From: Chris Greissing [mailto:chrisgreissing@ima-na.org]
Sent: Friday, November 07, 2008 3:17 PM
To: zzMSHA-Standards - Comments to Fed Reg Group
Cc: patricia.silvey@dol.gov
Subject: RIN 1219-AB41

Please find attached the comments from the Industrial Minerals Association – North America regarding the proposed rule for Alcohol-and Drug-Free Mines: Policy, Prohibitions, Testing, Training and Assistance. We appreciate MSHA taking our comments into consideration. Please contact us if you should have any questions regarding our comments. Thank you.

Best regards,

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202-457-0200 ext. 2

AB41-COMM-167

Industrial Minerals Association — North America

October 23, 2008
Docket ID No.: RIN 1219-AB41

MSHA, Office of Standards, Regulations, and Variances
Subject: RIN 1219-AB41
1100 Wilson Boulevard
Room 2350
Arlington, VA 22209-3939

Re: The following are comments submitted on behalf of the Industrial Minerals Association – North America (IMA-NA) regarding the proposed rule Alcohol- and Drug-Free Mines: Policy, Prohibitions, Testing, Training, and Assistance

The Industrial Minerals Association – North America ("IMA-NA") appreciates the opportunity to comment on the proposed rule which would replace the existing metal and nonmetal standards for the possession and use of drugs and alcohol and establish a standard for all mines.[1]

IMA-NA is an association that represents 46 companies who produce industrial minerals such as ball clay, barite, bentonite, borates, calcium carbonate, feldspar, industrial sand, mica, soda ash, talc and wollastonite, and 60 associate member companies that provide goods and services to the industry. IMA-NA typically represents 75 percent or more of the production for each of these minerals in the United States. IMA-NA members are committed to the goal of providing for a safe and healthful workplace.

While the numbers cited by the Mine Safety and Health Administration ("MSHA") in the rule's Introduction are quite staggering[2], and stories about drug addiction in the mining industry are quite troubling,[3] the proposed rule would not make our member's mining operations any safer. In fact, many of the provisions contained in the proposal could actually decrease the level of safety at our operations. Safety is the top priority of our members, and many of our members have expressed the view that this proposal would be taking a backwards leap in terms of ensuring the safety and welfare of anyone at their mining operations.

This proposed rule is also redundant for surface and underground metal and nonmetal mines. Current law states that "Intoxicating beverages and narcotics shall not be permitted or used in or around mines. Persons under the influence of alcohol and narcotics should not be permitted in or around mines."[4] MSHA has a clear record enforcing this rule over the last thirty years, and metal and nonmetal mine operators have developed programs to implement and enforce the rule.

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[1] *See* 73 Fed. Reg. 52136 (September 8, 2008)
[2] *See* 73 Fed. Reg. 52137 (September 8, 2008). Between 75-80% of binge drinkers and drug users are currently employed in the U.S. (roughly 55 million people). In 30 years, MSHA has issued a total of 270 drug/alcohol citations
[3] "A Dark Addiction," *Washington Post*, January 13, 2008, p. A01
[4] *See* 30 CFR Parts 56.20001 and 57.20001

IMA-NA Comments
Docket No. RIN 1219-AB41
Re: MSHA's Proposed Drug and Alcohol Policy

We would like to take the time to address specific issues within this proposed rule that we find especially troubling.

I. Definition of "Safety-Sensitive Job"

Throughout the proposed rule, MSHA states that this rule is meant to provide for what substances cannot be used or possessed while performing a "safety-sensitive job duty." In the section discussing the basis of the proposal, MSHA describes a safety-sensitive duty as being one in which "activities where a lapse of critical concentration could result in an accident, serious injury, or death."[5] To our members and many others in the mining industry, all jobs, once you set foot on mine property, are safety-sensitive jobs, and our members train all of their employees to treat their jobs in this manner. The reasoning behind this is that anyone on a mine property has the potential to create a safety hazard if they have a lapse in concentration.

II. Allowing for Job Security Following a Failed Drug Test

As MSHA has noted in the proposed rule's preamble, most mining operations perform alcohol and drug tests on a pre-employment basis, and continue to test their employees randomly.[6] In fact, many mining operations also have a zero tolerance policy if an employee violates the company's alcohol- and drug-free policy. However, Section 66.404 of the MSHA proposal states that mine operators would be "**required** to offer job security to miners who violate the alcohol- and drug-free mine policy for the first time."[7] This requirement can only be seen as a significant step backwards.

As part of the existing drug and alcohol testing programs already in place at the company level, many of our members have instituted a zero-tolerance policy. Using drugs and alcohol in the workplace, particularly one that has the history of being as dangerous as the mining industry,[8] is something that needs to be treated seriously. Allowing individuals who have shown a history of risking not only their own lives, but the lives of their co-workers, to receive what amounts to a "get out of jail free" card does not make sense. Providing a provision that **requires** an operator to return an individual to a job after they have sufficiently rehabilitated themselves fails to treat the issue as seriously as it should be. If the employee knows he or she has a free pass on their first failure, the deterrent of losing their livelihood is simply not there for the employee to remain drug and alcohol free.

Particularly troubling is Section 66.204 (b) which states "miners who voluntarily admit to the illegitimate and/or inappropriate use of prohibited substances prior to being tested and seek assistance shall not be considered as having violated the mine operator's policy." This would

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[5] *See* 73 Fed. Reg. 52141 (September 8, 2008)

[6] *See* 73 Fed. Reg. 52139 (September 8, 2008). Nearly 80% of all mining operations have pre-employment testing in place. While 75% have random testing already in place. Both of these numbers double the national average for all-industries.

[7] *See* 73 Fed. Reg. 52150 (September 8, 2008)

[8] *See* U.S. Department of Labor, Bureau of Labor Statistics, Census of Fatal Occupational Injuries, 2007. The fatality rate for the mining industry was 28 percent.

appear to give a miner unlimited opportunities to escape being terminated for substance abuse. So long as they admit they have a problem and request assistance, prior to testing, they are not in violation. This exculpatory approach simply cannot be included in any final rule, as it would provide an "out" for the miner to escape the adverse consequences of their illegal behavior. We strongly recommend that Section 66.204 (b) be struck from the final rule.

Recently, six United States Senators sent a letter to Acting Assistant Secretary of Labor Richard Stickler, requesting that this provision be excluded from the proposed rule stating that the provision was "unsupportable and contrary to the interests of worker safety." The letter also states that the provision in this proposal is "contrary to the provisions of other federal workplace drug testing programs."[9] The mining industry should be permitted to have the toughest standards in place, as the history of the industry has clearly indicated its propensity to be a dangerous one. Not allowing a company to make the decision on who they trust with their other employees well-being is clearly a mistake. A zero tolerance policy is tough, but it is also fair, especially in this instance.

Many companies have long had a zero tolerance policy in place for drug and alcohol policy offenders. By forcing these companies to allow for one-strike, it can only be seen as MSHA interfering in a labor relations matter and impacting safety in a negative way. Preempting existing programs should not be permitted under this proposal. If a company can document an existing program that is as strong if not stronger than the MSHA proposal, they should be exempt from the proposed rule.

There would be other impacts seen in allowing for one-strike, such as the difficulty in being able to find a reliable short-term replacement for an employee on leave following their violation of the drug and alcohol policy. There is a shortage of available workers in this industry, and it would be very difficult for a company to find a suitable short-term replacement. Most workers want the security of a long-term position, and many companies have a set number of employees they can afford to maintain on the payroll, especially in these tough economic times. This would amount to a significant economic impact which is not discussed in the proposed rule. Not to mention the added costs and time required for the training of the new employee. Forcing companies to absorb costs associated with hiring temporary workers to replace those on leave following their violation would be quite burdensome.

The final point we would like to make on the proposed rule forbidding companies from implementing a zero tolerance policy is that the Supreme Court has ruled that a company may have a policy in place for hiring and firing employees based on a general rule forbidding drug use. This decision would seem to indicate that the Constitution does not give the Federal Government the right to interfere in the policy decisions of a company.[10] The Supreme Court ruled that it was permissible for an employer to deny employment based on current drug use or

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[9] *See* Letter to Acting Assistant Secretary of Labor dated October 6, 2008 from Senators Michael Enzi, Johnny Isakson, Orrin Hatch, Larry Craig, John Barrasso, and Jeff Sessions.

[10] *See* New York City Transit Authority v. Beazer 440 U.S. 568 (1979). In this case the New York City Transit Authority, which employs safety-related positions, refused to hire and fired individuals who were participating in a methadone program, which is a treatment for heroin addiction. The court ruled there was a rational basis for its

treatment for past drug abuse. If MSHA was to move forward with this proposed rule and retain this provision, they will surely face a legal challenge based on the above Supreme Court decision, which clearly allows for companies to adopt a zero-tolerance policy.

If you were to go forward with this proposed rule, we would like to suggest the following alternative language:

> Eliminate all of 66.401 and change the text to read as follows: Those miners testing positive to a drug or alcohol test may be subject to appropriate disciplinary steps, up to, and including termination. At a minimum, these miners shall not be permitted to perform any safety sensitive duty until they can document that they have successfully completed a drug or alcohol treatment program.

III. Pre-existing Alcohol- and Drug-Free Mine Programs

The proposed rule states that if a mine operator "already has an alcohol- and drug-free mine program in place that tests for at least the substances specified by the rule, the mine operator would be considered in compliance with the proposed rule provided the prohibitions and training requirements are consistent with those in the rule even if differing in drug-testing technologies are being used."[11] The program must then come into full compliance with the proposed rule's requirements within two years of the effective date.

We suggest the following revision:

> "If a mine operator already has an alcohol- and drug-free mine program in place prior to the effective date that tests for at least the substances specified by the rule and has corrective action policies that are at least as significant as the rule, the mine operator would be considered in compliance with the rule."

We would also suggest that the requirement to come into compliance with the proposed rule within two years be removed from the proposal. This will allow for the necessary continuity to ensure safety at our member's mining operations. Attempting to change programs that have been agreed to in labor negotiations and implement new testing and recordkeeping procedures is far too burdensome, and fails to provide for a safer workplace for miners.

IV. Permitting a Miner with a Valid Prescription to Continue Working in a Safety-Sensitive Position

Section 66.402 deals with the issue of whether or not a miner would be permitted to continue working in a safety-sensitive position if he or she had a valid prescription from a physician

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classification of narcotics users and the extension of the rule to cover methadone users. The court stated that even if it was unwise for an employer to rely on a general rule rather than to consider individually each job applicant, it nevertheless did "not implicate the principle safeguarded by the Equal Protection Clause."

[11] *See* 73 Fed. Reg. 52142 (September 8, 2008)

indicating the miner has a legitimate reason for being on the medication. Just because an employee has a valid prescription, does not mean that the employee will be able to perform their job in a safe and secure manner. We encourage MSHA to add the following sentence to Section 66.402:

> It is the Employee's duty **before** engaging in any work to inquire and discuss with their physician(s) any effects which that medication may have on their ability to safely perform his or her job. The employee **must** promptly inform their employer anytime they are on medication which may impact their job prior to engaging in any work, and inform the company of any possible adverse effects the medication may have.

This provision is necessary to ensure the employee's safety while at work at the mining operation, as well as the safety of their fellow miner.

V. Potential Issues with New Testing Requirements

There are several potential issues with the new testing requirements proposed in this rule. Section 66.304 (e) states: "Any incumbent miner who is to be transferred to a position involving the performance of safety-sensitive job duties must be tested for the presence of alcohol or drugs prior to beginning the performance of safety-sensitive job duties and must receive negative test results."[12] We assume that this was meant to apply only to employees transferred from positions that are considered to not be safety sensitive; however, the way the rule is written, it could be interpreted to mean that the operator must test employees who are being transferred from other safety-sensitive positions. We suggest the following revision:

> Any incumbent miner who is to be transferred from a non-safety-sensitive position to a position involving the performance of safety-sensitive job duties must be tested for the presence of alcohol or drugs prior to beginning the performance of safety-sensitive job duties and must receive negative test results

Another area of concern would be the testing requirements set forth in Section 66.306 (1), which state: "The mine operator shall also be authorized and required to have a toxicology test conducted on the deceased that at a minimum tests for all the substances listed in Section 66.301."[13] What authority does MSHA have to authorize a drug test on a deceased miner? An operator would not be permitted to do testing on a deceased miner, especially in the likely event that the family would oppose such testing. This provision would likely face many legal challenges. We suggest that Section 66.306 (1) be revised and the above line be removed from the rule.

We would also like to request that clarification be given on the definition of the word "accident" in Section 66.306 (a) for determining post-accident testing. Would an accident that required post-accident testing include incidents where only equipment or property was damaged? If so, what level of damage would need to occur to activate the need for the rule (i.e. would a broken

[12] *See* 73 Fed. Reg. 52160 (September 8, 2008)
[13] *ibid*

side mirror on a truck be sufficient)?

VI. Liability Concerns

In reviewing this proposed rule, there are many questions regarding where the mine operator would be liable for violations. In terms of contractors and subcontractors who perform work on a mine property, the proposed rule provides that they must be informed of the "requirements under this rule."[14] Following the notification of the rules, would this end an operator's liability for the contractor or their employees/subcontractors?

Another part of the rule that is in need of clarification is in Section 66.101 (b). This section deals with prohibited behaviors and states "Miners must not report for duty or remain on duty if they:"[15] This would seem to put the duty on the miner to be in compliance with the rule. The question then would be that if this miner is in willful violation of this rule by showing up to work under the influence of alcohol and/or drugs and is involved in an accident, would this violation of the alcohol and drug rule by the miner then reduce the liability of the operator for the accident that they caused? This is a provision we would be in favor of including in the rule, as sometimes no matter how much training or education occurs, a miner is human and has free-will to willfully neglect that training and education and break the rules on their own. For instances such as this, an operator should not be liable.

VII. Training Requirements

The requirements set forth in Sections 66.202 (a)(1) and (2) and 66.203 (a)(1) and (2) for minimum mandated training requirements for implementing an education and awareness program for nonsupervisory miners and the minimum training program for supervisors should not include mandatory training times. While we believe that having a good training program in place is critical, mandating training times may not be necessary in all situations. For this reason, we would like to suggest that these sections pertaining to required training times be struck from the proposed rule.

VIII. Reconcile the DOT Requirements v. MSHA

There must be some clarification on how an operator would be able to reconcile the discrepancies between the Department of Transportation (DOT) drug and alcohol testing procedures and MSHA's proposed rule. There could very easily be several occasions where the jurisdiction will be covered by both the DOT and MSHA. The DOT is quite clear in its rule on how DOT drug and alcohol tests are to relate to non-DOT tests.[16] The rule states that DOT tests are to take precedence over all other tests, and must be completed first and completely separate

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[14] *See* 73 Fed. Reg. 52157 (September 8, 2008) Section 66.2 (c)

[15] *See* 73 Fed. Reg. 52158 (September 8, 2008) The rule continues on to say in short that prohibited behavior would include, if a miner reported to duty and had violated the alcohol or drug policies or refused to submit to a test or submitted an adulterated specimen for testing.

[16] *See* DOT Rule PART 40 -- : Title (PROCEDURES FOR TRANSPORTATION WORKPLACE DRUG AND ALCOHOL TESTING PROGRAMS), section 40.13

from any other tests.

Of particular concern is Section 40.13(c), which states: "you must not perform any tests on DOT urine or breath specimens other than those specifically authorized by this part or DOT agency regulations. For example, you may not test a DOT urine specimen for additional drugs, and a laboratory is prohibited from making a DOT urine specimen available for...other types of specimen testing." Section 40.85 states that "You must not test "DOT specimens" for any other drugs."[17]

While DOT clearly states that they will allow for testing on no more than the five drugs stated in Section 40.85, MSHA expands the test by five more drugs. While we support efforts to screen for more drugs in a miner's system, as we have indicated we would like to have the ten drugs be a minimum, there is clearly a severe discrepancy in how the tests should be completed.

Mine operators are going to be left attempting to get an employee to submit to two different specimens for these tests, and the mine operator will be forced to deal with two conflicting drug and alcohol testing policies. This issue could lead to confusion in training procedures. It will also lead to a difficult situation for operators in terms of maintaining records for two separate drug testing programs. This issue must be addressed between the two agencies before the rule can be enacted, or it would likely cause great confusion and potentially errors in results from tests.

IX. Costs and Feasibility

We believe that the cost estimates provided by MSHA are woefully underestimated, especially when it comes to the smaller and more remote mine operators. An example of this underestimation in cost can be seen in Section 66.300 (f), which states "Only laboratories certified by CAP as well as by HHS/SAMHSA shall be used to test collected samples." This rule would significantly impact small and remote mines. Some facilities may be several hours drive from a testing lab. These operations should be permitted to continue to utilize cheaper alternatives such as over-the-counter screening tools that are more readily available, and whose results can be read by a supervisor at the operation.

Sections 66.401 (c) and 66.403 (d)(2) deal with the wages of a miner who is suspended from performing his safety-sensitive job while awaiting the results of an alcohol or drug test. The rules state that "no action adversely affecting the miner's pay and benefits shall be taken." Does this rule prevent an operator from suspending a miner without pay for violating a company policy or safety rules thus contributing to an accident if there is a drug test required for the incident? Many operators have policies in place that address violations of safety provisions with suspensions. This would seem to forbid this policy so long as the miner is awaiting a drug test.

Rather than allow a miner who is subject to a reasonable suspicion drug or alcohol test be placed

[17] *See* ibid Section 40.85. The DOT only tests for 5 drugs, you MAY NOT test for more using that sample. Those drugs include: Marijuana, Cocaine, Amphetamines, Opiates, and PCP.

on paid suspension (or reassignment to a non-safety-sensitive job), we would like to see the provision revised to state:

> The miner will be placed on unpaid suspension pending the results of a reasonable suspicion test. If the results of the test are negative, the miner shall be reimbursed, so long as there are no independent reasons for discipline (such as a violation of a company safety policy).

This would be an added deterrent to using drugs or alcohol in the workplace. A company should not be forced to continue to pay a suspended miner.

X. Does MSHA Have the Necessary Resources to Implement this Rule?

We know that MSHA's budget and resources are already stretched very thin. As Senator Robert Byrd indicated in his letter to Acting Assistant Secretary of Labor Richard Stickler, the MINER Act passed in 2006 has yet to be fully implemented, and the transition to stronger enforcement in the nation's coal mines will take significant resources from MSHA.[18] MSHA simply does not have the necessary resources to implement such a significant rule as is being proposed here. This point has been echoed in a letter to Mr. Stickler from the United Mine Workers of America (UMWA).[19] We agree with the points made by the UMWA in the letter that the DOL has yet to show that there is even a need for this proposed rule, as seventy-five to eighty percent of miners report that they are subject to pre-employment screening and random testing, which is double the national average for all industries. We are worried that by further stretching the resources available to MSHA for a rule that is not necessary, it could result in the safety of our nation's miners being hurt far more than helped by this proposed rule.

XI. Conclusion

We would like to voice our displeasure at the speed at which this rule was forced upon the mining industry. The original 30 day comment period was clearly not enough time for industry to provide meaningful feedback. For an issue that has seen opposition from both the miners and mine operators it would make sense for the Department of Labor to slow this process down. While we are appreciative that the Department of Labor has granted a hearing and extended the deadline for comments slightly, we believe that this is an issue that will require more than just one hearing and a longer comment period is justified as well.

We would like to respectfully request that this proposed rule be rescinded. The surface and underground metal and nonmetal mines are already acting under existing law 30 CFR Parts 56.20001 and 57.20001 which forbid alcohol and drugs from being permitted on or being used around mines. The fact that only 270 citations have been issued to metal and nonmetal mines over a 30-year period for violating this law is only further proof that further regulation is not

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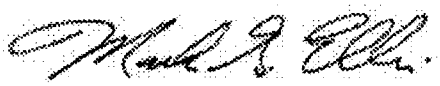
[18] *See* Letter from Senator Robert Byrd to Acting Assistant Secretary of Labor Richard Stickler dated September 23, 2008.

[19] *See* Letter from Dennis O'Dell, Administrator of Occupational Health and Safety for the United Mine Workers of America to Acting Assistant Secretary of Labor Richard Stickler dated September 11, 2008

needed for the metal and nonmetal mining industry. We urge that MSHA adopt a similar provision that would cover coal mines and allow companies and states to police this issue, as they have effectively been able to do. This will allow for the entire industry to be covered by the drug and alcohol regulations without forcing new requirements upon the entire industry. If the Department of Labor still decides to move forward we would like to reiterate our opposition to any provision that would not allow for a zero tolerance policy. Forcing companies with existing policies in place to take a lesser standard of a one-strike policy is not improving safety for our miners. Furthermore, as indicated in these comments, we believe that the Department of Labor would have to make significant revisions to this proposal in order for it to be acceptable to industry and our miners. We request that the Department of Labor recalculate its projected costs to take into account small and remote/rural mines. We also request that the Department of Labor and Department of Transportation come together to address the serious conflict between the two rules that would cause a logistical nightmare if not addressed.

IMA-NA appreciates the opportunity to comment on the proposed rule for Alcohol- and Drug-Free Mines: Policy, Prohibitions, Testing, Training, and Assistance. We agree that the risk posed by alcohol and drug use at a mine operation is significant. The safety of our miners is our utmost concern. Thank you for your consideration of our comments and for your attention to this very important matter.

Respectfully Submitted,



Mark Ellis
President