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**From:** Arnolds, David M. (dmarnolds) [mailto:dmarnolds@chevron.com]  
**Sent:** Monday, November 03, 2008 4:39 PM  
**To:** zzMSHA-Standards - Comments to Fed Reg Group  
**Cc:** Premo, Mark G. (MPremo); Knapp, Judith (JudithKnapp); Watzman, Bruce; Partridge, Dave; Cherniske, Ray; DIXON, WARREN; Eaton, Harry; Hoggan, Robert B  
**Subject:** Comments on the Proposed Rule for Alcohol- and Drug-Free Mines -- RIN 1219-AB41

Dear MSHA Staff,

Attached are Chevron Mining Inc.'s comments on the Proposed Rule for Alcohol- and Drug-Free Mines : Policy, Prohibitions, Testing, Training, and Assistance.

Thanks you for your consideration of them.

<<CMI COMMENTS D&A Proposed Rule Final.doc.pdf>>

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AB41-COMM-118



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**COMMENTS OF  
CHEVRON MINING INC.  
TO THE  
MINE SAFETY AND HEALTH ADMINISTRATION  
ON THE PROPOSED RULE FOR  
ALCOHOL- AND DRUG-FREE MINES:  
POLICY, PROHIBITIONS, TESTING, TRAINING, AND ASSISTANCE**

**E-Mailed to MSHA November 3, 2008: [zzMSHA-comments@dol.gov](mailto:zzMSHA-comments@dol.gov)**

**Regulatory Information Number (RIN 1219-AB41)**

Chevron Mining Inc. (CMI) appreciates this opportunity to comment on the proposed rule for Alcohol- and Drug-Free Mines: Policy, Prohibitions, Testing, Training, and Assistance published September 8, 2008 in the Federal Register (Vo.73, No. 174 beginning at page 52136.)

CMI shares MSHA's objective to protect miners from the hazards of the misuse of alcohol and drugs in mining. We support any initiatives by MSHA or the industry that will, in fact, enhance safety of our miners. CMI has had a drug and alcohol policy for many years at its mines that included pre-employment, reasonable suspicion, and post-accident testing. In 2005 CMI initiated random drug testing as well. Further, CMI's procedures track the DOT requirements, as does the proposed rule. Therefore, CMI strongly supports MSHA's purpose to require all mining operations to institute such policies.

CMI has several major concerns about the rule as MSHA has proposed it. The proposed rule:

- Mandates many aspects of the policies rather than sets minimum standards for them, thereby weakening the programs many operators already have.

- Prohibits a mine operator from terminating a miner for a first violation of the operator's policy.
- Would expose mine operators to numerous enforcement actions despite their good faith efforts to comply.
- Mandates referrals to a qualified Substance Abuse Professional if an employee fails a test for prohibited substances.
- Would result in serious invasions of privacy with respect to individual testing results.

I will address each concern separately.

The proposed rule mandates many aspects of the policies rather than sets a minimum for them, thereby weakening the programs many operators already have.

As with many other health and safety standards, the proposed rule should set minimum standards for alcohol and drug programs, not precise provisions of those policies. The proposed rule unwarrantedly mandates such things as:

- §66.2(b) - conducting drug and alcohol testing only of miners in safety sensitive jobs and not of employees in administrative and clerical jobs.
- §66.300 (b) - following DOT requirements. Although DOT requirements are commonly followed and CMI's policy is based on them, they should set a minimum. Variations from DOT may enhance a policy.
- §66.305 (a) - using a random testing rate of 10%. First, the provision is ambiguous because it fails to state 10% of what. Presumably it is 10% of the workforce per year but that is not clear. Further, subsection (c) indicates that the 10% is the floor but that is not what subsection (a) states. Employers should have the right to test a greater number than 10%. CMI does 100% annually.
- §66.305 (d) - establishing that each miner have an equal chance of being tested each time selections are made. This would prohibit variations that could be more effective. An example is a system in which there were two pools, one in which every miner would have an equal chance of being selected and a second in which only miners who had not been selected that year were drawn, thereby increasing the likelihood that people who had not been tested in a year would be selected.
- 66.307 (c) - conducting reasonable suspicion testing only on the basis of observations made by a supervisor trained to make the observations and made during, immediately preceding, or just after a shift. These restrictions would prohibit a mine operator from conducting the testing on the basis of other reliable information, such as from third parties, or at different times even though the operator may have good reason for doing so. These restrictions also unjustifiably intrude on the employers' rights to set employment rules and to manage the workforce.

These are only a few examples of where the proposed rule is unduly restrictive but they illustrate the need for the rule to set a minimum for, and not precise terms of, the policies.

The proposed rule prohibits a mine operator from terminating a miner for a first violation of the operator's policy.

This prohibition in § 66.400(b) is probably the single most objectionable provision in the proposed rule. It unjustifiably, and perhaps unlawfully, intrudes into labor/management relations and the employer's right to manage its workforce. Rehabilitation for first time offenders can be very valuable for both the mine operator and the individual employee. However, MSHA should not attempt to limit how an employer may deal with an employee who violates the operator's policies and the law.

The proposed rule would expose mine operators to numerous enforcement actions despite their good faith efforts to comply.

The proposed rule would result in an enforcement challenge for operators, as explicitly indicated in subsection 66.500(d)(2), which provides that "any and all alcohol- drug-test results will be made available upon request of MSHA inspectors or investigators and will be used in assessing overall compliance with safety regulations." The Mine Act is a strict liability act. Therefore, a mine operator could be cited every time a miner tested positive for drugs or alcohol, as evidenced by the test results. Second, the proposed rule has a multitude of detailed requirements for such things as: the terms of the policies, training, testing, assistance for violators, and record keeping. Deficiencies in any of these areas would be citable.

The preamble to the proposed rule in Subpart E- "Operator Responsibilities, Actions, and Consequences" gives the following assurance to mine operators.

It is not MSHA's intent to sanction mine operators who implement an alcohol- and drug-free mine program that includes alcohol- and drug-testing as prescribed in part 66, and who demonstrate a good faith effort to enforce their policy. However, mine operators who fail to implement and enforce these policies would be cited, specifically in cases where failure to enforce the provisions of the rule by monitoring miner compliance results in fatalities, accidents or injuries.

This assurance is of small comfort because it is not in the proposed rule itself and has no legal significance. CMI therefore proposes that the assurance be given legal effect by incorporating it into the rule. CMI proposes a new subsection 66.1 (b) to Part A, that would provide as follows:

- (b) A mine operator shall be deemed to be in compliance with this Part 66, regardless of whether there are positive test results or otherwise, if it demonstrates a good faith effort to:
- a. Implement an alcohol and drug-free program as prescribed in this Part 66, and
  - b. Enforce the program properly.

Deficiencies may be cited:

- a. only if the deficiencies are shown to be the result of a lack of a good faith effort to comply, and
- b. only as a single violation unless they are clearly unrelated to each other.

The proposed rule mandates referrals to a qualified Substance Abuse Professional if an employee fails a test for prohibited substances.

Due to the remote location of many mines and the limited number of SAPs, this requirement could be unduly burdensome on the employee. Many companies, including CMI, have effective employee assistance programs through which employees can receive rehabilitation services without meeting with an SAP. Therefore referral to an SAP should be one of various alternatives for help, including employee assistance programs and community-based resources.

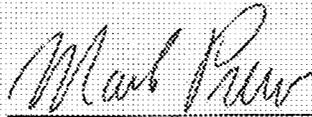
The proposed rule would result in serious invasions of privacy with respect to individual testing results.

Although §66.500 addresses the importance of confidentiality of test results for individual miners, subsection (d)(2) would eviscerate that provision and result in the records being public. That subsection states that “any and all alcohol- drug-test results will be made available upon request of MSHA inspectors or investigators and will be used in assessing overall compliance with safety regulations.” This would inevitably result in a gross invasion of privacy because any time an inspector identified what he thought was violation of any one of the proposed rule’s requirements, including any positive test result, he could issue a citation. The citation would have to describe the violation with specificity and the mine operator would have to post it on the mine bulletin board. Further, if the mine operator contested it, the underlying facts would be made public. CMI submits that inspectors on routine inspections should be able to review only the aggregated information required under subsections (b) (1), (2), & (3) of §66.500, not the specific personal information under (b)(4). MSHA investigators should have access to individual test results only from post accident testing.

Conclusion

CMI supports the promulgation of a rule requiring alcohol- and drug-free mine programs. However, CMI respectfully requests that MSHA carefully address CMI's concerns with the proposed rule. CMI also has contributed to the development of, and supports the comments submitted by, the National Mining Association.

Respectfully Submitted



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Chevron Mining Inc.