Comments of the National Employment Law Project

Proposed Rule by the Occupational Safety and Health Administration:

Occupational Exposure to Beryllium and Beryllium Compounds in Construction and Shipyard Sectors

Docket No. OSHA-H005C-2006-0870

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The National Employment Law Project (NELP) submits the following comments opposing every provision of OSHA's new proposal on Occupational Exposure to Beryllium and Beryllium Compounds in Construction and Shipyard Sectors, published on June 27, 2017. NELP strongly opposes the agency's new proposal that revokes the ancillary provisions for the construction and shipyard sectors that OSHA adopted on January 9, 2017.

NELP is a non-profit law and policy organization with 45 years of experience providing research, advocacy, and public education to advance the employment and labor rights of the nation's workers. We work together with national, state and local partners to promote policies and programs to create good, safe jobs and ensure that work is an anchor of economic security and a ladder of economic opportunity for all of America's working families.

This proposal is an unprecedented and a totally evidence-free rollback of the necessary protections contained in OSHA's final rule on beryllium and beryllium compounds promulgated on January 9, and will foreseeably lead to increased death and disease. Never in OSHA's history has the agency decided to roll back worker protections for a carcinogen. This proposal is also contrary to OSHA's statutory mandate, leaving unprotected workers in the construction and shipyard sectors that OSHA previously and correctly identified as being at risk. This proposal, published on June 27, is completely flawed, not supported by evidence or reasons, and should be completely disregarded. NELP requests that the agency reconfirm and move forward with enforcement of the January 2017 rules issued for the shipyard and construction industry.

NELP also supports the request of the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy Allied Industrial and Service Workers International Union (USW) for a public hearing on the June 27, 2017 proposed revisions titled.

On January 9, 2017 OSHA published final regulations to prevent chronic beryllium disease (CBD) and lung cancer from harming and killing our nation's workers by limiting their exposure to beryllium and beryllium compounds. The final rule updated a 40-year-old rule on beryllium exposure that was no longer protective of workers. In promulgating these final rules, OSHA conducted 15 years of review, including issuing a 2012 proposed rule, offering an extensive comment period, public hearings and consulting with industry, labor, small businesses, and experts on beryllium exposure. The final rule consists of three substantively similar yet tailored standards addressing beryllium exposure in construction, general industry, and maritime because the evidence was clear that a wide range of workers, including those in the shipyard and construction industry, have the potential for significant exposure to beryllium. The final rules—including all three standards—have already been adopted by the Virginia State Plan OSHA, and just a few weeks ago were overwhelmingly approved for adoption by the California Occupational Safety and Health Standard's Board.

In this new proposal published on June 27, mere weeks after the rule nominally went into effect, OSHA ignores much of the evidence gathered by the agency over 15 years of review. But the new conclusions that form the basis of this new proposal are not supported by evidence or reasons—they are totally and completely unfounded.

According to the agency, about 62,000 workers are exposed to beryllium in their workplaces, including approximately 11,500 construction and shipyard workers. During the rulemaking for the recently

published final standard, the agency received substantial comments confirming that workers in the construction and maritime industries were exposed to significant and excessive levels of beryllium. The comments included studies showing that workers in these sectors were at significant risk from occupational beryllium exposure. (United Steelworkers; AFL-CIO; NABTU).

OSHA reviewed the evidence and concluded that the record of the final rule shows that exposures above the new action level and PEL, primarily from abrasive blasting operations, occur in both the construction and shipyard industries (see Chapter IV of the FEA and REA). As discussed in Section V of the preamble to the final rule, on "Health Effects," and Section VII, "Significance of Risk," OSHA found that employees exposed to airborne beryllium at these levels are at significant risk of developing adverse health effects, primary chronic beryllium disease (CBD) and lung cancer." 82 Fed. Reg. January, 9, 2017; 2637

Significantly, OSHA has not changed this conclusion in the new proposal issued in 2017. Yet, in the new proposal, OSHA is proposing to strip away the protections for workers in the shipyard and construction sectors afforded by the "ancillary provisions" in the final promulgated rule, provisions that would require medical surveillance, medical removal protection, training, personal protective equipment, exposure assessment, written exposure control plan, housekeeping, hygiene areas, competent person, and regulated areas.

In response to the three questions in the proposed rule to which OSHA is "especially interested in responses," NELP submits the following comments. Our responses are below the question.

1)"OSHA has proposed revoking the ancillary provisions for the construction and shipyard sectors while retaining the new lower PEL or and STEL for those sectors." OSHA asks if this provides adequate protection considering other standards that apply. Should OSHA keep any of the ancillary provisions in the January 9, 2017 final rule and if yes, which ones?

Short answer: The proposed revocation of ancillary provisions for those sectors does not provide adequate protection, and OSHA should keep all the ancillary provisions. This proposal, revoking the ancillary provisions for the construction and shipyard sectors, is not based on any evidence or reason. All the evidence contained in the record of the final rule clearly supports the original conclusion by the agency that without all of the ancillary provisions, workers in the shipyard and construction sectors will not be adequately protected. Further, OSHA correctly concluded in the final rule that it would not be fulfilling its legal mandate under the OSHA law to write a final rule without the ancillary provisions for all exposed workers. In the preamble to the final rule, "OSHA found that workers exposed to beryllium at and below the preceding TWA PEL face a significant risk of material impairment of health or functional capacity within the meaning of the OSHA act, and that the new standards will substantially reduce the risk. OSHA's risk assessment also indicates that, despite the reduction in risk expected with the new PEL, the risks of CBD and lung cancer to workers with average exposure levels of 0.2 μg/m3 are still significant and could extend down to 0.1 μg/m3, although there is greater uncertainty in this finding for 0.1 μg/m3 since there is less information available on populations exposed at and below this level. Although significant risk remains at the new TWA PEL, OSHA is also required to consider the technological and economic feasibility of the standard in determining exposure limits. As explained in Section VIII, Summary of the Final Economic Analysis and Final

Regulatory Flexibility Analysis, OSHA determined that the new TWA PEL of 0.2 µg/m3 is both technologically and economically feasible in the general industry, construction, and shipyard sectors. OSHA was unable to demonstrate, however, that a lower TWA PEL of 0.1 µg/m3 would be technologically feasible. Therefore, OSHA concludes that, in setting a TWA PEL of 0.2µg/m3, the agency is reducing the risk to the extent feasible, as required by the OSH Act (see section II, Pertinent Legal Authority). In this context, the agency finds that the action level of 0.1 µg/m3, dermal protection requirements, and other ancillary provisions of the final rule are critically important in reducing the risk of sensitization, CBD, and lung cancer among workers exposed to beryllium. Together, these provisions, along with the new TWA PEL of 0.2 µg/m3, will substantially reduce workers' risk of material impairment of health from occupational beryllium exposure. 82 Fed. Reg. 2552

Thus, in the final rule, and consistent with its legal authority, OSHA set the lowest exposure standard (Permissible Exposure Limit, or PEL) that was feasible. But because beryllium is highly toxic, OSHA found that even at this new lower exposure limit, which substantially lowers the health risk from the 40-year-old standard, workers would still suffer material impairment of health. As OSHA is well aware, under the OSH Act and specifically section 6 (b) (5), the law states that "in promulgating standards dealing with toxic materials or harmful physical agents under this subsection the Secretary shall set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life." Therefore OSHA put into place additional, now called 'ancillary' protections—including medical surveillance, medical removal protection, training, personal protective equipment, exposure assessment, written exposure control plan, housekeeping, hygiene areas, competent person, and regulated areas—to ensure workers were adequately protected. As OSHA stated in the 2016 FEA "both industry and worker groups have recognized that a comprehensive standard is needed to protect workers exposed to beryllium." (FEA VIII 24). These ancillary provisions, along with the new PEL, are critical to saving, as OSHA predicted in its exhaustively analyzed FEA, 96 lives and preventing 46 new cases of disease every year. Both the PEL and the ancillary provisions together reduce the remaining significant risk for all workers exposed to beryllium; the PEL alone, while certainly necessary and important, does not do that.

Underlining OSHA's conclusion, the agency, after reviewing all the evidence, declared in the FEA, that "approximately 67 percent of the beryllium sensitization cases and the CBD cases avoided [by the final rule] would be attributable to the ancillary provisions of the standard." (FEA Chapter VII-24). According to the FEA, that was a conservative estimate—especially regarding workers exposed through abrasive blasting. (FEA Chapter VII-22-23). In reviewing all the evidence, the agency concluded in the FEA (FEA Chapter VIII- 24) that "OSHA expects the benefits estimated under the final rule will not be fully achieved if employers do not implement the ancillary provisions of the final rule." According to the FEA, Chapter VII, page 24, OSHA solicited comments on all aspects of this approach to analyzing ancillary provisions and asked for any additional data—and they received no comments. However, OSHA did receive substantial information supporting OSHA's conclusion that the ancillary provisions must cover not only beryllium exposed workers in general industry, but all beryllium exposed workers in the shipyard and construction sectors. Such comments came from labor and industry:

> "The UAW added that Alternative #2a [a comprehensive standard including all the ancillary provisions] would cover abrasive blasters, pot tenders, and cleanup staff working in construction and shipyards who have the potential for airborne beryllium exposure during blasting operations and during cleanup of spent media (Document ID 1693, p. 3 (pdf))."
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> "Kimberly-Clark Professional (KCP) similarly indicated that it favored the adoption of this alternative (Document ID 1676, p. 1). KCP explained that "[h]azardous exposures are equally dangerous to workers regardless of whether the worker is in a factory or on a construction site, and the worker protection provided by OSHA regulations should also be equal" (Document ID 1676, p. 1). In addition, 3M Company also observed that Regulatory Alternative #2a is a more protective alternative (Document ID 1625, p. 3 (pdf))." 82 Fed. Reg. 2637

Yet, despite *no* new information, in this new proposal published in June, OSHA is proposing to strip the workers exposed to beryllium in the construction and shipyard sectors of the protections from the ancillary provisions. OSHA has already found these protections are feasible in all three industry sectors—where workers face similar hazards. Yet the agency has proposed to roll back these protections in the shipyard and construction sectors—offering less protection to these workers than provided to workers in general industry and effectively leaving workers in these sectors unprotected. But neither the OSH Act nor relevant legal precedent authorize OSHA to withhold or revoke feasible protections from comparably at-risk workers just because their toxic exposures occur in different industries. The argument for doing so here, months after completing a long-awaited rulemaking, providing the necessary comprehensive (ancillary) protections to all workers in general industry, construction, and maritime, is weaker than the one the agency made and had rejected by the Third Circuit in United Steel Workers v. Auchter, 763 F.2d 728 (3d Cir. 1985). There, the court of appeals established once and for all times that OSHA must apply a rule to all industry sectors faced with like risks "unless [it] can state reasons why such application would not be feasible. 29 U.S.C. Sec. 655(b)(5)." Id. at 739. Here, the ancillary provisions were determined to be equally feasible in all three sectors in the underlying rulemaking, and no new evidence exists to contradict that evidence-based conclusion.

OSHA now claims that existing standards make it unnecessary for the ancillary provisions of the standard to cover construction and shipyard employers whose employees are exposed to beryllium, but NELP strongly disagrees. First, the few specific standards OSHA cites cover only a portion of affected workers—the blasters performing abrasive blasting. But the workers exposed in these sectors include more than those workers who do the actual abrasive blasting. The record is clear that pot tenders/helpers and cleanup workers "have the potential for significant airborne beryllium exposure during blasting operations and during clean-up of spent abrasive material." 82 Fed. Reg. 2638. In construction, workers in job titles including laborers, welders, carpenters and electricians are exposed to beryllium. (NABTU; Dennis Johnson, USW; hearing statement, AFL-CIO.) Further, these standards do not offer the same protections as the ancillary provisions—and OSHA had already concluded that in the final rule issued in January 2017.

First, there is no existing standard that requires medical surveillance or medical removal protection for beryllium exposed workers in the shipyard or construction sectors. The particular importance of keeping these requirements is addressed further below in response to OSHA's second preamble question.

Second, the agency in the final rule issued in 2017, reviewed all the evidence and concluded the following:

> "The OSHA Ventilation standard in construction (1926.57) and Mechanical Paint Removal standards in shipyards (1915.34) provide some general protections for abrasive blasting workers but do not provide the level of protections provided by the ancillary provisions contained in the final standard such as medical surveillance, personal protective equipment, and beryllium-specific training." (82 CFR 2637)

NELP agrees with this conclusion. There is absolutely no evidence that can lead the agency to a different conclusion. The agency is completely wrong in stating that other standards, like the vaguely written personal protective equipment standard in construction (which also exists in a version in general industry) provides the protections offered by the ancillary provisions. The requirements for personal protective equipment (ppe) written in the final rule for shipyards and construction lay out clearly and specifically when and what type of ppe is required—requirements that do not exist in current standards. OSHA's logic that the current ppe standard in 1926.95, for example, says the same thing and provides the same protection as the requirements spelled out in the final rule promulgated in January 2017, would be akin to reasoning that OSHA doesn't really need to publish any new standards, since the OSHA law requires employers to provide a workplace free of recognized serious hazards. It is bogus logic to then conclude from this, that all employers currently protect workers above the new Beryllium STEL and PEL with protective equipment, that they assure the equipment is removed after the work shift according to a specific beryllium exposure control plan, that beryllium contaminated clothing is stored separately from street clothing, etc. Without the specific requirements contained in the final rule's provisions requiring ppe, employees will clearly not receive these protections because they are not now required.

In the preamble to the final rule, OSHA stated clearly that: "OSHA intends to ensure that workers exposed to beryllium in the construction and shipyard industries are provided with protection that is comparable to the protection afforded workers in general industry." 82 Fed. Reg. 2640.

In order to assure that beryllium exposed workers in the construction and shipyard industries do not suffer a significant risk of material impairment to health, OSHA must keep all the ancillary provisions for these sectors.

OSHA clearly confirms this finding in the final rule, in the FEA, V111-24; "As a result of eliminating all of the ancillary provisions, annualized benefits are estimated to decrease 71%." As these estimates show, OSHA expects that the benefits estimated under the final rule will not be fully achieved if employers do not implement the ancillary provisions of the final rule."

2) In particular, what is the incremental benefit if OSHA keeps the medical surveillance requirements for construction and shipyards described in the January 9, 2017 final rule, but revokes the other ancillary provisions? Alternatively, should OSHA keep some of the medical surveillance requirements for construction and shipyards but not others?

As stated in the response to the first question above, NELP opposes any revoking of any of the ancillary requirements contained in the final rule. Revoking any of these provisions will clearly cause workers in the shipyard and construction industries to remain at significant risk of disease and death. It would also run counter to the Occupational Safety and Health Act and court interpretations of the act. Further, OSHA clearly found in the final rule, that the "ancillary provisions such as personal protective clothing and equipment, regulated areas, medical surveillance, hygiene areas, housekeeping requirements, and hazard communication all serve to reduce the risks to beryllium exposed workers beyond that which the final TWA PEL alone could achieve." 82 Fed. Reg. 2619

3) OSHA is considering extending compliance dates of the in the January 9, 2017 for the shipyard and construction final rules.

NELP does not believe that additional time is necessary or warranted for employer compliance. OSHA gave employers over a year to comply with most of the provisions—and over three years for others. Should an employer in a specific worksite have a specific need, OSHA can address that with the Variance process.

NELP is concerned about the current state of the rule's implementation. OSHA has announced that it "will not enforce the January 9, 2017 shipyard and construction standards without further notice while this new rulemaking is underway." 82 Fed. Reg. 29,182. This would be tantamount to a stay that has been issued absent sufficient notice and comment as required by the Administrative Procedure Act. Cf. Clean Air Council v. Pruitt, No. 17-1145 (D.C. Cir, July 3, 2017).

Conclusion

As we have laid out in these comments, this proposal is completely flawed, not supported by evidence or reasons, contrary to legal authority, and thus should be completely disregarded. Rolling back any of the provisions in the January 9 final rule would subject workers in the shipyard and construction industry to suffer significant risk of material impairment of health and lead to more death and disease. NELP submits that the agency is bound by law and the combined rulemaking records to move forward with enforcement of the January 2017 rules issued for the shipyard and construction industry. NELP strongly opposes OSHA's proposal to revoke the ancillary provisions in the shipyard and construction standards. The agency must not revoke any of the provisions and must assure that the full standards are implemented according to the final rule promulgated on January 9, 2017.

Sincerely,

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