

Natural building blocks for quality of life

November 23, 2005

Ms. Rebecca J. Smith, Acting Director
Office of Standards, Regulations and Variances
Mine Safety & Health Administration
US Department of Labor
1100 Wilson Blvd., Room 2350
Arlington, Virginia 22209-3939

Subject: RIN 1219-AB41

VIA E-MAIL: zzMSHA-comments@dol.gov.
VIA Hand Delivery

Dear Ms. Smith:

The National Stone Sand & Gravel Association ("NSSGA") is pleased to offer the following comments concerning the Mine Safety and Health Administration's Advance Notice of Proposed Rulemaking addressing *Use of or Impairment From Alcohol and Other Drugs on Mine Property*, 70 Fed. Reg. 57808 (October 4, 2005). NSSGA has producer member companies, which are engaged in the mining and production of aggregate materials and account for approximately 90 percent of the crushed stone production and in excess of 70 percent of the sand and gravel production annually. In addition, many of our associate member companies manufacture equipment to assist in the extraction and production of minerals, and/or provide services to the mining industry, and therefore fall within MSHA's jurisdiction at certain times..

The NSSGA/MSHA Alliance was the first industry cooperative effort and has developed a model safety program with core principles that include prevention of substance abuse. That document is available for all mining operations and may be of assistance in persuading more mines to be proactive in this regard. Discussions with NSSGA members, including members of the association's Safety & Health Committee, suggest that many aggregate industry operations already have policies in place and conduct testing pursuant to the US Department of Transportation ("DOT") requirements for at least the sector of their workforce that holds Commercial Drivers' Licenses and may have similar programs for the well being of all employees.

We commend MSHA for taking a hard look at this important issue, which has the potential for significant impact on safety and health at all mining operations. NSSGA does not support exempting any operations – large or small – from any substance abuse regulations, nor should any category of employee be exempt. A good first step, before imposing more regulatory burdens, would be for the agency to enforce its existing rule (§ 56/57.20001) Operators with a mandatory random drug testing policy and consequences for abuse of drugs or alcohol should be able to be waived in as compliant without additional regulatory burdens placed upon them.

MSHA should consider imposing personal penalties against miners who violate the agency's rules with respect to alcohol and illegal drug use at mines, just as the agency already does for miners who violate smoking bans by smoking in underground coal mines or near flammable materials. More stringent penalties may be warranted for supervisory personnel who violate these requirements, as well as for individuals holding mining certifications as trainers, blasters, foremen or inspectors.

Several of NSSGA's member companies already have provided individual testimony at the public hearings across the United States on this issue and have provided MSHA with copies of the programs that are already in place at their companies. Other NSSGA members may submit written comments as part of the post-hearing administrative record. Many of the questions posed by MSHA in the ANPRM require site-specific data and are best answered by these individual companies. However, NSSGA provides the following general information to other questions posed.

A1. What specific substances are most prevalent and pose the greatest threats to mine safety and health? Please include comments on "controlled substances," illegal or illicit drugs, alcohol, inhalants, prescription and over-the-counter drugs, and any other substances you believe may create safety hazards when used or misused by miners.

Alcohol, marijuana, methamphetamine, cocaine, and misuse of prescription drugs (e.g., oxycontin and vicoden).

A2. Based on your experience and knowledge of the industry, how widespread is the use or misuse of alcohol or other drugs in the mining workplace?

Use of illegal drugs is most prevalent among job applicants and new hires. In addition, alcohol abuse is a problem that most often affects older workers.

A3. How severe a risk does the use or misuse of alcohol and other drugs pose to miners' safety

This type of misuse poses a significant risk to the individual and at the workplace this can pose unacceptable risk to his or her co-workers and members of the public.

A4. What accidents or injuries at your mine in the last five years have involved alcohol or other drugs?

NSSGA does not have company-specific data to report.

B1. Should we revise this existing metal and non-metal standard and establish a standard for coal mines? If so, how?

At this time, there is no need to amend the metal/nonmetal standard, but penalties should be imposed against individual miners who violate the standard

B2. What substances should be prohibited? Please include comments on controlled substances, alcohol, misuse of prescription and over the counter drugs, and inhalants.

Both alcohol and illegal drugs (including misuse of prescription drugs) should be included in any substance abuse guidance. The DOT criteria should be used to determine what drugs are covered (marijuana, PCP, opiates, amphetamines, and cocaine). If testing is mandated, the current DOT program provides a good model, although companies with more stringent programs in place should be encouraged to continue those programs.

B3. How should impairment be determined, and who should make the determination?

The DOT five-panel criteria should be a minimum standard to determine what constitutes "under the influence." NSSGA recommends setting a Blood Alcohol Concentration (BAC) of 0.04 to determine impairment under § 56/57.20001, as this is consistent with the DOT limits for CDL drivers. Employees who take prescription drugs that could affect safety, who take the drugs as prescribed and who inform the mine operator of the situation so they can be placed in a non-safety-sensitive position while under doctor's care, would not be considered to have violated the alcohol/drug ban. The determination should be made through testing by appropriate laboratories under the DOT criteria, maintaining chain of custody for all specimens

B4. What actions should operators be required to take once an impaired miner is identified (e.g., remove from site, send home for the day, refer to the Employee Assistance Program or elsewhere for assessment, send for drug test, terminate, fine, or other actions)?

Under the existing MSHA standard, miners or other persons violating this standard must be removed from the mine site. Companies should recognize due process rights of employees, and NSSGA suggests that a Medical Review Officer (MRO) may be of assistance in this regard. Although mining companies should retain discretion in establishing their disciplinary programs relative to substance abuse, it may be beneficial to provide advance notice before commencing testing, so that workers have a grace period in which to self-report and seek treatment.

Mine operators should be encouraged to establish Employee Assistance Programs (EAPs) and to follow DOT guidelines or, where more stringent, their own corporate disciplinary procedures. Many companies will suspend workers (with or without pay) while test results are pending and will reinstate them if the results are negative or, in some cases, if the worker successfully completes a treatment program and remains clean when subjected to random testing thereafter. Some companies will not impose sanctions if an employee voluntarily discloses a drug/alcohol problem and seeks treatment through the EAP prior to being discovered through the corporate testing program, and will only take adverse action, including termination, if the problem is discovered through prehire, random, cause-based, or post-accident testing. NSSGA recommends that any programs or regulations not make distinctions between the disciplinary actions for different categories of workers or between hourly and salaried employees

B5. What policy or procedures do you have regarding employees who are using legally and properly prescribed drugs that may cause impairment?

NSSGA cannot comment specifically on this, as a national trade association

C1. Should our regulations address training in the prevention of alcohol and other drug misuse? If so, how?

MSHA should encourage inclusion of substance abuse prevention training as part of the existing Part 46 and Part 48 training standards. However, there is no need to amend these regulations as there is already sufficient flexibility to include this subject among those affecting safety and health at the mine during new miner and annual refresher training. MSHA can clarify that this is permissible through a Program Policy Letter or other interpretative memoranda (e.g., the Program Policy Manual) without engaging in formal rulemaking. For those mines under Part 48, MSHA could

clarify that such operations would not be required to resubmit or revise their training plans in order to incorporate substance abuse training into the existing curriculum. This approach would expedite training of miners and have the greatest immediate impact on the problem of alcohol and substance abuse

C2. Who should receive this training (e.g., supervisors, managers, foremen, miners, miners' representatives?)

All persons working at a mine should receive this training.

C3. What topics should be included?

The basic training should cover awareness of the hazards of substance abuse on and off the job, the requirements and enforcement by MSHA of 30 CFR §§ 56/57.20001 (including any modification of this or other standards through this rulemaking, and including the potential for individual penalties or prosecution under Section 110 of the Mine Act), and the tenets of the company's substance abuse prevention policy (including types of testing, where applicable, and the disciplinary consequences). The DOT program requirements should also be covered, as well as the availability of recovery resources such as the EAP and programs such as Alcoholics Anonymous and Narcotics Anonymous. In addition, mine supervisors should be trained how to recognize the signs of impairment in the miners they supervise, and how to handle situations involving impaired miners

C4. What training do you provide to address alcohol and other drug misuse?

This is a company-specific inquiry that will be addressed by individual NSSGA members.

D1. Should we revise 30 CFR 50.11 to address alcohol and other drug use inquiries by mine operators during accident investigations?

There is no need to revise this rule. Good accident investigation procedures, such as "root cause analysis," include examination of all factors including the impairment of involved workers. Mine operators should be encouraged to request drug/alcohol screens to be performed whenever a miner receives medical treatment or is killed in an accident that requires a report under 50.11, but MSHA must understand that it may be impossible to obtain drug/alcohol data in some situations. If MSHA is able to obtain this data directly from medical providers or from the medical examiner, it should be promptly shared with the mine operator.

If mine operators voluntarily include this information in the mandated report under § 50.11, this should not serve as the basis to issue a citation to the mine operator under § 56/57.20001 – particularly if the company had a substance abuse prevention program in place, provided worker training, and had implemented a testing program and disciplinary program. This is a situation where strict liability should not attach because, even with these safeguards in place, it may be impossible for a mine operator to determine if a miner has drugs or alcohol in their system prior to an accident – especially if the drugs were used during non-working hours and the findings relate to levels in the worker’s blood but are not conclusive of actual impairment at the time of the incident.

D2. What type of alcohol and other drug use inquiries should be made after accidents (e.g., questioning, drug testing)?

The majority of companies that do testing appear to test where a reportable injury occurs as defined in Part 50, or where property damage is involved over a specific dollar amount (e.g., \$250.00). In addition to post-accident testing and random testing per the DOT guidelines, some companies test “for cause” (where a supervisor reasonably believes that a worker is impaired due to appearance, speech or staggering gait) or test all workers who return from extended leave.

D3. What degree of accident or injury should trigger an inquiry (all, fatal, lost-time, others)?

Any incident culminating in a reportable injury should trigger an inquiry.

D4. How should the information collected in the inquiry be used, and by whom?

The information should be used by the employer and must be kept confidential to the maximum extent possible. NSSGA suggests following the DOT policy regarding handling of sensitive information and worker privacy.

D5. What actions should be required if it is determined that the use of alcohol or other drugs was a contributing factor or cause of the accident?

If a mine operator knowingly permits an impaired miner to work at the mine and an accident results, a citation should be issued to the mine operator. A miner should be cited if he/she is found to be under the influence of alcohol or illegal drugs while on mine property, and an individual penalty imposed as described above. Mine operators who exercise due diligence to monitor worker compliance with a drug and alcohol-free workplace policy, and who conduct testing of workers under the DOT scheme, should be permitted to offer this as an affirmative defense to the fact of violation and should not be held strictly liable for the presence of an impaired worker at the mine site under such circumstances.

With respect to internal disciplinary measures, this should be set on a company-by-company basis, and should also reflect any obligations under existing collective bargaining agreements. Companies that have existing and effective substance abuse prevention programs (including those under the DOT regulations) should not be required to alter them in order to comply with MSHA requirements.

Sections E and F: All questions require company-specific responses and will be answered directly by NSSGA members who participate in this rulemaking. However, NSSGA notes that while small mines are less likely to have existing programs and so will likely have higher start-up costs for any program requirements, MSHA can ease this situation by making model programs available on its website, through dissemination of information by educational field service personnel, and through the Office of Small Mines.

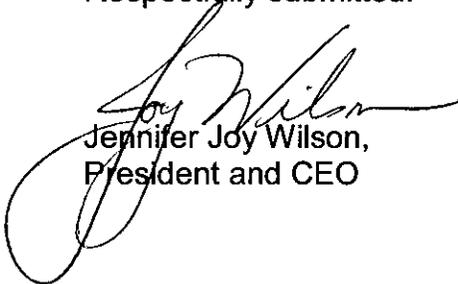
Moreover, state mining associations as well as national trade groups can offer outreach to members and it may be possible to form consortia that will provide small mine operators with the same economies of scale in terms of program, EAP and drug testing costs that larger operations currently experience.

Finally, although MSHA did not solicit comment on this issue, it is imperative that an appropriate approach is taken with regard to contractor responsibilities under any mandated substance abuse prevention program or regulatory scheme. Contractors are considered "mine operators" under the Mine Act and, given the nature of this issue, should be held primarily responsible for compliance with any substance abuse regulations. Mine operators should not be cited for contractor program failures, nor if it is determined that an impaired contractor is on the mine site. In most instances, mine operators will be precluded from requiring non-employees to participate in company drug screening programs.

NSSGA does urge mine operators to be proactive and include questions about substance abuse prevention programs and drug/alcohol testing in their contractor prequalification programs, to the extent feasible, so that information is available that can aid in selecting companies with strong safety, health and drug-free workplace programs. Contractors should also be informed, prior to commencing work at the mine, about any applicable MSHA regulations – including those relating to substance abuse prevention – so that they have the opportunity to bring their programs into conformity in advance.

NSSGA appreciates the opportunity to provide input on this important subject and looks forward to continued cooperation with MSHA, through the Alliance project, in moving the mining industry closer to achieve substance abuse-free operations in the future.

Respectfully submitted:



Jennifer Joy Wilson,
President and CEO