

EPI comment regarding OSHA's proposal to revoke the beryllium rule

Public Comments • By [Heidi Shierholz](#) and [Julia Wolfe](#) • August 28, 2017

OSHA Docket Office
Docket No. OSHA–H005C–2006–0870
Room N-3653
U.S. Department of Labor
200 Constitution Avenue NW
Washington, D.C. 20210

Attention: RIN 1218–AB76– Occupational Exposure to Beryllium and Beryllium Compounds in Construction and Shipyard Sectors, Docket No. OSHA–H005C–2006–0870.

To the Department of Labor:

On January 9, 2017, OSHA published a Final Rule (FR) establishing a new Permissible Exposure Limit (PEL) for beryllium for general industry, construction and shipyards. The FR also established ancillary provisions, such as protective clothing and medical surveillance, to further limit workers' exposure to beryllium. On June 27, 2017, OSHA published a notice of proposed rule-making (NPRM) proposing to revoke the ancillary provisions for the construction and shipyard sectors.

The Economic Policy Institute (EPI) is a nonprofit, nonpartisan think tank created in 1986 to include the needs of low- and middle-income workers in economic policy discussions. We are writing to express our opposition to the Occupational Safety and Health Administration (OSHA) proposal to revoke the ancillary provisions limiting occupational exposure to beryllium in the construction and shipyard sectors. OSHA must adequately protect all workers exposed to beryllium, not only those in general industry. According to OSHA's own analysis, nearly one in five workers (18.6 percent) who are exposed to beryllium work in the construction and shipyard sectors and "the best available evidence indicates that there is a significant risk of CBD [chronic beryllium disease] and lung cancer to workers in construction and shipyards based on the exposure levels observed" (82 Fed. Reg. 2568; 82 Fed. Reg. 29221). If enacted, the NPRM will fail to fully protect workers in the construction and shipyard sectors from beryllium exposure and will increase the

incidence of beryllium-related death and illness. The cost of the resulting illness and death would outweigh any cost savings to businesses. Further, the proposed changes are based on assumptions that contradict those in the FR without providing new evidence to justify these claims. These changes are therefore arbitrary and capricious.

We urge OSHA not to revoke the ancillary provisions protecting construction and shipyard workers from beryllium exposure. The proposal to revoke these provisions was made without considering new evidence and, if finalized, will cost lives.

Enforcing the new PEL alone will not sufficiently reduce beryllium exposure. In the FR, OSHA found the remaining risk at the new PEL to be significant; however a lower PEL would not have been technologically feasible (82 Fed. Reg. 2471). To mitigate the remaining risk, OSHA added the ancillary provisions. Removing these provisions for the construction and shipyard sectors will put workers in these sectors at risk of low-level beryllium exposure, which OSHA has determined to be harmful. In the NPRM, OSHA estimates that 2,762.7 workers in the construction and shipyard sectors are exposed to beryllium levels between .05 and .1 $\mu\text{g}/\text{m}^3$ and 3,794.1 workers in those sectors are exposed to beryllium levels between .1 and .2 $\mu\text{g}/\text{m}^3$ (82 Fed. Reg. 29196). Although these levels are below the PEL, they are still harmful, placing workers at a higher risk of developing CBD (82 Fed. Reg. 2537). If the proposed changes in the NPRM are implemented, these workers will no longer be protected from beryllium exposure.

Revoking the ancillary provisions for the construction and shipyard sectors will result in six cases of CBD each year, four of them being fatal, which will reduce benefits by \$27.6 million annually, according to information provided in the final economic analysis (FEA). Given that the annual cost savings of removing the provisions will be less than \$11.9 million, the proposed changes in the NPRM, if implemented, would be more costly to society than the existing rule (OSHA 2016 VIII-8). This is an analysis of regulatory alternative #2a from the FEA, which was an alternative that excluded the construction and shipyard sectors from all aspects of the FR (OSHA 2016 VIII-8). Comparing alternative #2a to the FR allows us to isolate the benefits and costs of including the construction and shipyard sectors in the FR. When summarizing these findings in the NPRM, OSHA notes that the FEA found that the FR “would prevent 4 cases of fatal and 2 cases of non-fatal CBD annually in these two sectors. Almost all of these estimated benefits were the result of the ancillary provisions” (82 Fed. Reg. 29215). Although regulatory alternative #2a excluded the sectors from all aspects of the FR (not just the ancillary provisions but also the PEL), OSHA acknowledges that almost all of these benefits were the result of the ancillary provisions, as opposed to the PEL. Similarly, the cost savings from removing the PEL requirement for these industries is negligible, so it is appropriate to use the economic analysis from regulatory alternative #2a in assessing the NPRM.

The regulatory alternative described above was presented in the FR, but rejected. Thus, in order to justify proposing this alternative in the NPRM, OSHA had no choice but to assert that the assumptions in the final rule were wrong. They did so by arguing that the ancillary provisions will have no additional benefits to the construction and shipyard sectors because these sectors are already in 100 percent compliance with existing OSHA regulations that provide the same protections (82 Fed. Reg. 29216). This assumption is

very different from the assumption in the FR, which estimated that these sectors had a 75 percent compliance rate. No new information was provided to justify this change. In fact, OSHA admits in the NPRM that they “requested, **but did not receive**, additional data during the previous rulemaking about exposures in these operations [construction and shipyards] and about protections provided by other OSHA standards” (82 Fed. Reg. 29220; emphasis added). They go on to acknowledge that their decision to revoke the ancillary provisions in these sectors was made “in light of the **limited information** regarding exposures and the **potential** that other OSHA standards may offer protection from beryllium exposures” (82 Fed. Reg. 29220; emphasis added). In short, OSHA is proposing to put additional lives at risk based purely on speculation, not additional information.

Further, OSHA specifically argued in the FR that the new ancillary provisions would provide protections for construction and shipyard workers beyond existing OSHA regulations (82 Fed. Reg. 2637). OSHA suddenly changes course in the NPRM, arguing that existing regulations sufficiently protect these workers (82 Fed. Reg. 29197). OSHA claims that their decision to revoke the ancillary provisions for construction and shipyards was based partly on the inclusion of additional existing regulations in their analysis; however the FR already found some of these regulations to be insufficient. For example, in the NPRM, OSHA argues that some housekeeping is required in construction and shipyard by Code of Federal Regulation (CFR) 1926.57 and 1910.94 (82 Fed. Reg. 29197). However, in response to comments from Materion, OSHA stated in the FR that “The OSHA Ventilation standard referenced by Materion (29 CFR 1910.94) applies only to general industry and **does not cover construction and shipyard workers**. The OSHA Ventilation standard in construction (1926.57) and Mechanical paint removers standard in shipyards (1915.34) provide some general protections for abrasive blasting workers but **do not provide the level of protection provided by the ancillary provisions** contained in the final standards such as medical surveillance, personal protective clothing and equipment, and beryllium-specific training” (82 Fed. Reg. 2637; emphasis added).

OSHA’s decision to revoke the ancillary provisions for the construction and shipyard sectors is baseless and dangerous. Workers in these industries will continue to be exposed to unhealthy levels of beryllium and risk developing CBD. By limiting exposure to beryllium at levels that are below the PEL but still dangerous, the ancillary provisions would prevent approximately four deaths and two non-fatal cases of CBD per year. The monetary value of these benefits far exceeds the costs compliance. Furthermore, the new compliance estimates on which OSHA based their decision did not incorporate any additional evidence. Their new compliance estimates were based on the existence of additional OSHA regulations, some of which OSHA had earlier argued were insufficient. Given this, we urge OSHA not to revoke the ancillary provisions protecting construction and shipyard workers from beryllium exposure.

Sincerely,

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References

Occupational Exposure to Beryllium; Final Rule, 82 Fed. Reg. 2470 (January 9, 2017) (to be codified as 29 CFR Parts 1910, 1915, and 1926).

Occupational Exposure to Beryllium and Beryllium Compounds in Construction and Shipyard Sectors; Notice of Proposed Rule-Making, 82 Fed. Reg. 29182 (June 27, 2017) (to be codified as 29 CFR Parts 1915 and 1926).

Occupational Safety and Health Administration (OSHA). 2016. Final Economic Analysis and Final Regulatory Flexibility Analysis: Supporting Document for the Final Rule for Occupational Exposure to Beryllium. U.S. Department of Labor.