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March 16, 2017

The Honorable Mick Mulvaney  
Director  
Office of Management and Budget  
725 17th Street, NW  
Washington, DC 20503

Mr. Edward Hugler  
Acting Secretary of Labor  
U.S. Department of Labor  
200 Constitution Ave., NW  
Washington, DC 20210

Mr. Nicholas C. Geale  
Acting Solicitor of Labor  
U.S. Department of Labor  
200 Constitution Ave., NW  
Washington, DC 20210

RE: Proposed Delay of Effective Date Regarding the OSHA Rule on Occupational Exposure to Beryllium and Beryllium Compounds (OSHA-H005C-2006-0870)

Dear Director Mulvaney, Acting Secretary Hugler and Acting Solicitor Geale:

We are writing to oppose the 60-day extension of the effective date of the OSHA rule regarding Occupational Exposure to Beryllium. OSHA has proposed extending the effective date from March 21 to May 20, ostensibly to provide time for further review of questions of law and policy. Objections have been raised regarding the application of this rule to shipyards and construction workplaces, but these are based upon faulty assumptions regarding health risk, feasibility, and procedural due process. We set forth a response to the three main objections below.

*Erroneous Assumption #1.* OSHA has provided no scientific evidence that the occupational exposure to beryllium in the construction or shipyard context presents an identifiable or measureable health risk, given the miniscule amounts of workplace beryllium exposure in these industries.<sup>1</sup>

*Factual Response #1:* OSHA provided detailed scientific evidence regarding worker exposure to unsafe levels of airborne beryllium during abrasive grit blasting at Navy

<sup>1</sup> Comment letter from Hon. Bradley Byrne, Ranking Member, Workforce Protections Subcommittee, Committee on Education and the Workforce, U.S. House of Representatives, March 13, 2017

facilities and a shipyard. Air samples of abrasive blasting workers using coal slag found that potential inhalation exposures frequently exceed the new OSHA Permissible Exposure Limit (PEL) of  $0.2 \mu\text{g}/\text{m}^3$ , as well as the previous PEL of  $2.0 \mu\text{g}/\text{m}^3$ --a level which, if left in place, presents an excessive risk.<sup>2</sup> OSHA's *Final Economic Analysis* reported the following data regarding worker exposure levels:

- Twenty eight of the samples (42%) with detectable beryllium levels at Navy facilities were greater than the old (and demonstrably unsafe) PEL of  $2.0 \mu\text{g}/\text{m}^3$ .<sup>3</sup>
- Of the 66 samples available with detectable levels at these shipyards, the median beryllium exposure level was reported as  $0.44 \mu\text{g}/\text{m}^3$ -- which is twice the new PEL. Some samples were more than 300 times greater.

Multiple studies were considered by OSHA, including one sponsored by the National Institute for Occupational Safety and Health (NIOSH), which found that the average airborne concentrations of beryllium for abrasive blasting operations using coal slag are in excess of the new PEL level of  $0.2 \mu\text{g}/\text{m}^3$ , and in many cases in excess of the previous PEL of  $2 \mu\text{g}/\text{m}^3$ .<sup>4</sup>

On December 6, 2013, OSHA reported on beryllium exposures in the construction industry to the Advisory Committee on Construction Safety and Health (ACCSH). OSHA reported that 70% of inspected abrasive blasting worksites have detectable beryllium levels, with a mean level of  $3.7 \mu\text{g}/\text{m}^3$  and a median of  $0.6 \mu\text{g}/\text{m}^3$ ; 35% of abrasive blasting worksites were above the previous PEL of  $2.0 \mu\text{g}/\text{m}^3$ .<sup>5</sup>

Some have misleadingly suggested that because there are only low levels of beryllium in coal slag, there is no plausible risk to abrasive blasting workers. According to NIOSH, coal slag -- such as material marketed under the trade name "Black Beauty" -- contains only small amounts of beryllium (less than 0.1% by weight); but the nature of abrasive blasting operations results in toxicologically significant levels of respirable beryllium in the air.

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<sup>2</sup> OSHA Final Economic Analysis and Final Regulatory Flexibility Analysis (2016).  
<https://www.regulations.gov/document?D=OSHA-H005C-2006-0870-2042>

<sup>3</sup> OSHA (2016), Table IV-67.

<sup>4</sup> NIOSH (1998): NIOSH/ KTA-Tator, Evaluation of Substitute Materials for Silica Sand in Abrasive Blasting. NIOSH evaluated coal slags (including Black Beauty) with and without the addition of a dust suppressant compound and reported a geometric mean airborne concentration of  $2.040 \mu\text{g}/\text{m}^3$  for the entire coal slag category tested. Meeker (2006): Comparison of Occupational Exposures among Painters Using Three Alternative Blasting Abrasives, *Journal of Occupational and Environmental Hygiene*, September, 2006. This study found beryllium in clean coal slag samples, and found task-weighted personal exposures outside of the blasters' personal protective equipment that ranged from  $2.5$ - $9.5 \mu\text{g}/\text{m}^3$ , with a mean exposure of  $5 \mu\text{g}/\text{m}^3$ . NIOSH (2007): Crouch, Keith, et al. Evaluation of Substitute Materials for Silica Sand in Abrasive Blasting. This study considered exposures during abrasive blasting and found 8 hour TWA for blaster ranging from  $0.029$  to  $2.1 \mu\text{g}/\text{m}^3$ .

<sup>5</sup> U.S. Department of Labor, Occupational Safety and Health Administration, Advisory Committee on Construction Safety and Health (ACCSH), December 5-6, 2013, transcript page 89.

In sum, OSHA presented exhaustive data showing excessive risk to construction and shipyard workers from abrasive blasting with coal and copper slag, and concluded that compliance with the new PEL was technically feasible using personal protective equipment, engineering controls and monitoring. Further, OSHA concluded there were substitute materials, other than silica sand, that did not contain beryllium for many abrasive blasting applications which could be technically feasible.

*Erroneous Assumption #2:* The beryllium rule as it applies to construction and shipyard industries imposes extremely onerous requirements, is unnecessary, and could jeopardize the health of workers who are already protected against targeted risks.<sup>6</sup>

*Factual response #2:* The shipyard industry supports the new, more protective PEL, which rebuts the argument that the new rule is “onerous.”

Dru Branche, Director of Environmental, Health and Safety for Newport News Shipbuilding wrote:

*Newport News Shipbuilding supports lowering the permissible exposure limits for beryllium as it applies to General Industry in the proposal and as it would apply to Shipyard Employment as presented in Regulatory Alternative #2b.*<sup>7</sup>

This position was echoed by the Shipbuilders Council of America (SCA) whose members constitute the shipyard industrial base that builds, repairs, maintains, and modernizes U.S. Navy ships and craft, U.S. Coast Guard vessels of all sizes, as well as vessels for other U.S. government agencies.<sup>8</sup> Matt Paxton, the President of SCA, wrote:

*The SCA supports regulatory alternative 2b for modifying 1915.1000 in the Maritime Standards to reflect a change in the Permissible Exposure Limit for beryllium.*

Robert Knowles, Environmental, Safety and Health Division, Bath Iron Works (General Dynamics) wrote:

*Bath Iron Works supports Option 2b for modifying 1915.1000 in the Maritime Standards to reflect a change in the Permissible Exposure Limit for beryllium.*<sup>9</sup>

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<sup>6</sup> Ibid.

<sup>7</sup> Letter from Dru Branche, Director, Environmental, Health and Safety, Newport News Shipbuilding to OSHA, November 3, 2015. <https://www.regulations.gov/document?D=OSHA-H005C-2006-0870-1657>

<sup>8</sup> Letter from Matthew Paxton, Shipbuilders Council of America to OSHA, October 29, 2015. <https://www.regulations.gov/document?D=OSHA-H005C-2006-0870-1618>

<sup>9</sup> Letter from Robert Knowles, Bath Iron Works (General Dynamics) to OSHA, September 22, 2015. <https://www.regulations.gov/document?D=OSHA-H005C-2006-0870-1595>.

Remarkably, opponents contend this rule could jeopardize the health of workers. Yet advocates of workplace safety and health support coverage for construction and shipyard workers.

The AFL-CIO stated in its comments on the scope of the rule:

*The AFL-CIO supports...a scope that includes all potential occupations with beryllium exposure, including construction, maritime, and industries that use materials with less than 0.1% beryllium by weight.*<sup>10</sup>

The United Steelworkers (USW) Union, which represents workers in the shipyard and general industry sectors, stated:

*The agency should incorporate the maritime and shipyard industry into this rulemaking, and should consider that the exposure to beryllium and beryllium compounds occurs in far more workers than the previously cited figure of 949.*<sup>11</sup>

North America's Building Trades Unions, which perform construction work, wrote:

*The rule is long overdue, and necessary to protect construction workers, particularly those who do abrasive blasting with coal and copper slag who experience unacceptable exposures to this toxic substance.*<sup>12</sup>

The National Council for Occupational Safety and Health wrote:

*OSHA should ensure greater protections to beryllium exposed workers by extending the scope of the proposed standard to workers in the construction and maritime industries.*<sup>13</sup>

Public Citizen stated:

*Public Citizen urges OSHA to apply the PEL and the STEL, in addition to all ancillary provisions in the proposed rule, to the tens of thousands of construction and shipyard workers exposed to levels of airborne beryllium that can lead to*

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<sup>10</sup> Comments of the AFL-CIO on OSHA's Notice of Proposed Rulemaking, November 5, 2015. <https://www.regulations.gov/document?D=OSHA-H005C-2006-0870-1689>

<sup>11</sup> Post hearing brief of the United Steelworkers Union, May 6, 2016. <https://www.regulations.gov/document?D=OSHA-H005C-2006-0870-1963>

<sup>12</sup> Comments of Chris Trahan Cain, North America's Building Trades Unions, March 10, 2017. <https://www.regulations.gov/document?D=OSHA-H005C-2006-0870-2053>

<sup>13</sup> Letter from Jessica Martinez, National Council for Occupational Safety and Health to OSHA, November 6, 2015. <https://www.regulations.gov/document?D=OSHA-H005C-2006-0870-1690>

*lung cancer and CBD. Workers in these industries are often exposed to beryllium when performing abrasive blasting in outdoor settings.*<sup>14</sup>

*Erroneous Assumption #3:* There was not adequate notice of OSHA's intent to include construction and shipyard sectors in a final beryllium rule because proposed text for those sections was not made available. Thus, stakeholders did not have a "meaningful opportunity" to "debate the economic and technological feasibility of the requirements applicable to the construction and shipyard industries before those requirements were published in the final rule."<sup>15</sup>

*Factual Response #3:* In its August 7, 2015 Notice of Proposed Rulemaking, OSHA proposed a comprehensive health standard for beryllium-exposed workers employed in "general industry" which reduced the Permissible Exposure Limit (PEL) from 2.0  $\mu\text{g}/\text{m}^3$  to 0.2  $\mu\text{g}/\text{m}^3$  under 29 C.F.R. Part 1910. That Notice also invited comments on whether OSHA should broaden the "scope" of the rule to add coverage for construction industry workers under 29 C.F.R. Part 1926, and shipyard industry workers under 29 C.F.R. Part 1915. Alternatives for which comments were invited include:

*Regulatory Alternative #2a would expand the scope of the proposed standard to also include employers in construction and maritime. For example, this alternative 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.*

*Regulatory Alternative #2b would update §§ 1910.1000 Tables Z-1 and Z-2, 1915.1000 Table Z, and 1926.55 Appendix A so that the proposed TWA PEL and STEL would apply to all employers and employees in general industry, shipyards, and construction, including occupations where beryllium exists only as a trace contaminant. However, all other provisions of the standard would be in effect only for employers and employees that fall within the scope of the proposed rule.*

*Another regulatory alternative that would impact the scope of affected industries, extending eligibility for medical surveillance to employees in shipyards, construction, and parts of general industry excluded from the scope of the proposed standard, is discussed along with other medical surveillance alternatives later in this section...*

Given the diversity and highly detailed comments in the record regarding the coverage of shipyard and construction sectors, it is clear that interested parties had adequate notice of OSHA's intent to consider adding these two sectors.

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<sup>14</sup> Post Hearing Comments from Public Citizen, May 6, 2016.

<https://www.regulations.gov/document?D=OSHA-H005C-2006-0870-1964>

<sup>15</sup> Letter from Abrasive Blasting Manufacturers Alliance to OSHA, March 13, 2017



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The main complaint about the process comes from the Abrasive Blasting Manufacturers Alliance (ABMA), which oddly contends it is primarily concerned about the safety and health of abrasive blasting workers they do not even employ. They filed 24 pages of detailed comments on the rule on November 5, 2015, which explored the full range of concerns that they purportedly claim OSHA never had a chance to consider because the agency allegedly failed to provide adequate notice. It is laughable that ABMA can state they have been harmed because they lacked adequate notice to express their views, when it is plain they fully expressed their views. The real issue is that ABMA's arguments did not prevail, and they want another bite at the proverbial apple based on a specious procedural argument.

*Conclusion:* There is support from industry, labor, and the public for this rule. The only companies who vehemently object to this rule do not even employ abrasive blasters in the construction or shipyard industries. Rather, the objections come from a coalition of companies who oppose more stringent safety protections for their customers, because they are fearful that their customers may reduce coal slag consumption by, perhaps, using less harmful substitutes. Their commercial interests should not trump the health and safety protections of workers employed in construction and shipyards.

In conclusion, the record is clear: there is a significant risk to construction and shipyard workers from beryllium exposure at the previous PEL based on scientific data, a more protective standard is feasible, and there is overwhelming labor, industry, and public support. In light of the record, it is clear that a delay in the effective date will only lead to negative consequences for workers' health.

Please contact Richard Miller of the Committee on Education and the Workforce at 202-225-3725 with any questions.

Sincerely,



**ROBERT C. "BOBBY" SCOTT**

Ranking Member

Committee on Education and the Workforce

Cc: Dorothy Dougherty, Acting Assistant Secretary, Occupational Safety and Health Administration