



GRAYMONT

Facsimile: 801-264-6874
www.graymont-ut.com
Writer's Direct Line: (801) 264-6863

November 27, 2005

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

RE: RIN 1219-AB41

Dear Director:

These comments are submitted on behalf of the Graymont Western US, Inc (Graymont) in response to the Advance Notice of Proposed Rulemaking (AMPRM) that was published on October 4, 2005, 70 FR 57808, which solicits information on regulatory and non-regulatory approaches to address the risks of impairment from alcohol and drugs in the workplace. We appreciate having the opportunity to comment on this most important and over-due initiative that recognizes the increasing safety and health risks which miners and mine operators are encountering due to the escalating use of illegal and legal substances in the workplace.

GENERAL COMMENTS

Graymont agrees with MSHA that all mining companies operating within the United States, including contractor resource companies should be required to have Drug and Alcohol Policies written and in place, and to enforce these policies to the fullest extent possible.

MSHA has a responsibility under the mine act to inspect all working mines twice or four times a year; while inspecting the mines, MSHA can play a vital role in assisting mining companies and their contracting partners by auditing company compliance with internal Drug and Alcohol Policies.

When auditing, MSHA should only audit to ensure that Internal Drug and Alcohol Policies exist and contain minimal elements necessary to comply with existing laws US Laws, but not regulate the specific content of said policies.

While Graymont advocates MSHA encouragement and auditing of internal company Drug and Alcohol Polices for compliance, MSHA should acknowledge the fact that there are roadblocks placed in the way of all unionized companies trying to enforce such policies; accordingly, Graymont encourages efforts on behalf of the agency to remove any agency policy, or regulatory obstacles restricting company enforcement of Drug and Alcohol Policies.

SPECIFIC COMMENTS IN RESPONSE TO ANPRM

Nature, Extent, and Impact of the Problem

A1. Methamphetamine, Cocaine and Marijuana

A2. Over a long period of time, approximately ten percent have failed drug tests.

A3. The severity of the risk imposed by a miner impaired due to alcohol or substance abuse cannot be overstated. Not only does that individual place themselves in harms way they also do so for all those working within their vicinity. The potential hazards associated with mining are known and well documented. Permitting an impaired individual to work in an environment where, for example, methane gas is liberated or on or around machinery capable of causing bodily harm cannot be tolerated.

A4. We have no specific information to share in response to this question.

Prohibited Substances and Impaired Miners

B1. The existing regulations in the Metal Non-Metal Sector of MSHA Regulated Industries are sufficient; these same regulations should be extended to any or all industry sectors regulated by MSHA.

B2. Where appropriate hereafter, excerpts from Graymont Drug and Alcohol Policies will be quoted to respond to ANPRM Survey Questions:

“Alcohol” means ethyl alcohol or ethanol.

“Controlled substance” means any substance (other than alcohol but including prescription and over-the-counter medicine) that has known mind or function-altering effects that may impair or affect the ability to perform work, the access to which is controlled by law.

“Illegal drugs” means any form of drug, narcotic, hallucinogen, depressant, stimulant, cannabis or other substance capable of creating or maintaining impairment or otherwise affecting one’s physical, emotional or mental state, the sale, purchase, transfer, use or possession of which is prohibited by law.

“Drug” means any substance recognized as a drug in the United States Pharmacopoeia, the National Formulary, the Homeopathic

Pharmacopoeia, or other drug compendia, or a supplement to any of those compendia.

B3. The Company, in its sole discretion, may test an employee and obtain samples any time there is probable cause to believe an employee is abusing alcohol or drugs. Probable cause may be determined by the employee's performance, appearance, or conduct. Some, but not all, indications of potential drug or alcohol abuse are:

- Change in work attendance or performance
- Alteration of personal appearance
- An increase in accident rate
- Mood swings or attitude changes
- Confusion
- Withdrawal from responsibilities/family contacts
- Lowered job efficiency and productivity
- Association with drug-using peers
- Poor employee relationships on the job
- Unusual patterns of behavior
- Defensive attitude concerning drugs
- Behavior that may adversely affect the Company

Post Accident Testing will be conducted on employees whose performance either contributed to an accident, or cannot be completely discounted as contributing to the accident. Such testing will occur as soon as possible, but not later than twelve hours after an accident has occurred. The immediate supervisor and the department manager of such employee shall determine if the performance of that employee either contributed to the accident or cannot be completely discounted as a contributing factor. "Accident" for purposes of this paragraph shall mean an accident that results in an employee requiring medical treatment, or property damage in excess of \$1,500.00.

B4. Follow Up per Drug and Alcohol and progressive discipline policies.

B5. Employees receiving or using prescription drugs or undergoing any prescribed medical treatment which may alter their physical or mental abilities must report the nature of the medication and the prescribed level, frequency and period of use to the designated supervisor as soon as practical following the commencement of use.

An employee tested for drugs or alcohol or required to provide samples shall fully disclose to the person taking the test or obtaining the sample any and all prescription drugs being taken by the employee or other prescribed medical treatment which the

employee is receiving which may alter the employee's physical or mental abilities. Such disclosure shall include but not be limited to the kinds of drugs prescribed, the prescribed level, frequency and period of use, and the purpose for which the drugs or other treatments are being prescribed. If the employee fails to make the disclosure required, the employee shall have the burden of establishing actual use of such prescribed drugs or treatments in the event of a positive test result.

The Company reserves the right, in its sole discretion, to dismiss an employee from work, to instruct an employee not to report for work, or to change an employee's job assignment while the employee is using prescription drugs, undergoing prescribed medical treatment, or is subject to any condition which would alter the employee's physical or mental abilities.

Training

C1. Graymont currently trains all new and existing employees on all components of Drug and Alcohol Policy.

C2. All workers (including contractors) on Graymont property should be subject to testing.

C4. See response to B5.

Inquiries Following Accidents

D1. While Graymont is not prepared to suggest specific regulatory language, we believe the authority provided in 30 CFR 50.11 should be expanded to provide operators the specific authority to include, as a part of their investigation, the contribution of alcohol and/or drug use in the accident. It is vitally important that care be given to carefully construct the circumstances where consideration of such factors is appropriate.

D2. Drug and Alcohol testing.

D3. All injuries or illnesses degrees one through five.

D4. Privacy concerns necessitate that the information be limited to only those authorized within the company to maintain such information and to the authorized representative of the Secretary, if requested.

D5. Existing Drug and Alcohol Policy provides for varying levels of disciplinary action depending upon situation encountered. As noted previously, disciplinary action up to and including termination are included in program.

Drug-Free Workplace Programs

E1. Graymont has implemented a Drug and Alcohol Policy to ensure that a drug free workplace is maintained.

E2(a). Concern for the health and wellbeing of our employees and the public.

E2(b). See attached Graymont Drug and Alcohol Policy

E2(c). Random Testing

E2(d). Less positives on DOT Test Results

E2(f). Drug Testing Policies must be approved by each and every Collective Bargaining Group; Unions tend to protect their members from the disciplinary results of positive drug and alcohol tests, above the safety of protecting their fellow employees from injury due to members working under the influence of Drugs or Alcohol.

Costs and Benefits

F1. There is some cost involved with hiring a good drug testing company that can also do your certification training

F2(a). You will have a yearly enrollment fee that varies with the number of employees, there is a charge for each test, and there is a charge for your certification training. There has to be one person that is the D&A program manager. In one region of Graymont, the annual costs for random drug testing average \$16,000.

F2(b). Costs to do drug testing in remote states (ex Montana) include travel costs for personnel to do drug testing.

F3. The principle benefit is a safe workplace due to employees operating out of the influence of Drugs or Alcohol. We test because it is the right thing to do.

Feb 2003

GRAYMONT WESTERN US INC.

**Policy Statement
on
Drug and Alcohol**

THIS POLICY STATEMENT GOVERNS THE TESTING OF UTAH EMPLOYEES OF GRAYMONT WESTERN US INC., FOR THE USE OF DRUGS AND ALCOHOL. FAILURE TO COMPLY WITH THE POLICY CAN RESULT IN THE TERMINATION OF EMPLOYMENT.

READ THE POLICY CAREFULLY

I Explanation Statement:

The 1987 Utah State Legislature enacted the Utah Drug and Alcohol Testing Act (the "Act"). The full text of the Act can be found at Title 34, Chapter 38, Utah Code Annotated, 1953. This law provides procedures and guidelines for private employers to conduct drug and alcohol testing of employees and provides for a limitation of liability of employers arising from drug and alcohol testing. The Act requires the employer to carry out any testing or retesting for the presence of drugs or alcohol within the terms of a written policy which has been distributed to employees and is available for review by prospective employees.

Graymont Western US Inc. (the "Company"), has reviewed the terms and conditions of the Act and finds it to be in the best interest of the Company and its individual employees to be able to conduct drug and alcohol testing of employees. This Policy Statement contains the written policy of the Company with regard to drug and alcohol testing and has been adopted and distributed to comply with the requirements of the Act.

II Findings:

In adopting the Act, the Utah State Legislature found, among other things, that the healthy and productive work force and safe working conditions free from the effects of drugs and alcohol are important to employers, employees, and the general public.

The Legislature found that the abuse of drugs and alcohol creates a variety of workplace problems, including increased injuries on the job, increased absenteeism, increased financial burden on health and benefit programs, increased workplace theft, decreased employee morale, decreased productivity, and a decline in the quality of products and services.

The Legislature also found that fair and equitable testing for drugs and alcohol in the workplace in accordance with the terms of the Act balanced the interests of employers, employee and the welfare of the general public and was, therefore, in the best interest of all parties.

The Company agrees with the findings of the Utah State Legislature and in addition specifically finds that this Policy Statement is needed for the protection of the persons of the Company's employees and the preservation of property.

II Purposes:

The Company adopted this Policy Statement and is requiring the collection and testing of samples for the following purposes:

- A. To maintain the safety of the Company's employees;
- B. To maintain the security of the Company's property and the property of individual employees;
- C. To maintain productivity and product quality;
- D. To provide a means to investigate possible individual employee impairment; and
- E. To provide a means to investigate accidents in the workplace or incidents of workplace theft.

IV Policy:

The Company prohibits employees from using, possessing, or being under the influence of alcohol, illegal drugs, or controlled substances while on Company premises or work time. This prohibition includes the improper use, abuse, possession, distribution, manufacture, dispensing, purchase, transfer or sale of alcohol, controlled substances, or illegal drugs when on duty or on Company premises.

An employee's use of a prescription or over-the-counter medicine can also pose a significant risk to the safety of the employee and of others. Employees must report to their immediate supervisor the use of medically authorized drugs or other substances that may reasonably be expected to impair their ability to perform safely all aspects of their job. Employees may be required to provide written medical approval from a physician to work while using such authorized drugs. It is the employee's responsibility to determine from the physician whether or not the prescribed drug would impair his/her job performance or safety.

V Implementation:

A. Definitions:

For purposes of this Policy Statement:

- 1. "Company" means Graymont Western US Inc.
- 2. "Alcohol" means ethyl alcohol or ethanol.
- 3. "Controlled substance" means any substance (other than alcohol but including prescription and over-the-counter medicine) that has known mind or function-altering effects that may impair or affect the ability to perform work, the access to which is controlled by law.

4. "Illegal drugs" means any form of drug, narcotic, hallucinogen, depressant, stimulant, cannabis or other substance capable of creating or maintaining impairment or otherwise affecting one's physical, emotional or mental state, the sale, purchase, transfer, use or possession of which is prohibited by law.
5. "Drug" means any substance recognized as a drug in the United States Pharmacopoeia, the National Formulary, the Homeopathic Pharmacopoeia, or other drug compendia, or a supplement to any of those compendia.
6. "Drug paraphernalia" shall have the meaning described in Title 58, Chapter 37a, Utah Code Annotated, 1953.
7. "Employee" means any person in the service of the Company for compensation.
8. "Prospective employee" means any person who has made application to the Company, whether written or oral, to become an employee.
9. "Sample" means urine, blood, breath, saliva, or hair.

VI The Act:

The Company intends to be bound by the terms of the Act and the implementation of this Policy Statement shall be controlled by the specific provisions of the Act. Any provisions of this Policy Statement found to be in violation of the Act shall be void. Subject to existing contracts with its employees, if any, nothing in this Policy Statement shall be construed to change the "employment at will" relationship between the Company and its employees.

VII Samples:

- A. In order to test reliably for the presence of drugs or alcohol, the Company may require samples from its employees and prospective employees and may require the presentation of reliable identification to the person collecting the samples.
- B. The Company may designate the type of sample to be used for testing.

VIII Time of Collection:

- A. Drug or alcohol testing and the taking of samples by the Company shall occur during or immediately after the regular work period of current employees and shall be deemed work time for purposes of compensation and benefits for current employees.
- B. Testing of prospective employees including the taking of samples shall be at the discretion of the Company and the time involved to obtain samples or otherwise be tested shall not be compensated.

- C. The Company, in its sole discretion, may test an employee and obtain samples at any time on either a random section basis or otherwise as long as such testing is in accordance with the provisions of this Policy Statement.
- D. The Company, in its sole discretion, may test an employee and obtain samples any time there is probable cause to believe an employee is abusing alcohol or drugs. Probable cause may be determined by the employee's performance, appearance, or conduct. Some, but not all, indications of potential drug or alcohol abuse are:
- Change in work attendance or performance
 - Alteration of personal appearance
 - An increase in accident rate
 - Mood swings or attitude changes
 - Confusion
 - Withdrawal from responsibilities/family contacts
 - Lowered job efficiency and productivity
 - Association with drug-using peers
 - Poor employee relationships on the job
 - Unusual patterns of behavior
 - Defensive attitude concerning drugs
 - Behavior that may adversely affect the Company
- E. Post Accident Testing will be conducted on employees whose performance either contributed to an accident, or cannot be completely discounted as contributing to the accident. Such testing will occur as soon as possible, but not later than twelve hours after an accident has occurred. The immediate supervisor and the department manager of such employee shall determine if the performance of that employee either contributed to the accident or cannot be completely discounted as a contributing factor. "Accident" for purposes of this paragraph shall mean an accident that results in an employee requiring medical treatment, or property damage in excess of \$1,500.00.

IX Procedures for Testing:

All simple collection and testing for drugs and alcohol shall be performed in accordance with the following procedures:

- A. The collection of samples shall be performed under reasonable and sanitary conditions.
- B. Samples shall be collected and tested with due regard to the privacy of the individual being tested, and in a manner reasonably calculated to prevent substitutions or interference with the collection or testing of reliable samples.
- C. Sample collection shall be documented, and the documentation procedures shall include:
- (1) labeling of samples so as reasonably to preclude the probability of erroneous identification of test results; and

- (2) an opportunity for the employee or prospective employee to provide notification of any information, which he considers relevant to the test, including identification of currently or recently, used prescription or nonprescription drugs, or other relevant medical information.
- D. Sample collection, storage, and transportation to the place of testing shall be performed so as reasonably to preclude the probability of sample contamination or adulteration.
- E. Sample testing shall conform to scientifically accepted analytical methods and procedures. Testing shall include verification or confirmation of any positive test result by gas chromatography, gas chromatography-mass spectroscopy, or other comparable reliable analytical method, before the result of any test may be used as a basis for any action by the Company under this Policy Statement or the Act.
- F. All drug specimen tests will be preformed exclusively at a Substance Abuse and Mental Health Services Administration (SAMSHA) certified laboratory.
- G. A test result shall be considered as positive, and an employee shall be considered “under the influence” if the test results equals or exceeds the following measurement criteria:

Test Cutoff Levels

	<u>Screen</u>	<u>Confirmation</u>
Marijuana	50 Ng/ml	15 Ng/ml
Cocaine	300 Ng/MI	150 Ng/ml
Opiates	2000 Ng/ml*	2000 Ng/ml
Phencyclidine	25 Ng/ml	25 Ng/ml
Amphetamines	1000 Ng/ml	500 Ng/ml
Alcohol	0.04%	0.04%

*Test for 6AM when morphine concentration exceeds 2000 Ng/ml

X Excess Fluids Sample

To obtain accurate and reliable test results, the employee or applicant must not dilute the urine sample by ingestion of excess fluids (hereinafter referred to as an “Excess Fluids Sample”) before providing the sample. A urine sample shall be considered an Excess Fluids Sample if (1) the test results indicates that the urine sample contains creatinine levels less than .2g/L and a specific gravity of less than 1.002, and (2) there is no medically sufficient explanation for such excess fluids, which to the medical review officer in his/her sole but reasonable discretion. If a urine sample provided by an applicant or an employee is determined after appropriate testing to be an Excess Fluids Sample, the applicant or employee shall, at the Company’s discretion, be required to provide another urine sample (the “Second Sample”) at a time and under conditions and requirements that are within the sole discretion of the Company. In the event the Second Sample is determined, after appropriate testing, to be an Excess Fluids Sample, the applicant shall be subject to disciplinary action up to and including termination.

If a second sample is utilized to resolve a dispute, a positive confirmation of the presence of prohibited substance shall result in termination.

XI Independent Analysis

No later than the (10) days after receipt of a positive drug test, the employee may obtain an independent analysis of the same sample at his or her expense. The Company shall not have the requested test performed unless the employee first pays in advance all costs of the second test. Upon request, the Medical Drug Consultant will authorize the laboratory holding the employee's sample to release to the laboratory approved by the Department of Health and Human Services a sufficient quantity of the sample to allow a secondary laboratory to conduct the drug testing analysis. Because some analyses deteriorate or are lost during freezing and/or storage, quantization for a retest is not subject to a specific cutoff requirement but must provide data sufficient to confirm the presence of the drug or metabolite. By requesting a second analysis, the employee authorized the Company to obtain a copy of any test results determined by the second laboratory. The accuracy of the test results submitted to the Company will be verified by the laboratory conducting the analysis. If the second test is positive, then the Policy will apply. If the second test is negative, then the original test shall be disregarded and the cost of the second test shall be refunded.

XII Persons Conducting the Tests:

The testing of employees and the taking of samples may be performed by employees of the Company or by non-employees so long as conducted in accordance with this Policy Statement. Testing and the taking of samples may occur on Company property or at such other location designated by the Company.

XIII Costs:

- A. The Company shall pay all costs of testing for drugs or alcohol required by the Company to be performed.
- B. The Company shall pay the cost of transportation to and from the place of testing for current employees if the testing is conducted at a place other than the employee's workplace.
- C. The Company shall not pay the transportation costs of prospective employees.

XIV Prescription Drug:

- A. Employees receiving or using prescription drugs or undergoing any prescribed medical treatment which may alter their physical or mental abilities must report the nature of the medication and the prescribed level, frequency and period of use to the designated supervisor as soon as practical following the commencement of use.
- B. An employee tested for drugs or alcohol or required to provide samples shall fully disclose to the person taking the test or obtaining the sample any and all prescription drugs being taken by the employee or other prescribed medical treatment which the employee is receiving which may alter the employee's physical or mental abilities. Such disclosure shall include but not be limited to

the kinds of drugs prescribed, the prescribed level, frequency and period of use, and the purpose for which the drugs or other treatments are being prescribed. If the employee fails to make the disclosure required, the employee shall have the burden of establishing actual use of such prescribed drugs or treatments in the event of a positive test result.

- C. The Company reserves the right, in its sole discretion, to dismiss an employee from work, to instruct an employee not to report for work, or to change an employee's job assignment while the employee is using prescription drugs, undergoing prescribed medical treatment, or is subject to any condition which would alter the employee's physical or mental abilities.

XV Use and Disposition of Test Results:

- A. Upon receipt of a verified or confirmed positive drug or alcohol test result which indicates a violation of this Policy statement or upon the refusal of an employee or prospective employee to provide a sample, the Company may use that test result or refusal as the basis for disciplinary or rehabilitative actions, which may include the following:
 - 1. termination of employment;
 - 2. suspension of the employee with or without pay for a period of time;
 - 3. a requirement that the employee enroll in a rehabilitation, treatment, or counseling program, approved by the Company and paid for by the employee, which may include additional drug or alcohol testing as a condition of continued employment;
 - 4. refusal to hire a prospective employee; or
 - 5. other disciplinary measures in conformance with the Company's practices, policies or procedures.
- B. All information, interviews, reports, statements, memoranda, or test results received by the Company through its drug and alcohol testing program are confidential communications and may not be used or received in evidence, obtained in discovery, or disclosed in any public or private proceeding, except in a proceeding related to an action taken by the Company under the Act.
- C. The information described in Subsection B shall be the property of the Company.
- D. The Company is entitled to use a drug or alcohol test result as a basis for action under this Policy Statement.
- E. Neither the Company nor any of its employees may be examined as a witness with regard to the information described in Subsection B, except in a proceeding related to an action taken by the Company under this Policy Statement or the Act.

XVI Disclaimer:

- A. The Company specifically disclaims any liability for:
 - 1. failure to test for drugs or alcohol, or failure to test for a specific drug or other substance;
 - 2. failure to test for, or if tested for, failure to detect, any specific drug or other substance, disease, infectious agent, virus, or other physical abnormality, problem, or defect of any kind; or
 - 3. termination or suspension of this Policy Statement or any drug or alcohol testing program or policy.

- B. The Company specifically disclaims the creation of a physician-patient relationship between an employee or prospective employee, and the Company or any person performing the test, whether because of the establishment of the drug and alcohol testing program in the workplace as set out in this Policy Statement or otherwise.

**ACKNOWLEDGMENT OF RECEIPT OF
GRAYMONT WESTERN US INC.'s
POLICY STATEMENT ON DRUGS AND ALCOHOL
FOR UTAH EMPLOYEES**

I acknowledge that I have received a copy of the Policy Statement on Drugs and Alcohol for Utah employees.

I understand that this policy does not in any way constitute a contract of employment, either expressed or implied.

I understand that it is my responsibility to make myself familiar with this policy and that this policy is subject to change.

Date

Signature

Name (Please print)