

Memorandum

To : ALL STANDARDS BOARD MEMBERS

Date: August 8, 2017

From : **Occupational Safety and Health Standards Board**

David Kernazitskas, MSPH, CIH, CSP
Senior Safety Engineer – Standards

Subject: **Occupational Exposure to Beryllium (Horcher)**

At the July 20, 2017 Public Hearing, the Occupational Safety and Standards Board considered revisions to California Code of Regulations, Title 8, Construction, General Industry, and Ship Building, Ship Repairing and Ship Breaking Safety Orders, New Sections 1535.1, 5205, 8359.1, and existing Section 5155, Occupational Exposure to Beryllium (HORCHER). The proposed regulations are substantially the same as those promulgated by Federal OSHA.

Labor Code Section 142.3(a)(3) exempts the Board from providing a comment period when adopting a standard substantially the same as a federal standard. However, as indicated in the Notice (Informative Digest), the Board is accepting limited comments for the following three purposes:

1. To identify any clear and compelling reasons for California to deviate from the federal standard; and,
2. To identify any issues unique to California related to this proposal which should be addressed in this rulemaking and/or a subsequent rulemaking; and,
3. To solicit comments on the proposed effective dates.

As a result of public comments, there were no modifications to the original proposal.

SUMMARY AND RESPONSE TO WRITTEN AND ORAL COMMENTS

I. Written Comments

Mr. Jeffrey M. Tanenbaum, Esq. and Ms. Traci Bernard-Marks, Esq., Nixon Peabody LLP, on behalf of Canam Minerals, Inc., and the Abrasive Blasting Manufacturers Alliance, by letter dated July 18, 2017.

Ms. Elizabeth Treanor, Director, Phylmar Regulatory Roundtable – OSH Forum, by letter dated July 18, 2017.

Mr. Terence M. Civic, Consultant for Materion Brush, Inc., by letter dated July 13, 2017.

Comment 1:

The commenters commented that it is not appropriate to proceed with a Horcher rulemaking where the federal rule under consideration is the subject of an open federal notice and comment rulemaking procedure. The commenters assert that a final federal rule has not been

“promulgated” because the recently published Notice of Proposed Rulemaking aims to remove major portions of the January 9, 2017 final rule.

Response:

Labor Code Section 142.3 mandates the Board adopt regulations at least as effective as federal regulations addressing occupational safety and health issues within 6 months of promulgation. The date of promulgation is understood by the Board and enforced by federal OSHA as the date a final rule is published in the Federal Register—in this case, January 9, 2017.

The Board understands the commenters’ concerns about the proposed changes to the final rule, but per Labor Code, has scheduled the rulemaking for adoption. Should the June 27, 2017, proposed amendments to the beryllium regulation be promulgated, the Federal Register will note such changes, and California will again evaluate the need for amendments to Title 8.

Mr. Jeffrey M. Tanenbaum, Esq. and Ms. Traci Bernard-Marks, Esq., Nixon Peabody LLP, on behalf of Canam Minerals, Inc., and the Abrasive Blasting Manufacturers Alliance, by letter dated July 18, 2017.

Comment 2:

“The explanation for Fed/OSHA’s new rulemaking provides compelling reasons why the Board should not proceed with new beryllium safety orders, at least with regard to construction and shipyards, at this time.” The commenter states that “Fed/OSHA initially concluded that there was insufficient evidence for new beryllium standards for [the construction and shipyard] industries,” and “[it] was only at the very end of the rulemaking process, without any proposed rule for construction and shipyards having been published for notice and comment, that Fed/OSHA suddenly added in these two industries.”

Response:

The Board understands the commenters’ concerns about the substance of the federal rulemaking process, but asserts that such concerns do not alter the Board’s obligations.

The Board refers the commenter to the response to Comment 1.

Mr. Jeffrey M. Tanenbaum, Esq. and Ms. Traci Bernard-Marks, Esq., Nixon Peabody LLP, on behalf of Canam Minerals, Inc., and the Abrasive Blasting Manufacturers Alliance, by letter dated July 18, 2017.

Ms. Elizabeth Treanor, Director, Phylmar Regulatory Roundtable – OSH Forum, by letter dated July 18, 2017.

Mr. Terence M. Civic, Consultant for Materion Brush, Inc., by letter dated July 13, 2017.

Comment 3:

The commenters state that “Cal/OSHA is already at least as effective as Fed/OSHA with regard to regulating beryllium [in the construction and shipyard industries] and thus there is no need to proceed with this rulemaking.” Therefore, they assert, the proposed orders “are not needed as a matter of law to keep Cal/OSHA at least as effective as Fed/OSHA.”

Response:

Some regulations governing employee exposure to beryllium and beryllium compounds already exist in the Construction Safety Orders and the Ship Repairing and Ship Breaking Safety Orders. The regulations proposed for adoption present vertical standards that the Board believes offer more protection to workers in these industries than the less-detailed regulations in Title 8.

Mr. Jeffrey M. Tanenbaum, Esq. and Ms. Traci Bernard-Marks, Esq., Nixon Peabody LLP, on behalf of Canam Minerals, Inc., and the Abrasive Blasting Manufacturers Alliance, by letter dated July 18, 2017.

Comment 4:

“There is no evidence that the proposed construction and shipyard rules are necessary to prevent material impairment of health or functional capacity.” The commenter points out that the federal rule was developed using exposure data from other than the construction and shipyard industries, and that “information and data outside of the general industry was ‘limited’.”

Response:

The Board refers the commenter to the response to Comment 1.

Mr. Jeffrey M. Tanenbaum, Esq. and Ms. Traci Bernard-Marks, Esq., Nixon Peabody LLP, on behalf of Canam Minerals, Inc., and the Abrasive Blasting Manufacturers Alliance, by letter dated July 18, 2017.

Comment 5:

There is no evidence that the proposed construction and shipyard rules are feasible or reasonable.

Response:

The Board refers the commenter to the response to Comment 1.

Mr. Jeffrey M. Tanenbaum, Esq. and Ms. Traci Bernard-Marks, Esq., Nixon Peabody LLP, on behalf of Canam Minerals, Inc., and the Abrasive Blasting Manufacturers Alliance, by letter dated July 18, 2017.

Ms. Elizabeth Treanor, Director, Phylmar Regulatory Roundtable – OSH Forum, by letter dated July 18, 2017.

Mr. Terence M. Civic, Consultant for Materion Brush, Inc., by letter dated July 13, 2017.

Comment 6:

The commenters request that if the Board proceeds with the present rulemaking effort, the effective dates of the standard be delayed until the construction and shipyard proposed amendments have been promulgated. They point out that Fed/OSHA stated in the Notice of Proposed Rulemaking that it will not enforce the beryllium standards for construction and shipyards until the rulemaking effort is complete.

Response:

The Board refers the commenters to the response to Comment 1. The earliest compliance date for the January 9, 2017, final rule for beryllium is March 12, 2018. The Board does not have the authority to adjust the effective dates of this standard using the Horcher process.

Mr. Doug Parker, Executive Director, Worksafe, Inc., by letter dated July 19, 2017.

Mr. Jeremy Smith, Deputy Legislative Director, State Building and Construction Trades Council, by letter dated July 19, 2017.

Mr. Timothy Shadix, Worksafe, Inc., by email letter dated July 20, 2017.

Comment 7:

The commenters request the Board adopt the January 9, 2017, federal final rule addressing occupational exposure to beryllium and beryllium compounds in accordance with Labor Code Section 142.3(a).

Response:

In accordance with Labor Code Section 142.3(a)(3), the Board proposes to adopt the federal final rule for occupational exposure to beryllium and beryllium compounds using the Horcher process.

Ms. Amber Rose, Area Director, Region IX, OSHA, U.S. Department of Labor, by letter dated June 27, 2017.

Comment:

Ms. Rose commented that federal OSHA has reviewed the proposal and found it to be commensurate with federal standards.

Response:

The Board thanks federal OSHA for their review.

The Board thanks the commenters for their comments and participation in the Board's rulemaking process.

II. Oral Comments:

Mr. Paul J. Mellon Jr., Director of Sales, Abrasives, Strategic Materials, Inc., in testimony given July 20, 2017.

Mr. Timothy Shadix, Worksafe, Inc., in testimony given July 20, 2017.

Comment 1:

The commenters spoke in support of the adoption of the January 9, 2017, federal final rule addressing occupational exposure to beryllium and beryllium compounds in accordance with Labor Code Section 142.3(a).

Response:

In accordance with Labor Code Section 142.3(a)(3), the Board proposes to adopt the federal final rule for occupational exposure to beryllium and beryllium compounds using the Horcher process.

Ms. Elizabeth Treanor, Phylmar Regulatory Roundtable, in testimony given July 20, 2017.

Mr. Terence Civic, Materion Brush, Inc., in testimony given July 20, 2017.

Mr. Fionn O'Neill, Kleen Blast Abrasives, in testimony given July 20, 2017.

Mr. Jeffrey M. Tanenbaum, Esq., Nixon Peabody LLP, on behalf of Canam Minerals, Inc., Kleen Blast Abrasives, and the Abrasive Blasting Manufacturers Alliance, in testimony given July 20, 2017.

Mr. Jim Spurgeon, Canyon Minerals, in testimony given July 20, 2017.

Mr. Kevin Bland, on behalf of Western Steel Council, in testimony given July 20, 2017.

Comment 2:

The commenters said that because of the June 27, 2017, Notice of Proposed Rulemaking, the final federal rule for beryllium and beryllium compounds is not final. They also stated that there are several lawsuits underway on the new rule. They requested the Board wait until the federal rulemaking process is completed before moving forward with the adoption of an equivalent standard.

Response:

The Board refers the commenters to the response to Comment 1 in the Written Comments section above.

Ms. Elizabeth Treanor, Phylmar Regulatory Roundtable, in testimony given July 20, 2017.

Mr. Fionn O'Neill, Kleen Blast Abrasives, in testimony given July 20, 2017.

Mr. Jeffrey M. Tanenbaum, Esq., Nixon Peabody LLP, on behalf of Canam Minerals, Inc., Kleen Blast Abrasives, and the Abrasive Blasting Manufacturers Alliance, in testimony given July 20, 2017.

Comment 3:

The commenters pointed out that California already has a permissible exposure limit for employees working with beryllium and beryllium compounds that is equivalent to the federal proposal. Additionally, they stated that California has other standards that equivalently protect employees exposed to beryllium.

Response:

The Board refers the commenters to the response to Comment 3 in the Written Comments section above.

Ms. Elizabeth Treanor, Phylmar Regulatory Roundtable, in testimony given July 20, 2017.

Mr. Terence Civic, Materion Brush, Inc., in testimony given July 20, 2017.

Comment 4:

The commenters requested that the Board take no action on the proposal at this time. If the Board does not delay the adoption of the present proposal, it should delay the effective date.

Response:

The Board refers the commenters to the response to Comment 6 in the Written Comments section above.

Mr. Fionn O'Neill, Kleen Blast Abrasives, in testimony given July 20, 2017.

Mr. Jim Spurgeon, Canyon Minerals, in testimony given July 20, 2017.

Comment 5:

The commenters said that the proposal would cost small businesses a lot of money, putting some of them out of business or forcing them to lay-off employees. They opined that only large companies could afford the costs.

Response:

The Board refers the commenters to the response to Comment 1 in the Written Comments section above.

Mr. Jeffrey M. Tanenbaum, Esq., Nixon Peabody LLP, on behalf of Canam Minerals, Inc., Kleen Blast Abrasives, and the Abrasive Blasting Manufacturers Alliance, in testimony given July 20, 2017.

Comment 6:

The commenter said that the rulemaking for beryllium in construction and shipyards is not yet final; therefore, using the Horcher process to expedite adoption is unnecessary.

Response:

The Board refers the commenters to the response to Comment 1 in the Written Comments section above.

Mr. Jeffrey M. Tanenbaum, Esq., Nixon Peabody LLP, on behalf of Canam Minerals, Inc., Kleen Blast Abrasives, and the Abrasive Blasting Manufacturers Alliance, in testimony given July 20, 2017.

Comment 7:

The commenter said that the Fed/OSHA rulemaking does not contain any studies showing adverse health effects from beryllium exposure to employees in the construction and shipyard industries. He said that employees in these sectors are typically exposed to levels below California's permissible exposure limit for beryllium.

Response:

The Board refers the commenter to the response to Comment 2 and Comment 3 in the Written Comments section above.

The Board thanks the commenters for their comments and participation in the Board's rulemaking process.

Mr. Dave Harrison, Occupational Safety and Health Standards Board Member, in testimony given on July 20, 2017.

Comment:

Mr. Harrison asked about the differences between the joint labor/management proposal delivered to federal OSHA and the final rule that was produced. He stated that he would like to continue forward with the Horcher adoption of the beryllium rule.

Response:

The Board is unable to reliably and accurately obtain the requested information in an expedited manner. Board staff discussion after the public hearing with some of the stakeholders present indicated that some of the concerns centered on sources of beryllium exposure hazards and housekeeping specifics. Should the Board desire a more complete analysis of the joint proposal, staff would need additional time to compile the information.

Ms. Laura Stock, Occupational Safety and Health Standards Board Member, in testimony given on July 20, 2017.

Comment:

Ms. Stock said that she favors continuing with the Horcher process to adopt the federal standards, pointing out that lawsuits and uncertainty often plague rulemakings at the federal level. She requested Board staff provide information on the extent to which the joint labor/management proposal delivered to federal OSHA is reflected in the final rule.

Response:

The Board refers the commenter to the responses to Mr. Harrison, Written Comment 1, and Written Comment 7.

Ms. Chris Laszcz-Davis, Occupational Safety and Health Standards Board Member, in testimony given on July 20, 2017.

Comment:

Ms. Laszcz-Davis asked if the Board does nothing, are workers still protected.

Response:

The regulations proposed for adoption present vertical standards that the Board believes offer more protection to workers in these industries than the less-specific regulations currently in Title 8. However, some regulations affecting employee exposure to beryllium and beryllium compounds do exist in Title 8.

The following standards specifically mention beryllium (among other hazardous materials, e.g. chromium, lead, and mercury):

- §5150. Ventilation and Personal Protective Equipment Requirements for Welding, Brazing and Cutting.
- §1536. Ventilation Requirements for Welding, Brazing, and Cutting.
- §8357. Inert-Gas Shielded Metal-Arc Welding

Various other standards more generally applicable, including:

- §3203 “Injury and Illness Prevention Program,”
- §5144 “Respiratory Protective Equipment”
- §5151 “Ventilation and Personal Protective Equipment Requirements for Abrasive Blasting Operations.”
- §5194 “Hazard Communication”
- Article 9 “Sanitation”
- Article 10 “Personal Safety Devices and Safeguards”, etc.

Ms. Barbara Smisko, Occupational Safety and Health Standards Board Member, in testimony given on July 20, 2017.

Comment:

Ms. Smisko asked if the Horcher would include the beryllium Short Term Exposure Limit (STEL) of 2.0 micrograms per cubic meter of air. She asked if the current proposal would add protections for employees that are not already included in California’s regulations. She asked about the Board’s options for moving forward.

Response:

The STEL is part of the Horcher package and not currently in California’s Title 8 regulations for beryllium. If adopted, the STEL would apply to all industries in California.

To the best of Board staff’s understanding, adopting the current proposal would be the option most closely conforming with the requirement of Labor Code Section 142.3(a)(4), to have, within six months of federal standard “promulgation,” equivalent or superior Title 8 safety order standards concerning beryllium exposure, either in place, or a state standard whose adoption is “imminent.”

The Labor Code does not identify other options for compliance with federal final rules. In the event the Board were not to adopt all or part of the present proposal, it could direct the Board staff to undertake development of a proposal to regulate beryllium exposure by means of expanded (non-Horcher) rulemaking, inclusive of existing or new California specific requirements providing for occupational safety and health equivalent or superior to that provided by the present proposal.

DETERMINATION OF MANDATE

These regulations do not impose a mandate on local agencies or school districts.