

**From:** Sharon Mitchell [mailto:smitchell63@cox.net]  
**Sent:** Monday, October 13, 2008 2:22 PM  
**To:** zzMSHA-Standards - Comments to Fed Reg Group  
**Subject:** RIN 1219-AB41

Submitted are our comments regarding the Proposed Rule for Alcohol- and Drug-Free Mines:  
Policy, Prohibitions, Testing, Training and Assistance.

AB41-COMM-68

# HATCH ENTERPRISES, INC.

P. O. Box 238 (386) 935-1419  
BRANFORD, FLORIDA 32008

September 30, 2008

Richard E. Stickler  
Acting Assistant for Mine Safety And Health  
U. S. Department of Labor  
1100 Wilson Boulevard, Room 2350  
Arlington, Virginia 22209-3939

RE: RIN 1219-AB41, Alcohol- and Drug-Free Mines, Proposed Rule

Dear Mr. Stickler,

Recognizing that drug and alcohol abuse is too common among American workers, Hatch Enterprises, Inc. voluntarily implemented a Drug-Free Workplace Program over ten years ago that complies with the requirements of §§440.101 and 440.102, Florida Statutes and Administrative Rule 69L-9, Division of Workers' Compensation. Our Drug-Free Workplace Program has been very effective in helping us maintain a workforce free from the harmful effects of substance abuse and control Workers' Compensation costs.

While we encourage all employers to implement an effective Drug-free Workplace Program, we respectfully oppose the Proposed Rule regarding Alcohol- and Drug-Free Mines for the following reasons:

- Like us, many employers have already implemented effective Drug-Free Workplace Programs that comply with state requirements and provide Workers' Compensation premium discounts or other incentives. The Proposed Rule advocates incorporating the alcohol- and drug-testing procedures of the Department of Transportation's (DOT) Part 40, which requires that such tests be separate from Non-DOT tests in all respects. The Proposed Rule includes elements that are inconsistent with our state's Drug-Free Workplace provisions and would essentially require duplicate testing, increasing the complexity and costs of administering a Drug-Free Workplace Program.
- Based on the number of citations issued over the past thirty years for violations of 30 CFR 56.20001 and 57.20001, the incidence of violations is apparently insignificant—less than 3 per 100,000 employees annually. This statistic indicates that there is little to be gained by adopting the Proposed Rule.
- § 66.100, Prohibited Substances, does not address over-the-counter or nonprescription medications that may contain otherwise prohibited substances. In accordance with state provisions, our policy treats the legitimate use of over-the-counter medications in the same manner as legally prescribed medications, while the abuse of over-the-counter medications is treated in the same manner as the use of illegal drugs or abuse of alcohol.
- We question the effectiveness of the training requirements proposed under §66.202 for new hires and supervisors. While we voluntarily conduct annual Drug-Free Workplace Training for all employees, our low turnover makes it increasingly difficult to find new and innovative training materials to keep the topic interesting. We contend that training should be purposeful, not redundant or arbitrarily dictated by a calendar or a clock. If MSHA wants to help in this regard, we would welcome the Agency's assistance in obtaining high quality training materials.

- Regarding § 66.300, Purpose and Scope, our Company does not receive funds as a federal contractor or grantee, nor do our employees pose the same threat to public safety or national security as those covered by the Omnibus Transportation Employee Testing Act of 1991 (OTETA) or DOT Part 40. The Proposed Rule calls for a different alcohol testing methodology than required by our state regulations and is more restrictive regarding a manager's right to conduct reasonable suspicion testing. Additionally, the Proposed Rule mandates the use of a 10-drug panel test, while DOT Part 40 limits testing to the 5-drug panel test. The 10-drug panel test is not only more expensive, but the Department of Health and Human Services currently only certifies laboratories to test federally regulated specimens for the 5-drug panel test. Therefore, we contend that the Proposed Rule unjustifiably includes requirements that are substantially more stringent and expensive than those established under DOT Part 40 and other successful Drug-Free Workplace Programs, which we consider excessive based on the level of risk we present to public safety and national security. Furthermore, the 10-drug panel test requirement is likely to lead to an increase in test result challenges and unnecessary administrative and legal costs.
- As written, § 66.400, Consequences To Miner For Failing An Alcohol Or Drug Test Or Refusal To Test, legitimizes the use of alcohol to a blood alcohol concentration of 0.04%. Furthermore, this section unduly prevents a mine operator from implementing a "zero tolerance" policy, usurps managerial discretion regarding employee disciplinary action, and unjustly expands the control of the Agency over private business operations.
- The required disclosure of all alcohol- or drug-test results upon the request of MSHA inspectors proposed in § 66.500 (d) (2) constitutes a violation of the Health Insurance Portability and Accountability Act (HIPAA), state Drug-Free Workplace regulations, and our Company's policies. We contend it is the employer's right to determine the appropriate disciplinary action for any employee who violates a Company policy. Furthermore, the employer's determination of disciplinary action is proprietary and confidential, and such management decisions should not be subject to review, question or scrutiny by an MSHA inspector. Therefore, there is no apparent justification to warrant the unreasonable disclosure of any protected health information, including employee drug test results, to an MSHA inspector unless such disclosure is directly related to the investigation of a workplace accident, compelled by a court of competent jurisdiction, or is otherwise lawfully required.

For the reasons cited above, Hatch Enterprises, Inc. urges the Mine Safety and Health Administration to withdraw the Proposed Rule for Alcohol- and Drug-Free Mines: Policy, Prohibitions, Testing, Training and Assistance.

Respectfully yours,

W. Randolph Hatch, President  
Hatch Enterprises, Inc.

Sharon H. Mitchell, PHR, Consultant  
Human Resource Professionals, Inc.

cc: Sen. Mel Martinez  
Sen. Bill Nelson  
Rep. Cliff Stearns  
Rep. Allen Boyd