ALAMO CEMENT COMPANY
SAN ANTONIO, TEXAS
GENERAL OFFICES AND PLANT: SAN ANTONIO, TEXAS



October 15, 2008

Ms. Patricia W. Silvey, Director
Office of Standards, Regulations, and Variances
U. S. Department of Labor
Mine Safety and Health Administration
1100 Washington Blvd., Room 2350
Arlington, VA 22209-3939
Facsimile 202-639-9441

Re: Proposed Rules: Alcohol and Drug Free Mines
RIN 1219-AB41
Alcohol-and-Drug-Free Mines: Policy, Prohibitions, Testing, Training and Assistance; Proposed Rule
Comments on Proposed Rule by Alamo Cement Company, Ltd.

Dear Ms. Silvey:

Alamo Cement Company, Ltd. (ACC) is grateful for the opportunity to express its comments on MSHA's "Proposed Rules" regarding Alcohol and Drug Free Mines and accordingly submits the following for MSHA's consideration.

Overview. ACC'S comments regarding provisions of the "Proposed Rules" are submitted pursuant to an overall theme and concern that the "Proposed Rules" will cause substantial degradation to the safe working environments arduously constructed and strictly enforced, which "zero tolerance" employers like ACC currently enjoy. These environments are safe, effective, and have well-established and focused safety-conscious cultures within the workplace. The "Proposed Rules" would require the dismantlement of these positive cultures and, indeed, would make potential citation for failure to provide a less safe culture and workplace a reality.

MSHA not only attempts to regulate employee rights through its "Proposed Rules" but, more significantly, actually creates employee rights, which trump legitimate safety concerns. MSHA's jurisdiction is to further safety in the workplace and not to create, regulate, and then enforce employee rights as if it were a collective bargaining agent or a Labor Board. This activity is totally outside the jurisdiction of MSHA. By so engaging, MSHA also creates employee rights which are directly adverse to safety interests of the employees as a group and diminishes safety for miners with zero tolerance programs. The Proposed Rules should be rescinded.

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I. Using 0.04% blood alcohol as a minimum for a positive drug test (instead of 0.00) results in a decrease in workplace safety for employers who have adopted and currently have "zero tolerance" policies and for their miners.

Many employers, such as ACC, currently have (and have had for many years) "zero tolerance" drug and alcohol policies. The "Proposed Rules" exempt from possible employer discipline or action any employee with a drug test of blood alcohol between 0.00 and 0.04, whereas under current policy for the "zero tolerance" mine operators, such an unsafe employee would be removed from the workplace immediately through termination. Retaining employees showing any blood alcohol while at work needlessly puts that employee and his fellow workers at risk and results in an overall diminishment in workplace safety. Indeed, under the Proposed Rules, such unneeded exposure and risk is mandated. In fact, an employer faces citation if it should attempt to remove this risk. Having employees at work whose blood alcohol is between 0.00 and 0.04 results in an increased safety danger to the employee so tested as well as to other miners along side whom the drug/alcohol using employee works. By mandating exemption of this group of employees from discipline, MSHA is creating a more unsafe workplace rather than fulfilling its stated mission of providing a safer workplace for all miners concerned.

Further, providing an exemption for 0.00 to 0.04% blood alcohol provides MSHA encouragement and employer encouragement to employees for alcohol experimentation, and perhaps provides a false sense of security to miners in being able to drink, arrive, then work on the job without consequence. Such encouragement is absent under current "zero tolerance" policies. Rather, under such policies, employees are discouraged from any use or influence of drugs and alcohol at work. ACC and its employees have had 18 years experience under a "zero tolerance" drug and alcohol policy and its employees clearly know that if they want to drink and report to work shortly thereafter that they risks their careers. The culture thus created emphasizes that the value of a healthy, totally alert, and safe miner, and detailed attention to safety on the job far outweighs even minor impairment caused by alcohol and drugs. No impairment minor or otherwise will be tolerated. This is an effective deterrent to either drinking on the job or reporting to work soon after alcohol has been consumed. Both circumstances create an unsafe work environment and are effectively discouraged through a "zero tolerance" policy. An absolute sober miner is much more safe than a "one beer" or "half beer" miner.

The creation of a mandated exemption for employees who have a blood alcohol content between 0.00 and 0.04% is nothing more than MSHA providing an absolute protection with MSHA-created rights for individual employees who have been drinking before reporting for work or who drink alcohol in smaller quantities while at work. It is not within MSHA's jurisdiction to create such employee rights (nor protection) and bar discipline to employees who drink anything at work or whose judgment is impaired in any way at work; rather, it is MSHA's jurisdiction to preserve and create safety in the workplace. By virtue of its creation of these employee rights through its "Proposed Rules," MSHA's primary mission not only fails to be accomplished but MSHA deliberately creates a less safe workplace. Any such creation of employee rights, other than the right to a safe workplace, should be left to employers, or employers and the employees' collective bargaining agents where appropriate, and not mandated

by MSHA. There is no such thing as an "acceptably unsafe workplace," and is especially wrong when promulgated by the agency responsible for safety.

Further, the use of a 0.04% threshold (instead of a "zero tolerance" standard) encourages employees to take advantage of a "free bite" (or more accurately, infinite "free bites") of the alcoholic apple, just as long as their appetite doesn't push them over 0.04. An employee who drinks alcohol just before work, or at work, who tests at a level of 0.00 to a level 0.04 cannot be expected to have the scientific knowledge, nor judgment, to know (or understand) this arbitrary division line as to blood alcohol content and adverse consequences. However, any employee can understand that any alcohol consumed just before work, or during work, which results in any blood alcohol detection will result in severe adverse employment consequences. This knowledge effectively deters alcohol consumption which can directly affect the safety of the would-be drinking miner (and/or fellow miners working around that miner) who has thoughts of consuming alcohol. However, this strong deterrent is effectively removed and replaced with alcohol tolerance, encouragement and ambiguity. Workplace safety is diminished when the "bar" moves from an absolute 0.0 to a nebulous, and much, much higher 0.04%.

II. The requirement under the "Proposed Rules" of a "second chance" for miners who have tested positive results in a unsafe workplace, results in more needless costs, and results in more bureaucratic paperwork, all in direct opposition to the stated purpose of MSHA to create and preserve safe workplaces.

The "Proposed Rules" require a mandatory referral of employees who have been proven to have used illegal drugs, be influenced by illegal drugs or have positive alcohol blood content at work. When first time offenders causing serious safety concerns can not only be returned to the work place rather than face termination, but indeed the return of a known unsafe miner is mandated, the Proposed Rules are directly adverse to the very purpose for existence of MSHA to ensure safe as possible workplaces under its jurisdiction. Termination or discipline of proven first time illegal drug or alcohol users at work is prohibited by the Proposed Rules. How this can possibly provide greater safety is unknown and is certainly illogical to assume. Currently, many employers like ACC, have "zero tolerance" drug and alcohol policies which result in immediate termination of persons who have verified positive drug test results. This "Proposed Rule", as applied to these diligent mine operators, will result in a less safe workplace through lesser deterrents to miners who abuse or use drugs and alcohol at work as well as fosters, encourages and even mandates reinsertion into their workplaces employees who have been previously proven to be safety risks. Miners will know they have a "free bite" in the form of a mandatory referral, and thus get one free pass at being unsafe in the workplace as required by the "Proposed Rule". Mine operators who have zero tolerance policies for good strong safety reasons do not allow any unsafe judgment at the workplace, and when demonstrated as likely or potential, such mine operators require an immediate termination. The "Proposed Rule" thus flies in the face of MSHA's stated purpose of providing safer workplaces – all to the safety determent of the miner so using drug/alcohol and to the miner's co-workers who must endure the impaired judgment of such a miner and thereby risk their own safety.

No cost has been estimated or considered by MSHA for a required referral policy and a mandatory termination prohibition. While under the "Proposed Rules" the cost of referral is theoretically left up to the discretion of the mine operator, as a practical matter significant costs are incurred by the mine operator. Most mine operators have insurance coverage for such occurrences triggered by the proposed mandatory referral and subsequent rehabilitation of drug/alcohol users. And, even if not expressly stated in an direct employee policy to pay for such rehabilitation, such rehabilitation costs will ultimately come back to the employers through claims filed under its healthcare insurance policies. Such direct medical costs generally run in the $8,000 to $10,000 range per employee utilizing rehabilitation. Such cost is comprised of approximately $400 per day for three weeks in-patient treatment ($8,400) and follow up medical costs of approximately $2,250 (two to three times a week follow up, for two to four hours, for each session, for three weeks).

In addition to this direct cost of medical treatment, which would be required under the "Proposed Rules", and which would be borne by the employer despite the "Proposed Rule's" statement to the contrary, additional costs under the employer's sickness and short term disability plans would be incurred due to time away from the job. At an average of $18 per hour per miner, along with 40% benefits, the time off for rehabilitation and follow-up would cost the mine operator approximately $3,000 for each miner attending a rehabilitation program, and another $450 for time off required for follow up testing under the regulations, and another $600 for the actual administration of the required follow-up tests. This over $4,000 cost is per miner undergoing rehabilitation in addition to the $8,000 to $10,000 direct medical costs. This is not free rehabilitation and the idea that the miner himself will incur or can be required to incur the costs is both non-practical and absurd. In short, the Proposed Rules fail to account the expensive burden placed upon mine operators for requiring referral and the "second chance" policy. Further, the additional costs attributed to the restriction on termination also do not include the cost of any subsequent safety related injury, loss of life, physical plant or product loss caused by any subsequent relapse at work of a miner returned and not terminated. Also, a temporary "replacement worker" to take the place of a rehabilitating miner must be trained and will inherently be less efficient, less productive, and less safety-conscious than an experienced miner. Costs for these attributes must be included but have been ignored.

Finally, in the corporate world, outside of MSHA, returning a known drug/alcohol abuser to a "safety sensitive job" would be grounds for punitive damages where such returned employee caused subsequent injury due to drug/alcohol impairment. MSHA, in the Proposed Rules however has mandated these terrible pre-condition circumstances and unfortunately relapse rates are high even after rehabilitation.

III. The "Proposed Rules" are replete with ambiguities and fraught with opportunities for litigation and opportunities for MSHA to cite mine operators for offenses that do not promote safety.

a. In Proposed Rule §66.2(c), mine operators are required to inform not only miners but "contractors who perform work on the mine property" of the requirements under the Rule. The

word "contractor" shows up in this "Proposed Rule" without any commentary and seemingly it just magically appeared out of nowhere. Its presence is confusing and ambiguous. Exactly what type of "contractor"—ranging from the "contractor" that would perform mining operations by way of sub-contract to "contractors" who from time-to-time deliver paper goods to the property to attorneys who sometimes consult with the mine operator on their property – are required to be informed? Further, it is unclear as to whether such contractors, when informed, acquire the obligations of the mine operator and the "Proposed Rules" with regard to alcohol and drug free environments testing, protocol, paperwork, referral and prohibition of discipline to its own employees and, if so, the extent to which those obligations extend. Further, to the extent that "contractors" are brought into the potential violation and citation net of MSHA by the "Proposed Rules", these contractors will incur costs which are unestimated and unstated, and thus misleading, in the "Proposed Rules".

b. Proposed Rule §66.100(a) states that prohibited substances shall not be permitted "around" mine properties. This term is ambiguous, and fails to specify exactly what geographic limits prohibited substances are confined to. Is "around" within 500 yards of the gate, including a local convenience store; does it include recreational areas currently on the mine site which have historically been exempted from MSHA regulations in terms of such matters as reporting accidents; or it merely redundant with the word "used on" and means, in fact, on the mine property? Because such term is neither objective nor specific, it not only leads to lack of notice to what mine operators need to comply with, but it is fraught for citation ability and subsequent litigation.

c. In the Section-by-Section discussion on page 52146 of the Federal Register (Monday, September 8, 2008/Proposed Rules) MSHA states that it believes that "drug use is a serious safety problem and that addiction is a treatable disease." This is a very broad statement that other federal laws, statutes, and agencies seem to disagree with. While alcoholism is considered a treatable disease, illegal drug usage has not historically been viewed as either a disease or, in some cases, treatable. MSHA shows no basis, study, or reports supporting its expansive statement that drug addiction is either a disease or treatable. Again, this statement seems to be made merely to support the creation of previously non-existing employee rights by MSHA to the determent of other miners' safety and in direct opposition to the stated charge of MSHA. MSHA has no jurisdiction to implement and enforce what it believes is social workplace justice.

d. Under Proposed Rule §66.204(b), MSHA has provided that miners "who voluntarily admit to the illegitimate and/or inappropriate substances prior to being tested and seek assistance shall not be considered as having violated the mine operator policy." This "Proposed Rule" when literally read, would include for such exemption from the mine operator's policy a miner who admits and seeks assistance at the designated laboratory just prior to the blood being drawn for a random test, or just after selection. This would include persons so admitting and seeking assistance even after identified as "reasonable suspicion" candidates but prior to testing. The "Proposed Rule" should (1) be discarded as being counter to safe workplace practices in general (see above with regard to "zero tolerance" and "second chances") and/or (2) at a minimum specifically state any voluntary admission and seeking of assistance shall be independent of and

unrelated to any other drug testing, selection or procedures under the Rules.

e. Under Proposed Rule §66.302 the Secretary shall be permitted to designate additional substances to which all mine operators must test. This provision improvidently provides unbridled authority for the Secretary. Such Proposed Rule should be eliminated. If, and when, the Secretary determines that testing additional substances would further the purposes of the Act and promote safety in mines, then the Secretary should be required to go through the appropriate rule-making procedures, estimating costs, providing effects, commentary and opportunity for comments just like is being followed now for the proposed initial Proposed Rules. Providing the Secretary with such unbridled authority and waiving normal administrative procedures, may very well subject employers to unwanted and unneeded burdens of costs, could create additional unintended employee rights, and actually cause additional degradation of workplace safety from current conditions. An actual "need" for additional testing should be shown, not just the Secretary acting on a whim. Indeed, no "need" for the Proposed Rules has been demonstrated through statistics and analysis of injuries, fatalities, lost production, costs, etc directly attributable to drug and alcohol use in mine operations which could be prevented by the Proposed Rules.

f. Under Proposed Rule §66.305(b), miners, who are on leave or otherwise absent from the workplace during random testing, "will be tested at the next available opportunity, that is immediately upon their return to work." It is unclear whether this Proposed Rule applies only to miners who have otherwise been selected for random testing or if it is applicable literally as stated. If the latter, persons who are sick with the flu, on vacation, and the like will be "automatically" chosen for random drug tests upon their return. Such a specific inclusion would, by definition, not be "random". Additionally, it is unclear as whether these people who are absent from work and must be tested would affect the number of other miners and be used in the percentage of miners to be randomly tested. Thus, if there were sufficient number of people on leave, sick, or on vacation, to constitute the required number of people submitted for random draw, such random draw (and testing of any miner currently at work) would not occur at all and all "random" miners would be identified and designated by the known characteristic (sickness, vacation, etc.) at the very time of test announcement. This Proposed Rule could adversely impact and discriminate against persons utilizing FMLA and/or with disabilities.

g. Under Proposed Rule §66.305(a) mine operators shall use random testing rates for alcohol and drugs of 10%. It is unclear as to whether this is a mandatory percentage or whether the employer may, at its discretion, select at a higher rate. If the mine operator may not select a higher rate of 10%, the effect of this rule will be to reduce for many mine operators, including Alamo Cement Company, Ltd., the number of persons randomly tested in a year, thus, theoretically, reducing the number of persons detected inappropriately using alcohol or illegally using drugs in the workplace, thus once again creating a <u>less</u> <u>safe</u> workplace than currently exists without the Rule.

IV. Conclusion.

Many mine operators, including Alamo Cement Company Ltd, consider drug and alcohol abuse in the workplace such a serious safety issue that they provide no tolerance with regard to use. Many mine operators consider drug and alcohol use similar to theft, fraud, and deliberate unsafe work practices, -- zero tolerance occurrences -- which result in no progressive discipline but rather an immediate termination. When MSHA dictates otherwise, MSHA deprives the employer of its flexibility to create and maintain a safer workplace and discourages the employee to make the reasoned judgment that drug and alcohol use in the workplace is a much more serious safety concern than MSHA currently deems.

ACC strongly believes that an experienced miner who uses any alcohol or drugs at work or just before reporting is a much higher safety risk to himself and others than an inexperienced sober, safety conscious miner. MSHA apparently deems otherwise, but shows no data or study for its illogical conclusion. Further, its conclusion erroneously fosters and encourages the belief among miners that some levels will be tolerated and a "why not get my free bite" attitude (because of mandatory second chance and tolerance of some level of drugs and alcohol) which clearly diminish safety concerns and indeed increase the potential for accidents and tragedies in the workplace.

In sum, these comments are provided to MSHA to support Alamo Cement Company's strong position that the Rules should be withdrawn and discarded. Fundamentally, the "Proposed Rules" provide, and indeed require, degradation of the degree of safety over what currently exists with many mine operators like Alamo Cement Company, Ltd. operating under zero tolerance use and immediate termination policies In addition, MSHA has wholesalely engaged in the creation of a whole host of rights for those drugged and intoxicated in the workplace, to the determent of the safety of the remaining vast majority of employees (who do not use alcohol or drugs in the workplace), and to the detriment of safety, and the overall safety environment and culture provided by the zero tolerance mine operator.

Thank you for your consideration.

Very truly yours,

Ron Mims
Director of Safety and Industrial Relations
Alamo Cement Company, Ltd.

RM/dgm