CALCIMA

California Construction and Industrial Materials Association

November 10, 2008

U.S. Department of Labor
Mine Safety & Health Administration
Office of Standards, Regulations, and Variances
1100 Wilson Blvd., Room 2350
Arlington, Virginia 22209-3939

Re: RIN 1219-AB41

Dear MSHA:

The California Construction & Industrial Materials Association (CalCIMA) represents aggregate and industrial mineral producers in California. We applaud the Mine Safety & Health Administration (MSHA) for focusing on creating drug and alcohol-free mine sites (30 CFR Subchapter N Part 66), and appreciate this opportunity to comment.

Mine operations in California have a strong commitment to maintaining safe, healthy, and productive work environments for the benefit of employees, customers, and the public. In particular, mine operations in California place a high degree of emphasis and scrutiny on preventing drug and alcohol abuse.

While the general aim of the MSHA proposal is laudable, there are a few provisions where further consideration appears warranted. The most notable concern is the provisions to allow a miner to escape disciplinary action, by admitting he or she is in violation of an operator's drug and alcohol policy. This is less stringent than most company policies. Whether this was intentional or not, it should be corrected.

We are hopeful also that a final rule can be developed that maintains a sufficient amount of discretion so as not to conflict with or deter from current company policies that are more strict. In this regard, we would hope that the final rule would *not* limit employers' discretion to address specific characteristics of their companies, operating sites, and employee agreements. Importantly, too, the rule should allow the discretion to address contractors that work at mine sites.

Again, we appreciate the opportunity to comment, and attach specific comments.

Sincerely,

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CalCIMA Comments

1. Miner Assistance Following Admission of Use of Prohibited Substances (subpart E, .400(b). It appears the rule would allow that when an employee becomes aware that they will be subject to post-accident or random testing, the miner may avoid discipline by voluntarily admitting that he or she is in violation of an operator's drug and alcohol policy.

   In essence, this would provide an escape clause or second chance, when most company policies provide neither. This seems to run clearly against a drug and alcohol free workplace. Either the provision should be struck or written more clearly to address whatever is the intended purpose.

2. Page 36 (Summary of Rule) states that "Testing would also be required for any additional drugs subsequently designated by the Secretary of Labor...."

   What process would be used to add additional drugs to the list? Would some sort of rulemaking process be used? Otherwise, what prevents this provision from being used to circumvent the rulemaking process, since it would modify a list included in an existing rule?

3. Page 49 (Section 66.101 – Prohibited Behaviors) states that "...possession and use of prohibited substances on and around the mine property is not permitted, unless the miner possesses a valid prescription that requires use while on mine property."

   This statement is concerning. A prescription is not likely to be so specific such that one could determine whether or not it "requires use on mine property." Many prescriptions, including prescriptions for some of the substances listed, may instruct the user to take them "as needed." Thus, determining required use may be a subjective judgment call that the mine operator or MSHA inspector is not qualified to make. If this determination is required to be the result of interaction between the MRO and the PMD, this should be so stated in the rule.

   Perhaps a better way to state this would be to say "except as prescribed and directed by the miner's physician." This would address a doctor's direction that the subject substance may be used, except while operating heavy equipment and other potentially prohibited tasks.

4. Page 64 (Section 66.300 - Purpose and Scope) states that only HHS certified laboratories may be used to test collected samples. Are there sufficient HHS certified labs available to accommodate the increased number of tests resulting from this rule?

5. Page 75 (Section 66.306 – Post-Accident Testing) states that post incident testing must occur no later than 8 hours after an incident for alcohol and 32 hours for drugs.

   There are several situations to consider:

   - In a significant event, it may not always be possible to test in 8 hours. Will mine operators be held responsible in these circumstances?
   - Is an employer responsible for complying with the 8/32 hour window in the event that the employee reports the injury late? In this case, does the window start at point of injury, or point of knowledge? Employers should not be held responsible for conditions over which they have no control.
   - Is it necessary to conduct drug testing in the case of a repetitive stress injury? It is not reasonable to assume that there is a connection between drug/alcohol use and repetitive stress.
   - Hospitals may refuse to test within the required window depending on necessity of medical treatment and patient care issues. In fact, it is generally the case that in the event of a serious injury, hospitals routinely refuse to provide any toxicology information, (blood, urine, etc.) within the stated window. The U.S. Department of Transportation (DOT) recognizes this and has provided relief for companies who cannot retrieve substance abuse screening data.

6. Page 76 (Section 66.306 – Post-Accident Testing) proposes a requirement for post-mortem testing in the event of a fatality. There should be an analysis of other regulations and restrictions to determine if this is feasible. If permission of the next of kin is required, it is highly unlikely that this will be received at all, let alone within the required time frame. There may also be an issue with the mine operator having the authority to request such tests in these circumstances, where the employee is unable to give the right of refusal. (Note the same may be true in the case of an employee who is unconscious and does not regain consciousness within the required window.). And, of course, there are religious concerns to consider.

7. Page 77 (Section 66.306 – Post-Accident Testing) states that "The proposed rule would also require that post-accident tests would not be allowed to delay the delivery of necessary medical attention to injured miners."

   This is a necessary provision, but does it also provide appropriate protections to mine operators, who should not be cited under these circumstances? Similar protections have been very narrowly applied in the case of the 15 minute reporting window. Mine operators should not be penalized for putting the lives of the miners ahead of any drug/alcohol testing.

8. Pages 78-80 (Section 66.307 – Reasonable Suspicion Testing) – The proposed rule requires that testing be conducted any time that a supervisor documents observable signs and symptoms that lead them to suspect drug and/or alcohol abuse. Many companies have very specific policies regarding reasonable suspicion testing, such as requiring at least two supervisors (or a supervisor and one additional employee) to agree that these signs and symptoms exist. This provision helps protect employees from the potential of harassment, or overly conservative determinations. In the event that such requirements exist, and a second supervisor is not available or does not agree with the first supervisor, how will MSHA requirements be reconciled with company policy?

9. Page 91 (Section 66.500 – Recordkeeping Requirements) states that "...it is proposed that post-accident results would be required to be included in reports of injuries and accidents as well as fatalities."

   It is unclear if this refers to MSHA post-accident reports, such as the 7000-1 and 7000-2, or if this is referring to internal company incident reports. Internal company accident reports are used for a variety of reasons – accident reporting, trend tracking, accident frequency of individuals, to correct hazards, training and learning experiences, among others, and may be shared across sites within a company. Inclusion of drug test results in internal reports may result in issues of confidentiality and limit the ability of companies to use these reports to improve safety and injury rates, and MSHA should not have the ability to dictate the content of internal reports.

   The U.S. Department of Transportation (DOT) has applied a reasonable program for reporting of positives for substance abuse. This information has been used by the DOT to reduce the number of samples taken during a program period.

10. Page 112 (Results of Screening Analysis) – Recordkeeping requirements include the name of the miner tested, the testing date, and the test results. Will this pose any issues of confidentiality under any other state or federal law?

11. Page 113 (Response Burden Estimate) estimates the annual hours for testing recordkeeping to be 0.167 hours and an additional 0.167 hours for substantive changes to policies. This calculates to be a total of 10 minutes annually for each of these activities. This seems to be unreasonably low. A review of the policy just to determine if changes are needed will take more than 10 minutes to do appropriately. Maintaining test records, which would include setting up files and place all records in those files, cannot likely be completed in 10 minutes. Additionally, it is estimated that initial policy development will take one hour if the MSHA sample is used. This estimate may also be low, particularly for operations with a corporate policy already in place, requiring them to combine the two policies.

12. Page 113-114 (Response Burden Estimate) estimates a total of 15 minutes for preparation of the chain of custody, including the donor, collector, laboratory, and MRO. This estimate seems low, particularly when the donor may have questions about the process or reading difficulties. As reference, a good model of the burden posed by such activities would be how companies comply with DOT regulations.

13. Page 114 (Response Burden Estimate) does not include any estimates for time spent to conduct the determination of random testing; time to locate the miner to undergo testing and communication regarding the test; the time to take the actual test (which may include a "wait" time); travel time if test cannot be performed on site; time spent by employer escorts in the event of off site testing; and time of other miners, potentially overtime, to fill in at the plant site while the miner is being tested.

    As reference, many companies have DOT regulated sites that are somewhat remote and are burdened when it comes to collection of samples...and this is in California where such networks have been in place for some time. There are many mining operations where NO such networks exist and compliance is problematic, at best. There are instances of post-accident DOT samples going un-taken due to the remoteness of where drivers may be stranded due to an accident.

14. Page 128 (Section 66.3 - Definitions) – Persons Performing Safety Sensitive Job Duties is defined as "those who perform job activities that are inherently dangerous on a regular and/or recurring basis and are required under 30 CFR Parts 46 and 48 to take comprehensive miner training." The interpretation of this definition is unclear. The definition seems to indicate a two-prong qualifier to determine performance of safety sensitive jobs – performance of inherently dangerous jobs *in addition to* a requirement to complete Part 46 or Part 48 training. However, all other discussion in the Federal Register seems to indicate that anyone who is required to take the training must be in the testing pool. Furthermore, there is no definition provided for "inherently dangerous jobs."

    Also, some mine operators may choose to provide Part 46 or Part 48 training for employees who are not required to take it under MSHA regulations. Will these employees be required to undergo drug testing as a result of this decision?

15. Page 128 (Section 66.3 - Definitions) – Post-Accident Testing is defined as "Testing for the misuse of alcohol or drugs that is triggered either by an occupational injury or an accident that is done to help determine whether alcohol and/or drugs were a factor in the injury or accident." Section 66.306 (page 145)
    specifies drug and alcohol testing for "occupational injuries requiring medical treatment beyond first aid." The same verbiage should be used in the definition section. In addition, accident is not defined.

16. Page 130 (Section 66.3 - Definitions) – Safety Sensitive Job Duties is defined as "any type of work where a momentary lapse of critical concentration could result in an accident, injury, or death." Based on this definition, driving to work; using a paring knife; using a paper cutter; or making French fries at a fast food restaurant are safety sensitive jobs. There is a high potential for an arbitrary and capricious application of this definition to many jobs that are not truly safety sensitive. It would be hoped MSHA could place some parameters on this.

17. Page 135 (Section 66.202 - Education and Awareness Program for Non-Supervisory Miners) states that "training must be delivered by a competent person knowledgeable about workplace substance abuse, these regulatory requirements, and the mine operator's policy." What type of documentation will a mine operator need to maintain to prove to an MSHA inspector that their trainer is competent?

18. Page 145 (Section 66.306 – Post-Accident Testing) requires drug and alcohol testing for injuries resulting in medical treatment beyond first aid. As stated in (5) above, in some cases an injury may start out as first aid, but result in medical treatment at a later date. How does the mine operator handle these circumstances? What about ergonomic and repetitive stress injuries? It does not seem to make sense to conduct drug/alcohol testing in these circumstances. Additionally, repetitive stress injuries are typically not recognized or reported right away. In these cases, when does the 32 hour window start?

19. Pages 145-146 (Section 66.306 (1)(a) – Fatal Accidents) states that "....a mine operator shall conduct alcohol and drug tests on each surviving miner involved in any work activity that could have contributed to the accident, injury, or death as determined by the mine operator, using the best information available at the time of the decision." This is very vague. To what extent should "could have contributed" be taken? What types of activities that could have contributed are taken into consideration? Working in the area, or on the project? Developing procedures or training related to the job? This is very subjective and the potential for a very broad interpretation, and there is a potential for abuse by both the mine operator (using a broad interpretation as an excuse to conduct tests on non-involved miners) or an inspector (using a broad interpretation to require the mine operator to test more personnel than necessary, or to cite an operator for not testing personnel).

20. Pages 145-146 (Section 66.306 (1) – Fatal Accidents) states that "the mine operator shall also be authorized and required to have a toxicology test conducted on the de deceased that at a minimum tests for all the substances listed in Section 66.301." Please see comments on (6) above.

21. Page 161 (Section 66.500 – Recordkeeping Requirements) – Section c(1) states that mine operators are required to "include post-accident test results in accident reports regardless of whether the test(s) are positive or negative." Please see comments on (9) above.

    The concern here is that the rule, if adopted as written, would result in Health Insurance Portability and Accountability Act (HIPAA) challenges in regards to their record keeping

requirements. We recommend that MSHA look more closely at the existing DOT drug and alcohol regulations for more guidance, beyond only the terminology.