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May 3, 2017

VIA HAND DELIVERY

Dorothy Dougherty  
Acting Assistant Secretary of Labor  
Occupational Safety and Health  
200 Constitution Avenue, NW  
Washington, DC 20210

Dear Ms. Dougherty:

On behalf of the American Foundry Society (“AFS”) and the National Association of Manufacturers (“NAM”), we respectfully submit for the Agency’s consideration the enclosed Petition for Limited Re-opening of the Rulemaking Record and Administrative Stay as it applies to OSHA’s final rule for respirable crystalline silica in general industry. 81 Fed. Reg. 16,285 (March 25, 2016). As you know, the impact of the rule on AFS and NAM members is significant and our members cannot – and will not be able to – comply with the rule in its current form. As a result, we ask that you grant the enclosed Petition to address the issues raised in it.

Thank you for your consideration of this request.

Sincerely,

Bradford T. Hammock

Enclosure

cc: The Honorable R. Alexander Acosta (with separate cover letter)  
Nicholas Geale  
Lauren Goodman

**Occupational Exposure to Respirable Crystalline Silica**  
**29 CFR Part 1910**  
**Docket No. OSHA-2010-0034**

Petition for Limited Re-opening of the Rulemaking Record and Administrative Stay

Pursuant to Section 6(b) of the Occupational Safety and Health Act of 1970 (“OSH Act” or “Act”), 29 U.S.C. 655(b), the American Foundry Society (“AFS”) and the National Association of Manufacturers (“NAM”) (hereinafter referred to as “Petitioners”) request that the Occupational Safety and Health Administration (“OSHA” or the “Agency”) re-open the rulemaking record for the respirable crystalline silica rule for general industry (29 C.F.R. 1910.1053) (“rule,” “silica rule,” or “standard”), published in the *Federal Register* on March 25, 2016, at 81 Fed. Reg. 16,285. Petitioners specifically request that the record be re-opened to examine (1) the feasibility of complying with the permissible exposure limit (“PEL”) of 50  $\mu\text{g}/\text{m}^3$  adopted in the rule, given the significant compliance difficulties that employers are currently experiencing with it, and (2) the appropriateness of several ancillary provisions included in the final standard. These provisions include the rule’s requirements related to exposure assessment (29 C.F.R. 1910.1053(d)); regulated areas (29 C.F.R. 1910.1053(e)); housekeeping (29 C.F.R. 1910.1053(h)); and medical surveillance (29 C.F.R. 1910.1053(i)). In addition, Petitioners request that OSHA stay the compliance date for implementation of the rule pending the re-opening of the rulemaking record and the Agency’s consideration of the information submitted.

Good cause exists for granting this Petition. As Petitioners predicted throughout the rulemaking process, OSHA’s PEL of 50  $\mu\text{g}/\text{m}^3$  cannot be met in most operations most of the time throughout general industry. Exposure to respirable crystalline silica is highly variable in a number of affected industries. This variability is often unpredictable. Ensuring that exposures remain below 50  $\mu\text{g}/\text{m}^3$  simply cannot be accomplished in the wide range of operations that rely on

crystalline silica throughout general industry. It is incumbent upon the Agency to re-examine feasibility and assess the extent to which exposure variability impacts the ability of employers to comply with a reduced PEL.

Furthermore, the ancillary provisions identified above are, as predicted during the rulemaking, highly burdensome with no appreciable benefit to workplace safety and health. As just one example, OSHA's virtual prohibition on dry sweeping and dry brushing is causing significant compliance difficulties for foundries that typically use large, commercial grade sweepers to clean their facilities. Replacing these sweepers is not practicable and applying wetting agents before use actually introduces other hazards into the work environment. Petitioners urge the Agency to re-examine this and other provisions related to exposure monitoring, regulated areas, and medical surveillance.

Since the rule was published, employers have been scrambling to understand its contents and to start the long process of attempting to comply through the use of engineering, administrative, and work practice controls. For many, this process involves advance permitting requests with federal and state environmental protection agencies that can take months or even years to accomplish. Just the start of this process is proving expensive and costly. Staying the compliance date for general industry will avoid needless expenditure of resources while the Agency re-examines the aspects of the rule identified in this Petition.

## **BACKGROUND**

OSHA published the rule in the last full year of the administration of President Obama. It is one of the most far-reaching rules ever promulgated by the Agency, with costs of over \$1 billion annually – as conservatively estimated by OSHA itself. Crystalline silica is one of the most common manufacturing materials in the world. It is a major component of most building products,

including brick, concrete, ceramic tile, mortar, and other items. Foundries use silica-containing materials to make the molds and cores used to produce thousands of metal products. The foundry industry alone uses *3 million tons* of silica sand a year.

The silica rule establishes a comprehensive – and burdensome – regulatory scheme for affected industries. The rule reduces the permissible exposure limit from the previous level of approximately  $100 \mu\text{g}/\text{m}^3$  down to  $50 \mu\text{g}/\text{m}^3$ , for an eight-hour time weighted average. The rule also sets an action level of  $25 \mu\text{g}/\text{m}^3$ , which triggers additional requirements for general industry employers. In addition to the PEL, the rule imposes ancillary requirements regarding exposure assessment, respiratory protection, medical surveillance, hazard communication, recordkeeping, and housekeeping. The rule essentially prohibits standard housekeeping practices like dry brushing and dry sweeping. In addition, the rule prohibits employers from receiving information gathered during medical surveillance to help protect employees from continued exposure to silica if they develop silica-induced disease.

To attempt to comply with the vast array of requirements in the silica rule, OSHA gave general industry employers only two years, until June 23, 2018, except for employers in the hydraulic fracturing industry which were given five years to comply with the PEL and engineering control provisions. OSHA also placed certain analytical requirements on commercial laboratories to ensure a higher level of consistency in silica monitoring results performed pursuant to the rule. These requirements also do not need to be met until June 23, 2018, the same date that virtually all general industry employers must be fully in compliance with the rule.

## DISCUSSION

### I. A Limited Re-opening of the Rulemaking Record is Necessary and Appropriate to Consider the Feasibility of the Rule and Certain Ancillary Requirements.

#### A. *Re-opening the Record will Allow the Agency to Reconsider the Feasibility of the PEL.*

As Petitioners demonstrated to the Agency during the rulemaking process, meeting a PEL of 50  $\mu\text{g}/\text{m}^3$  cannot be achieved reliably and consistently in many industries. Despite this evidence, the Agency pushed forward with the PEL and many employers are now realizing the daunting challenges of attempting to comply with it. Many foundries, for example, have already begun the lengthy process of trying to comply, investing significant resources in additional engineering controls, but with little assurance that compliance is attainable. We have learned that one foundry has decided to close its doors because of the silica rule and we understand that others are considering whether they will be forced to do the same. OSHA's technological and economic feasibility analyses are proving to be highly erroneous, necessitating the need to re-open the record and re-examine these issues.

*Technological Feasibility.* From a technological feasibility perspective, as predicted by many commenters, the new PEL simply cannot be met in all of the different job tasks with exposure to crystalline silica throughout general industry.

One of the primary issues with reaching a PEL of 50  $\mu\text{g}/\text{m}^3$  is the exposure variability of silica in the diverse industries affected. Petitioner AFS submitted a study to the original rulemaking record of this variability in the foundry environment. The study – “Critique of the Interpretation of Foundries Meeting a Reduced Silica Exposure Limit” – applied a National Institute for Occupational Safety and Health (“NIOSH”) strategy for assessing the variability seen in repetitive sampling to determine the statistical confidence of reaching a reduced PEL for silica

in a foundry environment. The study found that for a foundry employer to meet a PEL of 50  $\mu\text{g}/\text{m}^3$  with even 84% confidence, the employer would need to attain a level of 20  $\mu\text{g}/\text{m}^3$ .

The real life impact predicted by this study is now playing out. Foundry employers are examining how to come into compliance with a reduced PEL of 50  $\mu\text{g}/\text{m}^3$ . They are assessing what they need to do to ensure that whenever a compliance officer comes on site to inspect for silica, and take samples, that the exposures are below the PEL. Given the exposure variability, to ensure compliance they must work to reach levels of exposure far below the PEL and even the action level. Unfortunately, this simply cannot be done.

Petitioners contend that OSHA never fully considered exposure variability in finalizing the rule. In the preamble to the final rule and in the Final Economic Analysis, OSHA never discussed the AFS study as it relates to technological feasibility. The Agency alluded to its enforcement discretion in the final rule as adequate to address any exposure variability: “[I]n situations where exposure measurements made by OSHA indicate that exposures are above the PEL, and that result is clearly inconsistent with an employer’s own exposure assessment, OSHA will use its enforcement discretion to determine an appropriate response.” 81 Fed. Reg. at 16,460. However, it is now over a year since the final rule was issued and OSHA has issued no further guidance as to what its enforcement policy in this area will be. The Agency’s reference to flexible enforcement is an unacceptable response to the reality of exposure variability and the policy of OSHA to hold employers accountable – through citation and penalty – if exposures are above the PEL on the day sampled.

The challenges that employers are now facing will not go away with the rule as it is currently configured. The final standard put forward by the Agency sets an exposure limit that

cannot be reached. OSHA's determination of the feasibility of complying with the PEL must be re-assessed and additional evidence of the difficulty of compliance considered by the Agency.

*Economic Feasibility.* In addition, the Agency did not fully consider the true costs of compliance with the standard and the economic impacts that will result – and are currently being felt by businesses across the country. The Agency made assumptions regarding the costs and economic impacts of the rule that do not reflect the real world of compliance and by doing so significantly underestimated the costs of the rule. OSHA also essentially ignored the best available evidence of the costs of compliance – information provided by employers who have attempted to reduce levels of silica at their worksites.

In fact, foundry industry cost data and economic predictions which the Agency chose to ignore are being confirmed. For example, OSHA assumed foundries would use a 15 gallon \$3,500 vacuum the size of a large “Shop Vac” to clean foundries with hundreds of thousands of square feet of floor surface using hundreds of tons of sand per day. AFS provided data in the form of actual product quotations for the kind of vacuum suitable for use in foundry applications (\$45,000 cost plus \$15,000 in accessories). Several foundries have been experimenting with a variety of vacuum applications to replace sweeping (see below) and are finding that where vacuums can be used, the type and cost of most units is *in line with the AFS data* – not OSHA's projections.

As another example, one foundry has determined that it cannot reduce furnace operator exposure to even the previous PEL with its current furnaces. The foundry operates electric arc furnaces which normally experience sidewall erosion after several hours of use. The interior walls must be relined by gunning in a silica containing reinforcement mixture each day to prevent molten metal runout and explosions. To even attempt to reduce silica exposure to the new PEL, the foundry has determined that it must replace the electric arc furnaces with induction furnaces, a

major modification project and capital expense. The replacement is scheduled for next year at a cost in excess of \$1 million. Nowhere did OSHA consider costs of this type or nature in determining the rule is economically feasible in all affected industry sectors.

In fact, in the Final Economic Analysis OSHA failed to cost all of the variety of controls that OSHA identified in the technological feasibility analysis as potentially necessary to comply with the PEL. Throughout the foundry industry technological feasibility analysis, OSHA cites to control measures that may need to be implemented to adequately control exposures to below the new PEL. For example, for pouring operators in ferrous foundries, OSHA cites to four different “additional controls” that may be needed to get below the PEL. In the economic analysis of the cost of implementing controls to reach compliance for pouring operators, however, OSHA only calculates a cost for two of the possible controls. The incongruity between the technological feasibility analysis and the economic feasibility analysis has contributed to OSHA’s underestimation of the true costs of compliance with the standard.

Compelling data is now piling up that confirm both technological and economic feasibility barriers to meeting the new rule. The final rule will likely force additional foundries to close, shift production offshore, and impact the long-term productivity, profitability, and competitive structure of the industry. We respectfully request that OSHA re-open the rule to reconsider the *true* costs of compliance with the rule and its impact on general industry employers.

The Agency has a unique opportunity to reconsider and assess its feasibility analysis. General industry employers have been struggling to comply with the final rule for over a year. Re-opening the rulemaking record will allow these employers to speak directly to the Agency and provide new information and data showing the infeasibility of the rule. Employers will be able to provide data to OSHA demonstrating the exposure variability of certain environments and the

difficulties of reliably meeting a PEL of 50  $\mu\text{g}/\text{m}^3$ . This type of review is also consistent with the January 20, 2017 memorandum, “Regulatory Freeze Pending Review” from Reince Priebus, Assistant to the President and Chief of Staff, 82 Fed. Reg. 8,346 (January 24, 2017) and numerous statements from President Trump that federal agencies should review the regulatory burdens placed on employers and the ability of employers to comply with those requirements. OSHA should take this opportunity to re-assess the ability of general industry employers to comply with the silica standard.

*B. Several Ancillary Provisions are Not Reasonably Necessary and Appropriate and Must Also be Re-examined.*

In addition to the PEL, OSHA has included in the rule – over strong objections from industry – several provisions that are unworkable in practice and do not advance employee safety and health. These provisions are set forth below and we request that OSHA re-open the rulemaking record to re-consider whether they are reasonably necessary and appropriate to protect employees from the hazards of respirable crystalline silica.

29 C.F.R. 1910.1053(d) *Exposure Monitoring*. OSHA requires employers to conduct monitoring of silica exposure at periodic intervals based upon the results of the previous monitoring conducted. If the most recent monitoring demonstrates that employee exposures are above the PEL, employers are required to repeat such monitoring on a quarterly basis. 29 C.F.R. 1910.1053(d)(3). This requirement is extremely burdensome and makes little sense, considering that employers will need to have implemented all feasible engineering controls to reach the PEL of 50  $\mu\text{g}/\text{m}^3$  in the first instance. Requiring employers to engage in continuous monitoring *after* establishing that a PEL cannot feasibly be reached does not advance employee safety and health and is neither reasonable nor appropriate.

29 C.F.R. 1910.1053(e) *Regulated Areas*. This provision requires employers to establish regulated areas wherever an employee's exposure can reasonably be expected to exceed the PEL. 29 C.F.R. 1910.1053(e)(1). The regulated area must be demarcated in some fashion and access restricted. Given the infeasibility of reaching the PEL, many employers are having to establish entire facilities as regulated areas, an outcome that does not fit the underlying purposes of the requirement or make any sense in the overall context of the standard. Unlike other health standards (e.g., lead) where there is a dermal component to the regulation, the sole purpose of the regulated area in the silica rule is to identify a respirator requirement based on the PEL. This is redundant to and inconsistent with the rest of the standard which already clearly defines who must wear a respirator based on exposure levels.

29 C.F.R. 1910.1053(h) *Housekeeping*. The standard's prohibition on dry sweeping and dry brushing must also be revisited by the Agency. As numerous commenters to the rulemaking record stated, there is no health basis for this requirement and it is highly burdensome. While vacuuming may be appropriate for certain tasks, vacuums cannot approach the effectiveness of sweepers for overall housekeeping. Foundries, for example, rely on sweepers extensively to clean floors and surfaces. Wet sweepers can create an explosion risk and vacuuming simply cannot cover the surface area (up to 200,000 sq. ft. per day) that a sweeper is capable of covering. Failing to sweep the floor adds to the respirable dust burden as pedestrian and industrial truck traffic "kick up" respirable dust from the floor. Ironically, the effect of the housekeeping standard may be to reduce the amount of housekeeping performed and thereby increase the level of respirable dust from vehicle and foot traffic, an outcome contrary to the purposes of the standard.

29 C.F.R. 1910.1053(i)(6) *PLHCP's Written Medical Opinion for the Employer*. Finally, the standard's requirement that employers not receive key information from a health care

professional regarding an employee's health condition as it relates to exposure to respirable crystalline silica is inconsistent with past OSHA precedent, violates Section 4(b)(4) of the OSH Act, and will adversely impact workplace safety and health. The Agency needs to reconsider this requirement, which prohibits employers from receiving important information about the health condition of their employees and, in particular, any recommended limitations on an employee's continued exposure to respirable crystalline silica.

*C. Re-opening the Record will Cure Procedural Defects with the Rulemaking.*

Finally, in one key respect, the rulemaking process undertaken by the Agency to promulgate the silica rule was deficient. In promulgating the final rule, OSHA relied on data from the OSHA Information System ("OIS") as a basis for the Agency's feasibility findings. In fact, this information was critically important to the Agency concluding that the rule was technologically feasible in all affected industries. Of the 3,364 samples cited in the final feasibility analysis, 699 (or over 20%) are from the OIS. Further, for 10 general industry job/tasks and 2 construction job/tasks, the OIS data comprises all of the samples evaluated. For two significant job categories in the foundry industry (cleaning/finishing operator) and (maintenance operator), the OIS data comprises all of the samples evaluated. For an additional 15 general industry job/tasks and 4 construction job/tasks, OIS data comprises more than 50% of the sampling data.

Despite the obvious importance of this information to the Agency's consideration, the Agency put this information in the docket on the last day of the post-hearing data submission period. As a result, stakeholders were unable to review the data *and submit evidence* in the record for the Agency's consideration in response. This critical information – information that the Agency relied upon to find that the rule was feasible – should have and could have been made

available earlier for stakeholders to review. Re-opening the record on the issue of feasibility will allow this opportunity and correct the Agency's failure to do so in the first instance.

Re-opening the rulemaking record on feasibility will also go a long way to addressing concerns raised during the rulemaking that the Small Business Regulatory Enforcement and Fairness Act ("SBREFA") panel report that the Agency drafted was over a decade old when the Agency promulgated the proposed rule, did not include one of the most highly impacted industries – hydraulic fracturing – and included economic impact data from before the downturn in the economy in the mid-2000s. Allowing the public another opportunity to examine and comment upon the information the Agency relied upon for the final rule will only provide the Agency with better and more comprehensive evidence upon which to make critical cost and economic impact determinations.

## II. A Stay is Necessary to Avoid Significant Expenditure of Resources by General Industry Employers.

During the period of time that the Agency is re-opening the record and reconsidering the issues raised, AFS and NAM request that the Agency administratively stay implementation and enforcement of the rule. AFS and NAM members are being forced to expend significant resources attempting to comply with a rule that is not feasible in the first instance. Even though the compliance deadline for general industry is not until June 23, 2018, general industry employers are having to invest money now to try to redesign facilities, apply for new environmental permits, and purchase new equipment. AFS and NAM request that the Agency officially stay the rule to avoid forcing employers to shift resources away from other safety and health needs to try to comply with the new silica requirements.

The costs for the rule for some foundries are so great that, as stated above, some foundries are questioning whether to stay in business or close down. Indeed, in one case, a foundry decided

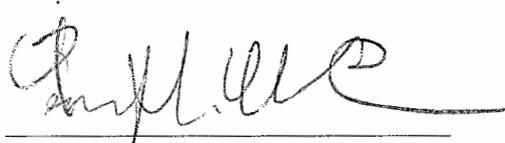
to close shop altogether, rather than start the expense of trying – in vain – to reach the PEL of 50  $\mu\text{g}/\text{m}^3$ . Petitioners submit that it is appropriate for the Agency to grant a stay in such circumstances to avoid needless expense while the Agency is considering these issues.

Indeed, OSHA has on numerous occasions administratively stayed rules when faced with similar facts and to allow the Agency to re-assess key aspects of rules based on new information. For example, OSHA administratively stayed compliance with the PEL for certain industries affected by the cotton dust standard based on “feasibility problems” recognized after promulgation of the final rule. 49 Fed. Reg. 6,717 (Feb. 23, 1984). OSHA did the same for portions of its formaldehyde standard (53 Fed. Reg. 50,198, Dec. 13, 1988) and the asbestos standard (51 Fed. Reg. 37,002, Oct. 17, 1986).

### **CONCLUSION**

Petitioners understand that the Agency has spent several years promulgating the standard. Unfortunately, important evidence was not fully considered in determining the feasibility of reaching the PEL. In addition, for several provisions, OSHA included requirements that are unnecessary and highly burdensome. AFS and NAM are not asking that OSHA re-open the entire rulemaking record. However, the Agency must reconsider in a meaningful way the issues identified above. Further, Petitioners respectfully request that until the Agency completes the re-opening and reconsideration process, that the rule be administratively stayed.

Dated: May 3, 2017



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