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Mining Association

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RE: RIN 1219-AB41 Proposed Rules on Alcohol and Drug Testing at Mines

To whom it may concern:

Please see Nevada Mining Association's comments below, regarding RIN 1219-AB41, 30 CFR Parts 56, 57, and 66 Alcohol- and Drug-Free Mines: Policy, Prohibitions, Testing, Training, and Assistance; Proposed Rule.

Section 66.1 Purpose

The Mine Act expressly states that the miner is the first priority and concern of all in the coal or other mining industry. Mine operators need to take appropriate steps to ensure the safety of their employees in regards to alcohol and drug use/abuse. 30 CFR 56/57.20001 states that, "Intoxicating beverages and narcotics shall not be permitted on the job." This standard has prohibited drug and alcohol use in surface and underground metal/non-metal mines for many years. The intent of these standards reflects the need for a drug-free, alcohol-free workplace. This is the type of environment that is needed to promote safety in a work culture. Removal of 56/57.20001 is not advised. The rule is intended to protect mining's most precious resource - the miner - by preventing accidents, injuries, and fatalities at the mine associated with the misuse of alcohol and drugs. The most effective way to protect miners from alcohol and drug related accidents is to develop and promote a drug-free, alcohol-free workplace with a zero tolerance policy.

Section 66.2 Applicability

Mine operators, whether metal/non-metal, surface, underground, or coal must protect miners from drug and alcohol related hazards. When an employee enters a mine, they are exposed to unique hazards that are not present in other industries. Although some employees do not perform safety sensitive job duties, many are required to travel through areas where other personnel are performing safety sensitive work, exposing them to potential hazards. While working on a mine site, whether they are office workers, security guards, mechanics, equipment operators, etc..., miners must be equally alert and lucid. There is no place for impairment or intoxication on a mine site. All employees working in

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safety sensitive positions or non-safety sensitive positions should receive the same training and testing. This should apply to all persons working on mine property.

Section 66.100 Prohibited Substances

Many operators already have drug policies in place. Operators should ensure that employees are not using any of the "SAMHSA-5", illicit drugs. A common practice is to administer drug screens on site that test for the five "illicit drugs". Screening can be performed on site and the results are final in a matter of minutes. Screening is only performed by trained personnel. If an employee fails a drug screen, they are immediately taken to a medical facility and a confirmation drug test is administered. The drug test is then sent to a certified lab. Screening is less expensive than testing and allows operators to test a much larger percentage of employees on an annual basis. 66.100 should read screening or testing, rather than "testing" in order to allow operators to sample a greater percentage of their workforce.

Section 66.101 Prohibitive Behaviors

While MSHA is considering a blood alcohol concentration level (breath alcohol level) of 0.04 to be "under the influence", most operators have a much more stringent policy. Many operators have a zero tolerance policy for blood alcohol. Most operators require employees to be 0.00 in order to return to work. The more stringent, operator required BAC level is more likely to prevent alcohol related accidents. We request that operators can continue setting and enforcing more stringent levels for employees, contractors, etc...

Section 66.200 Purpose and Scope

Responsible operators already have a drug free mine program implemented. We would encourage all operators to implement a drug free mine program.

Section 66.201 Written Policy

Written policy is the foundation of any successful program and is necessary in order to be consistent. Written policy should be used to communicate requirements and expectations of the miners.

Section 66.202 Education and Awareness Program for Non-supervisory Miners

Education is a critical part of workplace safety. Miners should be educated about the adverse affect of alcohol and drugs in the workplace. Company drug policy should be

explained by a competent person. Trainees should understand what is expected of them. Sixty minutes for new hire may be a little excessive. Thirty minutes is probably adequate for new hire. Thirty minutes for a refresher is a fair length. The refresher should be given by a competent supervisor and the operator should have the option to give this training in a regular crew safety meeting.

Section 66.203 Training Program for Supervisors

Supervisor training should review the topics that are covered by non-supervisory training per 66.202 as well as the following topics: 1. Reasonable suspicion and post accident testing/screening. 2. Supervisor's role in enforcing the alcohol and drug free workplace policy. 3. Physical, behavioral, and performance indicators of possible drug use or alcohol abuse. 4. What procedures to follow when reasonable suspicions are determined. 5. What procedures to follow post accident. 6. Employee Assistance Professional referral training.

Section 66.204 Miner Assistance Following Admission of Use of Prohibited Substances

Many operators have an Employee Assistance Program. Under this program, miners are allowed to get the help that they need without fear of termination. Mine operators should encourage employees to come forward and voluntarily admit drug and alcohol use/abuse. Only employees that volunteer this information should get a second chance, and only if it is not volunteered as the result of accident, injury, suspicion, or being called in for a random drug and alcohol test.

Section 66.300 Purpose and Scope (Testing Requirements)

66.300 states that MSHA proposes to incorporate DOT part 40 alcohol and drug testing procedures. MSHA however does not fully incorporate DOT standards as stated in 66.101 where MSHA chose not to adopt the bifurcated system, used by DOT. Operators that employ Breath Alcohol Technicians are already trained to DOT standards and MSHA's variance only creates more confusion. MSHA should completely adopt the DOT standards, rather than just using the standards that they prefer, in order to be consistent. In the alternative, MSHA should state that operators may set stricter standards if they choose to. According to 66.300, MSHA is offering mine operators the option to use service agents to perform the functions required in subpart D. If this truly is an "option", then MSHA should clearly state in 66.300, that mine operators can do their own screening. Please refer back to screening comments made about 66.100. The proposed rule contains a requirement that mine operators use only HHS-certified labs to test collected samples. We request that this only apply to confirmation tests and not to initial drug screen/tests. On site drug screens have been very effective in the past and will continue to be effective in the future. Mine operators have tests available to them that will identify any adulterants that may have been

placed in the specimen and they are just as accurate as a laboratory test. Any non-negative screen result would be sent to a medical facility for confirmation testing. Some companies, workers, and unions may require a lab test initially. Those issues can be addressed in collective bargaining agreements and do not need to be addressed in the proposal.

Section 66.304 Pre-employment Testing

Potential employers need to retain the ability to retract a job offer due to the presence of breath alcohol, even if the applicant's BAC was below 0.04. Operators should be allowed to set more stringent standards for themselves.

Section 66.305 Random Testing

Operators should be allowed to conduct screening on employees as a means of primary testing. Any positive screens should require following up with a confirmation test that is sent to a certified lab. The ten percent requirement is achievable. If screening is allowed as a preliminary test, operators could afford to perform random testing on a larger percentage of their workforce.

Section 66.306 Post Accident Testing

The proposed rule requires that post-accident tests be conducted by mine operators whenever an accident or occupational injury must be reported to MSHA. Mine operators will have a difficult time complying with this rule because injuries often appear to be minor at first and later develop into restricted duty or lost time accidents. Not all injuries are immediately identified or categorized as MSHA reportable accidents. The results of post accident testing should remain in a confidential file with the human resources department. Formal reports for serious accidents should have a place to record whether a post accident screen/test was administered, but the results should remain confidential. MSHA needs to ensure that HIPAA law is not violated when establishing requirements for reporting. Operators have a responsibility to their employees to ensure confidentiality.

Section 66.307 Reasonable Suspicion Testing

Recommend allowing screening as a primary means of testing, with a required follow up confirmation test, sent to a certified lab, for any positive screens.

Section 66.400 Consequences to Miner for Failing an Alcohol or Drug Test or Refusal to Test

Consequences for violation to this policy should require removal from safety sensitive duties. Mine operators should also reserve the right to discipline employees for violations of drug and alcohol policy, up to and including termination, even for a first offense.

Section 66.402 Substantiating Legitimate Use of Otherwise Prohibited Substances

Miners shall be given ample opportunity to demonstrate that any use of substances has been authorized by a physician. Obtaining a valid prescription alone should not be considered sufficient proof of legitimate use. A company appointed MRO should make this determination. Employees should not wait until a positive drug test/screen to report use of impairing drugs. Employees should be required, before performing work, to report the use of prescription drugs that might affect their ability to work safely.

Section 66.404 Evaluation and Referral

This section requires mine operators to offer job security to miners that violate the drug and alcohol policy for the first time. MSHA is attempting to move into a realm that it does not belong in. This decision should be left up to the mine operator's human resources department. The purpose of MSHA is to protect the health and safety of miners, not to ensure job security to those who violate company policy and MSHA standards. Mine operators shall retain the right to terminate employment for violations of a drug free policy. A drug free work place is just that, drug free. Working drug free is a condition of employment and positive confirmation tests should initiate discipline up to and including termination on the first offense. Drug use is a behavior and a choice. Users should not be given a free strike. Mine operators should encourage employees to come forward and voluntarily admit drug and alcohol use/abuse. Employees that volunteer this information should get a second chance, but only if it is not volunteered as the result of accident, injury, suspicion, or being called in for a random test. This section requires mine operators to provide violators with a list of SAPs. Employees can be given this list whether their employment is continued or terminated.

Section 66.405 Return-to-Duty Process

This section refers back to ensuring job security for first time offenders. Again, consequence for violation of a company's drug and alcohol policy should be determined by the operator as long as it is equal to or more stringent than MSHA policy.

Section 66.406 Return-to-Duty Testing and Follow-Up Testing

Mine operators should be allowed to set a lower BAC than .04 as a required test result to return to work.

Subpart F- Record Keeping and Reporting

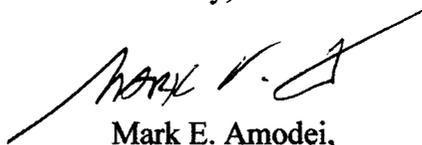
This section contradicts itself as it states that records of alcohol and drug tests would be protected as confidential communication between the mine operator and the miner, but goes on to require that post-accident test results be included on reports of injuries and accidents. The results of post accident drug and alcohol tests need to remain confidential between the employee and the mine operator recorded and kept by the human resources department. Reports should only indicate whether post accident testing took place. If MSHA needs to follow up on the results, that information could be made available by the appropriate department. The proposed requirement to report test results to MSHA further violates confidentiality and HIPAA law.

Additional concerns and comments

Some of the requirements in this proposal may greatly affect operators and miners in regards to collective bargaining agreement issues. MSHA must ensure that this proposal is consistent with rights and requirements set forth in HIPAA and privacy act. MSHA's rule only needs to set the minimum standards. The policy should state that mine operators can set their own drug and alcohol program standards as long as they meet or exceed set policy stringency.

In reality, MSHA only needs to require operators to implement a drug and alcohol policy that their employees are trained to and consistently held accountable to.

Cordially,



Mark E. Amodei,
President