West Virginia Coal Association

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Aromie Noe
Director, Office of Standards, Regulations and Variances
Mine Safety and Health Administration
201 12th Street South
Suite 4E401
Arlington, VA 22202-5450

Submitted electronically via Regulations.Gov website

Re: Lowering Miners' Exposure to Respirable Crystalline Silica and Improving Respiratory Protection, RIN 1219-AB36, MSHA-2023-0001

Dear Ms. Noe,

The West Virginia Coal Association ("WVCA") respectfully provides the following comments on the Mine Safety and Health Administration's ("MSHA") proposed rule to lower miners' exposure to respirable crystalline silica and improve respiratory protection.[1]

1. BACKGROUND

The West Virginia Coal Association is comprised of coal producing companies who collectively account for nearly 88% of the state's annual output of high-quality steam and thermal coal used in the electric generating industry for reliable, baseload household and industrial power, as well as 78% of West Virginia's metallurgical coal production that is used in our nation's steelmaking industry and infrastructure buildout. Our membership also includes equipment manufacturing companies, land companies, mine maintenance and reclamation businesses, mine supply companies and mine vendors. West Virginia is the nation's leading underground coal producing state, the second largest coal producing state in the nation, the largest producer of metallurgical coal, and holds the distinction of being our nation's number one coal export state accounting for nearly half of all the country's exports.

Our members employ mining technologies and extractive techniques that are specific to their mining method and are not found in other mining applications, foundries, or processes. Underground coal mining also uses mine ventilation systems that are unique to each mining operation and present their own set of challenges. Our comments reflect the unique circumstances presented by underground coal mining.

We appreciate MSHA's willingness to receive comments from stakeholders across the country, all of whom share the collective goal of protecting our nation's coal miners and providing them with a safe and healthy work environment. Many of our member organizations are also members of the National Mining Association.

[1] 88 Fed. Reg. 44852 (July 13, 2023).

We understand they intend to provide comments on this rule as well, and we wholeheartedly endorse and support their comments and encourage MSHA to give considerable weight to their comprehensive and well-researched positions. Today, we write on behalf of our membership to provide the following coal-specific recommendations to MSHA, submitted with the intent of making this crucial rule clearer, fairer, and more effective in protecting coal miners from the hazards of respirable crystalline silica.

2. COMMENTS OF WVCA MEMBERS:

As an initial matter, WVCA supports MSHA's plan to lower the permissible exposure limit ("PEL") of respirable crystalline silica to 50 $\mu g/m^3$, with an action level ("AL") of 25 $\mu g/m^3$. However, to effectively promulgate this rule, MSHA must acknowledge the unique legal, regulatory, and operational differences between coal mining and other forms of mining. Therefore, MSHA should amend the proposed silica standard to ensure the smooth and consistent implementation of this new standard within the existing dust sampling framework. As it did with the 2014 Respirable Coal Dust Rule, MSHA should also recognize an error factor to account for variance in sampling and weighing errors with the Coal Mine Dust Personal Sampling Unit ("CMDPSU") to accurately determine compliance with the new standard. Finally, MSHA should follow the well-reasoned guidance of the Occupational Safety and Health Administration ("OSHA") and allow the full hierarchy of controls for compliance with the proposed silica rule.

A. MSHA should Recognize the Inherent Differences Between Coal and Metal/Nonmetal Mines

The proposed silica rule goes to great lengths to create a rule that has universal sampling parameters applicable to coal and metal/nonmetal mines. However, MSHA has long recognized the fundamental differences between the mining practices, mined materials, and exposure risks between the two industries. The proposed silica rule appears to ignore these differences in favor of a rule which MSHA claims promotes consistency. However, consistency in sampling procedures between coal and metal/nonmetal provides no tangible benefit to either industry and would only serve to create confusion in the implementation of the rule, as well as generate results that do not accurately capture a miner's exposure to silica in a single shift. This is most clearly demonstrated in the shift sampling time described in the proposed rule, as well as the flow rate to be used on the CMDPSU.

i. MSHA should allow the coal industry to continue to use 2.0 Liters of Air Per Minute (L/min).

MSHA currently requires dust sampling with the CMDPSU in underground coal mines be conducted at 2.0 L/min.[2] All persons currently certified in respirable dust sampling in underground coal mines are trained on sampling and calibration at this 2.0 L/min flow rate. MSHA's stated intent of fostering "consistency" in the implementation of the rule will have the precise opposite effect for persons in the coal industry who have used these samplers for decades.

Further, both the underground coal mining industry and MSHA have maintained data on respirable dust history and trends for years. Analysis of such data is crucial to evaluating the effectiveness of

[2] 30 C.F.R. § 70.204(b)

ventilation controls at an underground coal mine. The samples that create that data for both industry and MSHA have been collected at a flow rate of 2.0 L/min. MSHA's proposal to arbitrarily reduce the flow rate to 1.7 L/min in the interests of "consistency" would, again, frustrate the smooth implementation of the standard by overcomplicating the mine's ability to rely upon the historical data and trends in evaluating its ventilation plan.

Finally, and perhaps most crucially to MSHA, requiring the coal mining industry to sample at a rate of 1.7 L/min would require a problematic change to MSHA's dust sampling procedures as well. Currently, MSHA conducts a mine's quarterly quartz sampling and respirable dust sampling at the same time, using the CMDPSU calibrated at a flow rate of 2.0 L/min. As currently drafted, the proposed rule allows the mine operator to use an MSHA quartz sample as part of their baseline sampling protocol. For that sample to be valid under the rule, as proposed, it must be taken with a flow rate of 1.7 L/min. This would require MSHA to return to the mine a second time and conduct their respirable dust testing at a flow rate of 2.0 L/min, consistent with MSHA's coal dust sampling regulations. Essentially, this would double the burden placed on MSHA inspectors to conduct dust sampling at coal mines, and overly-complicate the implementation of this rule for coal operators, all in the name of "consistency".

ii. MSHA should continue to allow coal mines to use actual minutes worked to calculate a miner's silica exposure.

In previous rulemakings, MSHA stated that a full shift time weighted average ("TWA") was the appropriate way to properly determine a miner's daily exposure to respirable coal dust.[3] However, the proposed silica rule appears to conflict with MSHA's previous judgment, stating a uniform TWA of eight hours (480 minutes) is the best method to calculate exposure. Again, MSHA's defense of this fundamental change in dust sampling methodology is grounded in a theory of "consistency" when the practical application is anything but consistent. Our member companies have work shifts that regularly last beyond eight hours, when travel time to and from the working section is included. Arbitrarily capping the amount of time a sample is calculated to 480 minutes improperly inflates the results and inaccurately captures a miner's actual exposure to respirable crystalline silica.

B. Apply an Error Factor to Determine the Excessive Concentration Value

As it did in the 2014 Respirable Coal Dust Rule, MSHA should apply an error factor to both the PEL and the AL to ensure that any errors inherent to the sampling process are factored in to determine a mine's compliance with the proposed rule. These errors in sampling and weighing of the CMDPSU can cause individual concentration measurements to deviate, either above or below the actual concentration of the sample. Applying this error factor would normalize results to be within any margin of error in the sample and ensure that any non-compliant samples would be valid.

Further, MSHA should recognize what OSHA currently does – many materials collected during the silica sampling process can, and do, interfere with the laboratory analysis of silica content. OSHA has

[3] 79 Fed. Reg. 24885 (May 1, 2014) "MSHA agrees with commenters and believes it is more appropriate to determine miners' daily exposures based on their full work shift."

established a method that identifies eighteen (18) types of minerals that can erroneously elevate the amount of silica contained in a sample. Much like the error factor, adopting a method to factor in these eighteen (18) minerals as OSHA did will protect the validity of samples taken by MSHA and the mine operator.

C. MSHA Should Allow Mine Operators to Use the Hierarchy of Controls

MSHA wisely followed the guidance of OSHA when the latter lowered the PEL for silica to 50 $\mu g/m^3$ in 2016. However, MSHA failed to follow one of the most crucial elements of OSHA's rule, use of the full hierarchy of controls to comply with the silica standard. The National Institute for Occupational Safety and Health ("NIOSH") identifies the hierarchy of controls as a process to protect individuals from occupational hazards. NIOSH claims the most effective controls are elimination, substitution, engineering, administrative, and personal protective equipment.

As currently drafted, MSHA would only permit mine operators to use engineering controls to eliminate silica from the mine atmosphere, with personal protective equipment only allowed on a temporary basis while the mine works to return the PEL to compliant levels. Our members cannot understand why MSHA would not encourage its stakeholders to use **ALL** measures available to the industry to reduce miners' exposure to respirable crystalline silica. This is even more crucial when you consider the vast differences between mining environments that will be subject to this rule. The engineering controls available to an underground coal mine in northern Appalachia will be vastly different than a sand and gravel mine in Illinois, which in turn would be vastly different than a gold mine in Nevada. The administrative controls that might protect a surface coal miner in Wyoming would be different than a trona mine in that same state. The effectiveness of personal protective equipment at a salt mine might vary from those used at a potash mine. Simply requiring operators to utilize engineering controls first and foremost as a means of compliance does a disservice to the miners whom MSHA is charged with protecting. Every means of reducing a miner's exposure to respirable crystalline silica should be on the table, and operators should be encouraged to deploy as many of these means as necessary to comply with the rule.

3. CONCLUSION

As we close our comments, we feel compelled to address some of the statements that were made on the record during the public hearing process, particularly at the Beckley, West Virginia hearing. Our organization and its members were appalled by some of the unfounded, baseless, and defamatory statements made about the mining industry by witnesses whose biases were plain and clear. Their comments were not grounded in any desire to constructively improve the proposed rule but were merely an attempt to provide a black eye to the industry before the media gathered at the hearing.

The allegations made by these witnesses were wholly unsupported by any facts or evidence and should be disregarded by MSHA in their entirety. If the persons making these outlandish claims were truly interested in curtailing the behavior of bad actors in the coal industry, they would have utilized the myriad options available to individual miners and their representatives under the Mine Act to notify MSHA of the conduct they described. Instead, they used a microphone, TV cameras, and a public forum to villainize both the coal industry and MSHA.

In future public comment hearings, we would encourage MSHA to require witnesses to give their comments under oath, or otherwise substantiate any claims which might lead to violations of federal mine safety regulations. The public comment process is circumvented when witnesses use the opportunity to make outlandish and harmful statements about the industry, rather than to try to help MSHA finalize a proposed rule.

Thank you very much for your leadership in advancing this crucial rule to the mining community, and we sincerely hope you consider our comments and partner with the mining industry to help protect our most precious resource, the miner.

Sincerely,

/s/ Chris R. Hamilton

Chris R. Hamilton, President
West Virginia Coal Association

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