



November 10, 2008

Ms. Patricia W. Silvey  
Director, Office of Standards, Variances & Regulations  
Mine Safety & Health Administration  
1100 Wilson Boulevard  
Arlington, VA 22209-3939

Re: RIN 1219-AB41, Proposed Rules on Alcohol-and Drug-Free Mines

Dear Ms. Silvey:

The National Mining Association (NMA) appreciates this opportunity to comment on the proposed rule for Alcohol-and Drug-Free Mines: Policy, Prohibitions, Testing, Training, and Assistance published Sept. 8, 2008 in the Federal Register (73 Fed. Reg. 52,136). These comments supplement the testimony and substitute regulatory language submitted by NMA at the public hearing conducted Oct. 14, 2008 in Washington, D.C.

We, like others who have commented during this proceeding, applaud the Mine Safety and Health Administration's (MSHA) recognition of the need to address the issue of alcohol- and drug abuse at mines. NMA is very concerned, however, that the proposed rule fails to adequately take into account: (1) the fact that two key mining states, Kentucky and Virginia, are already addressing the problem; and (2) the comprehensive state-of-the-art substance abuse programs that are widely established in the mining industry.

Thus, for example, as noted in our October 14 testimony, between July 2006 and October 2008, the Commonwealth of Kentucky revoked the certifications of 633 individuals employed by the mining industry for failure to pass a substance abuse test. Attached to this letter is a chart detailing the status of these 633 actions. Importantly, of the 633 cases, only 5 individuals have been recertified for mining employment.

In addition to state activities, central to our concern is the failure of the proposed rule to give effect and credence to the sophisticated substance abuse programs that have become commonplace across the industry, many of which are significantly more comprehensive than the requirements of the proposed rule. While the proposed rule appears to provide that operators' existing programs that are

“consistent” with or “provide at least the same level of protection” are grandfathered, the preamble undercuts this provision by indicating that operators employing testing technologies beyond those recognized under the U.S. Department of Transportation regulations, 49 C.F.R. Part 40, would have to revise their programs by the end of the second year from the rule’s effective date. In essence all programs, regardless of the level of protection currently provided, must be brought into conformity with the less protective, less comprehensive requirements of the proposal. This will diminish rather than enhance miner safety.

Many of these existing comprehensive substance abuse programs are the product of collective bargaining. NMA is troubled that the proposed rule could, by government fiat, disturb those programs if they differ from the proposed rule.

Of equal, if not greater, concern is the language of proposed section 66.400(b) which will limit the rights of operators in making personnel decisions based upon a violation of operators’ established policies and procedures. In analyzing this, NMA urges that consideration must be given to whether the MINE Act provides authority for MSHA to displace the employment-at-will doctrine as it relates to the employer-employee relationship. More specifically, NMA does not believe that a legally sound basis has been articulated to substantiate authority for MSHA, under the MINE Act, to displace the employer-employee relationship under state law as it relates to more stringent policies for an alcohol- and drug-free workplace nor do we believe such MINE Act authority exists. However, under any circumstances, the agency has failed to provide a satisfactory explanation of its basis for arriving at such a conclusion, and MSHA must do so in order for the provision to pass muster under the requirements of the Administrative Procedure Act. In fact, the preamble contains no explanation of this provision – arguably the single most important and far-reaching regulatory provision of this proposal. We, like others, believe inclusion of section 66.400(b) will diminish rather than advance miner safety and health and it must be stricken should the agency finalize this initiative.

In sum, despite the importance of this issue for the mining industry, as demonstrated by the enactment of new laws in Kentucky and Virginia, and the existence of sophisticated and comprehensive substance abuse throughout the mining industry, we are convinced that the proposed rule will: (1) undermine the success of existing drug and alcohol policies; and (2) curtail the industry’s continued success in reducing its injury rate – a rate that has declined 25 percent since 2002. We reach these conclusions because the proposed rule:

- mandates less rigorous testing methods than those used by NMA member companies;
- contains loopholes that restrict the application of substance abuse testing to defined employees, rather than covering an entire mine site workforce; and
- prohibits companies from taking disciplinary action, up to and including discharge, for an employee’s first offense of a company substance abuse policy.

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To address these shortcomings NMA has submitted comprehensive substitute regulatory language that will fulfill the agency's objective to "provide a consistent baseline for the mining industry and afford safety for all miners" and "to provide clear...guidance for mine operators." 73 Fed. Reg. 52,141. Absent significant revision to: (1) eliminate language that intrudes on the employment-at-will doctrine; and (2) fully recognize the comprehensive elements contained in existing operator substance abuse programs, NMA must recommend that the proposed rule be withdrawn.

Sincerely,

A handwritten signature in black ink, appearing to read "Bruce Watzman", is written over a rectangular area with a light gray dot grid background.

Bruce Watzman  
Sr. Vice President  
National Mining Association