

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

NATIONAL ASSOCIATION OF)
HOME BUILDERS; MASON)
CONTRACTORS ASSOCIATION)
OF AMERICA; and ASSOCIATED)
BUILDERS AND CONTRACTORS,)

Petitioners,)

v.)

U.S. OCCUPATIONAL SAFETY &)
HEALTH ADMINISTRATION and)
U.S. DEPARTMENT OF LABOR,)

Respondents,)

and)

UNITED STEEL, PAPER AND)
FORESTRY, RUBBER,)
MANUFACTURING, ENERGY,)
ALLIED INDUSTRIAL & SERVICE)
WORKERS INTERNATIONAL)
UNION, AFL-CIO, CLC,)

Intervenor.)

NATIONAL ASSOCIATION OF)
HOME BUILDERS, et al.,)

Petitioners,)

v.)

Civ. Nos. 17-1651
& 20-2414

OSHA, et al.)
)
 Respondents.)
)
_____)

SETTLEMENT AGREEMENT

The parties to this Settlement Agreement (“Agreement”) are the Occupational Safety and Health Administration, United States Department of Labor (“OSHA”) and National Association of Home Builders, Mason Contractors Association of America, and Associated Builders and Contractors (“Construction Petitioners”).¹

WHEREAS, on January 9, 2017, OSHA promulgated and published in the Federal Register at 82 Fed. Reg. 2470–2757 a final rule entitled “Occupational Exposure to Beryllium,” which is codified at 29 C.F.R. § 1926.1124 (hereinafter, “the Beryllium Construction Standard”), 29 C.F.R. § 1910.1024, and 29 C.F.R. § 1915.1024.

WHEREAS, Construction Petitioners filed a petition for review of the final rule entitled “Occupational Exposure to Beryllium” in the United States Court of Appeals for the District of Columbia, which was subsequently transferred to this Court and docketed as case number 17-1651.

WHEREAS, on September 30, 2019, OSHA published in the Federal Register at 84 Fed. Reg. 51377-51400 a final rule entitled “Occupational Exposure to Beryllium and Beryllium Compounds in Construction and Shipyard Sectors,” in which OSHA declined to adopt certain revisions to the Beryllium Construction Standard that it had proposed in a Notice of Proposed Rulemaking issued on June 27, 2017.

WHEREAS, Construction Petitioners filed a petition for review of the September 30, 2019 final rule in the Court of Appeals for the District of Columbia, which was consolidated with other petitions for review of the same rule in the Court of Appeals for the Third Circuit, and ultimately transferred to this Court at Construction Petitioners’ request and docketed as case number 20-2414 on July 13, 2020.

WHEREAS, OSHA and Construction Petitioners have diligently engaged in complex settlement discussions to resolve Construction Petitioners’ concerns regarding both the January 7, 2017 and the September 30, 2019 final rules;

NOW, THEREFORE, in light of the complexity of the issues raised by this matter and to avoid the expense and uncertainty of litigation, the parties have reached a mutually agreeable settlement of the litigation, and do hereby agree to the following terms:

¹ The following cases involving the same agency actions are also before the Court: Case Nos. 17-1124; 17-1270; 17-1448; 17-1546; 17-1638; 17-1645; 20-2407; 20-2408; 20-2413; 20-2416. Petitioners in these related cases are not parties to this settlement agreement.

1. **Guidance Document.** (a) Within thirty (30) days of the execution of this agreement, OSHA agrees to include the language specified in Appendix A (“FAQ”) on the Agency’s web page titled Frequently Asked Questions: Beryllium and Beryllium Compounds.

(b) After publication of the FAQ, OSHA shall not amend, modify, rescind, or change any language specified in the FAQ within seven (7) years of the execution of this agreement except pursuant to the following procedure:

(1) OSHA shall notify Construction Petitioners in writing at least thirty (30) days before OSHA adopts any contemplated change; and

(2) OSHA shall meet with Construction Petitioners upon request to discuss the contemplated changes before any changes are adopted.

(c) Construction Petitioners agree to file a motion to dismiss with prejudice their petitions for review of both the January 7, 2017 final rule (case no. 17-1651) and the September 30, 2019 final rule (case no. 20-2414) within thirty (30) days of publication of the FAQ.

2. **Effect of Agreement.** Notwithstanding anything in this Agreement to the contrary, nothing in this Agreement constitutes an admission of law or fact by any of the parties hereto for purposes of this litigation or in any other legal proceeding. By entering into this Agreement, the parties do not concede the validity or invalidity of any claim or argument that any party could have raised in this litigation.

3. **Scope and Amendment of Agreement.** Appendix A is incorporated by reference in this Agreement, which contains the full and complete agreement between OSHA and Construction Petitioners with respect to the matters covered herein. Any prior conversations, meetings, discussions, drafts, and writings of any kind with respect to the matters covered herein are specifically superseded by this Agreement. No modification of this Agreement shall be effective unless it is in writing and signed by OSHA and Construction Petitioners.

4. **Attorneys’ Fees and Costs.** Each party agrees to bear its own attorneys’ fees, costs, and other expenses that have been incurred in connection with the filing of the petitions for review and the negotiation of this Agreement.

5. **Execution.** (a) This Agreement is effective upon completion of the signing of the Agreement by OSHA and Construction Petitioners. Each person who signs this Agreement in a representative capacity warrants that he or she is duly authorized to do so.

(b) This agreement may be executed in any number of counterparts, each of which when executed shall be deemed an original. All counterparts together shall constitute a single original agreement.

IN WITNESS WHEREOF, OSHA and Construction Petitioners have executed the foregoing Settlement Agreement or counterparts thereof, intending to be legally bound.

Agreed to this ____ day of August 2020.

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Appendix A

OSHA agrees to publish the following FAQ within 30 days of the effective date of this agreement.

Beryllium is present in trace amounts in rock and soil and in some common building materials such as concrete and brick. Are the requirements of the beryllium standard in construction—such as the requirement to assess and monitor exposures—triggered by handling, processing, or otherwise being exposed to these materials on construction worksites?

Except as discussed below, when performing tasks at the typical construction site, exposure to common building materials containing trace amounts of beryllium will normally not trigger the requirements of the beryllium standard. The beryllium standard applies to occupational exposure to beryllium in all forms, compounds, and mixtures in the construction industry. However, the rule exempts from coverage materials containing less than 0.1 percent beryllium by weight where the employer has objective data demonstrating that employee exposure to beryllium will remain below the action level of $0.1 \mu\text{g}/\text{m}^3$, as an 8-hour time weighted average, under any foreseeable conditions. When these circumstances are met, none of the requirements of the standard apply.

OSHA's analysis of its own sampling data demonstrates that exposures from construction operations involving rock, soil, and concrete are highly unlikely to exceed the action level in typical circumstances. Given the low levels of beryllium in rock, soil, and concrete, airborne dust concentrations would have to be extremely high for exposures to even approach the beryllium action level.² The same is true for brick, which may contain beryllium in trace amounts comparable to these materials.³ Dust concentrations from rock, soil, concrete, or brick would typically exceed the permissible exposure limit (PEL) for total airborne dust ($15 \text{ mg}/\text{m}^3$), or particulates not otherwise classified (PNOC), long before the beryllium action level is reached. In the case of concrete, the level of airborne dust required to reach the beryllium action level would also surpass the PEL for respirable crystalline silica ($50 \mu\text{g}/\text{m}^3$) many times over. Thus, the action level for beryllium would only be reached under extremely dusty conditions that would also exceed the PELs for PNOC and respirable crystalline silica.

OSHA considers this data sufficient to demonstrate that exposure to rock, soil, concrete, and brick at the typical construction site will not result in beryllium exposure above the action level under foreseeable conditions. Outside of the materials listed above and certain abrasive blasting media (*see* FAQ: *Who is at risk from exposure to beryllium?*), OSHA is not aware of any other building materials at the typical construction site that contain beryllium. However, for any material containing comparable levels of beryllium, an employer may rely on objective data that exposures in its operations are consistently below the PEL for PNOC to demonstrate that exposure from these materials would not exceed the beryllium action level under foreseeable conditions.

² *See* Beryllium Air Samples at Construction Sites: An Analysis of OSHA OIS Sample Results 2012-2018, available in the rulemaking docket as [Document ID OSHA-H005C-2006-0870-2235 \(click to follow link\)](#). The beryllium content of soil and rock averages less than 2 ppm while the beryllium content of concrete is typically less than 1 ppm. *See id.* pp. 2, 6.

³ Some bricks may contain up to 50% fly ash, which in turn may contain beryllium in trace amounts. *See* Beryllium Final Rule (2017), Final Economic Analysis, Chapter IV, pp. 651-52, available at <https://www.regulations.gov/document?D=OSHA-H005C-2006-0870-2042>.

However, if an employer has reason to believe that the materials at its particular worksite contain beryllium at levels significantly above average—for example, the employer is performing construction tasks at a beryllium manufacturing facility—or that a particular process produces abnormally high levels of dust such that beryllium exposure might foreseeably reach the action level (as with abrasive blasting), that employer would be required to comply with the applicable provisions of the beryllium standard. In determining whether either of these scenarios applies, a construction employer may rely on objective data provided by an individual qualified by knowledge or experience to assess beryllium exposures at the employer's worksite.