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From: Callaghan, Beth (Rago) [mailto:BCallaghan@PattonBoggs.com] On Behalf Of Chajet, Henry

Sent: Thursday, November 06, 2008 3:45 PM

To: zzMSHA-Standards - Comments to Fed Reg Group

Subject: RIN 1219-AB41

Attached please find the Mining Awareness Resource Group's comments on RIN 1219-AB41 (Proposed Rule on Substance Abuse Programs). If you have any questions, please feel free to contact me.

> <<Mining Awareness Resource Group Comment on RIN 1219-AB41.pdf>>

Regards,

Henry Chajet

AB41-COMM-124

November 6, 2008

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Ms. Patricia W. Silvey  
Director of the Office of Standards,  
Regulations and Variances  
Mine and Safety Health Administration  
1100 Wilson Blvd Rm 2313  
Arlington, VA 22209

Re: RIN 1219-AB41 (Proposed Rule on Substance Abuse Programs)

Dear Ms. Silvey:

The Mining Awareness and Resource Group (MARG), through its undersigned counsel, appreciates the opportunity to comment on the proposed rule, published on September 8, 2008, at 73 FR 52136, et. seq. As a coalition of mining companies, MARG promotes regulations and polices that protect the safety and health of the workforce and the environment, and enhance the viability of the mining industry and its ability to supply critical jobs and raw materials for the nation's economy.

MARG endorses the concepts of the proposed rule, and condemns the abuse of drugs and alcohol in the work place as a plague on our nation that must be stopped. Not only does drug and alcohol abuse adversely impact the lives of the users and their families, but drug and alcohol impairment at work kills and injures fellow employees, reduces productivity and is a crime. Improvements in federal policy to stop this plague are long overdue and encouraged by MARG.

MARG endorses an MSHA substance abuse regulation that includes: (1) a prohibition on illegal drugs and alcohol on employment sites, enforceable against all individuals that violate the rule; (2) a written company policy on drug and alcohol abuse, communicated to all miners; (3) training of all miners on the company policy; (4) pre-employment drug and alcohol testing for all miners; (5) random drug and alcohol testing for all miners; (6) "for cause" drug and alcohol testing for all miners reasonably suspected of violating the company policy or the federal regulation; (7) post event drug and alcohol testing for every "reportable" MSHA accident, injury and illness; and (8) communication on available assistance from substance abuse and employee assistance programs (EAP) and professionals.

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However, MARG is concerned that the text of the MSHA proposed rule is too detailed and will interfere with existing successful programs. As a result, MARG suggests the alternative, "performance based" rule, set forth below, which mandates the elements of the rule, but allows employer flexibility to implement the program that works best for their workforce, community and resources.

MARG is particularly concerned about and is opposed to any regulatory provision that inhibits or interferes with an employer's right, authority and duty to discipline an employee for violations of law or company safety and health rules, up to and including termination of employment. Any regulation that interferes with an employer's right, authority and duty to discipline employees as a result of substance abuse, would reduce the safety protections of miners is not permissible under the Mine Act's prohibition against adopting rules that reduce safety and health.

As a result, if an employer's policy mandates the immediate termination of employment for illegal drug or alcohol abuse, removing the dangerous employee from the site and preventing him or her from endangering themselves and fellow employee, federal regulations can not mandate a second chance for that employee since such a mandate would reduce safety by risking a return to the worksite of a substance abuser. Regardless of whether that person successfully completes an assistance program, their return to the worksite undoubtedly increases the risk of injury to other employees, above the level that exists if the person is removed from the worksite, particularly in light of high reported recidivism rates.

MARG's objection to a mandatory "second chance" rule does not imply opposition to voluntary company programs that encourage confidential self reporting of abuse problems and treatment by EAPs. MARG members, like many other companies have such rules and programs and encourage employees to seek help without any adverse consequences, if they successfully complete the programs. MARG endorses and encourages these employee assistance programs, some of which provide a "second chance" even after a failure to self report, and believes they play a vital role in fighting drug and alcohol abuse. However, MARG emphasizes that these voluntarily adopted programs vary from company to company, and can not be mandated by MSHA due the Mine Act's prohibition on the adoption of regulations that reduce safety.

Moreover, no regulation should even imply, as the proposal does at Section 66.400(b), that a "second chance" be mandated for an employee whose alcohol or drug abuse causes an accident, injury or fatality. Such a provision clearly contradicts the Mine Act and other laws, and will be challenged by the regulated community as contrary to their safety and health goals.

We realize that the proposed rule includes a provision that allows termination for "some other separate, terminable offense," but the context of this statement within an unequivocal prohibition of termination for substance abuse violations, leaves far too much room for interpretation and

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litigation, should an employer terminate an employee following an accident involving substance abuse. For example, if an employer who prohibits employees from causing equipment damage or injury to other employees terminates the employment of a miner for violating those rules, the employer could face safety discrimination and other litigation or arbitration challenges if the terminated employee tested positive for substance abuse. Such an employee would merely have to claim that the "reason" for the discipline was the drug or alcohol abuse, likely resulting in his or her temporary reinstatement under the Mine Act, which mandates such reinstatement unless the claim is frivolous. The second chance rule simply has no place in a safety and health regulation when the underlying statute prohibits new rules that reduce safety.

MARG endorses effective training for all miners and supervisors on substance abuse policies and regulations. All employees (miners) that must receive safety and health training under Part 48, by definition are in safety sensitive jobs, regularly exposed to hazards, and must be covered by the substance abuse prevention rule and policies. However, MARG opposes the imposition of additional and specific training time mandates on existing and extensive training requirements under 30 CFR Parts 46 and 48, which not have not been shown to be inadequate to incorporate such training.

MARG also opposes the proposed rule's provisions that mandate and limit specific types of drug and alcohol testing, such as DOT testing, and encourages MSHA only to require that operators select testing methods that have been proven effective. DOT testing has been severely criticized for limiting technology and effective testing methods, such as prohibiting swab testing as a quick, effective and accurate screening tool.

Similarly, MARG opposes specific, detailed mandates for policy content, training content, EAP content, return to duty policy, testing circumstances, and MSHA restraints on permissible operator disciplinary actions. MSHA has neither the expertise to mandate such details, nor the authority to hinder the operator's authority to manage its workforce, particularly when the interference is contrary to law and public policy. As a result, MARG strongly suggests that MSHA promulgate the performance based rule, set forth below.

Thank you again for the opportunity to comment on the proposed rule. We encourage speedy adoption of our suggested alternative because each day that passes without MSHA addressing drugs and alcohol abuse on mine sites is another day of risking the lives and safety of our employees to this terrible threat to our nation.

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MARG Alternative Rule On Substance Abuse Prevention, Testing And Enforcement Program

1) Policy And Program

(a) Mine Operators shall develop, adopt and implement a Substance Abuse Prevention, Testing and Enforcement Program (SAPTEP) consistent with this standard.

(b) The possession or abuse of prohibited substances, as defined by law or the operator's policy, except when used according to a valid prescription, is prohibited for all persons on and around mine property.

2) Training

All miners are deemed to hold safety sensitive jobs and shall be provided training in the SAPTEP as an integral part of the New Miner, Newly Employed Experienced Miner, and Annual Refresher Training mandated by applicable regulations.

3) Substance Abuse Testing

The SAPTEP shall include effective testing for substance abuse, including pre-employment testing, random testing, for cause testing, and post incident testing at least for all injuries, illnesses and accidents reportable under 30 CFR Part 50.

4) Substance Abuse Employee Assistance

The SAPTEP and required SAPTEP training shall include providing all miners with information about available substance abuse, employee assistance services and the role of such services in the SAPTEP.

5) Substance Abuse Enforcement

The SAPTEP and SAPTEP required training shall include the role of the Mine Operator's discipline policy and procedures and the consequences of violating the SAPTEP.

6) Miners who are suspected of violating this standard or the SAPTEP shall not work in jobs where their suspected violation could endanger themselves or others, until the mine operator makes a determination that they do not pose a substance abuse related hazard to themselves or others.

7) Mine operators shall provide MSHA written or electronic evidence of compliance with this

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standard upon request, but recordkeeping and paperwork deficiencies not associated with substantive violations of this standard shall not be considered a violation of this standard.

8) Nothing in this rule shall be interpreted to interfere with a mine operator's authority to manage its workforce and discipline its employees, or to create employee entitlements or benefits that are the within the rights of regulated parties to determine.

Sincerely,



Henry Chajet  
for MARG