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Patricia W. Silvey
Director, Office of Standards, Regulations & Variances
U.S. Department of Labor
Mine Safety and Health Administration
1100 Wilson Boulevard, Room 2350
Arlington, VA 22209-3939

RE: Notice of Proposed Rulemaking – Alcohol and Drug Free Mines
Published September 8, 2008 / Docket, MSHA-2008-0011
RIN 1219-AB41

Dear Ms. Silvey:

The Illinois Association of Aggregate Producers (IAAP) appreciates the opportunity to submit written comments regarding the Mine Safety and Health Administration's (MSHA) "Alcohol- and Drug-Free Mines" rules proposed on September 8, 2008.

Illinois aggregate producers are a numerous and very diverse industry. The IAAP's 100 producing members range in size from "mom and pop" operations that manufacture less than 100,000 tons of these products each year to large companies that produce well over 20,000,000 tons annually. Nearly 400 small, medium and large surface and underground aggregate mines operate in Illinois, located in 79 out of 102 counties.

Like MSHA, the IAAP is committed to safe mines and a healthy workforce. The men and women employed by the Illinois aggregates industry are its most valuable asset. We have not had an aggregate mine fatality in Illinois since March 24, 2003 and are working hard to maintain this fine record. For that reason, the IAAP supports the establishment of uniform alcohol and drug rules for its workforce, including a fair and cost-effective system for substance abuse screening.

Many IAAP members have been proactive in this area by establishing substance abuse policies designed to promote the safety and health of mine employees. These policies take into account the unique circumstances at each mine, including the existence of collective bargaining agreements as well as USDOT jurisdiction over company employees holding CDL licenses.

Although IAAP members support alcohol- and drug-free workplaces, we submit that MSHA's rulemaking in this area should establish **minimum** standards for such program and then allow affected companies to create policies which meet or exceed these thresholds based upon their own unique circumstances. For that reason, the IAAP strongly opposes key elements of MSHA's rulemaking because this proposal: (1) improperly limits a mine operator's right under State law to establish appropriate work rules for alcohol and drug infractions; and (2) conflicts with USDOT alcohol and drug programs currently in force at some member pits and quarries.

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First, the IAAP strongly objects to MSHA's proposed "one-strike" provision set forth in Section 66.400(b). This section states:

> Mine operators shall not terminate miners who violate the mine operator's policy for the first time (e.g., by testing positive for alcohol or drugs). Rather, those miners testing positive for the first time, who have not committed some other separate terminable offense, shall be provided job security while the miner seeks appropriate evaluation and treatment. The miner will be able to be reinstated and allowed to resume performance of safety-sensitive job duties provided the miner complies with return-to-duty requirements outlined in §§ 66.405 and 66.406.

In short, this proposed rule would: (a) prevent employers from dismissing employees who are first-time offenders; (b) mandate that offending employees retain job security during evaluation, treatment and counseling; and (c) require that employers allow offending employees to resume safety-sensitive duties after all return-to-work rules were satisfied.

This proposed rule, on its face, diminishes health and safety at aggregate mines. As one of our member companies stated:

> **This is a lowering of our guard! What a backward step in safety! Most companies have a "Zero tolerance" approach with regard to drug and alcohol issues in the first place and virtually none of these companies have "non-safety sensitive" positions to "park" an employee in, while evaluation of the recovery and rehabilitation activities take place. It would be a huge expense for our industry in a time when we can ill afford any extra people in "make work" activities!**

Section 66.400(b) improperly regulates how a company manages its workforce. Another IAAP member succinctly stated: **"I feel that this is a clear example of the regulatory agency crossing the line into management of our business."**

After reviewing MSHA's proposed rules, an IAAP member stated:

> **We make the decision to retain an employee after a violation of the company drug & alcohol policy on a case-by-case basis. We would not retain an employee who was still in their probationary period of employment. We would not retain an employee who had several previous violations of company policy and had a written last chance employment agreement. We would not retain an employee who violated our long established Drug & Alcohol Policy the second time, even if it was the first time that person violated the MSHA Drug & Alcohol policy.**

Absent a collective bargaining agreement, a mine operator is granted broad authority under Illinois law to establish employee work rules. If a company chooses to allow a first time offender to enroll in a drug/alcohol treatment program in lieu of discharge, that choice is left to the company. Likewise, if a mine operator elects to pass the costs of re-testing, rehabilitation or other treatment options on to the employee, the company may do so under State law. As another

IAAP member commented: **"Why should we have to pay for someone else's wrong doing?"** Finally, if a company chooses to call an employee back to work pending post-accident testing, the company should be able to do so in lieu of granting such worker leave with pay.

It is critical to note that the scope of this proposed rule clearly exceeds MSHA's statutory authority to regulate mine safety and health. The federal Mine Safety and Health Act grants MSHA the power to establish and enforce safety and health standards at mining operations. This federal law does not allow MSHA to prescribe how a mine operator disciplines its workforce for violating safety and health standards. As stated by an IAAP member: **"These provisions you outline are without question the government overstepping their authority in directing the workforce. MSHA has no authority to regulate work rules dealing with employees."**

MSHA also lacks the requisite statutory authority to overturn work rules set by a collective bargaining agreement governed by the National Labor Relations Act. The collective bargaining process will routinely address disciplinary action that may be taken for violations of employer work rules. These work rules may include very detailed agreements governing the discipline administered for violations of company alcohol and drug policies within a bargaining unit. Regarding this issue an IAAP member commented: **"Currently our Alcohol & Drug Programs are written and signed into our Collective Bargaining Agreements for both Operators Local 150 and Teamsters Local No. 325. How will this be affected and who will burden the costs of making these changes, if necessary?"**

Under federal law, the answer to this question is clear: the National Labor Relations Act preempts MSHA's rulemaking authority over disciplinary action for alcohol and drug violations within established bargaining units. Work rules established by the collective bargaining process, work rules that may discipline for specific alcohol and drug infractions, cannot be lawfully set aside by MSHA rulemaking. In summary, MSHA should strike Section 66.400(b) from its proposed rulemaking given its lack of legal authority to set such standards.

Second, the IAAP strongly objects to MSHA alcohol and drug rules that conflict with a program developed and implemented by USDOT. Many aggregate producers employ workers with CDL licenses who are subject to USDOT substance abuse regulations. It seems plain that companies currently implementing USDOT substance abuse programs should be allowed to bring their mining workforce within the coverage of this time-tested, comprehensive regulatory system. Yet MSHA's proposal essentially requires aggregate producers already regulated by USDOT to create a second alcohol and drug program for their mining workforce. It makes absolutely no sense, from the standpoint of either safety or cost-effectiveness, for MSHA to mandate compliance with a duplicate regulatory program in lieu of allowing a company to comply with an existing USDOT program.

It makes even less sense for MSHA to create a duplicate regulatory program that conflicts with USDOT alcohol and drug rules currently in force at some aggregate operations. IAAP members currently regulated by USDOT have identified a number of issues and open questions generated by MSHA's proposed alcohol and drug program. For example,

- The MSHA rule establishes a 10-panel test for substance abuse; the USDOT program utilizes a 5-panel test. Many companies would need to maintain 2 sets of random pools with some employees included in both random pools. Moreover, creating a dual system mandates that separate forms and separate specimens would need to be sent to the testing lab. In short, the MSHA rule should track USDOT testing protocols to promote consistency with current practice and avoid costly, duplicative tests.

- When Post Accident testing or Reasonable Suspicion testing is required which rules will govern the testing process -- MSHA or USDOT?

- The proposed policy does not allow the miner to return to work until the company receives the results of the drug test; the company must also pay the employee while they are off work. USDOT policy only requires the person to remain off work until the results are known if they are tested for reasonable suspicion. The employer should have the discretion to allow the person to return to work after post-accident testing.

- Clinics testing employees regulated under USDOT guidelines have 2 Chain of Custody forms – one for all USDOT accidents requiring Drug & Alcohol testing and one for all other Non-Recordable Accidents. Is MSHA planning to implement a similar system?

- Employers are required to obtain information about the alcohol and drug history (previous 3 years) of all newly-hired employees covered by USDOT rules, including whether they tested positive for a controlled substance and have completed a Substance Abuse Program. Is MSHA planning to implement a requirement policy similar to the USDOT rule -- and if so, which agency rules would apply?

- If an employee who tests positive for a controlled substance is enrolled in both MSHA & USDOT Pools and the USDOT program spells out a NO second chance policy, which program governs -- and which pool is the employee tested in?

In summary, MSHA should give aggregate producers the option to bring its mining workforce within the coverage of an existing USDOT alcohol and drug program. At the very least, MSHA's rulemaking must be amended to bring its requirements into harmony with the USDOT substance abuse program, thereby promoting a cost-effective regulatory scheme for the aggregate industry.

In conclusion, it is important to remember how the aggregates industry successfully partnered with MSHA and labor organizations to create the Part 46 Mine Safety Training Rules. The successful implementation of Part 46 is a direct result of this collaborative process. In stark contrast, MSHA has failed to partner with its stakeholders on these proposed alcohol and drug regulations. The Illinois Association of Aggregate Producers submits that the serious flaws embodied in this rulemaking are direct result of this lack of collaboration.

As stated above, the IAAP supports the establishment of uniform alcohol and drug rules for its workforce, including a fair and cost-effective system for substance abuse screening. However, these uniform alcohol and drug rules must set minimum standards and then let each employer decide the best way to implement this program -- whether by compliance with existing USDOT rules or by establishing requirements taking into account the unique circumstances at each mine. Moreover, any alcohol and drug program established pursuant to MSHA's rules must factor in the existence of collective bargaining agreements, agreements that define how such programs are to be implemented within each bargaining unit, as a matter of law.

The Illinois Association of Aggregate Producers respectfully requests that this rulemaking be remanded to MSHA for further analysis and review. As part of this review process, we submit that MSHA should initiate a collaborative rulemaking process that would allow all interested stakeholders the opportunity to help fashion fair and cost-effective alcohol- and drug-free rules for the mining industry.

Respectfully,

John Henriksen, Executive Director
Illinois Association of Aggregate Producers

JCH/gls (Enclosure)
Cc: IAAP Board
IAAP Safety Committee
Office of Information and Regulatory Affairs