

OXBOW MINING, LLC



November 23, 2005

Received 11/23/05
MSHA/OSRV

Attn: **RIN 1219-AB41**
Mine Safety & Health Administration
Office of Standards, Regulations, and Variances
1100 Wilson Blvd., Room 2350
Arlington, VA 22209-3939

RE: Regulation Identification Number **1219-AB41**

Ladies and Gentlemen:

The following comprises the written comments from Oxbow Mining, LLC ("OMLLC") brought forth by proposed rulemaking **RIN 1219-AB41** regarding **Use of or Impairment From Alcohol and Other Drugs on Mine Property**.

OMLLC vigorously opposes a Mine Safety and Health Administration regulatory approach to the use and abuse of alcohol and other drugs as detailed in the following rationale:

OMLLC recognizes that improper drug use and alcohol use present safety hazards in any workplace, especially those which are safety-sensitive. It is OMLLC's contention that the most viable option to eliminate the use of or impairment from alcohol and other drugs on mine property is for each operator to take independent ownership of the issue and manage drug and alcohol abuse to optimize safe and efficient operations.

In the proposed rulemaking, the final paragraph of section III states: "Many miners, particularly those working in small mines are not likely to have access to these programs." Drug and alcohol testing technology has advanced to provide means by which testing can be administered expediently, independently, and at relatively low cost.

OMLLC recognizes the need to include a Drug and Alcohol Policy as an integral element of the way we commit to do good business. This policy encompasses OMLLC's ability and commitment to conduct drug and alcohol testing for pre-employment, reasonable suspicion, post accident, random, and follow-up testing.

Legally sound and sensible policy language is widely available at little to no cost. Likewise, legally sound testing devices are widely available at a cost of about \$15 per test kit. While urinalysis is still the most common testing method, other acceptable means are widely available (e.g. saliva and hair sample analysis).

OMLLC's sectional responses follow the outline provided in the proposed rulemaking:

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AB41-COMM-18

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A. Nature, Extent, and Impact of the Problem

A1. Based on experience and knowledge of the industry, the substances that are probably most prevalent are THC and methamphetamines. Since October, 2003, OMLLC has experienced 3.6% positive screening results. In each positive screening result, the prohibited substance was THC (marijuana).

A2. Based on experience and knowledge of the industry, the use or misuse of alcohol or other drugs in the mining workplace is present, but screening results indicate a relatively low proportion of users. Additionally, the substance generating 3.6% positive results is a substance that is known to metabolize very slowly out of the body. While it is the opinion of the author of this letter that those persons testing positive for THC were not *impaired* at the time the test samples were taken, THC was detectable above a legally-accepted cutoff level; therefore, the persons tested out of compliance with our policy.

A3. While the information in A2 would indicate that drug use and abuse is not statistically widespread, *any* drug- and alcohol-related risks to miners' safety is compelling for us to independently and without regulatory intervention maintain an effective alcohol and substance abuse policy.

A4. In the last five years, two relatively minor accidents occurred in which the injured tested positive for illegal drugs; THC in both cases. It was *not* thought at the time of the incidents that the persons were displaying behavior that would lead one to think they were *impaired*. THC is known to have a relatively short-term physio-psychological effect, yet metabolize slowly from the body. In both cases, the injured were terminated from OMLLC employment.

B. Prohibited Substances and Impaired Miners

B1. A standard regarding drug and alcohol abuse should not be established for coal mines. Most would agree any standard in this regard should be zero. Legally sound drug screening methodologies include "cutoff levels" for detectable prohibited substances.

B2. Prohibited substances should include alcohol, illegal or controlled drugs, and the illegal use of legal drugs.

B3. Because every person will be psycho-physiologically affected uniquely by a given substance, impairment is vague, difficult to determine, and nearly impossible to substantiate legally. The standard and legally accepted methodology for substance screening is the detectable presence of a substance that is above an established cutoff level, which for most substances is expressed as "nanograms per milliliter".

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B4. An effective independently administered, legally defensible drug and alcohol policy should be maintained to provide suitable latitude for an operator to act as it deems appropriate in the interest of safe and efficient business operations. In the event a miner reports to work and is behaving as though impaired, that miner should be tested on the basis of reasonable suspicion. The operator should have the latitude, without regulatory intervention, to act as it deems appropriate regardless of the test results (bearing in mind the miner in this instance exhibited behaviors suggesting impairment).

B5. Employees who are utilizing legally and properly prescribed drugs that may cause impairment are required to self-report such that a conscious and proper decision may be made as to whether that individual should be allowed to work, and in what capacity, while taking such medication.

C. Training

C1. Drug and Alcohol Abuse training should not be a regulatory issue; therefore training should not be part of the regulation. Should the Mine Safety & Health Administration prepare and make available training and educational materials regarding alcohol and substance abuse, such materials would quite probably be helpful.

C2. While Drug and Alcohol Abuse training should not be a regulatory issue, we currently have in our curricula a plan to educate all exempt personnel at our mine site and potentially work that education throughout the workforce.

C3. While Drug and Alcohol Abuse training should not be a regulatory issue, educational materials should be comprehensive and delineate suspect behavior patterns, methods and signs of use, and psycho-physiological effects of impaired persons. This education should be coupled with training on how to approach a miner who, by his/her behavior, draws reasonable suspicion that he/she may be under the influence of alcohol or drugs.

C4. We currently have substance abuse training in our proposed curricula for exempt personnel as discussed in C2.

D. Inquiries Following Accidents

D1. 30 CFR 50.11 should not be revised to address alcohol and other drug use inquiries by mine operators during accident investigations because drug and alcohol abuse should not be an MSHA regulatory issue. Any suitable drug and alcohol policy should include a post-accident drug-screening requirement, as does OMLLC's policy.

D2. Analytical drug screening and inquiries regarding any unusual behavior should be made after many accidents, and in some cases *before* accidents at the independent discretion of the operator.

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D3. In most cases, the degree of accident or injury that would trigger an independent inquiry would be at the discretion of the operator. At OMLLC, the degree of such a trigger is generally but not limited to a medical reportable incident, a lost time accident, or equipment damage of \$200 or more in value. OMLLC does not require regulation to ensure this happens. Operators should have the independent discretion to determine what levels of inquiry are appropriate for safe and efficient business operations.

D4. Operators should independently and without regulation perform inquiries as necessary for safe and efficient business operations. In general, management and safety departments would collect inquiry information and utilize/disseminate it as appropriate in the interest of safe and efficient business operations.

D5. An effective independently administered, legally defensible drug and alcohol policy should be maintained to provide suitable latitude for an operator to act as it deems appropriate and in the interest of safe and efficient business operations. In the event a miner reports to work and is behaving as though impaired, that miner should be tested on the basis of reasonable suspicion. The operator should have the latitude to act as it deems appropriate regardless of the test results (bearing in mind that alcohol or other drugs were a contributing factor or cause of the accident).

E. Drug-Free Workplace Programs

E1. A copy of the OMLLC Drug and Alcohol Policy is enclosed.

E2a. Verbal and visual indicators existed that instances of drug abuse may be occurring. Drug and alcohol usage, no matter how prevalent, would only serve to make dangerous an environment that is already hazardous.

E2b. See attached policy.

E2c. The most critical element of OMLLC's drug and alcohol policy is that OMLLC possesses the latitude to administer the policy without government intervention in the interest of safe and efficient mine operations.

E2d. Improvements at OMLLC may not necessarily be correlated with the existence of a drug and alcohol policy. Statistically only a small percentage of employees have tested positive for a prohibited substance. Perhaps coincidentally, OMLLC's safety performance continues to improve since the inception of its drug and alcohol policy.

E2e. Requested data is difficult to supply. The 3.6% positive drug screen results suggest that drug usage at OMLLC is not widespread, and that drug users are a substantial minority.

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E2f. OMLLC's program was initiated and is maintained without regulatory intervention and without issue.

E2g. Actions taken in response to situations in which the OMLLC drug and alcohol policy has been violated provide suitable latitude for proper decision making and are included in the enclosed policy.

E3. OMLLC did not have a drug and alcohol policy prior to the current policy, which was independently and without regulatory intervention put into place.

E4. Drug and alcohol education is in the planned curricula for all exempt personnel at OMLLC.

E5. OMLLC has an EAP. Use of the EAP is strictly confidential; therefore detailed statistical information is not available. It is suspected that, while OMLLC offers EAP services, the services are not widely sought for drug and alcohol abuse issues.

F. Costs and Benefits

F1. Costs for efforts to reduce or eliminate drugs or alcohol from the workplace are not substantive. The cost to develop OMLLC's drug and alcohol policy can be expressed in approximately five (5) man days. The cost to research and develop testing processes, procedures and devices can be expressed in approximately 3 man days. With the method used by OMLLC, the initial (immunoassay) screening costs approximately \$15 each. In the event a confirmation (gas chromatography/mass spectrometry) screen is required, the cost is approximately \$50. The labor cost to conduct the screening is nominal.

F2a. Costs associated with a drug-free workplace are nominal. The bulk of the time, effort and money associated with such a program are attributable to policy development, and implementation (policy distribution and conducting tests). Training is an ongoing effort and difficult to quantify.

F2b. Costs associated with a drug-free workplace would not be borne disproportionately by small mines. Sample language is widely available and requires nominal adjustment to suit individual operations. Many options exist regarding acceptable screening devices, some more costly than others but in general inexpensive. Such decisions should be made independently and without regulatory intervention.

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F3. Benefits derived from OMLCC's efforts to reduce or eliminate alcohol and drugs from the workplace are difficult to quantify. Workers' compensation costs and the NFDL incidence rates are demonstrably lower since the implementing the drug and alcohol policy, however, other indicators (absenteeism, morale, turnover) do not readily lend toward any such conclusion. OMLLC's compelling interest in developing and implementing its drug and alcohol policy is to optimize safe and efficient business operations.

In summary, OMLLC is in favor of maintaining its drug and alcohol policy independently and without regulatory intervention. It is believed government intervention is the method favored primarily by represented organizations that otherwise may be under-powered to independently implement and maintain effective drug and alcohol policies without regulatory intervention. Regardless of whether this is true, the burden of regulatory intervention should not be shifted to operators who do not need it to function in the best interests of safe and efficient business operations.

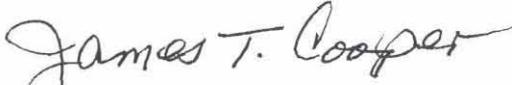
A further item of express concern regards liability. OMLLC is not in favor of employer liability in the event a worker, especially one who is involved in an accident, tests positive for alcohol or a controlled substance. Any liability should rest strictly on the offending individual(s). The rationale for this position is two-fold. (1) individuals abusing drugs and/or alcohol do so independently and against the best interests of safe and efficient production of the operator, and (2) persons who abuse drugs and alcohol can be difficult to detect. An employer should not be held liable in the event an individual tests positive for the *detectable* presence of a prohibited substance when suspicious behaviors are absent (the individual does not seem to be *impaired*). As stated previously, existing technology can detect the *presence* of a substance, but not *when* the substance was utilized, nor the *degree of impairment* elicited by it.

As previously expressed, OMLLC vigorously opposes a Mine Safety and Health Administration regulatory approach to the use and abuse of alcohol and drugs. Finally, we note that drug and alcohol regulations are already addressed and enforced by national, state, and local law. Law enforcement agencies, including the DEA, FBI, CIA, ATF, state and local, exist and are challenged with the enforcement of said laws, including coal mining communities. Mining companies should utilize drug and alcohol abuse programs and, more importantly, participate proactively against drug and alcohol in local communities where present and future miners live.

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Because of the inherent dangers present in all mining environments, OMLLC urges the Mine Safety and Health Administration to focus on **non-regulatory** approaches to address the risks and hazards to miner safety from the use or impairment from alcohol and other drugs.

Sincerely,



James T. Cooper
Executive Vice President

Enclosures (2)

- a. MSHA Proposed Rulemaking
- b. OMLLC Drug and Alcohol Policy

corrected to read "communications income. The source of income".

Cynthia Grigsby,
Acting Chief, Publications and Regulations Branch, Legal Processing Division, Associate Chief Counsel (Procedure and Administration).
[FR Doc. 05-19779 Filed 10-3-05; 8:45 am]
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DEPARTMENT OF LABOR
Mine Safety and Health Administration
30 CFR Parts 46, 48, 50, 56, 57, 75, and 77

RIN 1219-AB41
Use of or Impairment From Alcohol and Other Drugs on Mine Property
AGENCY: Mine Safety and Health Administration (MSHA), Labor.
ACTION: Advance notice of proposed rulemaking; notice of public meetings; close of record.

SUMMARY: Because of the inherent dangers present in all mining environments, we are considering regulatory and non-regulatory approaches to address the risks and hazards to miner safety from the use of or impairment from alcohol and other drugs, and are soliciting information from the public to help determine how to proceed.

DATES: Comments to this advance notice of proposed rulemaking must be received by November 27, 2005.

We will hold seven public meetings to gather additional information. The dates and locations are listed in the Public Meetings section under **SUPPLEMENTARY INFORMATION**. Individuals or organizations wishing to make presentations for the record are asked to submit a request to us at least five days prior to the meeting date; however, those who do not submit a request in advance will be given an opportunity to speak.

ADDRESSES: Comments must include Regulation Identifier Number (RIN) 1219-AB41 and may be submitted by any of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.
- E-mail to zzMSHA-comments@dol.gov. Include RIN 1219-AB41 in the subject line of the message.
- Fax: (202) 693-9441.
- Regular Mail or Hand Delivery: MSHA, Office of Standards, Regulations, and Variances, 1100 Wilson Blvd., Room 2350, Arlington, Virginia 22209-3939.
- Access to Docket: We post all comments received without change, including any personal information provided, at <http://www.msha.gov> under the "Rules & Regs" link. The public docket may be viewed at our Office of Standards, Regulations, and Variances, 1100 Wilson Blvd., Room 2349, Arlington, Virginia.

• We maintain a listserv on our Web site that enables subscribers to receive e-mail notification when we publish rulemaking documents in the Federal Register. To subscribe to the listserv, visit our site at <http://www.msha.gov/subscriptions/subscribe.aspx>.

FOR FURTHER INFORMATION CONTACT: Rebecca J. Smith, Acting Director, Office of Standards, Regulations, and Variances at 202-693-9440 (voice), 202-693-9441 (fax), or smith.rebecca@dol.gov (e-mail).

Outline of ANPRM

This outline will assist you in finding information in the **SUPPLEMENTARY INFORMATION** section of this document.

Supplementary Information

- I. Public Meetings
- II. Introduction
- III. Background
- IV. Issues
 - A. Nature, Extent, and Impact of the Problem
 - B. Prohibited Substances and Impaired Miners
 - C. Training
 - D. Inquiries Following Accidents
 - E. Drug-Free Workplace Programs
 - F. Costs and Benefits

SUPPLEMENTARY INFORMATION:

I. Public Meetings

The public meetings will begin at 9 a.m. and end after the last speaker testifies (in any event not later than 5 p.m.) on the following dates:

Date	Location	Phone
October 24, 2005	Little America Hotel, 500 S Main Street, Salt Lake City, UT 84101	801-363-6781
October 26, 2005	Hyatt Regency St. Louis, 1 St. Louis Union Station, St. Louis, MO 63103	800-233-1234
October 28, 2005	Sheraton Birmingham, 2101 Richard Arrington Jr. Blvd. North, Birmingham, AL 35203	205-324-5000
October 31, 2005	Sheraton Suites Lexington, 2601 Richmond Rd., Lexington, KY 40506	859-268-0080
November 2, 2005	Marriott Town Center, 200 Lee St. East, Charleston, WV 25301	304-345-6500
November 4, 2005	Hyatt Regency Pittsburgh Int'l Airport, 1111 Airport Blvd., Pittsburgh, PA 15231	800 233-1234
November 8, 2005	MSHA Conference Room 25th Floor, 1100 Wilson Blvd., Arlington, VA 22209	202 693-9440

The meetings will begin with an opening statement from us, followed by an opportunity for members of the public to make oral presentations to our panel. You do not have to make a written request to speak. You will speak in the order that you sign in. Any unallotted time will be made available for persons making same-day requests. At the discretion of our presiding official, the time allocated to speakers for your presentation may be limited. We will accept written comments and data for the record from any interested party, including those not presenting oral statements. The comment period will close on November 27, 2005.

The meetings will be conducted in an informal manner. We may ask questions of you. Although formal rules of evidence or cross examination will not apply, we may exercise discretion to ensure the orderly progress of the meeting and may exclude irrelevant or unduly repetitious material and questions.

A verbatim transcript of the meetings will be included in the rulemaking record. Copies of this transcript will be available to the public, and can be accessed at <http://www.msha.gov>.

II. Introduction

Given that our accident investigations do not routinely include an inquiry into the use of alcohol or other drugs as a contributing factor, there may be many instances in which alcohol or other drugs were involved in accidents and are not reported to us or that we do not uncover during investigations. Our preliminary review of our fatal and non-fatal mine accident records revealed a number of instances in which alcohol or other drugs or drug paraphernalia were found or reported, or in which the post-accident toxicology screen revealed the presence of alcohol or other drugs.

We are concerned that miners' use of and impairment from alcohol and other drugs can create considerable (but preventable) risks to miner safety. To the extent that use and abuse of alcohol and other drugs by miners is prevalent, it reflects problems in the community in general and the labor force as a whole.

The Department of Health and Human Services, Substance Abuse and Mental Health Services Administration's (SAMHSA) 2003 National Survey on Drug Use and Health (formerly the National Household Survey on Drug Abuse) shows that these community problems are also found in the labor force. The survey reports that of 16.7 million illicit drug users age 18 or older, 12.4 million (74.3 percent) were employed either full or part time. In addition, 14.9 million (77 percent) of the 19.4 million adults, age 18 or older, characterized with abuse of or dependence on alcohol or drugs were employed. The Bureau of Labor Statistics analyzed 1998 data from its Census of Fatal Occupational Injuries and estimated that 19 percent of the nation's workforce who die on the job test positive for alcohol and other drugs.¹ Similarly, a 1993 analysis of toxicology data on injured workers' blood alcohol concentration estimated that ten percent of fatal work injuries and five percent of non-fatal work injuries overall involved acute alcohol impairment.²

SAMHSA's 2000 National Household Survey on Drug Abuse analyzes alcohol and other drug use and abuse by industry sector. Notably, the construction and mining industries have the highest percentage of workers who reported current illicit drug use³ or have an alcohol dependence disorder or alcohol abuse disorder. Nearly one in seven workers in these industries report having a serious alcohol problem. The report shows the following rates of use for the mining and construction industries: 15.7% past month heavy alcohol use; 12.3% past month any illicit drug use; 10.9% past year dependence or abuse of alcohol; and 3.6% past year dependence or abuse of illicit drugs.

Using drugs or alcohol can impair a miner's coordination and judgment significantly at a time when he or she

needs to be alert, aware, and capable of performing complicated tasks. Even prescription medications may affect a miner's perceptions and reaction time. Mining is a complicated and hazardous occupation, and a clear focus on the work at hand is a crucial component of workplace safety. Alcohol- or drug-impaired miners endanger themselves as well as their co-workers.

A number of mine operators recognize this problem, and require applicants for employment to pass a pre-employment drug screening. At a summit held on December 18, 2004, some mine operators stated that a substantial number of job applicants are unable to pass the initial drug screen.

III. Background

Since the late 1980s, the federal government has implemented a number of programs aimed at reducing the use of alcohol and other drugs in the workplace. The Anti-Drug Abuse Act of 1986 (Pub. L. 99-570), among other things, directed the Secretary of Labor to initiate efforts to address the issue. Subsequently, Executive Order 12564, Drug-Free Federal Workplace, established federal drug-free workplaces, making it a condition of employment for all federal employees to refrain from using illegal drugs. The Drug-Free Workplace Act of 1988, 41 U.S.C. 701, *et seq.*, requires Federal contractors and grantees to have drug-free workplaces, and the Drug-Free Workplace Act of 1998, 15 U.S.C. 654, established grant programs that assist small businesses in developing drug-free workplace programs. To protect public safety, the Omnibus Transportation Employee Testing Act of 1991, Public Law 102-143, requires transportation industry employers to conduct drug and alcohol testing for employees in "safety-sensitive" positions, creating a model that many non-regulated employers follow.

In support of the President's goal of lowering the rate of illegal drug use, the Department of Labor's (DOL) Working Partners for an Alcohol- and Drug-Free Workplace (Working Partners) public outreach campaign raises awareness about the impact of alcohol and other drug use on businesses and encourages and assists employers to implement drug-free workplace programs that protect worker safety and health and respect worker rights. DOL's Occupational Safety and Health Administration (OSHA) recognizes that drug and alcohol impaired workers constitute a safety hazard and strongly supports comprehensive drug-free workforce programs, especially in certain workplace environments, such

as those involving safety-sensitive duties like operating machinery.⁴ Over the past year and a half, OSHA has implemented a number of strategies in support of this statement. For example, OSHA along with MSHA and DOL's Working Partners program, formed an alliance with four international labor unions⁵ focused exclusively on improving worker health and safety through drug-free workplace programs, and an OSHA/National Federation of Independent Business alliance agreement specifically includes promoting drug-free workplaces as a goal. OSHA also developed a Web page on workplace substance abuse, and OSHA and DOL staff have presented at conferences and written articles for publications attracting occupational safety and health professionals.

We currently address the presence and use of intoxicating beverages and narcotics at metal and nonmetal mines. Sections 56.20001 and 57.20001 of 30 CFR state:

Intoxicating beverages and narcotics shall not be permitted or used in or around mines. Persons under the influence of alcohol or narcotics shall not be permitted on the job.

Between January 1, 2000 and June 30, 2005, penalties were assessed for 75 violations of § 56.20001 and for three violations of § 57.20001. Our regulations contain no similar requirement for coal mines.

We have initiated a number of education and outreach efforts to raise awareness in the mining industry of the safety hazards stemming from the use of alcohol and other drugs. We, in partnership with the Joseph A. Holmes Safety Association, established the Professional Miner Program to recognize miners who have worked injury-free for at least three years. Miners who have been recognized as Professional Miners sign a pledge which includes a commitment to "work to ensure a safe, healthy, and alcohol and drug-free workplace." To date, approximately 15,500 miners have taken this pledge.

We participate in the drug-free workplace alliance mentioned above to provide union members and the construction industry with information, guidance and access to training resources that will help them understand the benefits of drug-free

¹ Weber, W., and Cox, C. "Work-Related Fatal Injuries in 1998," *Compensations and Working Conditions*, Spring 2001, pp. 27-29.

² Zwerling, C. "Current practice and Experience in Drug and Alcohol Testing," *Bulletin on Narcotics*, vol. 45 (1993), pp. 155-196.

³ The survey defined current illicit drug use as the use of marijuana, cocaine, heroin, hallucinogens, inhalants or non-medical use of prescription-type pain relievers, tranquilizers, stimulants, or sedatives in the past 30 days.

⁴ OSHA, "Safety and Health Topics, Workplace Substance Abuse," <http://www.osha.gov/SLTC/substanceabuse>.

⁵ International Union of Operating Engineers; United Brotherhood of Carpenters and Joiners of America; International Association of Bridge, Structural Steel, Ornamental and Reinforcing Iron Workers; and International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers.

workplace programs and protect employee health and safety. Although this alliance focuses on the construction industry, a substantial number of the union members work on mine property.

On December 8, 2004, we co-sponsored with the states of Kentucky, Virginia and West Virginia, a one-day summit for individuals involved with coal mining operations and activities in the Southern Appalachian region. The summit brought together industry, labor, state and federal government officials, and public health experts to share information, expertise, and experience in dealing with the use of or impairment from alcohol and other drugs on mine property. At the summit, industry representatives expressed concerns about the problems related to the use of drugs and alcohol in mines. Several coal mine operators described the effectiveness of their drug-free workplace programs and expressed their concern that such programs were not universal in the industry.

Along with Virginia and West Virginia, we are participating in Kentucky's Mine Substance Abuse Task Force. The task force currently meets monthly to examine options for eliminating the use of or impairment from alcohol and other drugs on mine property.

During the first four months of 2005, in our annual Spring Thaw meetings held by each of the 51 field offices of our metal and nonmetal program area, we included presentations and discussion of drug and alcohol abuse to raise awareness and provide information to mine operators.

Our State Grants Program awards federal grants to 49 states and the Navajo Nation. Our 2006 Solicitation for Grant Applications, sent out in July, 2005, requests that applicants include substance abuse training as part of new miner and annual refresher training curriculum. With assistance from DOL's Working Partners program, we will be developing materials to assist in conducting this training. Further, our National Mine Health and Safety Academy is producing an awareness video on the hazards of alcohol and other drugs. This video will be used for new miner and annual refresher training.

A number of mine operators have voluntarily implemented drug-free workplace programs, and many report that these programs have improved workplace safety and reduced workers' compensation costs. Additionally, some of these operators have told us that miners at their mines are supportive of these programs. However, the adoption of these programs is far from being an

industry-wide practice. Many miners, particularly those working in small mines are not likely to have access to these programs.

IV. Issues

We are seeking supporting information or data that will help us evaluate whether there is a need for additional federal action to address safety risks stemming from alcohol and other drug use by miners, and if so, whether this should involve rulemaking and what that regulation should include. In general, we are seeking information and comment on the extent of alcohol and other drug use problems in the mining industry and the impact on safety and health, and the types of programs currently in place and their effectiveness. Additionally, we need to assess both the costs and benefits of any intended federal action. We encourage the public to respond to the questions posed below. We also invite suggestions on alternatives or supplements to rulemaking that we should pursue. Please be as specific as possible in your responses to the questions and in suggesting alternatives. Providing specific examples, as well as cost and benefit estimates where possible, will help us evaluate and analyze your comments.

A. Nature, Extent, and Impact of the Problem

We believe that the use and misuse of alcohol and other drugs in the mining community and mining workplace create a preventable risk to the safety of miners. We are concerned that impaired miners can jeopardize their own safety and the safety of their fellow miners. Please provide examples and data to support your answers to the following questions:

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.

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?

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

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

B. Prohibited Substances and Impaired Miners

Our existing metal and non-metal standards [30 CFR 56/57.20001], as stated above, require:

Intoxicating beverages and narcotics shall not be permitted or used in or around mines. Persons under the influence of alcohol or narcotics shall not be permitted on the job.

No similar standard applies to coal mines. Please provide examples and data to support your answers to the following questions:

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

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

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

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)?

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

C. Training

Parts 46 and 48 of 30 CFR specify training requirements for supervisors and miners. Our regulations currently do not require training in the prevention of alcohol and other drug misuse. Please provide examples and data to support your answers to the following questions:

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

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

C3. What topics should be included?

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

D. Inquiries Following Accidents

Section 50.11 of 30 CFR (Investigation of accidents) requires mine operators to report and investigate accidents, and establishes criteria for the investigation and the report. Please provide examples and data to support your answers to the following questions:

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

§ 50.11 Investigation.

(a) After notification of an accident by an operator, the MSHA District Manager will promptly decide whether to conduct an accident investigation and will promptly inform the operator of his decision. If MSHA decides to investigate an accident, it will initiate the investigation within 24 hours of notification.

(b) Each operator of a mine shall investigate each accident and each occupational injury at the mine. Each operator of a mine shall develop a report of each investigation. No operator may use Form 7000-1 as a report, except that an operator of a mine at which fewer than twenty miners are employed may, with respect to that mine, use Form 7000-1 as an investigation report respecting an occupational injury not related to an accident. No operator may use an investigation or an investigation report conducted or prepared by MSHA to comply with this paragraph. An operator shall submit a copy of any investigation report to MSHA at its request. Each report prepared by the operator shall include,

- (1) The date and hour of occurrence;
- (2) The date the investigation began;
- (3) The names of individuals participating in the investigation;
- (4) A description of the site;
- (5) An explanation of the accident or injury, including a description of any equipment involved and relevant events before and after the occurrence, and any explanation of the cause of any injury, the cause of any accident or cause of any other event which caused an injury;
- (6) The name, occupation, and experience of any miner involved;
- (7) A sketch, where pertinent, including dimensions depicting the occurrence;
- (8) A description of steps taken to prevent a similar occurrence in the future; and
- (9) Identification of any report submitted under § 50.20 of this part.

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

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

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

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?

E. Drug-Free Workplace Programs

Although our regulations currently do not require programs to address the safety hazards that the presence of alcohol and other drugs in the workplace may cause, some mine operators have voluntarily put these programs in place. Typically, such a program, often called a drug-free workplace program, includes at least one of the following five components:

drug-free workplace policy; employee education; supervisory training; drug testing; and an employee assistance program. Please provide examples and data to support your answers to the following questions:

E1. Do you have a drug-free workplace program at your mine, or have you instituted any of the above mentioned components, even if not referred to as a drug-free workplace? Please provide a copy of your program policy and procedures. Is this program part of a broader program?

E2. If you have a drug-free workplace policy or program:

E2-a. What prompted you to initiate your program?

E2-b. What components does your program have?

E2-c. Which of your program's components do you feel are most critical and/or effective, and why?

E2-d. Have you been able to document any improvement as a result of your program?

E2-e. Please provide any data that demonstrate the extent of the problem at your mine and the effectiveness of your program in improving safety at your mine.

E2-f. What issues/problems have you encountered in implementing your program and how have you resolved them?

E2-g. What actions are taken for miners who violate the terms of the policy?

E3. If you previously had a drug-free workplace program, what did it include? Why was it discontinued?

E4. If you conduct supervisory training on drug issues, how are supervisors taught to recognize and handle employees who may have alcohol and/or other drug problems? Please elaborate on how supervisors make these determinations.

E5. Do you have an employee assistance program, and if so, how many employees have accessed the EAP for problems related to alcohol and drug use? How many of these employees have had their problems resolved successfully?

F. Costs and Benefits

We are particularly interested in the costs and benefits you have experienced in planning and implementing a drug-free workplace program. In addition, we are interested in knowing what you estimate the costs to be of designing and implementing other elements of a drug-free workplace program. Please provide examples and data to support your answers to the following questions:

F1. What costs have you incurred from your efforts to reduce or eliminate

drugs or alcohol from the workplace? Please provide the costs by type (e.g., personnel, training, equipment).

F2-a. What costs would be associated with having a drug-free workplace program (e.g., program implementation, training, drug testing, EAP, restricted work programs, personnel effects)?

F2-b. Would these costs be borne disproportionately by small mines? If so, please explain how and by how much the costs would vary.

F3. What benefits have you derived from your efforts to reduce or eliminate alcohol or drugs from the workplace (e.g., lower workers compensation costs, reduced absenteeism, employee morale, reduction in turnover, accident and injury reduction and related cost savings)?

Dated: September 29, 2005.

David G. Dye,

Acting Assistant Secretary for Mine Safety and Health.

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ENVIRONMENTAL PROTECTION AGENCY**40 CFR Part 62**

[R06-OAR-2004-NM-0002; FRL-7979-4]

Approval and Promulgation of State Plans for Designated Facilities and Pollutants: Bernalillo County, NM; Negative Declaration

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is approving three negative declarations submitted by the City of Albuquerque (Bernalillo County) certifying that there are no existing sources subject to the requirements of sections 111(d) and 129 of the Clean Air Act under their jurisdiction. These three negative declarations are for Sulfuric Acid Mist Emissions from Sulfuric Acid Plants, Fluoride Emissions from Phosphate Fertilizer Plants, and Total Reduced Sulfur Emissions from Kraft Pulp Mills. This is a direct final rule action without prior notice and comment because this action is deemed noncontroversial.

DATES: Written comments must be received by November 3, 2005.

ADDRESSES: Comments may be submitted electronically, by mail, by facsimile, or through hand delivery/courier by following the detailed instructions provided under the "Public Participation" heading in the Supplemental Information section of



Received 11/23/05
MSHA/OSRV

Oxbow Mining, LLC

DRUG AND ALCOHOL POLICY

I. Purpose

Oxbow Mining, LLC "OMLLC" is committed to a safe, healthy, and productive work environment for all employees free from the effects of substance abuse. Abuse of alcohol, drugs, and controlled substances impairs employee judgment, resulting in increased safety risks, injuries, and faulty decision-making.

II. Scope

This policy applies to all employees and requires each employee to acknowledge same by his/her signature. This policy, describing in detail what substances will be tested for and under what conditions employees will be tested is posted and also available to all employees requesting a copy.

III. Statement of Policy

To ensure a safe and productive work environment OMLLC prohibits the use, sale, dispensation, manufacture, distribution or possession of alcohol, drugs, controlled substances, or drug paraphernalia on any company premises or worksites. This prohibition includes company owned vehicles, or personal vehicles being used for company business or parked on company property.

No employee shall report to work or be at work with alcohol or with any detectable amount of prohibited drugs in the employee's system. (A detectable amount refers to the standards generally used in workplace drug & alcohol testing).

Employee shall, when drugs are prescribed by a medical professional, inquire of the prescribing professional whether the drug prescribed has any side effects which may impair the employee's ability to safely perform the employee's job duties. If the answer from the medical professional is yes, the employee shall obtain a statement from the medical professional indicating any work restrictions and their duration. The employee shall present that statement to his or her supervisor prior to going on duty.

Illegal use of drugs off duty and off company premises or work sites is not acceptable. It can affect on-the-job performance and the confidence of the public, and our customers in the company's ability to meet its responsibilities.

Any violation of this policy will result in disciplinary action up to and including termination.

IV. Employee and Applicant Drug and Alcohol Testing

To promote a safe and productive workplace, OMLLC will conduct the following types of Drug/Alcohol test for all employees:

- A. Pre-employment
- B. Reasonable Suspicion
- C. Random
- D. Post-accident
- E. Return-to-Duty/Follow-up Testing

V. Categories of Employee Substance Testing

A. Pre-employment Testing:

1. All persons seeking employment with OMLLC shall undergo post-offer, pre-employment drug testing. Applicants will be informed that, as a condition of employment, they must pass a drug-screening test to the satisfaction of OMLLC management.
2. Applicants who test positive will be notified that they have not met the standards for employment and of their right to request a re-test of the urine sample that can be reviewed by a medical review officer.

B. Reasonable Suspicion Testing:

An employee will be asked to submit to tests for alcohol and/or illegal drugs when the employee is reasonably suspected of being impaired in the performance of his or her job.

1. Reasonable suspicion testing may result from one of the following examples, but is not limited to the following:
 - a. Specific, personal and articulable observations concerning the appearance, behavior, speech or performance of the employee; or

- b. Violation of a safety rule, or other unsafe work incident which, after further investigation of the employee's behavior, leads the supervisor(s) /manager(s) to believe that the employee's functioning is impaired; or
 - c. Other physical, circumstantial, or contemporaneous indicators of impairment.
2. When a supervisor/manager has reasonable suspicion to request testing, the supervisor/manager will arrange to transport the employee to the collection site, and will arrange for the employee's transport home.
 3. The employee will continue in a paid status pending the receipt of drug testing results by OMLLC. In the event of a confirmed positive result, employment may terminate as of the generation of the sample testing positive.

C. Random Testing:

Except on those work sites prohibited by state or local statute or ordinances, all employees will be subject to controlled substance and alcohol testing at any time on a random basis, as a term and condition of continuing employment.

Random testing will be spread reasonably throughout the year and will be unannounced to ensure that no employee receives advanced knowledge of the time of testing. All employees will have an equal chance of being selected each time a random selection is made.

D. Post Accident Testing:

An employee must submit to a drug and/or alcohol test after an on the job accident.

1. An accident for purposes of this policy is defined as an incident or occurrence in which:
 - (a) a person dies or requires medical treatment or
 - (b) property damage is estimated at greater than \$100 or
 - (c) it involves use of a Company vehicle or
 - (d) it involves an employee in a personal vehicle accident who as a regular condition of his/her employment is required to drive a non-company vehicle.

2. An employee who is involved in an accident must immediately report the accident to his or her supervisor/manger.
3. Whenever a supervisor/manager observes or is notified of an accident as defined in #1 above, the supervisor/manager will initiate drug and alcohol testing. The supervisor/manager will order the employee to submit to a urine and/or breath test. The supervisor/manager will arrange to transport the employee to the collection site and will arrange for the employee's transport home.
4. The employee will continue in a paid status pending the receipt of drug testing results by OMLLC. In the event of a confirmed positive result, employment may terminate as of the generation of the sample testing positive.

E. Return to Duty/Follow-up Testing

If the company elects to allow an employee to return to work following a positive test result, it is mandatory that the employee must first pass a drug test and subsequently submit to a program of unannounced testing for a period of not more that twelve (12) months from the date of return to duty.

VI. The kinds of substances tested for will include the following substances or their metabolites:

- A. Marijuana
- B. Cocaine
- C. Opiates
- D. Methamphetamines
- E. Amphetamines
- F. Alcohol

VII. Inspection and Searches

The company may conduct unannounced inspection for violations of this policy in the workplace, worksites, or company premises. This includes lunchboxes, baskets, personal vehicles, etc. Employees are expected to cooperate in any inspection; failure to cooperate may result in disciplinary action including termination of employment.

VIII. Voluntary Treatment

The Company supports sound treatment efforts. Whenever practical, the Company will assist employees in overcoming drug, alcohol, and other problems

which may affect employee job performance, as long as this policy has not already been violated.

If an employee seeks treatment for drug or alcohol use, the employee may be eligible to go into a drug and/or alcohol treatment program either through OMLLC medical insurance program or at his or her own expense.

If the employee elects to enter an appropriate treatment program, the employee may be placed on unpaid status, but will be required to use any accrued vacation time and sick leave while participating in the evaluation and treatment program, so long as the employee is complying with the conditions of treatment. OMLLC will have the right to require verification from the health care provider for a release to work and/or verification of treatment as covered in the company's medical leave policies. More information regarding availability of treatment resources and possible insurance coverage for treatment services is available from the Human Resources Department.

IX. Safeguards/Confidentiality

The drug screen analysis is generally accomplished through urinalysis testing, though other body substances may be utilized as determined by OMLLC. Alcohol testing may be through breath testing. Samples will be collected in a sanitary environment designed to maximize employee's privacy while minimizing the possibility of sample tampering. If there is a positive drug and/or alcohol result on the initial screening test, the laboratory or blood alcohol technician will automatically do a second test to confirm the results. The second drug test will be performed using gas chromatography/mass spectrometry or other scientifically accepted method. A positive breath alcohol test will be confirmed by a second breath test.

All positive initial drug test results are confirmed by a government-certified outside laboratory. All government-certified outside laboratories strictly follow chain of custody guidelines to ensure the integrity of the testing process. The company shall use a Medical Review Officer (MRO) who will receive the laboratory results of the testing procedure. The MRO shall be a licensed physician and have knowledge of substance abuse disorders and the appropriate medical training to evaluate positive results, medical histories, and any other relevant biomedical information. The MRO shall review all medical records made available by the tested individual when a confirmed positive test could have resulted from legally prescribed medication.

If the results of the initial test are negative, additional tests on the specimen may or may not be performed at the discretion of OMLLC management.

If the results of the initial test are positive, that is, if the results exceed the permitted levels for any of the five drugs tested or if the blood alcohol test comes

back positive, a second confirmatory test shall be performed. The employee is prohibited from performing any duties if the initial test is positive, and while the confirmatory testing is being performed. Only specimens that are confirmed positive on the second (confirmatory) test are reported positive to the MRO for review and analysis. The MRO will contact the employee personally, in the case of a positive test result. The MRO has the responsibility of reporting to OMLLC whether the test results are positive or negative.

An applicant or employee who does not pass a drug test may request that the original sample be analyzed again at the individual's expense by a government certified laboratory. All requests for an independent analysis must be made in writing within 72 hours of notification of a confirmed positive test result. In the event the drug and/or alcohol test results are not achieved due to a diluted sample, the applicant will be required to re-test.

Each applicant or employee will have an opportunity to discuss the drug and/or alcohol test with a Medical Review Officer in a confidential setting. Each applicant or employee upon his or her request may be provided with a written copy of the positive test result, upon written request. Upon written request within seven days of taking the test an employee may access records relating to his drug and/or alcohol test.

X. Disciplinary Action

A. Testing Positive

Employees who test positive for drugs or alcohol are in violation of this policy.

B. Refusal to comply

Employees who refuse required testing are in violation of this policy.

C. Interference with testing

Employees who adulterate, tamper with or otherwise interfere with accurate testing are in violation of this policy.

D. Any employee, who has been observed using or possessing illegal drugs or alcohol during work time, including lunch breaks, or on OMLLC premises is in violation of this policy.

XI. At Will Employment

Nothing in this policy is to be construed to prohibit OMLLC *from* maintaining a safe and secure work environment or to limit its right to impose disciplinary

actions as it may deem appropriate for reasons of misconduct or poor performance, regardless of whether the misconduct or poor performance arises out of the use of alcohol or drugs. Such disciplinary actions may include termination of employment. Employment is at-will and subject to termination by OMLLC or the employee at any time, with or without notice and with or without cause.

ACKNOWLEDGMENT

I have received a copy of OMLLC's Drug and Alcohol Policy and understand that in order to continue my employment with this employer I must abide by the terms of the policy. I agree to notify the employer of any drug violation occurring in the workplace.

I understand that this policy in no way modifies my status as an at-will employee and in no way implies, infers, or guarantees my continued employment for any definite term and that I may be dismissed at the discretion of the employer for other reasons than failing to follow the terms of the policy.

Employee Name (print)

Date

Employee Signature