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August 28, 2017

Loren Sweatt
Deputy Assistant Secretary and Acting Assistant Secretary of Labor for Occupational Safety and Health
U.S. Department of Labor
200 Constitution Ave. NW
Washington, D.C. 20210

Re: RIN: 1218-AB76; Occupational Exposure: Beryllium and Beryllium Compounds in Construction and Shipyard Sectors (Docket No. OSHA-H005C-2006-0870-2076)

[comments filed electronically at regulations.gov]

Dear Ms. Sweatt,

Public Citizen, a consumer advocacy organization with more than 400,000 members and supporters nationwide, strongly urges you not to finalize the proposal to rescind, for construction and shipyard workers, all ancillary provisions from the Occupational Safety and Health Administration's (OSHA's) final 2017 beryllium rule or to delay for one year the deadline for compliance by construction and shipyard employers.¹ Eliminating these vital protections would allow employers to continue to expose construction and shipyard workers for an additional year to levels of beryllium that even OSHA acknowledges are highly toxic, which would unnecessarily ensure the occurrence of even more cases of beryllium sensitization (BeS), chronic beryllium disease (CBD), lung cancer, and death. We also are alarmed about OSHA's dangerous assertion that it will not enforce *any* of the provisions in the final beryllium rule for construction and shipyard employers (including even those it proposes to retain) while this new proposal is under consideration.

Ancillary provisions are absolutely necessary to protect workers

The important, disease-preventing ancillary provisions of the final beryllium rules for the construction and shipyard industries include the following:² 1) regular exposure assessment, which includes measurement of airborne beryllium concentrations to ensure that they fall below the permissible exposure limit (PEL) of 0.2 micrograms per cubic meter ($\mu\text{g}/\text{m}^3$) and the short-

¹ 82 FR 29182. Docket No. OSHA-H005C-2006-0870. Proposed Rule; Occupational Exposure: Beryllium and Beryllium Compounds in Construction and Shipyard Sectors. June 27, 2017. <https://www.federalregister.gov/documents/2017/06/27/2017-12871/occupational-exposure-to-beryllium-and-beryllium-compounds-in-construction-and-shipyard-sectors>. Accessed August 24, 2017. [Hereafter referred to as "OSHA Proposed Rule"]

² 29 CFR 1926.1024 and 29 CFR 1915.1024.

term exposure limit (STEL) of $2.0 \mu\text{g}/\text{m}^3$; 2) for shipyards, establishment of beryllium-regulated areas to sequester tasks resulting in beryllium exposure from the rest of the workplace; 3) maintaining a written exposure control plan; 4) instituting specific engineering and work practice controls to maintain low airborne beryllium exposures; 5) provision of respiratory protection and other personal protective equipment (PPE); 6) establishment of hygiene areas and practices; 7) housekeeping rules to minimize beryllium in workspaces; 8) medical surveillance of workers to monitor for BeS, CBD, lung cancer, and other beryllium-related ailments; 9) medical removal provisions that stipulate circumstances in which an employee will be eligible for removal from tasks associated with beryllium exposure and reassignment to other tasks, with financial and other protections guaranteed for the worker; 10) communication by the employer to all employees of the hazards of beryllium and education and training for workers on protective measures; and 11) recordkeeping requirements that mandate that employers maintain beryllium exposure data and medical records.

OSHA's primary argument for eliminating all of these ancillary provisions for construction and shipyard workers is that some workers in these industries who are exposed to beryllium already are protected through other regulations.³ These other, non-specific regulations mandate respirators and other PPE,⁴ exhaust ventilation,⁵ hazard communication,⁶ and education of employees regarding unsafe conditions.⁷

This argument falls short for several reasons. First, it is simply untrue, as is implied in OSHA's argument, that all of the ancillary beryllium provisions overlap with existing OSHA regulations and that workers therefore will achieve no additional protections from the dangers of beryllium with the implementation of the ancillary provisions of the rule. This is evidenced by a cursory comparison of the list of ancillary provisions with the existing regulations cited by OSHA. Should OSHA rescind the ancillary provisions for construction and shipyard workers, employers in those industries would not be required, *by any regulation*, to follow a prescribed schedule for measurement of airborne beryllium; notify employees and maintain written records of the results of such measurements; establish regulated work areas for tasks that release toxic levels of beryllium; maintain a written plan to control beryllium exposures; institute engineering and work practice controls, medical surveillance, and medical removal when airborne beryllium levels exceed the action level of $0.1 \mu\text{g}/\text{m}^3$; maintain clean work areas as free as possible from beryllium; and communicate with, and train, employees on the hazards of beryllium and mitigation strategies.

Second, the cited regulations, some of which are decades old,⁸ were clearly not drafted specifically to protect workers from the unique hazards of beryllium. By contrast, unlike these old rules, the ancillary provisions in the new beryllium standard were drafted over a period of nearly 15 years with exhaustive input from occupational health and safety experts and industry and relying on the latest science regarding the particular hazards of beryllium exposure. Having

³ OSHA Proposed Rule, PDF p. 6.

⁴ 29 CFR 1926.57; 29 CFR 1910.134; 29 CFR 1915.34

⁵ 29 CFR 1926.57

⁶ 29 CFR 1910.1200

⁷ 29 CFR 1926.21

⁸ 29 CFR 1926.57 was originally finalized in 1979 and last updated in 1998. 29 CFR 1915.34 was originally finalized in 1996.

protections in place specifically for beryllium exposure is critical because airborne beryllium causes harm through a mechanism that is atypical of occupational chemical exposures. Beryllium exerts its often lifelong and fatal harms through an immunological sensitization process triggered at extremely low concentrations and short-term exposures. As OSHA acknowledged in its final beryllium rule, workers are still at risk of BeS and CBD after exposure to airborne concentrations of beryllium at and below the new, lower PEL of $0.2 \mu\text{g}/\text{m}^3$.⁹ This increases the urgency of ancillary provisions, some of which would be mandated at an airborne beryllium concentration below the PEL, such as the action level of $0.1 \mu\text{g}/\text{m}^3$,¹⁰ in order to minimize the number of sensitized workers.

Third, the fact that certain generic regulations *may* protect *some* workers from the hazards of beryllium exposure does not obviate the need for the implementation of new requirements, just a few of which overlap with these old mandates. By definition, any overlap between the old regulations and the new ancillary provisions would not impose any new costs or other burdens on employers, and the majority of the ancillary provisions that are new and unique would serve to better ensure that workers are adequately protected from the specific hazards of beryllium. It is almost certainly the case that in most instances in which OSHA has issued a new regulation mandating certain protections, some employers in the affected industry already have implemented such protections. This is not surprising given the strong emphasis that OSHA places on the feasibility of compliance with new regulations before such rules are made final. The purpose of all such regulations is precisely to protect workers in workplaces that *do not already* have such protections in place.

Fourth, relying solely on engineering controls to protect workers from beryllium exposure, as would be the case should the PEL and STEL remain the only mandates to protect against beryllium exposure in the construction and shipyard sectors, is virtually guaranteed to fail in providing adequate protections for workers. OSHA's inability to adequately enforce its regulations through workplace inspections is well-known.¹¹ Indeed, OSHA itself noted in the preliminary economic analysis conducted in support of its proposed beryllium rule that many workplaces, including abrasive blasting operations in construction and shipyards, had exceeded the previous beryllium PEL of $2.0 \mu\text{g}/\text{m}^3$, a violation of OSHA's regulation.¹² Many employers will undoubtedly fail to comply with OSHA's new PEL and STEL, and workers likely will be unaware of such non-compliance. Unlike the case with only a PEL and STEL, workers will know whether their employers are in compliance with ancillary provisions such as regular airborne monitoring and periodic medical surveillance and can therefore act to pressure their

⁹ 82 FR 2470. Docket No. OSHA-H005C-2006-0870-2043. Final Rule; Occupational Exposure to Beryllium. January 9, 2017. <https://www.regulations.gov/document?D=OSHA-H005C-2006-0870-2043>. Accessed August 24, 2017. PDF p. 257-260.

¹⁰ Ancillary provisions triggered when airborne beryllium concentrations exceed the action level are: 1) the requirement to implement engineering and work practice controls [29 CFR 1926.1124(f)(2)(i) and 1915.1024(f)(2)(i)]; 2) the implementation of medical surveillance of exposed workers [29 CFR 1926.1024(k)(1)(i)(A) and 1915.1024(k)(1)(i)(A)]; and 3) eligibility of employees for medical removal (29 CFR 1926.1024(l)(1) and 1915.1024(l)(1)).

¹¹ AFL-CIO. Death on the Job: The Toll of Neglect. April 2017. https://aflcio.org/sites/default/files/2017-04/2017Death-on-the-Job_0.pdf. Accessed August 23, 2017.

¹² Occupational Safety and Health Administration. Preliminary Economic Analysis and Initial Regulatory Flexibility Analysis: Supporting document for the Notice of Proposed Rulemaking for Occupational Exposure to Beryllium. <http://www.regulations.gov/#!documentDetail;D=OSHA-H005C-2006-0870-0426>. Accessed August 24, 2017.

employers or file whistleblower complaints with OSHA in order to ensure that mandated protections are provided.

Fifth, the fact that some general industry workers also might be protected from some beryllium exposures did not prevent OSHA from retaining the ancillary provisions for general industry employers. We note that OSHA justified its rescission of the ancillary provisions for construction and shipyard workers by claiming that, because certain general industry standards (29 CFR 1910.134 and 29 CFR 1910.1200) apply to and may protect some construction and shipyard workers, the ancillary provisions are not necessary for these workers. Of course, these and other general industry standards also apply to general industry workers, yet OSHA correctly recognized that the ancillary provisions remained necessary for this group of workers. OSHA retained these ancillary provisions for general industry workers because it recognized the importance of specific protections against the unique hazards of beryllium; the necessity of a new, comprehensive standard to protect workers who are not already protected from beryllium by other general industry standards; and the inadequacy of a PEL and a STEL, on their own, to protect general industry workers.

Compliance date needs no extension

In addition to proposing to rescind the ancillary provisions of the beryllium rule, OSHA has proposed to delay the deadline for compliance by the construction and shipyard industries by one year.¹³ The current compliance date for the reduced PEL and STEL that OSHA proposes to maintain is March 12, 2018.¹⁴ This will be more than 14 months after the rule was finalized on January 9, 2017. OSHA offered no justification in its proposal for granting construction and shipyard employers an additional year to comply with the new rule, only stating that such a delay “could be warranted by the uncertainty created by this proposal.”¹⁵ This is a nonsensical argument given that OSHA is proposing no new requirements for these industries in its latest proposal. In fact, should OSHA’s proposal be finalized, compliance with the rule would be far more feasible by the original March 12, 2018, compliance deadline given that the vast majority of provisions in the original rule would be rescinded by the proposal. We strongly urge OSHA to retain the original compliance dates in the beryllium rule to avoid unnecessarily exposing workers to the risk of lifelong beryllium-related diseases for yet another year.

OSHA must enforce final beryllium rule while this proposal is considered

We note with alarm that OSHA indicated its intention not to enforce *any* of the provisions in the final beryllium rule for the construction and shipyard industries while the current proposed rulemaking is underway.¹⁶ OSHA provided no justification whatsoever for its unwillingness to enforce even the provisions of the final rule (the PEL and the STEL), which it concedes are necessary to adequately protect workers in these industries. We implore OSHA not to abdicate its statutory responsibility to protect workers from harm and to enforce at least the provisions of

¹³ OSHA Proposed Rule, PDF p. 8.

¹⁴ 29 CFR 1926.1024(o) and 1915.1024(o)

¹⁵ OSHA Proposed Rule, PDF p. 8.

¹⁶ OSHA Proposed Rule, PDF p. 6 -7.

the final beryllium standard that it agrees are necessary to protect workers from harm (we, of course, believe that all of the provisions of the rule are necessary).

Real reason for OSHA failing to protect workers

Because of the flimsiness of OSHA's justification for doing away with the ancillary provisions and for delaying the compliance date for construction and shipyard employers, it is likely that the real reason that President Donald Trump's OSHA rescinded the ancillary provisions for these workers was long-standing pressure exerted by certain industries wedded to the continued use of beryllium. In our comments on OSHA's proposed rule on beryllium in 2015,¹⁷ we noted that a manufacturer of coal slag, which is the raw material used in some abrasive blasting operations, lobbied the previous presidential administration not to implement a more protective beryllium rule for construction.¹⁸ OSHA should not place the perceived financial interests of certain corporations above the health and safety of all workers in the construction and shipyard industries.

For these reasons, we strongly urge OSHA to reject this proposal and to instead retain the ancillary provisions for construction and shipyard workers, as outlined in the beryllium rule finalized earlier this year. Thank you for taking our comments into consideration.

Sincerely,



Sammy Almashat, MD, MPH
Researcher
Public Citizen's Health Research Group

¹⁷ Public Citizen. Comments Urging OSHA to Finalize a More Protective Beryllium Rule. November 5, 2015. <https://www.citizen.org/our-work/health-and-safety/comments-urging-osha-finalize-more-protective-beryllium-rule>. Accessed August 24, 2017.

¹⁸ HARSCO presentation to the White House's Office of Information and Regulatory Affairs. September 30, 2014. <http://www.reginfo.gov/public/do/eoDownloadDocument?pubId=&eodoc=true&documentID=649>. The company went so far as to imply that OSHA's position was that the form of beryllium [beryllium silicate] the company utilized did not lead to CBD. See Slide 9, which stated that "Even OSHA's [actually the interagency Small Business Advocacy Review Panel's] analysis states: 'It has been suggested that CBD is the result of occupational exposure to beryllium oxide and other water-insoluble berylliums rather than exposure to water-soluble beryllium or beryllium ores,'" while omitting the very next sentence in the cited document responding to this suggestion: "However, there are inadequate data, at this time, on employees selectively exposed to specific beryllium compounds to eliminate a potential CBD concern for any particular form of this metal" (Small Business Administration. Report of the Small Business Advocacy Review Panel on the OSHA Draft Proposed Standard for Occupational Exposure to Beryllium. January 15, 2008. Page 4. https://www.sba.gov/sites/default/files/files/Report_review_panel_exposure_to_beryllium_01_15_2008.pdf). OSHA agreed with this conclusion in its proposed rule: "Based on a review of scientific studies, OSHA has preliminarily determined that the toxicological effects of beryllium exposure on the human body are similar regardless of the form of beryllium" (OSHA's 2015 Proposed Beryllium Rule, at 707). All links accessed August 24, 2017.

A handwritten signature in black ink that reads "Sidney Wolfe MD". The signature is written in a cursive, slightly slanted style.

Sidney Wolfe, MD
Founder and Senior Adviser
Public Citizen's Health Research Group