MEMORANDUM FOR:  Beryllium Construction and Shipyards Hearing Participants

FROM:  LOREN SWEATT
Principal Deputy Assistant Secretary of Labor

SUBJECT:  Hearing and Post-Hearing Procedures for OSHA’s Occupational Exposure to Beryllium and Beryllium Compounds in Construction and Shipyard Sectors Notice of Proposed Rulemaking

The Occupational Safety and Health Administration (OSHA or the agency) is setting hearing and post-hearing procedures for its Notice of Proposed Rulemaking (NPRM) on Occupational Exposure to Beryllium and Beryllium Compounds in Construction and Shipyard Sectors published in the Federal Register on October 8, 2019 (84 FR 53902; Docket No. OSHA-H005C-2006-0870). These procedures address: the hearing schedule, the nature of the hearing, availability of hearing testimony, the conduct of the rulemaking hearing, and post-hearing submissions. OSHA is issuing these procedures to ensure that the hearing proceeds in a fair, orderly, and timely manner.

I. General Information

1. Hearing Dates. The hearing will be held on Tuesday, December 3, 2019, in the auditorium of the U.S. Department of Labor, 200 Constitution Avenue, NW, Washington, DC 20210. The hearing will begin at 9:30 a.m. and is scheduled to end at 5:30 p.m.; however, the exact schedule may be amended at the discretion of the presiding Administrative Law Judge (ALJ).

2. Authority and Nature of the Hearing. OSHA conducts its rulemaking hearings in accordance with Section 6(b)(3) of the OSH Act, 29 U.S.C. 655(b)(3), and the Secretary of
Labor's procedural regulations in 29 CFR Part 1911.15 through 1911.18. This OSHA rulemaking hearing is a legislative-type hearing, not an adjudicative one. It is an informal administrative proceeding, intended for information gathering and clarification. The procedural rules governing the hearing are intended to facilitate the development of a clear, accurate, and complete record, while assuring fairness and due process. The rules of evidence and other procedural rules governing adjudications do not apply.

3. Availability of Hearing Testimony and Comments. Testimony, comments, and other materials submitted to the rulemaking docket are or will be listed online at 
http://www.regulations.gov; however, some information (e.g., copyrighted material) is not publicly available to read or download through that website. All submissions to the docket, including copyrighted material, are available for inspection and, where permissible, copying at the OSHA Docket Office, U.S. Department of Labor, Room N-3653, 200 Constitution Avenue NW, Washington, DC 20210.

II. Conduct of the Rulemaking Hearing

1. Schedule for Testimony. The agency will provide a copy of the schedule prior to the hearing to all participants who filed a timely notice of intention to appear. A copy will also be available to hearing participants on the day of the hearing and, if possible, will be posted on OSHA’s website (https://www.osha.gov/berylliumrule/). Unless other arrangements have been made with the agency, each witness should plan to be present at the beginning of the day and remain available until after they have testified and responded to questions. The schedule prescribes the amount of time for each participant to testify, and also allows time for other participants who filed a timely notice of intention to appear, or their representatives, and OSHA representatives to question the witness. The ALJ shall assure that the hearing proceeds in a fair
and orderly manner so as to facilitate development of the record. The ALJ has discretion to allow individuals who did not file timely notices of intention to appear to present brief oral statements of no longer than 10 minutes at the end of the scheduled presentations if additional time is available.

2. Schedule for Questioning. The ALJ shall allocate the time allowed in the schedule among questioners, including OSHA. The judge may adjust this time so long as the testimony and questioning of all witnesses scheduled for the hearing will be completed by the end of the day. OSHA representatives will be allowed sufficient time during the questioning period to ensure that the agency can develop a clear, accurate, and complete rulemaking record.

3. Form of Testimony. Written hearing testimony that was submitted before the hearing is already part of the rulemaking record, and participants who have submitted written testimony in advance are encouraged to use their oral presentation to summarize and clarify their written submissions. OSHA discourages witnesses from submitting a statement and then also reading the statement verbatim so that it appears twice in the record.

Those participants who wish to use the projection system in the auditorium for their presentations (e.g., for PowerPoint slides) should notify OSHA at least one week before the hearing begins and should submit the files they wish to use the day before their presentation to Joel Batchelor by email (Batchelor.Joel.E@dol.gov) with the subject line “Presentation for the Beryllium Construction and Shipyards Hearing.” Participants who wish to have a copy of any items used or referenced during their oral presentations (e.g., PowerPoint slides, photographs, studies) included in the record should bring an extra (paper) copy with them to the hearing. The ALJ may admit such items as exhibits to the hearing record on the agency’s motion.
Participants who have filed notices of intention to appear but failed to submit their comments or testimony in writing will be allowed a maximum time of 10 minutes for their presentations at the hearing. All participants who testify, or who participate in a panel of testifying witnesses, will be expected to respond to questions following their presentations. If time permits, the ALJ may allow persons who have not filed notices of intention to appear an opportunity to testify at the close of the day.

4. *Questioning of Public Witnesses.* All participants who filed a timely notice of intention to appear may question witnesses following the witnesses' testimony. Representatives of OSHA may also question witnesses. However, individuals who did not file timely notices of intention to appear may not question witnesses.

Questions must be as brief as possible and should be designed to clarify a presentation or elicit information that is within the competence or expertise of the witness. Participants may not ask questions that are outside the scope of the matters addressed by this rulemaking. OSHA recommends that participants ask their most important questions first. The ALJ has authority to disallow participants from using the question periods as a forum for debate or legal argument, or to present their own testimony and views on issues. Moreover, the ALJ has authority to cut off duplicative, argumentative, or irrelevant questions. Participants having similar interests are encouraged to designate one representative who can conduct the questioning on their behalf.

Participants may only direct questions to witnesses with whom they have no organizational affiliation. In this regard, a witness can most efficiently enter information into the record through testimony rather than through a question-and-answer exchange between the witness and his or her affiliates, which constitutes an improper extension of the time scheduled
for the witness’s testimony. When an organization is represented by more than one person, only
one person from the organization may question each witness or panel.

After all questioners have had an opportunity to question a witness or panel, if a
questioner still has important relevant questions that have not been asked, the questioner may
request permission from the ALJ to ask additional questions. The ALJ may allow a participant
such additional time for questioning as is necessary and reasonable for OSHA to develop a clear,
accurate, and complete record; the ALJ may allocate such questioning to the end of the
scheduled testimony. Permission to extend the questioning period will depend in part on the
witness schedule and the time available; the ALJ is unlikely to grant an extension if the hearing
falls significantly behind schedule. In such a case, the ALJ may place additional limits on
questioning, or require participants to consolidate their questions.

Because this is a legislative-type hearing, OSHA’s role is to hear from the public so that
it can further develop the rulemaking record. Accordingly, OSHA will not be testifying, and
participants will not be permitted to question OSHA.

III. Post-Hearing Procedures

At the close of the hearing, the ALJ will establish a post-hearing comment period during
which those participants who have filed notices of intent to appear will have the opportunity to
file additional evidence and data relevant to the proceeding, and to file final written briefs.
During the first part of the post-hearing period, those persons may submit final briefs, arguments,
summations, and additional data and information to OSHA. During the remainder of the post-
hearing period, they may only submit final briefs, arguments, and summations. No reply briefs
are to be filed.
After the hearing concludes, a transcript of the hearing will be made available in the docket. After the post-hearing comment period, the hearing record will be closed and certified by the ALJ to the Principal Deputy Assistant Secretary of Labor for Occupational Safety and Health.

IV. Contact Information
