a horizontal line drawn underneath it.

R. Brian Hendrix

HUSCH BLACKWELL LLP
1801 Pennsylvania Ave. N.W.
Suite 1000
Washington, D.C. 20006
(202) 378-2417 (direct)
(202) 378.2319 (facsimile)
Brian.Hendrix@huschblackwell.com

Counsel to the Silica Safety Coalition