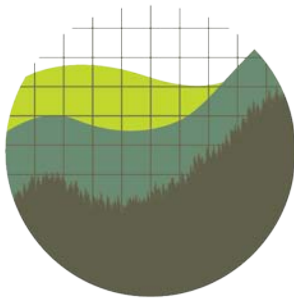

August 28, 2017

Maureen Ruskin, Directorate of Standards and Guidance, OSHA

Attn.: Docket ID No. OSHA-H005C-2006-00870

Subject: Comments on the Proposed Revocation of Ancillary Provisions on Exposure to Beryllium in Construction and Shipyard Sectors

The Institute for Policy Integrity ("Policy Integrity") at New York University School of Law[1] respectfully submits the following comments regarding OSHA's cost-benefit analysis in support of its proposed revocation of ancillary standards to protect workers in the construction and shipyard sectors from exposure to beryllium.

As OSHA acknowledges, under judicial interpretations of the Occupational Safety and Health Act, while the agency cannot base standards directly on a cost-benefit analysis, OSHA also "cannot choose an alternative that provides a lower level of protection because it is less costly."[2]

In this proposal, OSHA asserts that workers "will have limited to no foregone benefits" in terms of reduced health protection "as a result of withdrawing the ancillary provisions"[3]—provisions that include exposure assessments, beryllium regulated areas, written exposure control plans, protective work clothing, hygiene areas and practices, housekeeping, medical surveillance, medical removal, and worker training. At the same time, OSHA calculates $11 million in annual cost savings, and these estimated cost savings feature prominently in the agency's preamble justifying its proposed rule.[4]

But when the ancillary standards were finalized a mere seven months ago in January 2017, OSHA calculated that the ancillary standards would generate over $27 million per year in health benefits in the construction and shipyard sectors.[5] Thus, it is hard to believe that OSHA can now revoke the same standards with only "limited to no foregone benefits."

Indeed, OSHA's finding of "limited to no foregone benefits" lacks an adequate explanation. OSHA's assumption of "limited to no foregone benefits" is seemingly based on a single fact: OSHA's original "benefit estimates did not account for compliance with PPE [personal protective equipment] and housekeeping provisions by shipyard welders and construction and shipyard abrasive blasting workers." OSHA claims it mistakenly had calculated the pre-existing baseline use of personal protective equipment at 75%, and that it now believes that the compliance rate is 100% in the relevant industries,[6] and for that reason alone none of the ancillary standards provide any

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[1] This document does not purport to present New York University School of Law's views, if any.

[2] 82 Fed. Reg. 29,182, 29,185 (June 27, 2017) (citing *Int'l Union, UAW v. OSHA*, 37 F.3d 665, 668 (D.C. Cir. 1994)).

[3] *Id.* at 29,186.

[4] *Id.* at 29,201, 29,212-13, 29,215, 29,217.

[5] In the proposed revocation, OSHA states that "[a]lmost all" of the estimated $27 million in benefits to the construction and shipyard sectors—including preventing 4 fatal cases and 2 non-fatal cases of CBD per year—"were the result of the ancillary provisions." *Id.* at 29,215.

[6] As OSHA states in the proposed revocation, "[i]n the 2016 FEA, OSHA estimated that abrasive blasters in construction and shipyards had a 75 percent compliance rate with the PPE requirements in the beryllium standards. However, upon further review of existing OSHA standards, OSHA is revising that estimate to 100 percent compliance for the purpose of this preliminary economic analysis." *Id.* at 29,197.

meaningful benefits. According to OSHA, once it adjusted the *"*baseline compliance estimates," it found that *"[a]s a result*" there would be *"limited to no benefits* in terms of reduced cases of CBD [chronic beryllium disease] *attributed to the ancillary provisions* for the construction and shipyards standards."[7]

But even assuming OSHA is correct that the industries already use personal protective equipment 100% of the time and so there would be no benefits from a new regulation requiring use of that equipment, the required use of personal protective equipment was just one of nine standards included in the ancillary provisions. OSHA offers no explanation for why the other eight standards can now be revoked without any significant loss of the $27 million per year in health benefits generated by the package of nine ancillary standards.

For example, OSHA continues to estimate that the pre-existing baseline rate of one of the other ancillary measures—exposure assessments—is 0%,[8] meaning that if all the ancillary provisions are revoked, industry will not conduct exposure assessments. OSHA now implies that exposure assessments would generate no benefits. Yet only seven months ago, OSHA found exposure assessments to be a beneficial and necessary requirement. In that original rule, OSHA wrote: "These [exposure assessment] provisions are important because assessing employee exposure to toxic substances is a well-recognized and accepted risk management tool," which allows:

> determination of the extent and degree of exposure at the worksite; identification and prevention of employee overexposure; identification of the sources of exposure to beryllium; collection of exposure data so that the employer can select the proper control methods to be used; and evaluation of the effectiveness of those selected methods.[9]

In the economic analysis to support the January 2017 rule, one of the first and key reasons OSHA gave to explain the "need for regulation" was that "imperfect information about job hazards is present at several levels that reinforce each other: employers frequently lack knowledge about workplace hazards and how to reduce them; workers are often unaware of the workplace health and safety risks to which they are exposure; and workers typically have difficulty in understanding the risk information they are able to obtain."[10] OSHA concluded that "without regulation, many employers are unlikely to make themselves aware of the magnitude of beryllium-related health risks in the workplace or of the availability of effective ways of ameliorating or eliminating these risks."[11] The exposure assessments directly address that need for regulation.

OSHA has not adequately explained why it can revoke these same "important" ancillary standards without lowering the level of health protection for workers in these industries in violation of the Occupational Safety and Health Act. Moreover, its explanation "runs counter to the evidence before the agency" and "entirely fail[s] to consider an important aspect of the problem,"[12] and, therefore, is arbitrary and capricious under the Administrative Procedure Act.

Sincerely,
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[7] *Id.* at 29,216 (emphasis added).
[8] *Id.* at 29,199.
[9] 82 Fed. Reg. 2470, 2651 (Jan. 9, 2017).
[10] OSHA, Final Economic Analysis and Final Regulatory Flexibility Analysis: Supporting Document for the Final Rule for Occupational Exposure to Beryllium at II-5 (2016).
[11] *Id.* at II-6.
[12] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).