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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 construction industry trade associations listed below, I 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 construction. 81 Fed. Reg. 16,285 (March 25, 2016).

As you know, the construction industry has been an active participant throughout the rulemaking process undertaken by the Agency to promulgate the silica rule. Unfortunately, the rule as currently formulated, is **unworkable and infeasible** in the construction industry. We are seeking a **limited re-opening** of the rule to address those issues that we believe were not fully considered in the original rulemaking and that are making compliance exceedingly difficult for contractors. In addition, while we appreciate the Agency's 90-day extension of the compliance dates for construction, such an extension is insufficient to, and cannot, address the myriad of problems with the rule itself. For that reason, we are also requesting a stay of the compliance dates pending OSHA's re-opening of the rule and reconsideration of the information presented.

We look forward to your response to this Petition. Thank you for your consideration of this request.

Sincerely,

Bradford T. Hammock



Petitioners

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

Enclosure

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

Occupational Exposure to Respirable Crystalline Silica
29 CFR Part 1926
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 undersigned (“Petitioners”) request that the Occupational Safety and Health Administration (“OSHA”) re-open the rulemaking record for its respirable crystalline silica rule for construction (29 C.F.R. 1926.1153), published in the *Federal Register* on March 25, 2016, at 81 Fed. Reg. 16,285. Specifically, Petitioners request that the Agency re-open the rulemaking record on the feasibility of complying with the construction standard and alternative approaches to addressing the hazards of crystalline silica on construction worksites. Petitioners request that the re-opening include a request for comments on Table 1 of the construction standard. Petitioners further request that the Agency re-open the record to consider the appropriateness of provisions in the final rule related to housekeeping (29 C.F.R. 1926.1153(f)), written exposure control plan (29 C.F.R. 1926.1153(g)), and medical surveillance (29 C.F.R. 1926.1153(h)). Finally, Petitioners request that the compliance deadlines for the construction rule be stayed by the Agency pending and during the re-opening of the record and the consideration of the data and evidence submitted.¹

There is good cause for re-opening the rulemaking record on a limited basis and staying the compliance date for the rule. As set forth below, construction employers are facing significant issues in complying with the rule. These issues are driven principally by OSHA’s final Table 1, which does not present a viable compliance option for contractors. The issues are compounded by OSHA’s failure to assess the feasibility of the rule for construction *outside* of the Table 1 context. And despite the Agency’s recent 90-day delay in enforcement of the rule, construction employers are being forced to expend significant resources to even attempt to comply with a rule that is infeasible and unworkable in the industry.

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). For the reasons discussed below, the construction industry is facing

¹ Some of the undersigned Petitioners have also filed a Petition for Review of the rule, which is currently pending before the U.S. Court of Appeals for the District of Columbia Circuit. *See North America’s Building Trades Unions v. OSHA*, No. 16-1105 (D.C. Cir.).

the same issues as stakeholders faced in those previous rulemakings and, thus, seeks a stay and re-opening to allow the Agency to re-assess its approach to the rule.²

BACKGROUND

The silica rule sets a comprehensive regulatory scheme for affected industries. For construction, the rule significantly reduces the permissible exposure limit (“PEL”) for crystalline silica from 250 $\mu\text{g}/\text{m}^3$ to 50 $\mu\text{g}/\text{m}^3$. 29 C.F.R. 1926.1153(d)(1). In addition, the rule imposes burdensome ancillary requirements regarding exposure assessment, respiratory protection, medical surveillance, hazard communication, recordkeeping, and housekeeping. *See* 29 C.F.R. 1926.1153(d)-(j).

OSHA adopted in the final rule what it thought would be a workable compliance option for meeting the PEL in construction – “Table 1.” Table 1 sets forth 18 specific construction “equipment/tasks” and describes the engineering and work practice control methods and respiratory protection required for those tasks. When employers follow the procedures exactly as they are outlined in Table 1, OSHA asserts that they do not have to comply with the PEL or follow the exposure monitoring requirements.

If employers are unable to comply with Table 1 or choose a control method that is not allowed by Table 1, employers must follow what is commonly referred to as the alternative exposure control method of compliance. 29 C.F.R. 1926.1153(d). Under this approach, employers must comply with the reduced PEL through the hierarchy of controls and meet rigorous exposure assessment obligations.

With respect to the rule’s ancillary provisions, OSHA included what is **essentially a prohibition on dry sweeping and dry brushing** in the rule, a practice that is routinely performed on construction worksites throughout the country. 29 C.F.R. 1926.1153(f). Under the rule, employers are only permitted to engage in dry sweeping or dry brushing when they can prove to OSHA that it is infeasible to wet sweep, use a HEPA-filtered vacuum, or use some other method that minimizes the likelihood of exposure. *Id.* OSHA also deviated from its past practice in the rule by **depriving employers of basic information about an employee’s health condition** as it relates to exposure to crystalline silica, including whether a physician or other licensed healthcare provider has recommended to an employee any limitations on the employee’s exposure to respirable crystalline silica. 29 C.F.R. 1926.1153(h).

The economic impacts of the rule are just now beginning to be seen for construction employers. OSHA estimated that the rule would cost construction employers approximately \$700 million annually (81 Fed. Reg. at 16,468), although other estimates pegged the silica rule for construction at over **\$3.8 billion**. Construction employers are being forced to expend significant resources attempting to comply with a rule that is infeasible in ways that stakeholders did not even anticipate during the rulemaking.

² This request 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).

OSHA initially established a compliance date for the construction industry of June 23, 2017. On April 4, 2017, OSHA announced that it was delaying enforcement of the rule for 90 days, until September 23, 2017. The reason for the delay was “to conduct outreach and provide educational materials and guidance for employers.” Notwithstanding this delay, OSHA stated:

OSHA expects employers in the construction industry to continue to take steps either to come into compliance with the new permissible exposure limit, or to implement specific dust controls for certain operations as provided in Table 1 of the standard. Construction employers should also continue to prepare to implement the standard’s other requirements, including exposure assessment, medical surveillance and employee training.

The construction industry is appreciative of this extension and looks forward to additional guidance from the Agency on compliance with the rule. However, Petitioners respectfully assert that this extension is not adequate to address the overall problems with the rule and that they can only be solved if the rulemaking record is re-opened on the issues identified in this Petition and the rule is administratively stayed pending that review.

DISCUSSION

I. A Limited Re-opening of the Rulemaking Record is Necessary to Re-examine Key Aspects of the Standard.

OSHA’s rule regulating crystalline silica was finalized in the last year of President Obama’s Administration. It is the most far-reaching health standard ever to be applied to the construction industry in the history of the Agency. Silica is ubiquitous on construction worksites and exposure is highly unpredictable. The difficulties of controlling silica on ever-changing construction worksites, with multiple trades, and constantly shifting environmental conditions were apparent in the rulemaking record developed by the Agency. Yet with construction, the Agency never fully considered this information, clinging to the approach it proposed at the outset of the rulemaking, and never fully considering whether the standard could be actually met by contractors in most operations most of the time.

A. Re-opening the Rulemaking Record will Allow the Agency to Fully Consider the Feasibility of the Construction Standard.

In promulgating the final rule, OSHA did not fully consider and adequately assess the technological and economic feasibility of meeting a PEL of 50 $\mu\text{g}/\text{m}^3$. Substantial evidence in the rulemaking record demonstrated that a PEL of 50 $\mu\text{g}/\text{m}^3$ could not be met in most operations most of the time.

i. Technological Feasibility

In the final rule, OSHA tied its technological feasibility analysis to Table 1. OSHA claims that virtually all construction employers will be able to use Table 1 to achieve compliance, with

the exception of abrasive blasting, drywall finishing, and underground construction. Thus, OSHA determined that because Table 1 can be used **all of the time**, the rule is feasible.

However, Table 1 cannot be used all of the time.³ In fact, it is not a workable, realistic compliance option for **many** affected employers in the construction industry. For example, for the following tasks (stationary masonry saw, handheld power saw, walk-behind saw, drivable saw, and a rig-mounted core saw or drill), to use Table 1 employers must use an integrated **water** delivery system. There are numerous situations where tasks cannot be performed wet, and thus employers cannot follow Table 1. Water may not be available to a job site, weather may prevent the use of water, or clients/location (i.e., indoor work environments/interior jobs, health care environments, nuclear facilities, residential home building) may prohibit the use of water. Even OSHA has recognized that there are numerous situations where wet methods cannot be used (*see, e.g.*, 81 Fed. Reg. at 16,718, 16,720, 16,730, 16,732, 16,735, and 16,749).

Similarly, some entries on Table 1 require the use of a commercially-available **shroud with dust collection** (handheld and stand-mounted drill, dowel drilling rigs for concrete, vehicle-mounted rigs for rock and concrete, jackhammers and handheld powered chipping tools, handheld grinders for mortar removal). As with wet methods, depending upon the type of work performed this equipment may also not be able to be used. In these situations, wet methods would also not be allowable for purposes of Table 1 and the alternative exposure control methods for compliance would have to be utilized.

OSHA's feasibility analysis is incomplete and legally insufficient given the reliance on Table 1 and the Agency's **failure to truly assess whether a PEL of 50 $\mu\text{g}/\text{m}^3$ can actually be met in construction**. Re-opening the rulemaking record on this issue will allow the Agency and affected stakeholders to inform the Agency of the actual compliance challenges stemming from attempting to comply with the rule in the numerous situations where Table 1 cannot be followed. More importantly, it will allow construction employers to explain directly to the Agency the vast array of circumstances for which Table 1 cannot be used.

ii. Economic Feasibility

Petitioners also request that OSHA re-open the rulemaking record on the **true costs and economic impacts** of the rule on construction. The economic analysis put forth by the Agency was based on several flawed assumptions of the impact of the rule on construction employers. The primary example of this is OSHA's assumption – based on no evidence in the rulemaking record – that construction work is only performed for 150 days a year. There is no basis to apply such a low number across all construction jobs across the country and yet that is precisely what OSHA did. Furthermore, OSHA only considered engineering control costs for tools included in Table 1. OSHA did not cost construction employer compliance with the alternative exposure control method of compliance in any operations. We now know that this is flawed as a matter of fact, but

³ Even if Table 1 could be used all of the time, the table itself demonstrates the rule is infeasible because of its heavy reliance on the use of respirators. In fact, of the 31 tasks – and locations for those tasks – analyzed on Table 1, one-third of them require some form of respiratory protection when the task is performed for just over four hours. 81 Fed. Reg. at 16,877-79.

it is also inconsistent with OSHA’s own statements in the rulemaking record that there would be multiple situations where employers may need to use the alternative exposure control method when trying to comply with the rule.

The flawed assumptions adopted by the Agency resulted in OSHA calculating **absurdly low costs** per industry affected by the rule. The table below reproduces the annualized costs per establishment in some of the construction industries impacted:

Industry	Annualized Cost per Affected Establishment
Electric Utilities	\$360
Residential Building Construction	\$364
Land Subdivision	\$912
Building Equipment Contractors	\$421
Building Finishing Contractors	\$716

On their face, these estimated costs make no sense in the real world of compliance. Take, for example, a residential home builder who is constructing multiple homes and home developments throughout the course of a year. Potential silica generating tasks involve cutting block and brick; cutting tile and granite; grinding and tuckpointing; cutting roof tiles; drilling holes into walls for piping and conduit; and so on. Under the rule, that builder will have to implement controls, work practices, and respiratory protection under Table 1 (or the alternative exposure control methods), develop a written exposure control plan, and take a myriad of other actions to ensure compliance. Under OSHA’s analysis, an employer will be able to do all of those tasks on an annual basis for just over \$350. This cannot be right.

Re-opening the rule to re-examine the issues of cost and economic impacts on the industry is critically necessary and appropriate so that the Agency can make informed decisions about how to proceed with its approach to respirable crystalline silica in construction.

B. The Agency Must Re-examine Table 1.

Similarly, Petitioners seek to re-open the rule as it relates to the specifics of Table 1. Petitioners have long supported the concept of a “Table 1,” however Table 1 as it exists in the final rule does not serve as a meaningful compliance option.

First, tool manufacturers have not developed tools with the control measures recognized by Table 1 (or otherwise potentially applicable to controlling exposure under the alternative exposure control method), for use in the wide variety of settings in the construction environment. As just one example, one association member has been researching and testing rotary hammers with vacuum-shroud attachments. The member reports that there are two brands that work somewhat effectively. However, the member reports that it uses a 5/8” rotary hammer bit to set 1/2” anchors and neither manufacturer makes a 5/8” rotary hammer bit to fit into their rotary hammers with vacuum shrouds. The tool requires a 6” long bit to work and both companies make 5/8” bits that are 8” long. Therefore, the member cannot use either tool.

Second, certain engineering control options were removed from the proposed Table 1 in the final rule. For example, the proposed Table 1 would have permitted stationary masonry saws to be used with either an integrated water delivery system or a combination shroud/vacuum, but the final Table 1 only permits the use of such saws with integrated water delivery systems. Presumably this was because the use of a shroud/vacuum would not result in exposures that reliably meet a PEL of 50 $\mu\text{g}/\text{m}^3$. Whatever the reason, this omission has led to many contractors scrambling to follow the alternative control method of compliance – and (obviously) not Table 1.

Third, virtually all tasks in Table 1 require operating and maintaining tools in accordance with manufacturer's instructions. The manuals for the equipment are highly detailed with many "requirements" and "prohibitions." Many of these requirements are not related to the health and safety of employees, but are included for other purposes, such as extending the life of the equipment. It is unreasonable for OSHA to expect employers to follow each and every aspect of an owner's manual under threat of citation or penalty. This is a significant issue for compliance with Table 1.

Table 1 requires respirator use for certain tasks, which could be triggered based on whether the duration of the task is greater or less than four hours. In these situations, it will be extremely difficult for an employer to track the amount of time – to the minute – that respirators have been used. OSHA has not set forth an enforcement policy to explain how or whether it would reasonably enforce this part of the standard.

Indeed, many construction employers have realized the limitations of Table 1 and are now having to monitor numerous tasks in different environments to start to understand how to comply with the silica rule. The further problem, however, is that contractors are finding that they cannot meet the PEL of 50 $\mu\text{g}/\text{m}^3$ for the reasons that Petitioners and other stakeholders made clear in comments to the proposed rule.

Petitioners understand that OSHA has been meeting with tool manufacturers and certain other groups to continue to monitor tool technology and determine to what extent certain tools can comply with Table 1 or otherwise can meet a PEL of 50 $\mu\text{g}/\text{m}^3$. It is unfortunate that OSHA is engaging in this process *after* promulgation of the final rule and not opening this up to *all* interested stakeholders. Petitioners assert that this information should be made part of the re-opening and all stakeholders – not just a select few – be permitted to comment on it and participate in shaping a Table 1 that actually works.

C. Certain Ancillary Provisions Must also be Revisited.

In addition to the threshold issues discussed above, Petitioners request that OSHA re-open the rulemaking record on three ancillary provisions in the standard: housekeeping; written exposure control plan; and medical surveillance.

In the final rule's housekeeping requirements, OSHA prohibits dry sweeping and dry brushing where the activity "could contribute to employee exposure to respirable crystalline silica unless wet sweeping, HEPA-filtered vacuuming or other methods that minimize the likelihood of

exposure are not feasible.” 29 C.F.R. 1926.1153(f)(1). The proposed rule also contained restrictions on these housekeeping practices. However, the proposal required HEPA-filtered vacuuming or wet methods only when accumulated silica dust “could, if disturbed, contribute to employee exposure to respirable crystalline silica *that exceeds the PEL.*” The final rule contains no such qualification. Virtually all dry sweeping or dry brushing could “contribute” to employee exposure, thus requiring an employer to demonstrate infeasibility. OSHA has not defined feasibility in this context and it would be very difficult for an employer to demonstrate that wet sweeping or using a HEPA-filtered vacuum could *never* be done. This provision amounts to a complete prohibition on dry sweeping and dry brushing, which makes practical compliance extremely difficult.

There was significant testimony in the rulemaking record regarding this prohibition, and numerous industry stakeholders argued that the prohibition was impracticable, burdensome, and unnecessary. And the broadening of the prohibition in the final rule to prohibit dry sweeping that “could contribute” at all to employee exposure has little support in the rulemaking record. Petitioners request that OSHA re-open the record on this issue – which affects virtually every construction worksite in the country – to evaluate whether this prohibition is reasonably necessary and appropriate.

In addition, in the final rule a written exposure control plan is required, including “[a] description of the procedures used to restrict access to work areas, when necessary, to minimize the number of employees exposed to respirable crystalline silica and their level of exposure, including exposures generated by other employers or sole proprietors.” 29 C.F.R. 1926.1152(g)(iv). It appears that the final rule requires a written exposure control plan, including restricting access, on every job where there is any employee exposed to respirable silica. On a multi-employer construction site, one employer could be generating silica dust on a single floor under construction and therefore the entire floor – or in a worst case scenario, the whole construction site – could be demarcated as a restricted work area. OSHA has not addressed how this provision could impact scheduling issues (causing construction delays for projects) if only a single employer is permitted to be in a restricted access area at a time. While Petitioners appreciate the intent behind this requirement, the requirement is overly broad and unnecessary for all job sites.

Finally, the rule requires that employers “make medical surveillance available at no cost to the employee, and at a reasonable time and place, for each employee who will be required under this section to use a respirator for 30 or more days per year.” 29 C.F.R. 1926.1153(h)(1). Breaking with prior OSHA precedent, the rule denies employers crucial information about the employee’s workplace exposure to respirable crystalline silica. The rule does not allow employers to receive key information about the employee’s recommended limitations on exposure to respirable silica unless the employee provides written authorization. This unprecedented denial runs directly counter to the primary purposes of medical surveillance: allowing employers to understand the effects that hazards in the work environment are having on the health of their employees and to make necessary changes to the worksite.

While Petitioners respect the privacy interests of employees, it is critical for employers to know of exposure limitations recommended by physicians or licensed health care providers to

protect the health of employees. This has historically been the position taken by the Agency and the Agency should re-open the record on this requirement to consider the true ramifications of prohibiting employers from receiving this important information that impacts their employees.

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

Finally, re-opening the rule will provide an opportunity for the Agency to cure procedural deficiencies in the initial rulemaking. In the silica rulemaking, OSHA relied on data gathered from a variety of sources to attempt to justify the feasibility of the rule. In certain instances, consistent with the Administrative Procedure Act and the OSH Act, OSHA made this data available for review by stakeholders and to rebut the data with additional evidence during the public comment period. However, with respect to one significant data set, stakeholders were denied the opportunity to submit contrary evidence to the Agency.

OSHA based its preliminary exposure profile principally on OSHA and National Institute for Occupational Safety and Health (“NIOSH”) inspection reports and site visits. This data was disclosed as part of OSHA’s preliminary economic analysis and interested parties had an opportunity to respond to and comment on the data and provide the Agency data to contradict that put forward by the Agency. After the initial comment and hearing period, an Administrative Law Judge provided additional time for interested parties to submit data and post-hearing comments. At the very end of the data-submission period (indeed on the last day), OSHA submitted data from the OSHA Information System (“OIS”) to the docket. This data was ultimately used as a basis for OSHA’s feasibility findings.

The OIS data did not merely serve as a supplement or addition to the PEA data. 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 an additional 15 general industry job/tasks and 4 construction job/tasks, OIS data comprises more than 50% of the sampling data.

This critical information – information that the Agency relied upon to find that the rule was feasible in construction – should have and could have been made available earlier for stakeholders to review and present contrary evidence for the Agency’s consideration. 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.

II. An Administrative Stay is Necessary Pending Reconsideration.

Even with the 90-day extension of the compliance deadline, construction employers are facing in just a few months the prospect of citations and penalties for failing to comply with a standard that is not workable and not feasible. As stated above, tools compliant with Table 1 are not available for the wide range of construction operations. Furthermore, construction employers are having to scramble to attempt to comply with the alternative exposure control method given the large number of tasks where employers cannot use Table 1. This involves analyzing tasks, conducting extensive exposure monitoring, sending silica samples to qualified laboratories (who themselves do not need to come into compliance until June 23, 2018), getting the samples back

(which can take a significant amount of time), re-assessing exposures based on those results, and so on. OSHA only gave construction employers one year to comply based on the incorrect assumption that all employers could and would use Table 1 for all operations. Such a short compliance period is insufficient given the difficulties with Table 1.

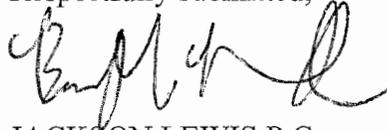
Petitioners submit that a stay is appropriate in these circumstances to allow the Agency time to reconsider the issues raised in this Petition and to avoid construction employers expending significant resources to attempt to comply with a standard that cannot be met.

CONCLUSION

Petitioners respectfully request that OSHA re-open the rulemaking record on the feasibility of the construction silica rule and alternative approaches to addressing the hazards of crystalline silica on construction worksites. Petitioners also seek review of Table 1 and three ancillary requirements adopted by the Agency. The Agency and all stakeholders will benefit from a re-examination of the rule and what ultimately would be effective in the construction environment. Petitioners also request that OSHA administratively stay the compliance dates in the rule to allow for this reconsideration and to avoid unnecessary expenditure of resources.

Dated: May 3, 2017

Respectfully submitted,



JACKSON LEWIS P.C.

Bradford T. Hammock
Tressi L. Cordaro
Counsel for Petitioners

Petitioners

American Road and Transportation Builders Association
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