



Portland Cement Association

November 7, 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 202-693-9441

Dear Ms. Silvey:

**Re: Proposed Rule Alcohol- and Drug-Free Mines: Policy, Prohibitions,  
Testing, Training, and Assistance, *Federal Register* Vol. 73, 52136-52163,  
RIN 1219-AB41**

The Portland Cement Association (PCA) is a trade association representing companies that produce portland cement in the United States and Canada. PCA's U.S. membership consists of thirty (30) companies operating one hundred fifteen (115) plants in thirty-six (36) states and distribution centers in all fifty (50) states servicing nearly every Congressional district. PCA members account for more than ninety-eight percent (98%) of cement-making capacity in the United States and one hundred percent (100%) in Canada. PCA's members employ more than ten thousand (10,000) persons at cement plants, and the industry is interested in the subject proposal and its potential impact on cement company operations. PCA appreciates the opportunity to share our thoughts on the proposal.

Portland cement is an essential construction material and a basic component of our nation's infrastructure. It is utilized in numerous markets, including the construction of highways, streets, bridges, airports, mass transit systems, commercial and residential buildings, dams, and water resource systems and facilities. The universal availability of portland cement ensures that concrete remains one of the world's most essential and widely used construction materials.

The top priority of PCA and its member companies is the health and safety of our employees, customers, visitors, contractors, and ultimate users of portland cement. Every member company<sup>1</sup> of the PCA has a formal program to detect illegal substance abuse and alcohol abuse by employees in the workplace. This remarkable statistic demonstrates the commitment that the portland cement industry has to a safe and healthy workplace for its employees and visitors to manufacturing sites.

<sup>1</sup> [http://www.cement.org/pca/pca\\_directory.asp](http://www.cement.org/pca/pca_directory.asp) for a member directory of the Portland Cement Association

500 New Jersey Avenue, N.W., 7<sup>th</sup> Floor  
Washington, DC 20001  
202.408.9494 Fax 202.408.0877

[www.cement.org](http://www.cement.org)

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There are four basic steps in the portland cement manufacturing process.<sup>2</sup> Raw materials in the form of limestone, clay and sand are mined in a quarry that is usually located near the plant. These materials are blended in the right proportions and then ground together. Next the finely ground raw materials are heated in an industrial furnace called a kiln to form an intermediate product called clinker. Kilns reach a temperature of 1870 degrees Centigrade, or 3400 degrees Fahrenheit. Finally the clinker is then cooled and ground with a small amount of gypsum into the fine gray powder known as portland cement. At each stage, process data are continuously monitored. Because of the nature of the work environment, everyone must be attentive to individual actions and workplace conditions.

PCA's greatest concerns with the proposal are summarized in the following bullet points, and additional detail is provided for each position.

- To require that *"mine operators shall not terminate miners who violate the mine operator's policy for the first time"* diminishes safety.
- The scope and intention of the Department of Transportation (DOT) and the Mine Safety and Health Administration (MSHA) alcohol and drug testing rules are conflicting in specific ways.
- The rule should allow alternative methods for substance abuse testing at the work site using commercially available diagnostic tests.
- The role of independent contractors needs to be clarified.

**The rule should afford mine operators the discretion to discipline employees, up to and including termination, who test positive for alcohol / drugs for a first offense.**

The members of the PCA are supportive of the efforts of the MSHA to test miners for alcohol and drug use in the workplace, including pre-employment, random, post-accident, reasonable suspicion and follow up. The fatalities referenced in the supplemental information of the proposed rule occurred, in part, because of alcohol or drugs. (*Federal Register, Vol. 73, No. 174, p 52140*).

However, the rule as proposed would result in either a compromise of individual and plant safety or in a diminution of safety to miners in the cement industry. In particular, the PCA disagrees with 30 CFR 66.400 (b), which states that *"Mine operators shall not terminate miners who violate the mine operator's policy for the first time."* The lack of agreement here

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<sup>2</sup> *A New Stone Age: The Making of Portland Cement*, Portland Cement Association, Skokie, Illinois, 1992, pp. 1-12.

from the cement sector is justified because a standard such as §66.400(b) runs counter to the obligation of MSHA which has the responsibility, when promulgating rules, to achieve the objectives of “protection of life and prevention of injuries” among the nation’s miners.<sup>3</sup> In addition, we believe that a miner who uses drugs or alcohol in the mining environment will take chances and risks that a sober person would not take. The proposed standard seems to reward individuals who are under the influence of drugs or alcohol at work by creating a situation where one positive drug or alcohol test is allowed for every employee in safety-sensitive jobs.

Because many PCA members have provisions in their current employee drug and alcohol testing programs that require termination of an employee upon a first positive test,<sup>4</sup> §66.400(b) creates a significant and untenable variation with cement operator’s practices. The inconsistency contradicts years of management and labor relations and formal agreements.

The proposed standard §66.400(b) compromises not only individual safety, but also the safety of other employees working at an operation. With the assistance of miners, operators have a primary responsibility to prevent unsafe and unhealthful work practices and conditions in a cement plant.<sup>5</sup> The agency with responsibility for enforcement of standards to protect miner’s health and safety should not diminish an alcohol and drug program’s effectiveness.

**Compliance with §66.301 potentially requires mine operators to violate DOT testing requirements in 49 CFR 40.13(c) and 40.85.**

A brief summary of 49 CFR 40.13(c) is in order. As you’re aware, the provision prohibits testing of urine for a DOT test for any drug metabolite other than the five listed in DOT regulations. Consequently, if urine is tested for any drug other than one of the five, the employer will be cited by DOT for violation of this provision.

There are haul truck drivers who work for cement companies and are subject to DOT alcohol and drug testing rules. Because the drivers transport stone or sand and gravel from a quarry located near the cement plant, such drivers must sometimes travel on public roads, therefore making them subject to these DOT testing requirements. The individuals are also miners who must receive comprehensive training, and they are subject to both MSHA and DOT training requirements.

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<sup>3</sup> Federal Mine Safety & Health Act of 1977, Public Law 92-173, Sec. 101(a)

<sup>4</sup> In Attachment 1, “*Alcohol And Drug Policy*”. Attachment 1 is an example of an alcohol and drug program and contains a requirement to discharge an employee who tests positive for drugs and/or alcohol while at work, and who doesn’t first notify the operator that the (s)he seeks assistance for a drug or alcohol-related problem.

<sup>5</sup> Federal Mine Safety & Health Act of 1977, Public Law 91-173, Sec. 2(e)

If the proposed rule becomes final, these drivers will be subject to separate sets of drug and alcohol testing rules and must be placed into two separate random drug and alcohol pools for testing purposes. In a worst case scenario, the mine operator, the testing laboratory and the haul truck driver / miner would violate the DOT employee drug and alcohol test rule<sup>6</sup> in order to be in compliance with the proposed MSHA test rule.<sup>7</sup>

The cement plant operator and the miner / haul truck driver each is placed in a difficult position by potentially being required to violate the standard of one federal agency in order to comply with the standard of a different federal agency. This is a situation where the scope and the intention of MSHA and DOT are conflicting. Because 49 CFR 40.13(c) and 49 CFR 40.85 specifically state that there are only five drugs for which companies may test, and companies that test for any additional drug(s) will be in violation of the standard, then mine operators that test haul truck drivers / miners for ten drugs can be cited by DOT auditors for testing specimen samples and subsequently recording results for drugs other than those listed individually in the DOT rules.

In §66.300(b) mine operators are directed to follow the DOT's rule for drug and alcohol testing, except for the provisions addressing split specimens and bifurcated alcohol levels for testing. Title 49 CFR 40 encompasses Subparts A through R inclusively and contains more than one hundred fifty (150) separate provisions. In addition, there are eight (8) appendices in Part 40. In referencing DOT rules in only one paragraph, MSHA adds a detailed management program containing hundreds of specific requirements, therein creating an overly complicated set of standards.

Furthermore, the version of the DOT rule that operators must follow is not clear. For example, the *Omnibus Transportation Employee Testing Act of 1991* set out the general requirements for individuals involved in public sector transportation. Most recently, however, standards to address "direct observation" for urine tests of transportation employees who must report for a follow up or a return to duty test have been promulgated.<sup>8</sup> In referencing §66.300(b), MSHA will require "direct observation" for miners who submit to a follow up or

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<sup>6</sup> Two separate rules apply here, 49CFR40.13(c) states that "...you must not perform any tests on DOT urine or breath specimens other than those specifically authorized by this part of 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 a DNA test or other types of specimen identity testing," and 49 CFR 40.85 states that "...As a laboratory, you must test for the following five drugs or classes of drugs in a DOT drug test. You must not test 'DOT specimens' for any other drugs. (a) Marijuana metabolite (b) Cocaine metabolites (c) Amphetamines (d) Opiate metabolites, and (d) Phencyclidine (PCP).

<sup>7</sup> §66.301 Substances subject to mandatory testing. Tests will be conducted for the drugs listed below: (a) alcohol (b) Amphetamines (including methamphetamines), (c) Barbiturates, (d) Benzodiazepines (e.g., Valium, Librium, Xanax), (e) Cannabinoids (THC/marijuana), (f) cocaine, (g) Methadone, (h) Opiates (heroin, opium, codeine, morphine), (i) Phencyclidine (PCP), (j) Propoxyphene (e.g., Darvon), and (k) synthetic/Semi0synthetic Opioids (oxymorphone, oxydodone, hydromorphone, hydrocodone).

<sup>8</sup> *Federal Register*, Vol. 73, No. 166, August 26, 2008, p 50223

a return to duty test. In summary, the proposed rule is unnecessarily rigid and is also intrusive, and therefore needs to be more flexible to address the problems of drug and alcohol use in the mining sector.

**The rule should allow mine operators to test employees' oral fluids at the work site by using a commercially available drug testing device in lieu of urine testing.**

Oral fluids' testing is effective for detecting drugs listed in §66.301. Moreover, PCA believes that this type of testing is observed by the collector and is therefore not susceptible to adulteration,<sup>9</sup> which has been a major drawback associated with urine testing by outside service agents.<sup>10</sup> Indeed, the General Accounting Office reported that "...*The urine test itself can be subverted in several ways, such as adulterating or diluting the urine sample or substituting synthetic urine or a drug-free sample.*"<sup>11</sup> In another report from GAO, investigators posing as commercial truck drivers needing random drug tests found that employees in ten (10) of twenty-four (24) collection sites tested did not ask the investigator to empty his pants pockets, as they are required to do, to ensure he was not carrying adulterants or substitutes.<sup>12</sup> If MSHA were to allow collection of oral fluids' samples at the job site, there would be significant savings in resources without compromising the program's intentions to detect drug/alcohol use while at work. In addition, saliva testing provides no opportunity for sample adulteration since the test is physically viewed by a sample collection agent.

If the proposed notice becomes final, PCA believes that MSHA should allow alternative methods for sample collection, such as saliva testing, for drug testing purposes in order for mine operators, especially those that are remotely located, to discover and address illicit drug and alcohol usage by employees in the workplace. The agency should allow other options such as hair sample testing as well. The reports that are cited herein illustrate the inherent challenges associated with recognizing and relying on only one method for drug testing.

**The role of independent contractors needs to be clarified.**

In section §66.2(c) the proposal states in part that mine operators must inform all miners and contractors who perform work on mine property of the requirements of the rule, but this provision does not clearly state that contractors as well as mine operators are responsible for compliance with all provisions of the rule. PCA understands the need to test contractor employees, but does not believe that the mine operator should be responsible for the testing.

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<sup>9</sup> Revisions to *Mandatory Guidelines for Federal Workplace Drug Testing Programs*, *Federal Register*, April 11, 1988, amended June 9, 2004, amended September 30, 2997, amended April 13, 2004

<sup>10</sup> Motor Carrier Safety Preliminary Information on Challenges to Ensuring the Integrity of Drug Testing Programs, GAO Highlights, United State Government Accountability Office, GAO-08-220T, November 1, 2007

<sup>11</sup> *Ibid*

<sup>12</sup> Motor Carrier Safety: Improvements to Drug Testing Programs Could Better Identify Illegal Drug Users and Keep Them off the Road, United States Government Accountability Office, GAO-08-600, May 15, 2008

Rather, independent contractors must be responsible for developing and implementing their own programs, and the administration, including all testing, management and record keeping, must be carried out by the independent contractor.

In the cement industry, for example, there may be several hundred contract employees working on specialized construction projects at times during any given year. It would be very impractical to make cement plant operators responsible for testing contractor employees. This would be particularly burdensome in the cases of pre-employment, random, reasonable suspicion and follow up tests.

PCA believes that MSHA should explicitly state in an appropriate section of any finalized rule that contractors must develop and maintain a drug / alcohol testing program in compliance with the rule, and that the contractor policy and program administration is independent of the of a mine operator program. When MSHA conducts inspections of independent contractors working at regulated facilities, the agency can review contractor compliance with Part 66.

### **Conclusion**

PCA believes that mandatory drug and alcohol testing leads to a safer working environment for cement industry employees. PCA also believes that the proposal is significantly flawed and should be revised to provide operators with the ability to ensure a drug- and alcohol-free workplace.

In order to achieve a safe working environment at cement facilities, the industry's operators must manage effective drug / alcohol policies and programs. A cornerstone element of an effective program is operator discretion to address all offenses related to violations of drug / alcohol programs, including for first offenses. Cement companies have successfully managed drug and alcohol programs which include the requirement to dismiss an employee for a positive test result, and this rule, if finalized, would contradict program policies. The agency must not require operators to allow an employee who tests positive for amphetamines, as an example, to re-enter a mining environment.

The adoption by reference of Title 49 Code of Federal Regulations Part 40 adds a mountain of regulation to the proposed Part 66 rule. By referencing the hundreds of individual paragraphs in Part 40 and combining them with the individual parts of MSHA's proposal, operators are placed in a position of violating one agency's rule (DOT) in order to comply with a separate agency's rule (MSHA), as in the case of miners who drive haulage trucks on public highways. There are likely similar instances where compliance with the DOT Part 40 rule would require operators to violate the MSHA Part 66 rule, or vice versa.

PCA believes that testing of oral fluids at the manufacturing or mining site should be allowed in a final rule. If an individual tests positive, then a second test can be administered by a service agent to verify in lieu of urine testing the first test's results. The documents from the General Accounting Office that are cited in this comment underscore that test adulteration and specimen substitution present significant challenges to ensuring that urine testing provides valid test results.

For purposes of Part 66, independent contractors act as mine operators. A drug and alcohol program wherein hundreds of contractor employees would cycle in and out of the pool of participants would be impractical and unmanageable, potentially subjecting the operator to unfair enforcement actions and penalties.

Thank you for the opportunity to share PCA's perspective on the proposed rules. I may be reached at 202-408-9494 or [tharman@cement.org](mailto:tharman@cement.org) to address any questions or clarification regarding our views.

Sincerely,

A handwritten signature in cursive script, appearing to read "Thomas V. Harman".

Thomas Harman  
Portland Cement Association

## Attachment 1

# ALCOHOL AND DRUG POLICY

### Introduction

It is the Company's policy to maintain a safe and healthful working environment for all of its employees and efficiency and productivity in all of its operations. This Policy is based on several important principles. First, all Company employees must be alert and in full possession of their faculties whenever they are on Company property. Second, employees should be given an opportunity to seek treatment, counseling and/or rehabilitation for abuse of alcohol and drugs before their performance deteriorates to a point where discipline may be required. Third, while individual employees have the right to make choices and they are subject to disciplinary action, including discharge, for violation of the Company's rules and regulations.

The Company encourages employees who are experiencing problems with alcohol and/or drug abuse to voluntarily seek assistance for such problems through available treatment, counseling and/or rehabilitation programs. The confidentiality of all records for any employees who seek assistance through such programs will be maintained to the extent reasonably possible. Furthermore, the employee's decision to voluntarily seek such assistance, before Company intervention, will not be the basis for disciplinary action. On the other hand, employees who choose not to voluntarily seek such assistance through available Company approved rehabilitation programs will not be protected from discipline for violation of the Company's Alcohol and Drug Policy. In all cases participation in such programs will not be a basis for diminishing or mitigating future discipline should the employee choose to continue use alcohol or drugs in violation of the Company's rules.

Alcohol and/or drug testing will be conducted under the Company Alcohol and Drug Policy in accordance with the procedures and guidelines set forth below, subject to Company rules and applicable law. Where federal, state or municipal law imposes restrictions on the implementation of this policy, this policy shall be amended to the extent necessary to conform to the requirements of such laws. The Company has established the following specific policies regarding the use, possession, concealment, manufacture, distribution, and sale of alcohol and drugs.

All employees must be free from the effects of alcohol and drugs during scheduled working hours, and when they report for work, as a condition of employment. Drinking alcoholic beverages or using drugs on Company premises, or working when ability to perform is impaired by alcohol and drugs is strictly prohibited and is grounds for discharge. Possession, concealment, manufacture, distribution, or sale of alcohol or drugs while on duty or on Company property, is prohibited and is grounds for discharge.

The Company reserves the right to require an employee to submit to breath, saliva or blood tests to determine usage of alcohol and/or urine tests to determine usage of drugs as provided in the Policy. If an employee refuses to take any authorized test, he/she will be deemed insubordinate and it shall be conclusively presumed that the employee was impaired by alcohol and/or drugs. The Company also reserves the right to require follow-up alcohol and/or drug testing if it agrees to allow the employee to return to work following disciplinary action for a positive test, or as the result of a condition of continuing employment or reinstatement following completion of a Company-approved alcohol and/or drug treatment, counseling or rehabilitation program.

### A. Prohibited Substances/Unauthorized Items/Searches

**Prohibited Substances:** Alcoholic beverages and drugs are considered to be prohibited substances in the work place. For purposes of this policy, the term "drugs" includes the

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controlled substances listed below, synthetic drugs, and prescription drugs, excepting only prescription drugs approved by and used in accordance with the directions of the employee's attending physician. Any employee using a prescription drug should consult with his/her physician regarding the effects of the medication in relation to the performance of the employee's job responsibilities, and provide the Company with a written statement from his/her physician advising the Company of any adverse effects on his/her ability to perform his/her duties.

The Company reserves the right to use appropriate test panels for the detection of use of prohibited substances. The following identifies prohibited substances under a 5-panel test.

1. Marijuana (Cannabinoids)
2. Cocaine
3. Opiates
4. Phencyclidine (PCP)
5. Amphetamines

**Unauthorized Items:** Employees may not have any unauthorized items in their possession while on duty or on Company property. Unauthorized items include drugs as previously defined, drug paraphernalia and alcoholic beverages and containers.

This policy and rule shall not be construed to prohibit the presence of an otherwise lawfully unopened container of alcoholic beverage in a private motor vehicle which is not used in the business of the Company.

**Searches:** Where management concludes that it has reasonable suspicion that the use, possession, sale and/or distribution of illegal drugs or alcohol is taking place on Company property, management retains the right to perform reasonable searches or inspections of employees' work area, lockers, desks, vehicles, and personal effects to determine whether an employee is engaged in such prohibited conduct while on Company property.

In such a case, the employee will be required to cooperate in the search. Employees who refuse to cooperate will not be forcibly searched, but will be advised that submission to such a search is a condition of employment and that failure to cooperate will result in termination of employment. If the employee again refuses, their employment will be terminated.

Any suspected illegal drugs or alcohol found will be impounded and sealed in a container.

The seal will bear the date, names of the persons present, and general description of the item. A receipt will be given to the employee for such seized property. Seized items will be retained in a locked cabinet under the exclusive control of a designated management representative. If possession is transferred, a chain of custody will be established. Management will have an authorized testing laboratory test the substances. If the substances are not illegal or violative of the Company's Alcohol and Drug Policy, they will be returned to the employee in return for a receipt previously provided to the employee.

#### **B. When Alcohol And/Or Drug Testing May Be Required**

An employee may be required to submit to appropriate testing (blood, saliva, breath or urine) in the following circumstances:

- (1) When, in the Company's discretion, an employee's performance, physical appearance, and/or attendance record or verified information submitted to the Company creates a reasonable suspicion that the employee is currently using, impaired by, or under the influence of prohibited substances, including, but not limited to, alcohol or drugs as defined in Section A, above.
- (2) Following a serious or potentially serious accident or incident in which safety precautions were violated, or careless acts were performed by the employee, or in case of injury or property damage where there is reason to suspect that drug or

alcohol abuse caused or contributed to the injury or property damage.

- (3) As part of a post job offer medical examination.
- (4) As part of a return to work medical examination when the employee is absent from work for thirty (30) or more calendar days, for any reason, except for vacation.
- (5) As part of a follow-up alcohol and/or drug test required under an agreement allowing an employee to return to work following disciplinary action for a positive breath, saliva, blood and/or urine test, or as the result of a condition of continuing employment or reinstatement following completion of a Company approved alcohol and/or drug treatment, counseling or rehabilitation program.
- (6) When any prohibited substance, including drugs, an alcoholic beverage, or an unauthorized item is found in an employee's possession (possession includes, without limitation, the employees' person, work area, locker, desk or vehicle).
- (7) Following any arrest for the use, possession, manufacture, distribution, and sale of alcohol and drugs.
- (8) In compliance with D.O.T. testing guidelines.
- (9) As part of the companies random drug testing program. (Note: Consult with your local Human Resources or Office Manager for details regarding random drug testing as it might apply to your specific location.)

### **C. Who May Require Testing**

For tests administered pursuant to subsection B (1) and B (2) above, the demand for tests shall be made only on the express authority of an appropriate manager or supervisor, or his/her designee, with the concurrence of another supervisory employee.

### **D. Alcohol and Drug Testing Procedures**

The following procedures shall govern the administration of alcohol and drug tests:

- (1) When an alcohol test is to be administered, a breath, saliva or blood sample will be taken from the employee. When a drug test is to be administered, a urine sample will be taken from the employee. (An employee who is afflicted with hemophilia, diabetes, or a condition requiring the use of anticoagulant under the direction of a physician may be permitted to take a breath or saliva test, in lieu of a blood test, to determine the presence of alcohol.)
- (2) Breath, saliva or blood samples will be collected and witnessed by authorized medical personnel at an outside health-care facility, practitioner's office or collection agency, and in the case of blood samples, will be sealed and initialed by the employee and a witness.
- (3) Urine samples will be collected at an outside health-care facility, practitioner's office or collection agency, under approved procedures designed to ensure the integrity of samples. Urine samples will be sealed and initialed by the employee and a witness. If personnel at the collection site determine that an adulterated sample has been provided, the employee will be required to submit another sample in the presence of collection site personnel. Both samples will be submitted for testing and if it is concluded that the initial sample was altered, the employee will be subject to immediate discharge.
- (4) Blood and/or urine samples will be promptly sent to and tested by a laboratory approved by the Company. Substance Abuse and Mental Health Services Administration (S.A.M.H.S.A.) approved laboratories shall be used whenever possible before any other laboratories.
- (5) An approved chain of custody procedure shall be followed in the administration of all blood and/or urine tests. Whatever collection site(s) is/are chosen, appropriate arrangements will be made to coordinate activities with the testing laboratory so as

to insure the integrity of the samples to be tested. Blood samples which test positive for alcohol and/or urine samples which test positive for drugs will be stored at the laboratory for a minimum of one (1) year.

- (6) Alcohol testing shall be conducted using a single quantitative blood test. (A preliminary breath or saliva test may be used if a breath test is administered, provided the results are confirmed by a second preliminary breath test or another accepted procedure.)
- (7) Initial drug screening shall be conducted using the EMIT or RIA (Immunoassay Techniques) drug testing methods. All positive drug tests shall be confirmed by the GC/MS (Gas Chromatography/Mass Spectrometry) drug testing method.
- (8) An employee required to submit to a breath, saliva, blood and/or urine test must, if required by a health-care facility, practitioner, collection agency or laboratory, promptly execute a consent to the taking of samples, their analysis related to alcohol and drugs, and the release of test results to the Company.
- (9) A legible copy of the laboratory report shall promptly be made available by the Company to the employee.
- (10) Any information collected in the process of administering breath, saliva, blood and/or urine tests shall be treated as confidential information and shall be released to other persons only on a "need-to-know" basis.

#### **E. Positive Drug or Alcohol Tests**

The following cutoff limits will be used to determine whether initial drug screens and confirmation tests are positive for drugs and/or their metabolites:

<b>Substance</b>	<b>Initial (EMIT or RIA) Level ng/ml</b>	<b>Confirmatory (GC/MC) Level ng/ml</b>
Marijuana	50	15
Cocaine	300	150
Opiates	2000	2000
Phencyclidine (PCP)	25	25
Amphetamines	1000	500

The cutoff levels (EMIT/RIA-GC/MS) for the above drugs are subject to change as recommended by the testing laboratory.

When a positive drug test may be the result of use of a prescription drug, the employee will be required to submit proof of the prescription within forty-eight (48) hours of the request to do so, together with a written statement from his/her attending physician approving the use of the drug during working hours. If the prescription and/or the physician's statement is not submitted within the specified time limit, the employee will be subject to disciplinary action under this policy, up to and including termination of employment.

The cutoff levels used to determine whether alcohol tests are positive will be working or reporting to work with a blood alcohol content at or exceeding the state's legal intoxication limit, based upon the test result and application of a blood alcohol dissipation rate of .015% per hour.

#### **F. Second Opinion Testing**

If a sufficient portion of the initial sample is available for further testing, (i.e., at least 2 ml in the case of a blood sample and 20 ml in the case of a urine sample), an employee who tests positive for drugs or is subject to discipline for violation of the Company's alcohol rule may request a second opinion test in accordance with the following guidelines:

- (1) The request must be made to the Company in writing within seven (7) calendar days of the date the laboratory report is provided to the employee.
- (2) The employee must pay the total cost of the second opinion test, including any courier fee, at the time the request is made. If the second opinion test is negative, the Company will reimburse the employee for these costs.
- (3) The second opinion test may be performed at an independent laboratory selected by the employee tested, provided said laboratory is S.A.M.H.S.A. approved.
- (4) An approved chain of custody procedure must be followed with respect to the release of the sample(s) to the laboratory which is going to perform the second opinion test (i.e., the sample(s) will only be released directly to the laboratory).
- (5) All alcohol and drug testing procedures set forth in this policy, including procedures regarding consent forms, shall be strictly observed. However, since some analytes deteriorate during storage, detected levels of drugs below the cutoff limits recognized by the Company, but equal to or greater than the established sensitivity of the assay, shall, as technically appropriate, be considered corroborative of the original positive results.
- (6) The results of the second opinion test will be binding on the Company and the employee.

If the second opinion test is negative, any discipline the employee has received as a result of the initial test will be voided and no further disciplinary action will be taken against the employee. If the second opinion test is positive, the test result cannot be challenged in any forum.

#### **G. Policy Violations**

Employees will be subject to immediate discharge for the first offense in any of the following circumstances:

- (1) Refusal to take any authorized breath, saliva, blood or urine test, or do any acts the Company determines reasonably necessary for implementation of this Policy, including, but not limited to, refusal to execute any required consent forms, refusal to cooperate regarding the collection of samples or refusal to cooperate in a search.
- (2) Drinking alcoholic beverages or using drugs on Company property.
- (3) Possession, concealment, manufacture, distribution, or sale of any prohibited substance, including alcoholic beverages, while on duty or on Company property.
- (4) Working or reporting for work with a blood alcohol content at or exceeding the state's legal intoxication limit, based upon the test result and application of a blood alcohol dissipation rate of .015% per hour.
- (5) Testing positive for drugs and/or their metabolites in any authorized drug test.

Although the foregoing infractions will ordinarily result in discharge regardless of the employee's position, the Company reserves the right to consider extenuating circumstances and impose lesser discipline when such action is deemed appropriate.

#### **Rehabilitation and Additional Testing**

In cases where an employee receives a disciplinary suspension for having a positive drug test, having a blood alcohol content at or exceeding the state's legal intoxication limit during working hours, or any other violation of the Company's Alcohol and Drug Policy.

- (1) The Company may require the employee to participate in an approved treatment, counseling and/or rehabilitation program for alcohol and/or drug abuse at the time discipline is imposed. Participation in such programs shall not diminish the

Company's right to issue appropriate disciplinary action, to include discharge.

- (2) The Company shall have the right to require the employee to undergo follow-up alcohol and/or drug testing at any time for a period of up to two (2) years as a condition of reinstatement or continued employment.

If an employee is required to enroll in a treatment, counseling and/or rehabilitation program for alcohol and/or drug abuse, his/her continued employment or reinstatement with the Company will be contingent upon successful completion of the program and remaining alcohol and drug free for its duration. In addition, an employee who is required to enroll in such a treatment, counseling and/or rehabilitation program must submit to any alcohol and/or drug tests administered as part of the program, and must sign a release of information form allowing the agency running the program to provide periodic progress reports and the results of such alcohol and/or drug tests to the Company.

If an employee who has received a disciplinary suspension for violation of the Company's Alcohol and Drug Policy tests positive for drugs and/or their metabolites in any subsequent drug test or a subsequent alcohol test reveals an alcohol content at or exceeding the state's legal intoxication limit during working hours (based upon the test result and application of a blood alcohol dissipation rate of .015% per hour), the employee will be subject to immediate discharge.

#### **Individual's Employability Pending Receipt of Test Results**

In addition to appropriate disciplinary measures, including suspension, which may be taken in response to the incident or course of conduct which gave rise to the test, management reserves the right to decide whether the incident or course of conduct prompting the test is of such a nature that the employee should not be put back to work until laboratory results are received. If such a decision is made, the employee will be removed from work, as appropriate, with or without pay. Where the test result is negative, the employee will be returned to work with back pay, for any regularly scheduled straight time hours missed up to the time the Company receives the test results. Suspensions for violating other Company rules will be administered separately from removal from work while awaiting such test results.

#### **H. Voluntary Alcohol and Drug Rehabilitation**

If an employee who is not otherwise subject to disciplinary action for use of alcohol and/or drugs or otherwise voluntarily admits that he/she has an alcohol and/or drug abuse problem, the Company will meet with the employee to discuss the various treatment, counseling and rehabilitation options which are available. These options may include allowing the employee to continue working while receiving outpatient treatment, counseling and/or rehabilitation in a Company approved alcohol and/or drug abuse program; or placing the employee on a requested or unrequested leave of absence while he/she is receiving treatment, counseling and/or rehabilitation in a Company approved inpatient or outpatient alcohol and/or drug abuse program.

When such an employee voluntarily admits that he/she has an alcohol and/or drug abuse problem, the Company shall have the right to require the employee to submit to breath, saliva, blood or urine test(s) prior to deciding what action is appropriate. No disciplinary action will be taken by the Company against such an employee who voluntarily admits that he/she has an alcohol and/or drug abuse problem, in the manner described previously. However, the Company shall have the following rights in such a situation:

- (1) The employee may be required to enroll in and successfully complete an approved inpatient or outpatient alcohol or drug abuse program, and remain alcohol and drug free for its duration, as a condition of continued employment or reinstatement with the Company.
- (2) If the employee enrolls in such a program, he/she must submit to any alcohol

and/or drug tests administered as part of the program, and must sign a release of information form allowing the agency running the program to provide periodic progress reports and any such test results to the Company.

- (3) The employee may be required to agree to be subject to future unannounced alcohol and/or drug testing, at the Company's discretion, for a period of up to one (1) year from successful completion of a Company approved program.
- (4) If the employee subsequently tests positive for any alcohol or drugs, the employee will be subject to immediate discharge.

**I. No Waiver of Legal Rights**

The parties agree that this program shall not diminish the rights of individual employees under state and federal laws relating to alcohol and/or drug testing.