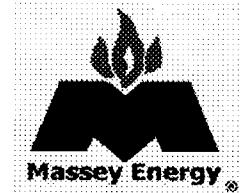


Massey Coal Services



300 Morgan Massey Drive
Julian, WV 25529

November 10, 2008

Ms. Patricia W. Silvey
U.S. Department of Labor, MSHA
Office of Standards, Regulations, and Variances
1100 Wilson Boulevard, Room 2350
Arlington, Virginia 22209-3939

**Re: Alcohol and Drug-Free Mines: Policy, Prohibitions, Testing,
Training, and Assistance, Proposed Rule RIN: 1219-AB41**

Dear Ms. Silvey:

I write to you on behalf of the members of Massey Energy Company and its related companies ("Massey") to comment on the Mine Safety and Health Administration's above-referenced proposed rule relating to alcohol and drug free mines. Massey, headquartered in Richmond Virginia, with operations in West Virginia, Kentucky and Virginia, is the fourth largest coal company in the United States based on produced coal revenue and has more than 5,500 members. While Massey commends MSHA for the introduction of provisions intended to promote alcohol and drug free mines, adoption of the Proposed Rule would substitute a less rigorous substance abuse program and system for testing than the proven effective programs already adopted by various states and/or in use by Massey and other industry participants.

The Proposed Rule would prevent Massey from taking disciplinary action, up to and including termination, against a member for a first violation of Massey's substance abuse policy and potentially prevent the withdrawal of an offer of employment when the candidate fails the pre-employment alcohol and drug abuse screening process. The Proposed Rule would also appear to narrow the application of substance abuse testing from Massey's entire workforce at a mine site to only defined employees who serve in "safety sensitive" positions. Every position at a mine site is "safety sensitive" in nature and must be subject to a uniform, substance abuse testing program. Massey respectfully submits that the Proposed Rule should NOT prevent an employer from developing and/or continuing its own, more stringent substance abuse policy and

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testing program. Nor should the Proposed Rule eviscerate existing, proven effective state laws addressing alcohol and substance abuse in mining. Safety must be “Job One” and members should not be required to work along side substance abusers.

Currently, all Massey members must successfully pass a pre-employment drug and alcohol screen and are subject to post-accident, random and reasonable suspicion drug and alcohol testing. Members who refuse to submit to testing as required under the policy, alter or attempt to alter a test result, or produce a positive test result are subject to disciplinary action, up to and including discharge. Before disciplinary action is taken, a positive test result is verified with additional testing. Because of Massey’s dedication to safety and because of the significant hazards created by substance abusers at the mine site, Massey’s substance abuse policy can be described as one of “Zero Tolerance.” However, where a member voluntarily seeks assistance or where circumstances support it for a member subject to disciplinary action, Massey will assist and support such members with necessary treatment. The application of its current substance abuse policy, including disciplinary action, is central to Massey’s commitment to safety. Because the rule as proposed would diminish Massey’s ability to keep its members safe, Massey asks that MSHA withdraw the proposal in its current form.

The Proposed Rule’s most troubling shortcoming is the requirement that a member with a failed drug test be returned to work after education and/or treatment with a substance abuse professional (“SAP”) and the completion of a return-to-duty process.¹ Simply put, Massey cannot risk giving a member found in violation of its substance abuse policy an automatic second chance – Massey members who are committed to maintaining safe and substance free mining operations deserve more. Massey also believes that it must continue to apply its own substance abuse policies in order to effectively address alcohol and drug abuse at its mine sites. This conclusion is concretely supported by a independent medical and scientific documentation.

The prevalence of substance abuse within the industry is well documented. As reported by the Department of Health and Human Services Substance Abuse and Mental Health Services Administration (“SAMHSA”), workers in the construction and mining occupations reported the highest prevalence of heavy alcohol use, 17.8%, when compared with other full-time workers from 2000 to 2004.² These same occupations had the second highest prevalence of workers, 15.1%, with past month illicit drug use.³ Additionally, data collected by the National Survey on Drug Use and Health (“NSDUH”) between 2004 and 2006 shows that both West Virginia and Kentucky, where most Massey members live and work, have two of the highest rates of

¹ This proposal is found at Proposed Rule 30 C.F.R. § 66.400(b), Subpart E – Operator Responsibilities, Actions, and Consequences, Consequences to miner for failing an alcohol or drug test or refusal to test.

² Substance Abuse and Mental Health Administration, Office of Applied Studies, National Survey on Drug Use and Health, “Worker Substance Use and Workplace Policies and Programs,” (June, 2007) *report available at* <http://oas.samhsa.gov/work2k7/work.htm>. SAMHSA is the Federal Government’s lead agency for improving the quality and availability of substance abuse prevention, addiction treatment, and mental health services in the United States. This survey investigates substance use among full-time employed U.S. workers aged 18 to 64.

³ *Id.*

nonmedical use and abuse of prescription pain relievers when compared with other states.⁴ For 2004, an estimated 11.3 million people engaged in the non-medical use of pain relievers.⁵ SAMHSA also emphasized that while use of illicit drugs dropped in 2007, the abuse of prescription drugs increased.⁶ There was a spike in drug use among 55 to 59 year olds, with abuse of prescription drugs by this age group more than doubling, and a substantial increase in the nonmedical use of prescription pain relievers in young adults ages 18 to 25.⁷ An estimated 8.2 percent – about one in 12 – full-time workers aged 18 to 64 reported past month illicit drug use, while 8.8 percent – about 10.1 million – full-time workers reported past month heavy alcohol use.⁸ This data establishes the likelihood that workers in the mining industry, more than workers in other industries, could be under the influence of substances while at the mine site.

More importantly, treatment by substance abuse professionals, when episodic, involuntary, and simply required for “return to work,” does not prevent an abuser from continuing his/her alcohol or drug use. Medical and scientific research shows that treatment for addicts does not result in sobriety, particularly when that treatment is followed by the addict’s return to everyday work life. The National Institute on Drug Abuse (“NIDA”) defines “addiction” as a “chronic, relapsing brain disease that is characterized by compulsive drug seeking and use, despite harmful consequences.”⁹ Addiction is considered a brain disease because it changes the structure of the brain and how it works and because it leads to harmful behaviors.¹⁰ NIDA also recognizes that, although the initial decision to take drugs is “mostly voluntary,” when a drug user becomes an abuser, “a person’s ability to exert self control” is seriously impaired.¹¹ Importantly, alcohol and drug addicted individuals show physical changes in the areas of the brain that are “critical to judgment, decision-making, learning and memory, and behavior control.”¹² In other words, a person’s judgment and critical thinking, both of which are necessary to maintain the highest level of safety in the mining industry, are irreparably damaged if that person is a substance abuser.

⁴ Substance Abuse and Mental Health Services Administration, Office of Applied Studies, National Survey on Drug Use and Health, “The NSDU Report: Nonmedical Use of Pain Relievers in Substate Regions: 2004 to 2006,” (June 19, 2008), available at <http://oas.samhsa.gov/2k8/pain/substate.htm>. See full report at <http://oas.samhsa.gov/substate.cfm>. “Nonmedical use” is defined as “the use of prescription drugs not prescribed for an individual by a physician or used only for the feeling they produce.”

⁵ Substance Abuse and Mental Health Services Administration, Office of Applied Studies, National Survey on Drug Use and Health, “Misuse of Prescription Drugs,” report available at <http://oas.samhsa.gov/prescription/Ch.1.htm>.

⁶ Substance Abuse and Mental Health Services Administration News Release, “New National Survey Reveals Cocaine, Methamphetamine Use Drop among Young Adults; Prescription Drug Abuse Increases,” (September 18, 2008), available at <http://www.samhsa.gov/newsroom/advosories/0809033637.aspx>.

⁷ Id.

⁸ SAMHSA, “Worker Substance Use and Workplace Policies and Programs,” (June, 2007).

⁹ National Institute on Drug Abuse, “Drug Abuse and Addiction,” available at <http://www.nida.nih.gov/scienceofaddiction/addiction.html>.

¹⁰ Id.

¹¹ Id.

¹² Id.

NIDA's research has further established that addicts and abusers "often relapse" in response to what most people "consider mild stressors."¹³ Even with treatment by a substance abuse professional, a drug abuser is "likely" to relapse because of the chronic nature of addiction and because it involves physiological and behavioral components.¹⁴ It is known that someone who abuses drugs has a diminished ability to think clearly, remember, and pay attention, has slower motor functioning, and is hypersensitive to even mild stress. Because safe mining practices protect the health and safety of all members at a mine site, a rigorous substance abuse policy and testing program, like that utilized by Massey, must not be compromised. The Proposed Rule fails to ensure safe mining practices when it prevents employers from taking disciplinary action against a member who is so lacking discipline that he or she ignores substance free work practices. An automatic second chance for such a member could be tragic.

In the Federal Register for the Proposed Rule, MSHA identifies and explains the significant risk posed by substance abusers in the mining industry:

Using alcohol and/or drugs can affect a miner's coordination and judgment significantly at a time *when he or she needs to be alert, aware, and capable of performing tasks where there is substantial risk of injury to oneself or others.* Even prescription medications may affect a miner's perception and reaction time. *Mining is a complicated and hazardous occupation, and a clear focus on the work at hand is a crucial component of mine safety.* Miners under the influence of alcohol and/or prohibited drugs endanger themselves as well as their co-workers. This is of particular concern since *many fatal and non-fatal mining accidents involve the operation of some type of equipment, tool, or machinery.*¹⁵

This statement seems to contradict the Proposed Rule's limitation to testing only those in "safety sensitive" positions in that it acknowledges that all tasks performed by miners are "safety sensitive" because mining is complicated, hazardous, and requires clear focus on the work.¹⁶ Given this acknowledgement, any rule that forces a mine operator to return a previously confirmed alcohol or drug abuser to the mine site risks the health and safety of all miners, is contrary to the stated purpose of the Mine Act, and should not be promulgated.

¹³ Stocker, Steven, "Studies Link Stress and Drug Addiction," National Institute on Drug Abuse, *available at* http://www.nida.nih.gov/NIDA_Notes/NNVol14N1/Stress.html.

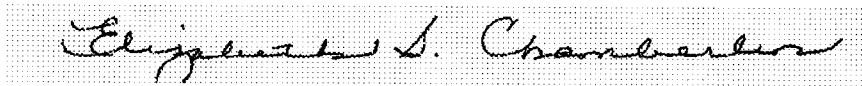
¹⁴ National Institute on Drug Abuse, "Treatment and Recovery," *available at* <http://www.nida.nih.gov/scienceofaddiction/treatment.html>. See also Dennis, Michael Ph.D. and Christy K. Scott, Ph.D., "Managing Addiction as a Chronic Condition," *Clinical Perspective – Managing Addiction, Addiction Science and Clinical Practice* (December, 2007) (Explaining that single episode addiction treatment, even when specialized, does not result in recovery and abstinence, and that clinical addiction treatment includes cycles of recovery and relapse often spanning many years).

¹⁵ "Alcohol and Drug-Free Mines: Policy, Prohibitions, Testing, Training, and Assistance; Proposed Rule," Vol.

Massey requests that MSHA reconsider the Proposed Rule, withdrawing it in its current form, and propose instead a rule that provides minimum standards for prevention of alcohol and drug abuse in the mining industry, but does not undermine existing more stringent programs. Massey requests that MSHA continue to provide educational information, training and resources to afford mine operators the flexibility and discretion to enhance existing substance abuse programs that are tailored to the needs of their members and mine sites. “Safety is Job One” and “Zero Tolerance” must be the guiding principles when it comes to addressing substance abuse in the mining industry. Massey members and others engaged in mining should not have their safety threatened by members with impairments to judgment and focus. Mandating a second chance for individuals who did not voluntarily seek help is an unreasonable accommodation in light of the likelihood of relapse and the clear and present danger to others.

Massey asks that MSHA accept these comments as constructive and looks forward to working together in partnership to protect the health and safety of our Nation’s miners.

Respectfully submitted,

A handwritten signature in black ink on a light gray dotted background. The signature reads "Elizabeth S. Chamberlin" in a cursive script.

Elizabeth S. Chamberlin
Vice President – Safety and Training