

State of California
Department of Industrial Relations
M e m o r a n d u m

To : ALL STANDARDS BOARD MEMBERS

Date: September 1, 2016

From : **Occupational Safety and Health Standards Board**
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Senior Safety Engineer – Standards

Subject: Respirable Crystalline Silica (Horcher)

At the August 18, 2016 Public Hearing, the Occupational Safety and Standards Board considered revisions to California Code of Regulations, Title 8, Construction and General Industry Safety Orders, New Sections 1532.3, 5204, and existing Section 5155, Respirable Crystalline Silica. The proposed regulations are substantially the same as those promulgated by Federal OSHA.

Labor Code Section 142.3(a)(3) exempts the Board from providing a comment period when adopting a standard substantially the same as a federal standard. However, as indicated in the Notice (Informative Digest), the Board is accepting limited comments for the following three purposes:

1. To identify any clear and compelling reasons for California to deviate from the federal standard; and,
2. To identify any issues unique to California related to this proposal which should be addressed in this rulemaking and/or a subsequent rulemaking; and,
3. To solicit comments on the proposed effective dates.

The Board notes that some of the comments received are outside of the scope of acceptable comments on a rulemaking being adopted under the Horcher process. However, the Board elects to respond to the comments for the purpose of reassuring the regulated public that the Board is aware of their concerns and intends to address them expeditiously.

As a result of public comments, there were no modifications to the original proposal.

SUMMARY AND RESPONSE TO WRITTEN AND ORAL COMMENTS

I. Written Comments

Mr. Kevin Moran, Director – Crystalline Silica Panel, on behalf of the American Chemistry Council Crystalline Silica Panel, by letter dated August 9, 2016.

Comment:

Mr. Moran commented that 1) the permissible exposure limit (PEL) for crystalline silica should be $100 \mu\text{g}/\text{m}^3$ instead of the proposed $50 \mu\text{g}/\text{m}^3$ 8-hour time weighted average, 2) the proposed PEL is economically infeasible in many general industry sectors and technologically infeasible in

both construction and general industry, and 3) commercial laboratories cannot reliably measure crystalline silica at concentrations of $50 \mu\text{g}/\text{m}^3$ and below. He asserts that the above concerns, combined with the fact that the proposed PEL is undergoing judicial review in the United States Court of Appeals for the District of Columbia Circuit, constitute a clear and compelling reason for California to deviate from the federal standard.

Response:

Labor Code Section 142.3 mandates the Board adopt regulations at least as effective as federal regulations addressing occupational safety and health issues within 6 months of promulgation. The commenters' concerns may or may not be valid, but they do not relieve the Board of its obligations to the Labor Code. If the Court of Appeals litigation results in changes to the federal rule, the Federal Registrar will note such changes, and California will again evaluate the need for amendments to Title 8.

The Board thanks Mr. Moran and the Crystalline Silica Panel for their comments and participation in the Board's rulemaking process.

Coalition of employers and employer representatives (below), by letter dated August 15, 2016:

Associated General Contractors of California,
Associated Roofing Contractors of Bay Area Counties,
California Chamber of Commerce,
California Chapters of the National Electrical Contractors Association,
California Framing Contractors Association,
California Legislative Conference of the Plumbing, Heating and Piping Industry,
California Professional Association of Specialty Contractors,
Construction Employers Association,
Mason Contractors Association of California,
Northern California Paint Finishing Contractors,
Residential Contractors Association,
Roofing Contractors Association of California,
Southern California Contractors Association,
Union Roofing Contractors Association of California,
United Contractors.

Comment:

The Coalition requests that the Board not Horcher the construction requirements of the federal final rule and instead direct the Board staff to convene an advisory committee to address the requirements found in the federal rule. The Coalition is concerned with the absence of vacuum methods for dust controls in many instances in Table 1. Without providing specifics, the Coalition claims that "There are multiple obvious advantages of using a dry process instead of a wet process [to control dust exposures]". They also express concerns that the federal

requirements are subject to change as a result of pending litigation and that the federal standard does not allow for an exception to dust controls for rooftop tile cutting.

Response:

The Board is not persuaded by the Coalition comments to amend its proposal. However, to address the concerns raised, the Board will direct the Board staff to convene an advisory committee made up of Coalition members and other stakeholders to discuss necessary amendments to the federal rule as it applies to the construction industry in California.

The Board thanks the Coalition for its comments and participation in the Board's rulemaking process.

Mr. Robert Rios, Business Manager, Roofer & Waterproofers #95, by email sent August 17, 2016.

Mr. Ben Duterte, Technical Director, Wall and Ceiling Bureau, by email sent August 16, 2016.

Mr. Jeff Buczkiewicz, President, Mason Contractors Association of America, by email sent August 18, 2016.

Mr. William A. Good, Chief Executive Officer, National Roofing Contractors Association, by letter dated August 18, 2016.

Comment:

The above listed individuals commented in support of the Coalition comment letter.

Response:

The Board refers the commenters to its response to the Coalition's letter above.

The Board thanks the commenters for their comments and participation in the Board's rulemaking process.

Mr. Richard Olson, President, Tile Roofing Institute, by letter dated August 17, 2016.

Comment:

Mr. Olsen commented that his organization believes the new PEL and action level are too low to be reliably measured in actual field performance. He asks the Board to delay adoption of the federal rule until after an advisory committee has met to discuss their concerns. He says that using wet methods to control dust on rooftops exposes workers to slip and fall hazards, and requiring workers to ascend and descend ladders to cut roofing tiles will only exasperate such issues. He also believes that the cost impact of the regulation is understated. Finally he adds his support to the Coalition letter mentioned in previous comments.

Response:

The Board refers Mr. Olsen to its response to the American Chemistry Council and the Coalition's letter above.

The Board thanks Mr. Olsen for his comment and participation in the Board's rulemaking process.

Mr. William Turley, Executive Director, Construction and Demolition Recycling Association, by letter dated August, 2016.

Comment:

Mr. Turley commented that his industry has several concerns with the federal standard as proposed and that California should fix the federal deficiencies before implementing its standard.

Response:

The Board refers Mr. Turley to its response to Coalition's letter above.

The Board thanks Mr. Turley for his comment and participation in the Board's rulemaking process.

Mr. Bruce Wick, Risk Management Director, California Professional Association of Specialty Contractors, by email sent August 18, 2016.

Comment:

Mr. Wick said that the implementation date should be 15 months after the date the federal standard is adopted in California (instead of 15 months from the date the federal rule was published).

Response:

The Board will consider the effective date of the construction proposal when it convenes an advisory meeting on the subject. No change is currently proposed, as a result of this comment.

The Board thanks Mr. Wick for his comment and participation in the Board's rulemaking process.

Ms. Cindy Sato, Construction Employers Association, by email sent August 18, 2016.

Comment:

Ms. Sato said that the implementation date should be 15 months after the date the federal standard is adopted in California to allow for advisory committee meetings to take place.

Response:

The Board refers Ms. Sato to the response to Bruce Wick.

The Board thanks Ms. Sato for her comment and participation in the Board's rulemaking process.

Mr. Jerry Vandewater, President, Vandewater Associates Consulting, Inc., by email sent August 17, 2016.

Comment:

Mr. Vandewater said he fully supports the position of the Tile Roofing Institute.

Response:

The Board refers Mr. Vandewater to its response to the American Chemistry Council and the Coalition's letter above.

The Board thanks Mr. Vandewater for his comment and participation in the Board's rulemaking process.

Mr. William D. Callahan, Executive Director, Associated Roofing Contractors of the Bay Area Counties, Inc., by letter dated August 18, 2016.

Comment:

Mr. Callahan said he supports the Horcher of the general industry proposal, including the updated permissible exposure limit of 50 micrograms per cubic meter of air as an 8-hour time weighted average. He also suggested that adoption of the construction portion of the proposal be delayed until an advisory committee can be convened to reconcile the new requirements with existing Section 1530.1.

Response:

The Board appreciates Mr. Callahan's support and refers him to the response to the Coalition letter.

The Board thanks Mr. Callahan for his comment and participation in the Board's rulemaking process.

Mr. Douglas L. Parker, Executive Director, Worksafe, by letter dated August 18, 2016.

Comment:

Mr. Parker said he supports the Horcher of the federal silica rules, including both general industry and construction proposals. He cautioned against convening an advisory meeting to

address industry concerns with the construction proposal because there is not enough time to meet the six-month mandate for adoption, nor are any deviations from the federal language likely to be deemed at least as effective as the current federal rule. He also opined that an advisory committee meeting convened by the Board staff may be contrary to the intent of Labor Code Section 147.1, which directs the Division of Occupational Safety and Health (Division) to “Analyze proposed and new federal occupational health standards, evaluate their impact on California, [and] determine any necessity for their modification.”

Response:

The Board appreciates Mr. Parker’s support for the adoption of the proposed rule. In response to Mr. Parker’s comments on convening an advisory committee, the Board refers him to the response to the Coalition letter.

Regarding Mr. Parker’s concerns with Labor Code Section 147.1, the Board points out that although the Division is directed to analyze and evaluate federal occupational health standards, the Labor Code does not prohibit Board staff from doing so as well. Staff work closely with the Division in developing all rulemaking proposals and will continue to seek their input and expertise in the present rulemaking effort.

The Board thanks Mr. Parker for his comment and participation in the Board’s rulemaking process.

II. Oral Comments:

Mr. Bruce Wick, Risk Management Director, California Professional Association of Specialty Contractors, in testimony given August 18, 2016.

Comment:

Mr. Wick spoke in support of the Coalition letter and their request to convene an advisory committee to resolve the differences between the existing California silica standard and the proposed federal standard. In support of the current California standard, he said that working in a dry environment would reduce slip and fall hazards, as well as water run-off issues. He questioned the wisdom of protecting against the potential hazard of chronic exposure to silica by exposing employees to the acute hazard of slips and falls from a roof. He also said that the limitations and exceptions in the current standard should be preserved.

Response:

The Board refers Mr. Wick to the response to the Coalition letter in the response to written comments above.

The Board thanks Mr. Wick for his comment and participation in the Board’s rulemaking process.

Mr. Rickie Leinenweaver, Petersen Dean Roofing and Solar, in testimony given August 18, 2016.

Comment:

Mr. Leinenweaver said he supports the Coalition letter.

Response:

The Board refers Mr. Leinenweaver to the response to the Coalition letter in the response to written comments above.

The Board thanks Mr. Leinenweaver for his comment and participation in the Board's rulemaking process.

The following commenters provided testimony on August 18, 2016, in support of the Coalition letter and the convening of an advisory committee to resolve the differences between the existing California standard and the proposed federal standard:

Mr. David Jones, Associated General Contractors of California,

Mr. Michael Hollan, Block Construction,

Mr. Vince Hundley, San Diego Association of General Contractors,

Dr. William Callahan, Associated Roofing Contractors of the Bay Area Counties,

Ms. Julie Trost, Mason Contractors Association of California,

Mr. Jeff Barber, John Jackson Masonry,

Mr. Brian Miller, Rudolph and Sletten,

Mr. Roy Vlaovich, Zurich Insurance,

Mr. Kevin Bland, representing Masonry Contractors Association of California, Residential Contractors Association, and California Framing Contractors Association,

Response:

The Board refers the commenters to the response to the Coalition letter in the response to written comments above.

The Board thanks the commenters for their comments and participation in the Board's rulemaking process.

Mr. Ray Whitmore, Pacific Bay Masonry, in testimony given August 18, 2016.

Comment:

Mr. Whitmore said that electric handheld saws cannot safely be used with wet methods, as required in many instances in the new federal regulation. He said that vacuum systems should be an option for dust control where wet methods are required.

Response:

The Board refers Mr. Whitmore to the response to the Coalition letter in the response to written comments above.

The Board thanks Mr. Whitmore for his comment and participation in the Board's rulemaking process.

Mr. Joel Guth, IQ Power Tools, in testimony given August 18, 2016.

Comment:

Mr. Guth said that federal OSHA is working on further modifications to Table 1 that will include more options for vacuum controls. He suggested California delay the inclusion of the proposed construction amendments until the federal discussion is completed to avoid employer confusion.

Response:

If federal OSHA makes changes to the federal rule, California will evaluate the need for amendments to Title 8 at such time.

The Board thanks Mr. Guth for his comment and participation in the Board's rulemaking process.

Mr. Doug Parker, Worksafe, in testimony given August 18, 2016.

Comment:

Mr. Parker reasserted the comments from his written letter, indicating his support for the adoption of the federal standard via Horcher.

Response:

The Board refers Mr. Parker to the response to his written comments above.

The Board thanks Mr. Parker for his comment and participation in the Board's rulemaking process.

Mr. Dave Harrison, Occupational Safety and Health Standards Board Member, in testimony given on August 18, 2016.

Comment:

Mr. Harrison expressed support for convening an advisory committee to address the differences between the existing California standard and the proposed federal regulation, but does not want to ignore the Horcher process and its timeline.

Response:

The Board intends to adopt the proposed federal regulation, both the construction and general industry components, and then expeditiously convene an advisory committee meeting to address concerns between the existing and newly proposed construction regulations regarding crystalline silica.

Ms. Laura Stock, Occupational Safety and Health Standards Board Member, in testimony given on August 18, 2016.

Comment:

Ms. Stock said that she favors continuing with the Horcher process to adopt the federal regulations with the reduced PEL. She requested Board staff provide clarification on the dust controls allowed by the new construction standard.

Response:

The Board refers Ms. Stock to the response to Mr. Harrison.

In regard to dust control measures allowed by Table 1 in the proposed standard, Board staff observes that there are 18 tools or pieces of equipment listed in the table. Nine of the tools list wet methods as the only option for controlling dust in accordance with the table. Five list vacuum, or dry, controls as the sole control method, and four list both wet and dry controls as options.

According to proposed Section 1532.3(d), when an employer “does not fully and properly implement the engineering controls, work practices, and respiratory protection described in Table 1,” the employer must ensure that no employee is exposed in excess of $50 \mu\text{g}/\text{m}^3$, as an 8-hour time weighted average. To comply, employers must assess employee exposure through air monitoring or objective data sufficient to accurately characterize an employee’s exposure. Employers must use feasible engineering and work practice controls to control exposure, which could include either wet or vacuum control methods, and respiratory protection where such controls do not adequately protect workers.

When stakeholders state that specific dust control methods (e.g. vacuum controls) are not allowed by the federal standard, they are referring to the absence of such controls as listed options for compliance with Table 1 in the proposed construction standard. Controls specifically

listed in Table 1 can be used in accordance with Table 1 without the need for air monitoring or objective data to characterize employee exposures.

Mr. Dave Thomas, Chairman, Occupational Safety and Health Standards Board, in testimony given on August 18, 2016.

Comment:

Mr. Thomas stated that an advisory committee is needed to address the concerns raised by commenters. He said that it is necessary to adopt the current proposal using the Horcher process, and then convene an advisory committee to discuss improvements to the standard.

Response:

The Board agrees with Mr. Thomas' assessment.

Ms. Barbara Smisko, Occupational Safety and Health Standards Board Member, in testimony given on August 18, 2016.

Comment:

Ms. Smisko asked for clarification on whether or not dry controls would be allowed between the time of the Horcher adoption and the date of the proposed advisory committee meeting. She suggested that Board staff chair the advisory committee.

Response:

The effective date of the proposed construction standard is June 23, 2017. Vacuum, or dry, controls are allowed until June 23, 2017 under the current regulations. After the effective date of the new federal regulation, vacuum controls would be subject to the new federal requirements. If the controls are not listed on Table 1 for the desired tool or equipment piece, then the employer would need to comply with the air sampling and other requirements discussed in the response to Ms. Stock. The Board refers Ms. Smisko to the response to Ms. Stock for further information.

Ms. Patricia Quilan, Occupational Safety and Health Standards Board Member, in testimony given on August 18, 2016.

Comment:

Ms. Quinlan indicated support for adopting the proposed PEL and then convening an advisory committee to discuss vacuum controls for dust suppression.

Response:

The Board agrees with Ms. Quinlan.

DETERMINATION OF MANDATE

These regulations do not impose a mandate on local agencies or school districts.