

July 13, 2017

C. Ray Davenport, Commissioner  
Virginia Department of Labor & Industry  
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Re: Request for Delay in Enforcement of Construction Silica Standard

Dear Commissioner Davenport:

We write to request that the Virginia Occupational Safety and Health (“VOSH”) program reconsider its determination to proceed with enforcement of the Respirable Crystalline Silica standard for the construction industry (29 C.F.R. 1926.1153) on June 23, 2017, unlike the Occupational Safety and Health Administration (“OSHA”), which recently delayed enforcement of the standard for 90 days until September 23, 2017.<sup>1</sup> We believe a delay in enforcement for at least 90 days is necessary given the significant obstacles to compliance that contractors in Virginia are experiencing. We also believe that VOSH may use its inherent enforcement discretion to implement such a delay.

As you know, the silica standard 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  $\mu\text{g}/\text{m}^3$ . 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. 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. Under this approach, employers must comply with the reduced PEL through the hierarchy of controls and meet rigorous exposure assessment obligations.

Construction employers in the Commonwealth are finding compliance extremely difficult if not impossible for many job tasks. These issues are driven principally by the standard’s final Table 1, which does not present a viable compliance option for contractors. As just one example,

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<sup>1</sup> On April 6, 2017, OSHA announced that it would delay enforcement of the respirable crystalline silica standard for 90 days. See <https://www.osha.gov/news/newsreleases/national/04062017>. The Virginia Department of Labor and Industry announced in a June 14, 2017 memorandum that it would not similarly delay enforcement, but announced it was suspending its National Emphasis Program on crystalline silica.

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, however, 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. In addition, tool manufacturers have not developed tools with the control measures recognized by Table 1 for use in the wide variety of settings in the construction environment.

Because of the limited use of Table 1, contractors are having to attempt to comply with the alternative exposure control method, which involves conducting sampling for respirable crystalline silica and trying to develop engineering controls to reduce exposures below the new PEL. However, even receiving results from sampling in a timely manner is proving challenging as the laboratories that analyze the samples and provide results to contractors are not themselves required to meet the analytical mandates in the standard until June 23, 2018, *a full year after contractors must be in compliance.*

The compliance challenges are made even more difficult by the lack of guidance from OSHA on how it intends to enforce and interpret the rule. To date, OSHA has not issued a compliance directive educating compliance officers and employers on how it will enforce the standard and, in particular Table 1. It has provided virtually no guidance materials to contractors on the meaning of key requirements and provisions, such as the standard's prohibition on dry sweeping and dry brushing. There are countless interpretive issues that have not been addressed by OSHA that should be before enforcement can begin. Indeed, the need to "provide educational materials and guidance for employers" is why OSHA delayed enforcement of the standard in the first instance.

We are not requesting that VOSH amend the standard to change the compliance date. We understand the practical and legal difficulties associated with doing so. However, we request that VOSH use its enforcement discretion – as did OSHA in April – to delay enforcing the standard for at least 90 days, while outreach and enforcement guidance can be developed.

We thank you for your consideration of this request.

Sincerely,

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