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From: Roybal, Charles CE [mailto:Charles.CE.Roybal@bhpbilliton.com]

Sent: Monday, November 10, 2008 6:22 PM

To: zzMSHA-Standards - Comments to Fed Reg Group

Subject: RIN 1219- AB41

AB41-COMM-159



Navajo Coal Company

**BHP Billiton Limited**  
P.O. Box 1717, Fruitland, NM 87416  
16 miles south of Fruitland CR 6675 @ A3

October 22, 2008

Patricia Silvey  
Acting Director, Office of Standards, Variance & Regulations  
Mine Safety & Health Administration  
1100 Wilson Boulevard  
Room 2350  
Arlington, VA 22209-3939  
Attn:

Dear Ms. Silvey,  
**Navajo Coal Company**  
**Navajo Mine 1, MSHA I.D. No. 29-02170**  
**Comments Re:**

Navajo Coal Company is pleased to have the opportunity to present our comments regarding the following proposed rule; 30 CFR Parts 56, 57, and 66, 1219-AB41, Alcohol- and Drug-Free Mines: Policy, Prohibitions, Testing, Training, and Assistance.

Our general comments are included below along with answers to those MSHA specific requests for comments. Navajo Coal Company strongly supports promulgation of a rule that enables mine operators to establish drug & alcohol testing programs. It is an essential component to ensuring that all miners are fit for duty in the mines. If miners are not fit for duty, they present a significant risk to themselves and their co-workers. Numerous accident investigations have revealed the impairment of a miner was a contributing factor to the accident occurring. Sadly, it is our view that the proposed rule will actually weaken the ability of mine operators to develop such programs and will significantly reduce the effectiveness of many programs that are already in place.

We also believe that the attempt to incorporate so much specificity in the rule will actually undermine its effectiveness and ability to evolve to meet changes in the future.

MSHA should avoid establishing such prescriptive requirements. A better approach would be to design the rule as a set of minimum guidelines and allow for development of the specific requirements to occur at the mine site level. This would allow for those represented organizations to negotiate those specific requirements as has occurred in many organizations throughout the country today.

Navajo Coal Company believes that the proposed rule does not establish a sufficient deterrent and in some respects will in fact serve to actually enable miners to continue to abuse without real

consequences. Debate about how big this problem is within the mining industry has been going on for some time.

**MSHA also welcomes comments from those that already perform post-accident tests regarding the number of cases where alcohol or drugs were determined to be a contributing or root cause of all accidents/injuries where tests reveal some alcohol or drug involvement.**

Some persons will question exactly what the impact has been with regard to injuries and fatalities within the mining industry. We believe the following question is relevant, "What is an acceptable number of injuries or fatalities caused or contributed to by an impaired miner?" We believe the only acceptable number is zero.

**MSHA seeks comments on the list of drugs that are specifically identified as prohibited substances and the means for maintaining flexibility to include additional drugs as need arises.** Navajo Coal Company supports the prohibition of the use, sale or possession of prohibited substances on and around mine property as included in the proposal, with the exception that the list of prohibited substances must retain the flexibility to allow additional substances to be included in the future.

**MSHA requests comments about the determinations of who performs safety sensitive job duties is and therefore required to be tested and trained.**

Safety-sensitive positions and Prohibited Behaviors – This is one of the areas where the proposed rule can weaken existing programs. It is our opinion that any person on the mine site or who is involved in directing the activities at a mine site, should be subject to these prohibitions. This would also include administrative employees if they work or travel on the mine site. Even an administrative employee walking or driving on the mine site, during a momentary lapse of critical concentration, could potentially contribute to an accident, injury, or death. The final rule should not retain the narrow definition contained in the proposed rule.

Navajo Coal Company is in support of a requirement for the program to contain the Five Elements identified in the DOT rules.

1. The policy should be in writing.
2. Employee education is required.
3. Supervisory training is required. The rule should require that employee education and supervisory training will be conducted as per the policy without prescriptive times identified. The amount of education and training should be commensurate with the drug and alcohol problem. If you have a very robust program and drug use drops off to almost nothing after a few years, your policy can reflect a reduction in training
4. Alcohol and drug testing for miners who perform safety-sensitive job duties and supervisors. (Provided the rule allows for testing of all personnel working on the mine site).
5. Referrals for assistance for miners who violate the policy. (Provided the rule allows for a company to establish consequences for repeat offenses up to and including termination and does not retain the allowance for protections of a miner who admits use of drugs, after being selected for a test. The admission of drug use, after being selected for a test, under

any part of this program is too late.) The specifics of these elements should not be included in the Final Rule beyond establishing minimums.

**MSHA invites comments on how the [written policy] should be provided to miners.** We believe this information can be delivered during orientation to the work site such as during their new miner training. A copy could be provided and the miner could sign off on having received their copy. Further education should occur if there are changes made to the policy. The training could be effectively delivered by members of the Human Resources group, the Safety or Training groups or by representatives of the Employee Assistance Provider or Medical Review Officer.

**MSHA invites comments about the amount and type of training for non-supervisory miners and about the methods appropriate for delivering this training and also about the best means for assuring that training is delivered by qualified personnel.** We believe this information can be delivered during orientation to the work site such as during their new miner training. A copy could be provided and the miner could sign off on having received their copy. Further education should occur if there are changes made to the policy. The training could be effectively delivered by members of the Human Resources group, the Safety or Training groups or by representatives of the Employee Assistance Provider or Medical Review Officer.

**MSHA invites comments about the amount and type of training for supervisors and about the methods appropriate for delivering this training and also about the best means for assuring that training is delivered by qualified personnel.** Supervisors need to understand these requirements just as they do other regulations. They also need training on how to recognize when an employee might be impaired. Tools can be provided to assist with making that determination. A copy of a checklist used here at Navajo Coal Company is attached to these comments as an example of such tools.

All of these trainings should allow for policy defined amounts, types, and time. If MSHA needs to be prescriptive these materials be delivered via classroom, video, letter, newsletter toolbox meetings etc. The time should not be prescriptive especially if an identified drug problem drops off significantly.

**MSHA seeks comment on [the provision to encourage but not require miners to voluntarily seek assistance].** This is another area where the proposed rule would weaken the existing program here at Navajo Coal Company. Our program provides for miners to voluntarily seek assistance and in the case of a first positive test, requires such assistance in order to return to work. Such specifics should not be included in the Final Rule other than to allow them to occur.

**MSHA seeks comments about the extent to which third party health benefits are available to cover the cost of SAP and treatment services for miners covered by the rule. MSHA also seeks comments on all aspects of the miner's assistance**

**provisions required by this rule.** MSHA should not attempt to regulate health benefits or treatment services. These programs are part of the individual benefits packages developed or negotiated at a given operation. Establishing regulations concerning such benefits could result in a Federal requirement to alter components of a Collective Bargaining Agreement. The Final Rule should not attempt to make such requirements.

Navajo Coal Company also supports the proposal to require Five Types of Alcohol and Drug Testing, The existing program in place at Navajo Coal Company contains these requirements. These elements are part of an overall Fitness for Duty Policy and Memorandum of Agreement with the International Union of Operating Engineers, Local 953.

The Final Rule should not attempt to spell out the specifics of how this testing is done. The Final Rule should be written to enable operators to have such programs and require that said program will meet or exceed the requirements of DOT or FDA rules. That should be the extent of the Final Rule with regard to what and how to test. That would allow the programs to evolve in the future and remain in concert with other Federal D&A testing programs as they are modified or improved.

**MSHA seeks comments about the required panel of drugs subject to mandatory testing.** The testing section of the Final Rule should allow an operator to test for substances other than those identified in the proposed rule. The Final Rule should provide this DOT list as an example or minimum, not as a specific rule.

The Final Rule should not attempt to identify the specifics of how samples are collected, how testing is conducted etc. The Final Rule should simply require that all sampling and testing will be conducted in accordance with the standards established by credible organizations as DOT, FDA or others having expertise or oversight of such processes. Such an approach would build in the ability to use improved methods as they are developed in the future. An operations policy should state if they are using the DOT, FDA or operation defined procedure. There should especially be greater allowance for pre-screen or initial quick tests. Personnel Residue Testing, hair samples and mouth swabs have been around for 10 years and are very accurate. The rule should state the operator's policy may choose from a collection of accepted methods. This allows for technological advancement.

1. Pre-employment;
2. Random and unannounced;
3. Post-accident testing (provided the rule allows for testing of non-fatal accidents such as first aid, property damage or even near miss events).
4. Reasonable Suspicion testing; and
5. Return-to-duty testing for miners found in violation.

**MSHA invites comments as to the appropriate means for enforcing the provisions of the proposed rule.**

The proposed rule includes a collection of operator responsibilities, required actions and limited consequences. The final rule should not attempt to be so specific in these areas. The rule could be used to establish a set minimum standard but should not prohibit an operator and associated labor groups from negotiating something more stringent. These specifics are already included in most drug and alcohol programs and are another area that the proposed rule stands to weaken such existing programs. The same can be said for the specifics of actions pending receipt of results, actions after receiving verified test results, evaluation, referral and the return to duty process, including return to duty follow up testing.

The section on consequences for a positive test or a refusal to test needs to be revised. We believe the Final Rule should address Section 2, (g) (2) of the Mine Act which states the purpose of the Act is ***“to require that each operator of a coal mine or other mine and every miner in such mine comply with such standards.”*** Since the requirements exist for both operators and miners, consequences for non-compliance with this Final Rule should include both as it does for smoking articles in underground mines. The Final Rule should include a provision for individual consequences to be applied by MSHA. A decision to use prohibited substances prior to reporting for work, possess, use or sell prohibited substances while at work could have the same potential to do harm to others as does a miner choosing to smoke in an underground coal mine.

This activity produces an unnecessary and very preventable risk and results from an individual making a personal choice. The miner should be accountable for that choice.

The Final Rule should also include consequences for those who adulterate, falsify or wilfully contaminate a drug sample. These consequences should also be applied to both mine operators as well as miners, depending on who took the steps to adulterate, falsify or wilfully contaminate the sample.

In the areas of Return to Duty and Follow up Testing we believe the proposed rule would cause some significant issues with regard to the requirements spelled out in HIPPA rules. In order to avoid this, the Final Rule should not attempt to address the specificity of these record keeping requirements or should be carefully reviewed to ensure there are no conflicts created by the Final Rule.

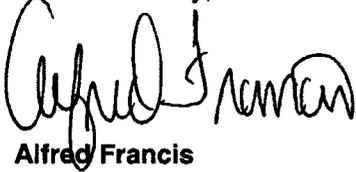
**MSHA welcomes comments on how the alcohol and drug testing results should be documented in accident reports as well as how they should be evaluated during an accident investigation to help determine the cause of the accident.**

Accident records are regularly reviewed as safety meetings. Including test results in these records could result in labor issues. Test records should not be included in such reports.

Records of drug test results and evaluations are best handled by the Substance Abuse Professional (SAP) and the Medical Review Officer (MRO). The records associated with all testing should be maintained in a secure Human Resources file. We agree that such records are confidential between the miner and the mine operator.

Navajo Coal Company appreciates the opportunity to provide these comments concerning this important regulatory proposal. Please give these comments serious consideration in development of the Final Rule.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Alfred Francis". The signature is written in a cursive, flowing style with a large initial "A".

**Alfred Francis**  
Operations Manager  
Navajo Coal Company