



September 11, 2023

Ms. Aromie Noe
Director
Office of Standards, Regulations, and Variances
Mine Safety and Health Administration
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 Essential Minerals Association

Filed via the Federal eRulemaking Portal: <http://www.regulations.gov>

Dear Ms. Noe:

Please find below comments from AMI Silica LLC (“AMI” or the “Company”) on the Mine Safety & Health Administration’s (“MSHA”) Proposed Rule on Lowering Miners’ Exposure to Respirable Crystalline Silica and Improving Respiratory Protection, published at 88 FR 44852 et seq. (July 13, 2023).

AMI operates a silica sand mine in Hixton, Wisconsin, where AMI extracts, processes, and sells high-quality silica sand. The safety and health of AMI’s employees is the Company’s utmost priority, and given the nature of the mineral deposit mined by the Company so is mitigating the potential hazards associated with respirable crystalline silica (“RCS”). Since the mine now operated by AMI opened, it has enrolled all its miners in medical surveillance and examinations. This includes annual surveillance appointments to monitor for any decreased lung function or silicosis. Throughout these examinations and surveillance, AMI has never been informed of a negative finding for a miner. Regardless, AMI continues to evaluate its operations, improving existing engineering and administrative controls, and implementing new controls when determined appropriate.

AMI does note, that in its experience – and as is apparent from the data MSHA relies upon in the rulemaking process – the hazards of silicosis in the Metal/Nonmetal industry are vastly different than in the Coal mining industry. As the two segments of the mining industry have had separate standards throughout the history of MSHA, the agency should take into consideration that the conditions are not sufficiently similar between mines like AMI and those underground coal mines in Appalachia where clusters of black lung have been reported. As such the mines need not be regulated in the same way and MSHA should consider developing separate standards for Coal and Metal/Nonmetal mines which are more appropriately tailored to the potential hazards the respective mining environments.

Proposed Permissible Exposure Limit and Action Level

While AMI does not oppose the heart of MSHA’s proposed rule, AMI finds the proposal lacks clarity throughout and deliberately undermines operators’ opportunities to employ administrative controls which have proven successful in minimizing miner exposure to RCS.

AMI does not oppose MSHA’s proposal to reduce the Permissible Exposure Level (“PEL”) for RCS to 50 micrograms per cubic meter of air ($\mu\text{g}/\text{m}^3$). However, AMI does oppose the incorporation of the proposed Action Level (“AL”) of 25 $\mu\text{g}/\text{m}^3$. As proposed, the incorporation of the Action Level does not serve to further miner safety and health. This goal is best served by the incorporation of the PEL, and the requirements to implement corrective actions if operator samples indicate exposure greater than the PEL. As written in the proposed rule, the Action Level serves little purpose other than increasing the administrative and financial burden on operators. MSHA does not propose any corrective actions after a sample is collected above the Action Level, but below the PEL. MSHA only requires additional monitoring, which will result in mines quickly exceeding MSHA’s cost estimate for compliance with the proposed rule. AMI anticipates that testing alone could cost it tens of thousands of dollars per year under the proposed rule.

Further, there are doubts as to the ability to reliably collect data at the Action Level and below, and the inclusion of the Action Level and the associated sampling will only put further strain on an already stressed network of approved laboratories. MSHA should eliminate the Action Level as currently included in the proposed rule.

Control Measures and Respiratory Protection

AMI opposes the proposed rule’s explicit prohibition against the administrative control of worker rotation to limit exposure to respirable silica. AMI further opposes the proposed rule’s limitations on the use of respiratory protection equipment (i.e. respirators). While AMI generally agrees the use of engineering controls is one of the best ways to prevent exposure to potentially harmful levels of RCS, such blanket prohibitions and limitations by MSHA would serve to strip operators of utilizing proven dust control methods.

While the proposed rule states that MSHA would allow operators to utilize respiratory protection equipment as a means to control miner exposure “*on a temporary basis or under non-routine, limited conditions*,” MSHA fails to define these situations with any specificity. The use of respirators as an additional control measure and protection while performing maintenance is a common practice in the mining industry especially at industrial sand operations. Miners have the potential to be exposed to levels of RCS during these tasks which are not present during normal operations as equipment such as crushers, screens, or driers are no longer sealed. Without providing greater detail on what tasks will be considered for these *temporary or non-routine limited conditions*, operators will be stripped of one of the best tools to prevent unexpected overexposure to RCS, respirators.

Further, the proposed rule fails to discuss the implementation of regulated spaces or areas as an administrative control. By regulated areas, AMI refers to areas of a processing plant or mine

where miners are not permitted during normal operations, and only when the plant is not in operation or other specific practices are followed, including the use of respiratory protection. As proposed, the rule does not consider how MSHA would apply in such areas and, again, whether the use of respiratory protection would be permissible to control potential exposure to RCS. It is unclear if operators would need to conduct sampling in these areas even though the areas are not accessed during normal operations and only for maintenance and/or when operations are inactive.

MSHA should reconsider its position on the use of administrative controls by operators, engage in further discussion with operators to develop a practical and workable description of when respiratory protection can be used and address the operator use of regulated areas in mining operations and how those areas would be expected to be monitored within the bounds of the proposed rule.

Semi-Annual Evaluation and Post-Evaluation Sampling

AMI questions the need for both the semi-annual evaluation of operations and MSHA's expectation of post-evaluation sampling as included in the proposed rule. First, the proposed rule includes that at least semi-annually operators shall "*evaluate any changes in production, processes, engineering or administrative controls, or other factors that may reasonably be expected to result in new or increased respirable crystalline silica exposures.*"

The evaluation should be a performance-based requirement. Having mine operators perform semi-annual evaluations even if there are no changes to the operation does not further safety and health. If this evaluation remains as part of the proposed rule, it is only reasonable to make it a performance-based requirement. Meaning, it would only need to be completed if or when changes are made in mining operations or with controls at the mine that could reasonably be expected to result in new or increased exposures. Requiring a semi-annual evaluation when the mining process and equipment have not changed simply creates additional burdens on mine operators without improving safety and health.

MSHA's proposed rule is vague concerning what would trigger the post-evaluation sampling requirement as included in §60.12(e) which states:

If the mine operator determines as a result of the semiannual evaluation under paragraph (d) of this section that miners may be exposed to respirable crystalline silica at or above the action level, the mine operator shall perform sampling to assess the full shift, 8-hour TWA exposure of respirable crystalline silica for each miner who is or may reasonably be expected to be at or above the action level.

This provision, as written, can be construed as a semi-annual testing requirement for operators. The section on post-evaluation sampling does not specify that this sampling requirement is invoked when a change is identified which could lead to increased exposure – as included when MSHA discusses the goal of the mandatory semi-annual evaluation. It only says that post-evaluation sampling would be required when a miner may be exposed to RCS at or above the Action Level. Exposure to an Action Level as low as 25µg/m³, could reasonably be met or

exceeded in nearly any environment where RCS is present. Therefore, as written, this element of the proposed rule could be construed as requiring operators to conduct semi-annual sampling just because there is a risk of exposure in the mining environment at levels greater than the Action Level.

Further, this contradicts MSHA's periodic sampling process in §60.12(b) which allows operators to discontinue sampling when two samples below the Action Level are collected. It does not state that periodic sampling is discontinued when miners may no longer be exposed above the Action Level, but when two samples are collected below the Action Level. In this scenario, it is still possible a miner could be exposed at or above the Action Level, but MSHA does not require additional testing.

MSHA should consider modifying the semi-annual evaluation requirement to a performance-based evaluation when there is a change to process, equipment, or controls. Additionally, the post-evaluation sampling should explicitly state that it is only required when a change is identified during the evaluation which has the reasonable potential to increase the chance of exposure to RCS at or above the Action Level.

Submitting Samples Exceeding the PEL to MSHA

It is a concerning development that during the August 21, 2023, public hearing held in Denver, CO, remarks were made that a potential significant and novel expansion on the language of the proposed rule was under consideration. In MSHA's opening remarks, MSHA Deputy Assistant for Operations Patricia Silvery stated:

“Further, if an operator's sample is above the proposed PEL, the mine operator would be required to take immediate corrective actions to reduce miners' exposure to below the PEL, make the record of the overexposure which would have to be posted, and made available to miners' representatives and re-sampled to ensure that the corrective action is effective and that miners' exposures are reduced to at or below the PEL. If the miners' exposures exceed the PEL, MSHA will issue a citation. MSHA has received comments on the recordkeeping requirement.

Some commenters recommend that exposure records be kept for longer than two years. At this point in the rulemaking process, MSHA is considering requiring that when an operator's sample is over the PEL, that operator sends the record of that overexposure to the MSHA district manager. This exposure data will allow MSHA to immediately take appropriate enforcement action and provide any necessary compliance assistance to operators.¹”

Such a consideration represents a seismic shift in reporting obligations for operators that were not previously included in the proposed rule and could not be considered a logical outgrowth from the text of the proposed rule. If MSHA is truly considering such a substantive change to the operator reporting requirements, and most especially when the agency is stating that such reporting would be used to support the immediate issuance of enforcement against operators, stakeholders must be provided the opportunity to review and comment.

¹ MSHA's Denver Public Hearing Transcript, page 8, lines 23-25, and page 9, lines 6-11 (August 21, 2023)

This would be an extraordinary departure from current practice and is not even mentioned in the proposed rule. The punitive nature of MSHA's considering mandatory self-incriminating reporting for the purpose of enforcement would only serve to alienate operators from MSHA in what should be a team effort focused on controlling RCS exposure in the nation's mines. MSHA has already included in the proposed rule requirements that operators maintain and provide copies of sampling to authorized representatives. MSHA also requires that operators implement corrective actions when samples are collected above the PEL. In this proposed rule, MSHA's opportunities to issue enforcement to operators who are not in compliance or working towards compliance are numerous, but this would go too far. If MSHA seeks to issue penalties for exposures to the PEL, MSHA must collect those samples, not rely on the operator to monitor levels, implement corrective actions (if needed), and then self-report to MSHA for enforcement.

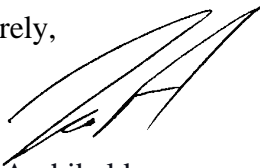
Further, this consequential consideration was only mentioned during the August 21, 2023, Public Hearing, which is 39 days after the proposed rule was published and 11 days after the 15-day extension was announced. Moreover, the transcript of the Denver Hearing was not ultimately published for stakeholders to confirm these statements made by MSHA until September 1, 2023.² A mere ten days before the comment period deadline, which is insufficient to allow the regulated community to consider and prepare comments regarding this statement by the agency.

MSHA should discontinue its consideration of adding a provision that would have such a chilling effect on the relationship between the agency and its regulated community.

Further, MSHA should reopen this rulemaking effort to engage with operators, industry associations, miners, and all stakeholders to develop clear and reasonable rules which furthers efforts to protect miners from respirable crystalline silica.

AMI thanks MSHA for its consideration of these comments. AMI offers these comments in the spirit of creating a regulation which serves to improve miner safety and health, limit miner exposure to potentially harmful levels of respirable crystalline silica, and avoid unnecessarily burdensome and ineffectual compliance obligations on operators.

Sincerely,



Dana Archibald
President, AMI Silica LLC

² MSHA's Denver Public Hearing Transcript was originally posted to regulations.gov on August 27, 2023, but then subsequently withdrawn. A revised version was posted on September 1, 2023.