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United States Department of Labor
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Re: RIN 1219-AB41 (Proposed Rule on Substance Abuse Programs)

FMC appreciates the opportunity to provide comments on the proposed rule regarding Alcohol and Drug Free Mines. FMC, like MSHA, is genuinely concerned about the safety of our miners and has a multi pronged approach within our safety program to enhance the safety and health of our workplace as well as our miners. FMC commends MSHA for understanding the significance of substance abuse in the workplace and driving regulations that help improve the safety of miners. This rulemaking process is a great start to assist and educate not only miners, but other members of the community about the perils of substance abuse in the workplace.

As any mine operator would agree, drugs and alcohol have no place in mining. As noted historically, mining has many inherent risks that can have drastic impacts on the safety and welfare of miners and their families. Miners, both surface and underground, operate large, expensive equipment on a routine basis. The use of drugs or alcohol can severely impact an individual's judgment and put the miner, co-workers and equipment at risk. Many operators today have some format for dealing with substance abuse in the workplace. Some of these operators have a zero tolerance policy, which the current rulemaking would contradict. MSHA has historically had a performance based set of standards where the regulatory requirement was the minimum acceptable level of performance. This rule should be treated no differently and allow those operators to continue to perform above the MSHA Standard. For others, this rule is an enhancement to existing practices and again should be considered the minimum requirement. The following comments relate directly to specific sections of the rule.

§66.101 Prohibited Behaviors

Sub-paragraph B, indicates a lower Blood Alcohol Concentration (BAC) from the DOT rule that many operators currently have to comply with. What is the premise for using a lower number than that already established by DOT?

§66.200 Purpose and Scope

It would seem appropriate for the education and awareness program to be directed at all miners regardless of their supervisory capacity. "Referrals for assistance for miners who violate this rule" should be amended to "availability of assistance for miners who come

forward seeking treatment.” Many operators already have assistance available; although after a drug test it is too late for the miner (salaried or hourly) to ask for assistance. Where a zero tolerance policy exists and is well understood by all employees, hourly and salaried alike, the opportunity for assistance is available prior to the random substance abuse testing. Section 66.200 should establish this rule as a minimum standard.

§66.202 Education and awareness program for nonsupervisory miners.

It would appear that these programs are targeted for hourly or wage roll personnel. If the education and awareness program is good for one group it should be delivered to all employees regardless of their supervisory capacity. As the rule is currently written, some employees could easily be left out of any education and awareness training. Suggest re-write the rule to read all miners.

Subpart E

First, this section will be less stringent than policies of many operators. MSHA’s historical standard setting process has been to set performance standards which operator’s have been applauded for exceeding. This standard, as written, regresses many operators’ programs. Rulemaking should allow operators the ability to maintain a zero tolerance policy. Areas of concern for operators with less stringent programs include the items listed below.

§66.400 Consequences to miner for failing an alcohol or drug test or refusal to test.

A mine operator should not be required to follow sections 66.405 and 66.406 for miners who refuse to submit to testing, or who intentionally adulterate or substitute a urine specimen. Refusal to submit to a drug or alcohol test is already considered the same as providing a positive sample under the United States Justice System. Actions of adulterating or substituting a sample alone should constitute falsification of documentation as anyone who submits a sample must complete the required paperwork. This paperwork would be required much in the same manner as training documentation for inspection purposes. In this instance, falsification of these documents should be grounds for termination if the operator so chooses.

§66.401 Operator actions pending receipt of test results.

This section diminishes current testing protocols that allow for a “quick test” to determine if a sample is negative or non-negative. Current technology should be allowable to determine whether or not suspension from safety sensitive duties is warranted. Technological advancement should be considered since the Agency has stated historically, “Rulemaking will drive technology.” This technology is already present and by neglecting available technology we would find ourselves in a situation that places someone in jeopardy of injuring themselves or others.

Paragraph (d) under this section seems to contradict paragraph (c). Is there an explanation to which such withholding of pay would not adversely affect a miner’s pay and benefits?

§66.403 Operator actions after receiving verified test results.

Subpart (a) not only allows for a miner who most likely has a substance abuse problem to continue working, but it also allows for a dishonest miner who has falsified regulatory required documentation to remain employed.

§66.404 Evaluation and referral.

This section is confusing in that mine operators must, by the standard, provide applicants a listing of acceptable SAP's. Does this also mean that any applicant will be covered under this standard and subject to EAP assistance paid for by the operator? It would stand to reason that inclusion of "applicant" in paragraph (b) would open up a significant cost to employers as many operators require every applicant to pass a drug screen through a conditional offer of employment. Applicants who cannot pass a drug screen would not be hired should they fail a drug or alcohol test as part of a conditional offer of employment, and thus would not be employees of the operator.

Subpart F- Recordkeeping and Reporting

§66.500 Recordkeeping Requirements

Section (a) and section (c) are contradictory where mine operators do not restrict access to accident reports for safety committee's data analysis. Operations where employee involvement in the safety process requires access to accident reports by those miners would be in violation of section (c). The requirement to include test results in accident reports should be removed from this standard to ensure confidentiality.

In consideration of the above comments, suggested revisions to the rulemaking are as follows:

1) Policy And Program

(a) Mine Operators shall develop, adopt and implement a Substance Abuse Prevention, Testing and Enforcement Program (SAPTEP) consistent with this standard.

(b) The possession or abuse of prohibited substances, as defined by law or the operator's policy, except when used according to a valid prescription, is prohibited for all persons on and around mine property.

2) Training

All miners are deemed to hold safety sensitive jobs and shall be provided training in the SAPTEP as an integral part of the New Miner, Newly Employed Experienced Miner, and Annual Refresher Training mandated by applicable regulations.

3) Substance Abuse Testing

The SAPTEP shall include effective testing for substance abuse of all miners as defined in 30CFR Part 48, including pre-employment testing, random testing of all miners, for

cause testing, and post incident testing at least for all injuries, illnesses and accidents reportable under 30 CFR Part 50.

4) Substance Abuse Employee Assistance

The SAPTEP and required SAPTEP training shall include providing all miners with information about available substance abuse, employee assistance services and the role of such services in the SAPTEP.

5) Substance Abuse Enforcement

The SAPTEP and SAPTEP required training shall include the role of the Mine Operator's discipline policy and procedures and the consequences of violating the SAPTEP.

6) Miners who are suspected of violating this standard or the SAPTEP shall not work in jobs where their suspected violation could endanger themselves or others, until the mine operator makes a determination that they do not pose a substance abuse related hazard to themselves or others.

7) Mine operators shall provide MSHA written or electronic evidence of compliance with this standard upon request, but recordkeeping and paperwork deficiencies not associated with substantive violations of this standard, shall not be considered a violation of this standard.

8) Nothing in this rule shall be interpreted to interfere with a mine operator's authority to manage its workforce and discipline its employees, or to create employee entitlements or benefits that are the within the rights of regulated parties to determine.

Summary

Again, FMC appreciates the opportunity to provide comments to MSHA in this important rulemaking process. FMC strongly encourages MSHA to again consider this rulemaking a performance based standard and allow mine operators to utilize this proposed rule as a minimum standard allowing a mine operator to adopt a program that works best for their workforce, community and resources. Operators, who currently have a zero tolerance policy in effect, would be forced into a less rigorous program by the adoption of these regulations as written. However, other operations which have less stringent requirements would be substantially improving their programs with the assistance of this rule. FMC applauds the agency's efforts in this rulemaking process. Thank you for considering these suggestions and comments.

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