Vulcan
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U.S. Department of Labor
Mine Safety & Health Administration
Office of Standards, Regulations and Variances
1100 Wilson Blvd, Room 2350
Arlington, VA 22209-3939
zzMSHA-comments@dol.gov

RE: **RIN 1219-AB41**

Ladies and Gentlemen:

Vulcan Materials Company is the nation's largest producer of construction aggregates, a major producer of other construction materials including asphalt and ready-mixed concrete and a leading producer of cement in Florida. The majority of its facilities are thus governed by the Mine Safety and Health Administration (MSHA).

On September 8, 2008, published proposed rule 30 CFR Subchapter N Part 66, Alcohol- and Drug-Free Mines: Policy, Prohibitions, Testing, Training, and Assistance. An opportunity for comment was announced in that publication.

Vulcan therefore offers its comments set forth in detail below and requests that MSHA consider Vulcan's comments in connection with the Agency's deliberations on this proposed rule.

Generally, the proposed rule is too restrictive, should be more performance-oriented, and should allow more discretion by the operator. If the Agency moves forward with a final rule, it should establish minimum standards in certain provisions. Also, the language of the proposed rule should be changed to allow operators more flexibility in adopting drug and alcohol testing policies that meet the needs of different workplaces and collective bargaining agreements, provided that these policies also meet the minimum requirements of the federal standard. Furthermore, by proposing to dictate certain details of a substance abuse program for mining operations, MSHA would limit the discretionary authority of operators to ensure a safe workplace for their employees. Vulcan respectfully asserts that, if the authority exercised by the operators is intended to contribute to the safety and health of its miners, the Agency should not overly restrict this role.

Many operators, Vulcan included, already have strictly enforced, comprehensive substance abuse policies in place and disagree with the need for MSHA to mandate certain additional specifications for programs. If the Agency deems it necessary to enact regulations to mandate alcohol and drug-free mine sites, the Agency should do so in a manner that does not undermine the programs that members of the industry already have in place, nor render aspects of the programs less restrictive than those currently in place. Vulcan suggests MSHA's proposed rule be streamlined to accomplish the following major goals:

- It should prohibit the possession or use of alcohol or illicit drugs on mine property, as is already the case for metal/nonmetal mining industries.
- It should require that each operator have a drug and alcohol program/policy.
- It should require all employees who meet the definition of a miner be subject to pre-employment, random, reasonable suspicion, and post-accident/injury drug/alcohol testing as applicable. It should also allow operators to expand this policy or a similar policy at their discretion to non-miner employees.

Beyond the above-listed items, the actions of the operators should be governed by their own policies and applicable labor agreements. MSHA should not dictate what may or may not be done with regards to employee discipline if an employee violates an alcohol- and drug free workplace program or require certain methodology of the testing processes. Further, MSHA should not complicate the regulatory framework concerning drug and alcohol testing of employees by partially incorporating DOT part 40 requirements while removing certain discretionary authority that the operator currently has under part 40.

MSHA should carefully consider each of the following issues as it moves forward with the proposed rule:

Applicability:

Generally speaking, it should be at the operator's discretion to expand the program requirements beyond those employees currently required to take comprehensive training under either part 46 or part 48 of the Act.

Miner Assistance Following Admission of Use of Prohibited Substances:

Under the proposed rule, when an employee becomes aware that he or she will be subject to post-accident or random testing, it appears that the miner may avoid discipline by voluntarily admitting that he or she is in violation of an operator's drug and alcohol policy. Vulcan recognizes this may not have been the Agency's intention in its proposed rule, but rather the Agency may have intended to merely ensure that miners suffering from an addiction problem could avoid discipline by voluntarily admitting the problem and requesting admittance to a substance abuse program (SAP) and time off from work (if necessary) to participate in such a program. However, the phraseology of the proposed rule may provide a "loophole" for an employee to admit to the use of prohibited substances for the sole purpose of avoiding discipline when he or she knows that testing is

forthcoming. Vulcan supports employees who voluntarily admit to a substance abuse problem and offers SAP opportunities to them, but employees' admissions must be entirely voluntary and not used as a means to avoid disciplinary action.

Testing Requirements:

Laboratory Certifications: DOT only requires certification by HHS/SAMHSA. The added certification by CAP offers no discernible benefit and would require additional costs to the laboratories which will then likely pass the costs on to the operators.

Testing Methods: MSHA's current list of testing methods does not include alternative testing methods for drug use such as saliva and hair testing. These methods are valuable tools currently available to employers and gaining widespread acceptance throughout the industry. Vulcan currently uses both of these methods and has had great success in obtaining accurate results from both. In addition, as technology and science advance, even more accurate testing methods may be developed, which would be prohibited under this rule as currently worded. Amending the proposed rule to either include these testing methods or specifying that the rule's current list of testing methods is intended as a required minimum would accomplish this goal.

Required Substances Tested For: MSHA should consider adopting the DOT 5-panel testing requirement, with additional testing requirements left at the operator's discretion. Mandatory 10-panel testing will significantly increase testing costs as well as create confusion regarding employees who may fall under both DOT and MSHA standards. Requiring a minimum of the 5-panel testing requirement instead of the 10-panel will also give operators the option of including additional panels to test for substances that may have a higher rate of abuse within their local population.

Alcohol Levels: The proposed rule regarding acceptable blood alcohol content (BAC) levels restricts testing for any BAC below a .04 percent level. Operators should have the discretion to set a lower limit, such as .02 percent BAC. The DOT uses bifurcated limits for BAC levels of .02-.039 percent. This bifurcation of limits were implemented after thorough research indicating that an employee within that range may be impaired to the extent that he cannot perform safety-sensitive job duties in a safe manner. It is Vulcan's position that operators should, at the very least, have the option of using the DOT-established more restrictive BAC levels rather than the proposed higher MSHA levels.

Random Testing Requirements: Regarding the 10-percent minimum, Vulcan suggests leaving to the operator's discretion whether this minimum is defined as 10 percent for each individual operation (each mine identification number), the company as a whole (i.e., Vulcan's entire workforce employed in safety-sensitive positions), or by other means such as by an operator's geographical division(s) or business unit(s). Allowing the operator discretion to satisfy the 10-percent mandate would reduce the burden on operators

while simultaneously complying with existing DOT regulations that overlap the proposed MSHA requirements.

Regarding employees who are away from the workplace when selected for random testing, Vulcan would argue it should be the operator's discretion whether to return the employee to the selection pool and test an alternate employee or to test the selected employee upon their return to work. Leaving this discretion to the operator avoids unnecessary disruptions of business activities, given that the employee who is away from work at the time of testing would have to be sent off-site upon return for testing.

Post-Accident Testing: While Vulcan does not disagree with all of the provisions of the rule regarding required post-accident testing, operators should also have the discretion to mandate testing for non-reportable accidents such as property damage, minor injuries, or high-potential near misses. The current provision could be interpreted to restrict operators from determining whether testing in such instances is appropriate to ensure a safe workplace.

This section of the proposed rule should also be worded to only require testing for those employees who appear to have directly contributed to the accident. This section should contain a "good faith" provision prohibiting issuance of a citation to the operator in the event that, during the course of an investigation, it is determined that a previously unidentified employee may have directly contributed to an accident and has not been tested as required because this information was not known. As shown by MSHA's own accident investigations, a thorough investigation and root cause analysis may indicate causal factors that were not readily apparent during the initial investigation, and may in turn indicate that additional actions or conditions contributed. In such scenarios, it could initially be difficult to identify all responsible employees. Although it is true that such subsequently identified employees could have, if tested, exceeded the specified 8 and 32 hour testing specification, an operator should not be penalized for failing to identify all possible responsible employees within the 8- to 32-hour time limit. This logic also supports the allowance of alternative testing methods such as hair testing which would allow operators the opportunity to obtain accurate results after the 32 hour limit has been exceeded.

Regarding operator actions while awaiting test results for post-accident testing, Vulcan is of the opinion that the decision to return an employee to his or her usual job duties or remove them from only safety-sensitive duties is best left to the operator's discretion based on the circumstances and the requirements of each company's drug and alcohol testing program. If Vulcan is entrusting its supervisory personnel to make decisions regarding reasonable suspicion, those managers should also be entrusted with making an initial informed judgment as to whether particular employees pose a safety risk while awaiting testing results.

The proposed rule also imposes upon the operator the obligation to pay all employees while they are off work awaiting test results. Vulcan asserts that the Agency's authority, as established by the Act, does not encompass instructing an operator to mandate pay and benefits to employees in these circumstances. Although Vulcan does not object to

making an employee whole whose testing subsequently reveals he or she was not in violation of the program, MSHA's dictation of payment concurrent with the employee's suspension would result in an operator compensating those employees who test positive. A retroactive method of paying employees who tested negative for the regularly scheduled work hours they missed while awaiting test results would accomplish MSHA's apparent goal in adopting this provision. Determinations regarding pay and benefits under the program should ultimately be left at the operator's discretion.

Return to Duty Testing: While Vulcan supports the need for a SAP to determine testing requirements for follow-up testing after the employee has returned to work, these provisions should be amended to allow the operator shared authority in determining the number and frequency of follow-up tests in the event that the operator views the SAP's suggested schedule as insufficient.

Provisions in this section are also unclear as to whether the operator has the option of sending the employee for a reasonable suspicion or post-accident test while the employee is subject to a return-to-duty follow-up testing plan. Clearly, this was not the intent of the Agency, and clarifying that the other reasons for testing under the program are not prohibited while an employee is subject to a return-to-duty follow-up testing plan is essential to ensure a safe, substance-abuse workplace.

Actions Upon Receipt of Verified Positive Test Results:

Disciplinary System: The rule, in its current form, sets forth a mandatory progressive discipline system for employees who have violated the program that may be more lenient than the system an operator may already have in place. In essence, certain operators have "a zero tolerance" disciplinary system under which employees are terminated after the first violation of the program. Although it may not have been the Agency's intention, the current phraseology of the rule appears to provide additional job security for employees engaged in mining operations who violate the program than is currently allowed by many operators. Discipline, up to and including termination, for violation of the program, regardless of any previous violations, should be left to the operator's discretion. Forcing an operator to return a "first offense" employee to work after completion of a SAP could result in an unsafe workplace, which is exactly what a "zero-tolerance" policy is intended to prevent. As is commonly known, completion of a SAP does not ensure an individual remains drug or alcohol-free. Even the mandatory random testing period does not provide this assurance, given that an employee could again violate the policy after the testing period expired.

The rule's current progressive discipline system could also undermine employee morale. Understandably, employees would continue to have safety concerns when working around an employee known to have tested positive in the past. Completion of a SAP cannot alleviate those concerns.

In addition, DOT regulations permit the employer to terminate an employee for a first offense violation, should they choose to do so. MSHA-regulated mining operations

are at least as safety-sensitive as those operations subject to DOT regulations, and MSHA should not impose a lesser standard for this reason as well.

Finally, the current proposed disciplinary system could run afoul of collective bargaining agreements governing operators and employees at many locations. Agreements commonly contain provisions regarding discipline for drug and alcohol-related offenses. Naturally, such agreements, at least at this time, would not be identical to those set forth in this proposed rule.

Substance Abuse Program Referrals: The proposed rule mandates that the operator fund an employee's SAP treatment after an employee tests positive. Realistically, certain operators may not have the financial wherewithal to pay for a SAP program. Rather than requiring the operator pay for the treatment, MSHA should strike these provisions, thus continuing to allow the determination of who funds the treatment, whether the employee or the operator, to the operator's discretion.

Training Requirements:

MSHA's proposed establishment of mandatory time lengths for training of supervisors and non-supervisory employees is overly burdensome. The Agency's identification of the substantive components of a training program is sufficient to ensure employees are educated on the MSHA rules. The length of such training should be left to the discretion of the operators; they have more in-depth knowledge of the aptitude and experience of those to be trained to ensure adequate time is allotted.

Recordkeeping Requirements:

Inclusion of Test Results in Accident Reports: Because the Agency requires all accidents be reported within 10 days, Vulcan is concerned that MSHA may also require the inclusion of the test reports with that submission. However, there will be occasions, as stated above, when the test results are not available yet and thus cannot be included. The Agency should clarify this provision so that operators will avoid citations that should not be imposed.

Also, as a general note, the inclusion of alcohol and drug test results in accident reports appears contradictory to the confidentiality requirements of this proposed rule. It is therefore necessary that the rule be revised to ensure no citation is wrongfully issued to an operator making a good faith attempt to comply.

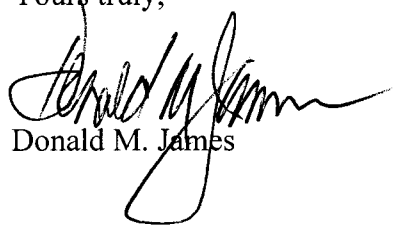
Record Retention: Vulcan suggests that MSHA structure the recordkeeping provisions of this rule to correspond with the current DOT requirements. This will allow operators already maintaining DOT records to consolidate their recordkeeping processes to comply with both MSHA and DOT requirements without unnecessary burden and the potential for error in compliance.

In summary, while Vulcan certainly supports workplace drug and alcohol testing and providing an alcohol and drug-free workplace, Vulcan opposes certain provisions of

this proposed rule. Most importantly, MSHA should reconsider the proposed progressive discipline provisions, as these would conflict with stricter programs already in place at many operations, including Vulcan's. This proposal has the likely unintended potential to unnecessarily restrict the ability of operators to maintain their own comprehensive drug and alcohol policies in a manner that most effectively ensures a safe workplace. While Vulcan supports MSHA's efforts to prohibit drug and alcohol use and possession at mine sites industrywide, Vulcan cannot support this rule in its current form.

Thank you for allowing Vulcan Materials Company the opportunity to provide these comments.

Yours truly,



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