



Barrick Gold of North America, Inc.
136 East South Temple
Salt Lake City, Utah 84111

October 21, 2008

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

RE: RIN 1219-AB41
Docket ID: MSHA-2008-0011
Document ID: MSHA-2008-0011-0001
Alcohol and Drug Free Mines: Policy, Prohibitions, Testing, Training and Assistance

Dear Sir or Madam:

The following presents the comments of Barrick Gold of North America, Inc. and its operating affiliates (collectively "Barrick") on MSHA's proposed regulation as referenced above. Barrick operates five (5) gold mines in the western United States employing approximately 3400 people.

The attached comments first set forth Barrick's general comments on the proposed rule and then identify Barrick's recommendations on certain specific proposed provisions.

We appreciate the opportunity to comment on this proposed rule and look forward to providing meaningful input into the final effort to assist in making our mines safer. If you have questions concerning this submittal, please contact me at (801) 990-3746 or via email at bferdinand@barrick.com.

Sincerely:

A handwritten signature in black ink, appearing to read "Bill Ferdinand".

Bill Ferdinand
Director, Environment, Health and Safety
Barrick Gold of North America, Inc.

xc: file

(1)

ABY1-COMM-90

BARRICK COMMENTS ON MSHA'S PROPOSED RULE
ALCOHOL & DRUG FREE MINES: POLICY, PROHIBITIONS, TESTING, TRAINING &
ASSISTANCE

Please find Barrick's comments on the proposed rule and its response to MSHA's request for comments in the preamble of the rulemaking.

GENERAL COMMENTS

1. Overall, we support MSHA intended outcome, namely alcohol and drug free mines that allows for a safer and healthier work environment. Although Barrick is pleased that MSHA has taken an initiative on this important matter, we believe that the proposed rule as currently published diminishes work place safety relative to Barrick's existing Drug and Alcohol Abuse Program. We believe that MSHA's proposal if enacted will weaken and provide a less safe working environment than presently enjoyed by employees, contractors and visitors to our mines.

Barrick believes that MSHA should propose minimum threshold requirements relative to drug and alcohol abuse programs that do not preclude an employer, a bargaining unit, State or other entity from developing, implementing and maintaining a program that enhances its program above the minimum threshold standards. Many mines in the United States have such programs that are effectively working to combat drug and alcohol abuse, and MSHA should not replace effective drug and alcohol programs with mandatory *less* effective prescriptive programs.

Barrick requires prospective employees pass pre-employment drug and alcohol tests prior to employment. During employment, we utilize random drug and alcohol testing to assure our facilities remain a safe place to work. Employees that fail the tests or refuse or alter the tests are subject to disciplinary action, up to and including termination.

However, prior to reaching that point, to assist our employees and their families, Barrick's drug and alcohol policy encourages its employees to voluntarily seek help with treatment and counseling available under the policy. Once the employee satisfactorily completes the rehabilitation program from health care professionals, they reenter the work force without consequence. However, if an employee does not seek assistance before the drug and alcohol testing under the policy, it is too late for the employee to avoid disciplinary actions for violating the policy.

To further enhance the working environment, the policy provides "For Cause Testing" of drugs and alcohol in all vehicular accidents and those that involve serious injuries or are perceived to be "under the influence". These primary tenants coupled with the substance abuse program (SAP) and other provisions within Barrick's policy including training, contractor requirements, confidentiality, prescription drugs, and call-out provisions provided within Barrick's policy enhance and improve our work environment. We are very concerned that under MSHA's proposed rule, it would actually weaken our program and put more miners at risk.

In summary, we believe and recommend that MSHA revise its proposal rule to assure it does not preclude an entity from having a drug and alcohol program that exceeds the proposed levels of protection proposed or would otherwise diminish the effectiveness of existing drug and alcohol programs.

2. Barrick believes the proposed rule at §66.400 is not adequately protective of workplace safety. Companies must have the discretion to terminate employees who fail to pass a drug or alcohol test. Otherwise, there is little incentive to employees to take the policy seriously until they incurred "one strike" by failing a test. Mining companies must have the discretion to adopt a "zero tolerance" policy that authorizes the dismissal of an employee upon the failure of any drug or alcohol test.

As drafted, the proposed rule could be interpreted as limiting a company's ability to dismiss an impaired employee who has caused a major safety violation, even one leading to injury. Companies must possess the discretion to discipline and terminate employees who breach MSHA and site-specific safety policies. Under the proposed rule, there is the potential that a sober employee could be subject to termination for causing a workplace accident, while an impaired worker who caused an identical accident would actually be protected from dismissal. Obviously, that result would be nonsensical.

SPECIFIC COMMENTS

Preamble – Effective Date and Implementing Language (Page 52142)

MSHA states within this section of the preamble that:

"The proposed rule would allow mine operators who do not have an existing alcohol- and drug-free mine program in place one year from its effective date to implement its requirements. In the event a mine operator already has an alcohol- and drug free mine program in place that tests for at least the substances specified by the rule, the mine operator would be considered to be in compliance with the proposed rule provide the prohibitions and training requirements are consistent with those in the rule even if differing drug-testing technologies are being used. However, mine operators with pre-existing drug free mine programs would need to come into compliance with all requirements of the rule, including drug-testing procedures and technologies, within two years of the rule's effective date."¹

Comment – contrary to this preamble language indicating the proposed rule would allow mine operators to come into compliance within one (1) year for operators that do not have an existing drug and alcohol program and two (2) years for those operators who do have an existing drug and alcohol program, the actual proposed rule does not contain any such language.

Preamble - Section 66.2 Applicability (Page 52143) and Propose Rule §66.2 (b)

MSHA requests comments about the determinations of who performs safety sensitive job duties and therefore required to be tested and trained.

¹ Federal Register, Volume 73, Number 174, Page 52142

Comment - As MSHA is aware, drug and alcohol abuse doesn't stop at the mine working face or "safety sensitive" positions. Its use and abuse is simply a microcosm of our society as a whole and accordingly, Barrick's policy and Substance Abuse Program (SAP) is provided to protect all employees at its mining operations. Thus, we recommend and propose that MSHA's proposal at §66.2 (b) and throughout its rulemaking, reflect and note that these are minimal standards for drug and alcohol programs allowing operators at their discretion, to have enhanced programs that may include other "non" safety sensitive job duties in their drug and alcohol program.

Propose Rule §66.3 Definitions

MSHA proposes to include the definition and prescriptively define the term "Follow-up Testing".

Comment – Barrick believes MSHA is overly prescriptive in its definition of "Follow-up Testing". In its proposal, MSHA prescribes the number of tests required to be performed after violating the alcohol and drug free work place policy. We believe that follow up testing should be left to the decision of the health care professionals based on their intimate knowledge of the case and their expertise. It is our belief that MSHA should not be prescriptive as a "one size does not fit all" approach is flawed.

Preamble – Section 66.200 Purpose and Scope (Page 52144)

MSHA states it "*believes that having programs in place at all mines would be in the best interest of all miners*".

Comment – Barrick, concurring with the overall intent, cautions MSHA that its "one size fits all" approach is flawed. Each mine is unique in both their size and its physical location relative to providing the services proposed by the Agency. MSHA should propose minimal thresholds as the current prescriptive proposal diminishes and would effectively ban those programs whose performance exceeds those in the proposed rule.

Preamble – Subpart D – Alcohol and Drug Testing Requirements (Page 52146)

MSHA states in the preamble that some mine operators are using alternate testing methods and requests comments and information on their experiences.

Comment - Barrick uses approved alternate testing methods in collaboration with the DOT urinalysis testing for drugs and breathalyzer test for alcohol.

As part of our hiring program, Barrick utilizes hair testing as an integral part of its overall drug and alcohol pre-employment screening program. The hair testing methodology is approved by the U.S. Food and Drug Administration (FDA). The FDA has a long association with the Substance Abuse and Mental Health Services Administration (SAMHSA) and under the testing program for Federal workers, SAMHSA's drug testing program requires the use of products

cleared or approved by the FDA.² The hair testing methodology used by Barrick meets the cut-off levels for drug screening and confirmation established by SAMHSA.

An advantage to utilizing hair testing as a screening tool is that it detects drug usage over a longer period of time, generally, the last 90 days. Such drugs as cocaine, methamphetamine, opiates and phencyclidine are rapidly excreted and usually undetectable in urine 72 hours after their last use. In saliva, it becomes undetectable after about 48 hours. The hair testing method allows a company to make a more informed decision on hiring prospective employees.

Another alternate method utilized in the event of "For Cause Testing" such as significant accidents, vehicle incidents; suspicion of being under the influence is the "ICUP Drug Screen" urinalysis method.³ This test method has FDA clearance and can cover up to a 13 panel test including the 10 drugs proposed by MSHA. Barrick currently uses this test as a screening tool in the event of an accident or when there appears to be an "under the influence" incident. This test allows for a timely test result ranging from 5 to 60 minutes after submission of a urinalysis. Upon detection of a positive result, the sample can be safely sealed and utilized as a confirmation sample using gas chromatography/mass spectrometry (GS/MS) approved by SAMHSA.

Preamble - Section 66.100 Prohibitions (Page 52143) and Propose Rule §66.100 (b)

MSHA seeks comments on the list of drugs that are specifically identified as prohibited substances and the means for maintaining flexibility to include additional drugs as need arises. Public comments also is sought from individuals and entities that have experience and data regarding the specific drug compounds to be tested for within these drug groups and classes: the target parent drug and/or metabolite(s) to be tested for; the quantitated concentrates of these drug and/or metabolites to determine an initial presumptive positive result; along with the test practices and recommendations for training and certification of Medical Review Officers (MRO) in reviewing the laboratory test results for mines and differentiating use in accordance with a valid medical prescription versus illicit use.

MSHA proposes at §66.100 (b) that a miner who possesses or have used a prohibited substance will not be in violation of this part provided that an MRO has determined that the miner has a valid prescription for the substance and is using it as prescribed.

Comments – Relative to the preamble discussion on the list of drugs, Barrick believes the identified 10 substances are those likely to be abused and are appropriate for testing.

In regards to the proposed rule at §66.100 (b), Barrick questions the language within this section because as literally proposed, it infers that an individual who has a legal prescription from their own private doctor, must also have a MRO determine it is indeed a valid prescription and is being used as prescribed prior to being permitted on mine property.

² Testimony on Federal Workplace Drug-Testing, Dr. D. Bruce Burlington, Director Center for Devices and Radiological Health, Food and Drug Administration U.S. Department of Health and Human Services, House Committee on Commerce, Subcommittee on Oversight and Investigations, July 23, 1998

³ Instant Technologies, Inc.

This would entail each individual who has a prescription, to be tested and obtain a MRO certification prior to being allowed on site to work. This proposal in essence would also require an individual whose prescription is new or might change to be re-tested prior to be able to work on-site.

Barrick does not believe this should be the unintended outcome of the proposed rule. Rather, the intent should be to determine through the normal random drug test process if the prescription is being abused. We don't believe that an MRO should be certifying if the individual has a valid prescription. This is between their private doctor and the individual. The MRO review should be used to identify if the test concentrations are consistent with its prescribed use as directed by the individual's doctor.

Barrick, as part of its program requires individuals to let their supervisor know if they are on prescription drugs and the affects it might have on their job performance. If the prescription affects their ability to work in a safe manner, they are not allowed to perform that function. An individual who fails to inform their supervisor relative to a prescription and its affects is a violation of the Company's program subjecting them to potential disciplinary action.

We request that MSHA clarify its intent in this section.

Propose Rule §66.101 (b)(1)

MSHA proposes impairment of alcohol by Blood Alcohol Concentration be set at 0.04 percent or greater.

Comment – Barrick's Drug and Alcohol Policy set the impairment limit at 0.02 percent or greater. We continue to recommend and propose that MSHA's proposal throughout the rulemaking reflect minimal standards for drug and alcohol testing and operators may at their discretion provide enhanced programs.

Propose Rule §66.200 Purpose and Scope

MSHA proposes that the mine operator provide "referrals" for assistance for miners who violate this rule.

Comment – Barrick believes that the term "referrals" infers plurality when in reality, especially in rural areas, there are limited available of SAP providers. Accordingly, Barrick would propose the term "referral(s)" due to this fact.

Preamble - Section 66.201 Written Policy (Page 52144)

MSHA invites comments on how the written policy should be provided to miners.

Comment – Barrick believes the best means to assure the policy is known and familiar to its employees is to provide such items to each individual upon initial employment with a company. For those policies that become effective after an individual's employment has commenced, such policies may be provided during meetings, training sessions, mailings (hard copy and digital), or other rollout mechanisms. However, Barrick does not believe it prudent for MSHA

to codify how a written policy is provided to a company's employees. Rather, we believe it is sufficient that MSHA codifies that such policies are available and provided to employees.

Preamble - Section 66.202 Education and Awareness Program for Non-supervisory Miners (Page 52145) and Propose Rule §66.202 (b)

MSHA invites comments about the amount and types of training for nonsupervisory miners and about the methods appropriate for delivering this training and also about the best means for assuring that training is delivered by qualified personnel.

Comment – Barrick concurs that employees need to be informed regarding the regulation, the company's drug and alcohol policy, its impacts, available assistance programs and the disciplinary actions relative to this policy.

We disagree however with MSHA proposal at §66.202(b) that such training cannot be completed entirely through an electronic interactive training. An appropriately designed and implemented interactive training can provide the appropriate training whether it's provided by audio visual, videos, movies, on-line interactive tutorials or other means provided it satisfactorily covers the topics and provides for questions and feed back.

Preamble - Section 66.203 Training Program for Supervisors (Page 52145)

MSHA invites comments about the amount and type of training for supervisors and about the methods appropriate for delivering this training and also about the best means for assuring that training is delivered by qualified personnel.

MSHA also seeks comment on who should receive reasonable suspicion training.

Comments – Barrick concurs that supervisors should be knowledgeable and informed on the regulations, the company's drug and alcohol policy, its impacts, available assistance programs to assist the employees and the disciplinary actions relative to the program. We disagree however with MSHA proposal that such training cannot be completed entirely through electronic interactive training means. Barrick believes an appropriately designed and implemented interactive training can provide supervisors the necessary information to discharge their responsibilities under a drug and alcohol program provided it allows for questions and feed back.

In regards to who should receive reasonable suspicion training, Barrick concurs with MSHA that mine operators must determine who should receive "reasonable suspicion" training as each company has different policies or guidelines for those who have the authority to implement a "reasonable suspicion test".

Preamble - Section 66.204 Miner Assistance Following Admission of Use of Prohibited Substances (Page 52146) and Proposed Rule §66.204

MSHA seeks comments on the provision to encourage but not require miners to voluntarily seek assistance.

MSHA also seeks comments about the extent to which third party health benefits are available to cover the cost of SAP and treatment services for miners covered by the rule. MSHA also seeks comments on all aspects of the miner's assistance provisions required by this rule.

Comments – Barrick's drug and alcohol program contains provisions that support and encourages employees to voluntarily seek assistance and enroll in a Substance Abuse Program (SAP) provided by the Company. These programs are designed to assist the individual and continue to provide for the need of their family. It is our belief however, that such voluntary acknowledgement cannot be enacted as a simple matter to avoid drug and alcohol testing and the disciplinary actions that might result.

In review of the proposal however, various MSHA statements in the preamble and its proposed rule conflict with each other and effectively negate all voluntary incentives for an employee to seek assistance.

For example, within the preamble discussions for Section §66.204, MSHA specifically states:

*"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."*⁴

Incongruent with this overarching intent to help the individual to seek assistance is MSHA's propose rule at §66.403 (a). MSHA's proposal at this citation states:

*"A mine operator who receives a verified positive drug test result or a verified positive drug test result or a verified adulterated or substituted drug test result must immediately remove the miner involved from performing safety sensitive job duties and refer the miner to a qualified SAP."*⁵

In essence, a miner's incentive to voluntarily seek assistance becomes moot as they will get referred into a substance abuse program in any event, whether before by volunteering to seek help or after a positive drug test is confirmed.

Contrary to MSHA's underlying intent, namely to help the individual, it has the opposite affect because as presently proposed at §66.204 coupled with §66.403, it allows an individual to "game" the system. As proposed, the person could voluntarily seek assistance, satisfactorily complete the return to duty process and subsequently fail a drug and alcohol program allowing them to once again be referred to a SAP for a second time.

MSHA's proposal is divergently opposite of the Department of Transportation (DOT) regulations in this regards. The DOT regulations do not enter the arena of regulating labor and employment. DOT states:

"All employment decisions belong solely to the employer. DOT regulations do not address employment actions such as hiring, firing or leaves of absence. DOT and USCG regulation may prohibit you from performing your safety-sensitive functions after a positive test result or

⁴ Federal Register, Volume 73, No. 174, Page 52146.

⁵ Ibid at Page 52162

refusal to submit to testing. You should be aware that a positive, adulterated or substituted DOT drug or alcohol test may trigger consequences based on company policy or employment agreement.”⁶
[Emphasis Added]

We concur and believe that MSHA should not be proposing rules that affect a Company's ability to rightly manage its employees.

For a drug and alcohol program to be effective, we believe there must be incentives for the individual. This is one of the purposes of a “Zero Tolerance” drug and alcohol program. A “Zero Tolerance” program allows individuals to seek assistance without any consequence to their employment provided they do so not to avoid a positive drug/alcohol test.

In proposing these new rules MSHA clearly states:

“The intent of the proposed rule is to improve safety in the nation’s mines.”⁷

Although we believe this is the intent of MSHA’s proposal, we also believe the proposal is overall very flawed as it is “reactive” versus being “proactive” in addressing illicit drug use and those who abuse alcohol. Barrick doesn’t believe the intent of any rule should be to punish people, but we do believe each individual is responsible and accountable for the decisions they make. To improve safety at the nation’s mines, we must work proactively to prevent the use of illicit drugs and alcohol prior to putting them into the workplace. This is the purpose of a “Zero Tolerance” program.

Accordingly, Barrick believes it prudent and again strongly recommends MSHA propose minimum threshold requirements that do not preclude an employer, bargaining unit, State or other entity from developing, implementing and maintaining programs that exceeds the minimum threshold drug and alcohol program.

In regards to availability of SAP, Barrick received comments from its SAP and EAP providers on the proposals and they indicate that such services in rural and remote areas may not be available for smaller more remote operations.

Preamble - Section 66.301 Substances Subject to Mandatory Testing, and Section 66.302 Additional Testing (Page 52147)

MSHA invites comments about the required panel of drugs subject to mandatory testing.

Comments – Barrick believes the identified 10 substances are those likely to be abused and are appropriate for testing.

⁶ U.S. Department of Transportation, Office of Drug and Alcohol Policy and Compliance, Employee Web Page, October 2, 2008

⁷ Ibid at page 52144

Proposed Rule §66.302 Additional Testing

MSHA proposes the Secretary of Labor can add additional substances requiring operators to test as part of the alcohol and drug program

Comment – Barrick believe that if the Secretary of Labor wishes to modify the list of substances for which an operator must test their employees, it should be proposed and be subject to public comment before it becomes an enforceable regulation. Accordingly, Barrick believes this section should be deleted from the final rule.

Preamble - Section 66.303 Circumstances Under Which Testing Will Be Required (Page 52148)

MSHA invites comments about the circumstances under which testing is warranted and should therefore be required.

Comment – Barrick concurs with the types of testing, specifically pre-employment testing, random testing, post-accident testing and reasonable suspicion testing coupled with the return to duty requirement.

However, Barrick believes the testing for post accident non-fatal description is very vague and open to interpretation as described by the proposed rule at §66.306 (a). Within the preamble for this section, MSHA states that it expects and will require "*post-accident tests be conducted by mine operators whenever an accident or occupational injury must be reported to MSHA.*"⁸

Barrick concurs that testing may be prudent in the case of fatalities and other serious non-fatality cases, but believes that testing should not be necessary in those situations where there is clearly no reason to test. For example, a slip, trip or fall by an individual during icy conditions, a back sprain caused by improper lifting might be cause to have it reported to MSHA. We do not believe these types of possible reportable injuries justify drug and alcohol testing unless there is reasonable suspicion of that person being under the influence of drugs or alcohol. Testing should be let at the discretion of the Company based on the facts of the incident.

Preamble - Section 66.304 Pre-employment Testing (Page 52148) and Proposed Rule §66.304 (f)

MSHA invites comments about the proposed pre-employment alcohol and drug testing provisions.

Comment – Barrick concurs with MSHA's overall concept that pre-employment testing should be performed. However, as previously indicated (see Barrick comments in "Preamble – Subpart D Alcohol and Drug Testing Requirements"), we utilize additional drug screening mechanisms when hiring prospective employees. We believe that MSHA proposal is overly

⁸ Ibid at page 52148

prescriptive on the types of tests that it will allow severely limiting and conflicting with the Company's ability to make a more informed hiring decision.

We again recommend to MSHA that it proposes only minimum threshold requirements that do not preclude an employer, bargaining unit, State or other entity from developing, implementing and maintaining enhanced programs that exceeds the minimum threshold drug and alcohol program.

In regards to the proposed language at §66.304 (f), it specifically states:

"An incumbent miner that has failed or refused a pre-employment alcohol and drug test administered under this part, shall not perform safety-sensitive job duties until that miner provides the mine operator proof of having successfully completed a referral, evaluation and treatment plan and test negative on return to duty testing".⁹

Barrick questions why an employed miner would take a pre-employment alcohol and drug test. Further, this is opposite of language within the preamble for Section 66.304 which states:

"the rule will not require that incumbent workers take pre-employment tests to continue performing their safety-sensitive job duties"¹⁰

MSHA needs to clarify its rule as the preamble and proposal are not consistent.

Propose Rule §66.305 (a) Random Testing

MSHA proposes within the rule that an operator conduct random unannounced alcohol and drug test on a minimum of 10 percent without indicating over what period of time.

Comment – Barrick recommends that MSHA modify its proposed language at §66.305 (a) to assure clarify and to be consistent with the preamble language that testing is to be performed at a minimum of 10 percent of the miner population per year.

The preamble states a *"minimum of 10 percent of the miners that perform safety-sensitive job duties and their supervisors be randomly tested each year."*¹¹

Accordingly, Barrick suggest the following language for §66.305 (a);

"(a) A mine operator shall test for alcohol and drugs on 10 percent of the miners each year."

Please note that the term "miner" is already defined in the proposed definition section to refer to miners and supervisors of those in safety sensitive job duties. Thus, it is not necessary to include it again in this section of the proposed rule to prevent redundancy.

⁹ Ibid at Page 52160

¹⁰ Ibid at Page 52148

¹¹ Ibid at Page 52148

Preamble - Section 66.305 Random Testing (Page 52148) and Propose Rule 66.305 (b)

MSHA invites comments about the floor rate at which [random] testing would be conducted and what options, including joining consortia, are viable for small mines operators to fulfill the random testing requirements of the proposal.

Comment – Barrick generally concurs overall with this MSHA's proposal and concept except with the provision at 66.305 (b) which states “*Miners who are on leave or otherwise absent from the workplace will be tested at the next available opportunity, that immediately upon their return to work.*”¹² [Emphasis Added]

Many of our mines are located in remote parts of Nevada located several hours from the nearest drug and alcohol testing provider who might performs such tests. Accordingly, it is neither reasonable nor situational prudent that an individual must “immediately be tested upon their return” due to the distance and limited availability of a service agent who might perform such tests. Since these are random tests unknown to employees, it is doubtful the individual will be missing work because they know a test is to be performed.

Thus, we propose MSHA delete the language “that is, immediately upon their return to work” as the phrase “next available opportunity” within the sentence is sufficient acknowledging the remoteness of these mines.

Preamble – Subpart E – Operator Responsibilities, Actions, and Consequences (Page 52149)

MSHA invites comments as to the appropriate means for enforcing the provisions of the proposed rule.

Comment – Barrick believes that MSHA needs to examine as a whole, the term “responsibility and accountability”. Companies when implementing their drug and alcohol programs coupled with their EAP and/or SAP programs are indeed responsible and accountable for their implementation. A key item not addressed by MSHA is that each individual must be responsible and accountable for their specific actions, including those who abuse alcohol and drugs.

A “Zero Tolerance” program provides and assures proper responsibility and accountability for all, both the operators and the employees. We recognize that not all companies nor labor agreements provide for such a program, but those that do should not be penalized by the prescriptive nature of these proposals that limit the overall effectiveness of these programs.

Barrick believes the proposal should only reflect minimum threshold requirements and not preclude programs that exceed the minimum threshold drug and alcohol program.

Proposed Rule §66.400 (b) Consequences To Miners For Failing An Alcohol or Drug Test or Refusal To Test

¹² Ibid at Page 52160.

MSHA proposes that miners who; (1) have a verified positive alcohol or drug test; (2) alter their tests or; (3) refuse to be tested, cannot be terminated for violating this policy for the first time.

Comment – Barrick strongly disagrees with MSHA proposal that these violations should not be disciplined. We believe this section should be deleted from the proposed regulations. Prohibiting operators from applying disciplinary measures including up to termination for violating work place safety policies is an unjustified interference in an operator's management of a facility's operation.

MSHA states:

*"The proposal is intended to prevent the safety risks that can result from the use of alcohol and drug by those who work on mine property."*¹³

As present proposed, Barrick sincerely believes MSHA is increasing the safety risks to our employees, contractors and visitors at our operations by the prescriptive nature of these proposal including §66.400.

MSHA states in the preamble for Section 66.400:

*"The process for removal, referral, and potential return to work has been modeled on the provisions of the DOT rule."*¹⁴

Barrick notes however that DOT regulations do not prohibit employment actions. Rather, DOT specifically states that all employment decisions belong to the employer. Please refer to our comments at "Preamble-Section 66.204 Miner Assistance Following Admission of Use of Prohibited Substances (Page 52146) and Proposed Rule 66.204" regarding DOT's regulations. We believe this section should be deleted.

Preamble – Section 66.403 Operator Actions After Receiving Verified Test Results (Page 52150)

MSHA invites comments about the provisions on what action mine operators must take upon receiving alcohol and drug test results that are positive.

Comments – As previously noted elsewhere, Barrick believes the proposal should reflect minimum threshold requirements and not preclude programs that exceed the minimum requirements. This proposed section would render "Zero Tolerance" programs such as that used by Barrick and other useless. We believe MSHA should not preclude an operator's ability to effectively manage its business when its program ensures a safer work environment.

Preamble – Section 66.404 Evaluation and Referral (Page 52150)

MSHA invites comments on inclusion of SAP functions without EAPs.

¹³ Ibid at Page 52141

¹⁴ Ibid at Page 52150.

Comment – Barrick concurs with the proposal that only a SAP is needed. Requiring an EAP contains items clearly outside the scope of the intent of these proposed regulations.

Preamble – Section 66.406 Return to Duty and Follow-up Testing (Page 52151) and Proposed Rule §66.406 (b) (3)

MSHA invites comments about the consequences that would be imposed upon miners by the proposed rule. MSHA also invites comments about the evaluation and referral process and the role of the SAP in recommending treatment and determining compliance.

Comment – Barrick believe that MSHA is overly prescriptive in the amount of “Follow-up Testing”. We believe that follow up testing should be the call of the Substance Abuse Program (SAP) and their health professionals based on their specific and intimate knowledge of the case. Once again, an overly prescriptive approach of “one size fits all approach” is flawed.

Finally, Barrick would like to note that throughout this proposal, independent contractor obligations under this proposal have not been clarified nor addressed. The only mention within the proposed rule regarding contractors is at §66.2 requiring operators inform contractors regarding the rule. Prior to promulgating any new standard, Barrick believes contractor obligations and responsibilities need to be clearly identified.