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Mine Safety and Health Administration
Office of Standards, Regulations, and Variances
1100 Wilson Boulevard
Room 2350
Arlington, VA 22209-3939

Re: Proposed Rule
Alcohol and Drug Free Mines, Policy, Prohibitions, Testing, Training, and
Assistance
RIN 1219-AB41

Dear Sir or Madam:

The Colorado Mining Association (CMA) would like to thank MSHA for the opportunity to provide comments regarding the proposed regulation entitled "Alcohol- and Drug-Free Mines: Policy, Prohibitions, Testing, Training, and Assistance". These comments reflect the unified views of the members of CMA, which currently represents 25 mining companies in the State of Colorado. CMA, founded in 1876 and incorporated in 1897, is an industry association whose members include the producers of coal, metals and other minerals throughout Colorado and the west. Our 900 members also include individuals and organizations providing services and supplies to the industry.

The CMA supports MSHA in its efforts to improve the safety and health of the nation's miners. CMA further supports the reduction and elimination of drug and alcohol abuse in all mining activities. However, CMA is opposed to MSHA's proposed rule as it is written. First and foremost, the proposed rule appears to be a step backwards for many companies with well established drug and alcohol programs that have zero tolerance policies. CMA believes that MSHA should allow zero tolerance policies due to the potential for serious accidents where drug or alcohol abuse can be the primary cause of the accident. Eliminating drug and alcohol abuse reduces the potential for the serious accident to occur. Even the DOT regulations, adopted by MSHA in the proposed regulations, do not hinder a zero tolerance policy.

Secondly, if the proposed regulation becomes a mandatory safety standard, operators could be held liable for personal actions taken by an individual miner. For example, operators could be cited for the possession and/or use of drugs or alcohol on company property by an individual miner. In this case, should operators start regularly searching personal vehicles on company property for the contraband to reduce citations? We think the answer is "no."

AB41-COMM-102

Third, the regulation, as proposed, would have a significant financial impact on already heavily burdened small mine operators. These small mine operators do not have the resources necessary to comply with the proposal.

CMA encourages MSHA to propose a basic requirement that all companies adopt a drug and alcohol program. In this program, operators should be able to specify their own frequency of testing as well as actions to be taken for positive tests.

In regards to the proposed regulation, CMA provides the following comments on specific sections:

30 CFR 66.101(b)(1)

Mine operators should be allowed to establish the maximum acceptable BAC level before action is taken at their mine site, including zero tolerance. Action should be taken on all positive tests above the accuracy of the testing device since personnel may still be somewhat impaired at levels less than 0.04 percent. Even the DOT regulations require action to be taken for positive tests at or above 0.02 percent. The action taken for positive test results should be left up to the discretion of the mine operator based upon established corrective action policies.

30 CFR 66.201(b)

In lieu of posting a copy of the written policy on a bulletin board in a common area, operators should be allowed to post a notice of where to obtain a copy of the written policy. With unsecured bulletin boards, it can be difficult to maintain the required posting.

30 CFR 66.203(a)(1)(vi)

Supervisors should be trained to refer personnel to human resources personnel or other designated benefit administrators since these referrals are typically governed by established company benefits which are administrated by human resources or other designated personnel. Human resource personnel (or other designated personnel) are better equipped and qualified to make the necessary referrals to EAP's or SAP's. Human resources or other designated personnel typically have more information about the programs and the requirements thereof.

30 CFR 66.204(b)

MSHA should specify a short "grace period" upon the regulation becoming effective where miners may voluntarily admit to the illegitimate and/or inappropriate use of prohibited substances. The preamble states that "It is MSHA's intention to encourage miners to voluntarily seek assistance, but not to allow them to do so to avoid testing or other requirements under the proposed rule." As written, it appears that if a miner is required to submit to either a random drug screen or for cause testing, the miner could at that point in time

voluntarily admit to abuse of drugs and/or alcohol, avoiding the test. Miners should not be able to take advantage of the amnesty provision after they are identified for testing.

30 CFR 66.300(b)

MSHA should specify the exact testing requirements, rather than relying on a separate federal regulation not included in 30 CFR. This would eliminate confusion where there are clear differences between 30 CFR 66 and 49 CFR 40. For example, 49 CFR 40.85 requires testing of five drug classes only, whereas MSHA proposes testing for ten. 49 CFR 40.85 states that “you must not test “DOT specimens” for any other drugs, conflicting with the MSHA’s Preamble (Page 52147) that states “It is allowable for mine operators who choose to test for additional drugs to use the same sample to do so.”

Additionally, DOT sampling requirements are inflexible by prohibiting alternative types of sampling including, but not limited to, saliva samples, blood samples, hair analysis and direct reading cards. These types of alternative testing should be allowed and they actually enhance miner safety. For example, use of direct reading cards for instant analysis can immediately detect drug usage above the cutoff limits of the detection card. This allows immediate removal of the person from the safety sensitive position, pending the confirmation test utilizing standard analysis (gas chromatography/mass spectrometer) methods. Without the use of the direct reading card, the person would remain in the safety sensitive position for a period of seven to ten days awaiting both the initial test and confirmation test results. Alternative types of testing have proven to be accurate and effective in determining drug usage. The regulation should allow for the full suite of diagnostic methods to be utilized at the mine operator’s discretion.

MSHA should also allow alternative compliance methods. 30 CFR 66.1 states that “Alcohol and drug free programs established prior to the effective date of this rule that include consistent policies, and alcohol and drug testing programs, and provide at least the same level of protection as these requirements, are in compliance with this standard. With this regulation, companies with well established programs that have proven safe and effective should not have to revise their program to maintain compliance with the intent of the regulation. In other words, the regulation should be revised to set a minimum standard only.

30 CFR 66.304(d)

Mine operators should be allowed to establish the maximum acceptable BAC level before action is taken at their mine site, including zero tolerance. Action should be taken on all positive tests above the accuracy of the testing device since personnel may still be somewhat impaired at levels less than 0.04 percent. Even the DOT regulations require action to be taken for positive tests at or above 0.02 percent. The action taken for positive test results should be left up to the discretion of the mine operator based upon established corrective action policies. This may include removal from mine property since non-safety sensitive jobs may not be available.

30 CFR 66.306(e)

This section allows the use of blood, urine or breath tests. This conflicts with the DOT requirements that urine be used for the detection of drugs. As stated earlier, operators should be allowed to use multiple types of collection methods other than what is approved by DOT regulations.

30 CFR 66.307(b)

Persons using drugs or alcohol may not necessarily exhibit the signs or symptoms of being under the influence of the substances. Personnel other than supervisors may have direct knowledge of a person using drugs or alcohol. As the proposed regulation is written, reasonable suspicion testing could not be conducted unless a supervisor or company official makes the required observation. This is in direct conflict with many existing drug and alcohol policies. Reasonable suspicion can be justified in other ways other than through the supervisor observation process.

30 CFR 66.400

Mine operators should be the ones specifying actions to be taken on any violation of the drug and alcohol policy, including first time violations. Requiring mine operators to retain personnel that have violated such policies is contradictory to well established corrective action policies. Violations of the drug and alcohol policy should be considered as serious as other significant safety infractions where termination is justified on the first offense. MSHA should not overrule the operator's right to establish and enforce corrective action policies.

Additionally, adulterating a specimen is equivalent to falsification of records, which in many cases can be a federal offense, punishable by a fine and imprisonment. A refusal to test is of equal justification to terminate on the first offense. By refusing to test, the chances of the test results being negative after a delayed period of hours or days are significantly increased. This results in a diminution of safety to all miners working with or around a person under the influence of drugs or alcohol.

30 CFR 66.401(a)

As previously stated, DOT sampling requirements are inflexible by prohibiting alternative types of sampling such as direct reading cards. This type of alternative testing should be allowed and can actually enhance miner safety. For example, use of direct reading card for instant analysis can immediately detect drug usage above the cutoff limits of the detection card. This allows immediate removal of the person from the safety sensitive position, pending the confirmation test utilizing standard analysis (gas chromatography/mass spectrometer) methods. Without the use of the direct reading card, the person would remain in the safety sensitive position for a period of seven to ten days awaiting both the initial test and confirmation test results. This is a diminution of safety to all personnel working with or around the affected person.

30 CFR 66.403(b)

Mine operators should be allowed to establish the maximum acceptable BAC level before action is taken at their mine site, including zero tolerance. Action should be taken on all positive tests above the accuracy of the testing device since personnel may still be somewhat impaired at levels less than 0.04 percent. Even the DOT regulations require action to be taken for positive tests at or above 0.02 percent. The action taken for positive test results should be left up to the discretion of the mine operator based upon established corrective action policies. This may include removal from mine property since non-safety sensitive jobs may not be available.

30 CFR 66.404(a)

Due to the limited number of SAPs, especially in rural communities, significantly hinders a mine operator's ability to comply with the proposed requirement. In addition, miners may be required to drive significant distances to meet with the SAP for evaluation purposes. Allowing evaluation by either an SAP or EAP would reduce the potential conflict of availability and travel distance.

30 CFR 66.404(b)

Operators should not be required to provide a listing of SAPs to applicants. This type of information is applicable to employees whereas applicants are still in the pre-employment phase. Operators should not be forced to hire applicants that fail pre-employment testing.

In addition, the comments for 30 CFR 66.400 applies where MSHA should not govern the termination rights of operators, even for a first offense. Mine operators should have the right to withdraw an offer of employment to any applicant that tests positive for drugs or alcohol on the pre-employment screening.

30 CFR 66.404(e)

The comments for 30 CFR 66.400 applies where MSHA should not govern the termination rights of operators, even for a first offense.

30 CFR 66.406(a)

Mine operators should be allowed to establish the maximum acceptable BAC level before action is taken at their mine site, including zero tolerance. Action should be taken on all positive tests above the accuracy of the testing device since personnel may still be somewhat impaired at levels less than 0.04 percent. Even the DOT regulations require action to be taken for positive tests at or above 0.02 percent. The action taken for positive test results should be left up to the discretion of the mine operator based upon established corrective action policies.

30 CFR 66.406(b)(1)

Mine operators should be allowed to determine how frequent follow up testing is required. Allowing other personnel to determine the testing frequency conflicts with many well established company policies.

30 CFR 66.406(b)(3)

Mine operators should be allowed to determine how frequent follow up testing is required. Allowing other personnel to determine the testing frequency conflicts with many well established company policies.

30 CFR 66.406(b)(7)

Samples collected for other reasons such as a random drug screen should be allowed to substitute for any other required sampling. For example, if a follow up drug screen is due and the person is also randomly chosen for the random drug screen, collecting two different samples on the same day is unnecessary since the results of both tests will be identical.

30 CFR 66.500(c)(1)

MSHA should not require operators to include post accident test results in accident reports due to the potential release of confidential information. Accident reports are public record which can easily be obtained. In smaller communities, an injured miner may be well known. Any reference to a positive drug or alcohol test could be easily traced to the injured miner, even if his name is redacted from the injury report that is readily obtainable.

In closing, CMA again expresses its appreciation for the opportunity to comment on the proposed regulation. Our members fully support a drug and alcohol free workplace. Our members encourage MSHA to revise the proposed regulation to outline a basic drug and alcohol program that can be tailored to each mine's unique circumstances while still allowing a zero tolerance policy.

If you have any questions concerning these comments, I can be reached at (303) 575-9199.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Stuart A. Sanderson", with a long horizontal flourish extending to the right.

Stuart Sanderson
President
Colorado Mining Association