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**From:** Allen Dupree [mailto:adupree@alphanr.com]  
**Sent:** Friday, September 26, 2008 11:41 AM  
**To:** zzMSHA-Standards - Comments to Fed Reg Group  
**Cc:** Allen Dupree  
**Subject:** Alpha Natural Resources Comments on Proposed Rule RIN 1219-AB41

Please find attached comments from Alpha Natural Resources on MSHA's proposed rule entitled "Alcohol and Drug Free Mines: Policy, Prohibitions, Testing, Training, and Assistance." If you have any questions, please feel free to contact me at (276) 619-4059.

Sincerely,  
Allen Dupree  
Vice President, Health and Safety  
Alpha Natural Resources, LLC

AB41-COMM-26
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**Alpha Natural Resources**

Alpha Natural Resources, LLC  
One Alpha Place  
P.O. Box 2345  
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September 25, 2008

Mine Safety and Health Administration  
Office of Standards, Regulations, and Variances  
1100 Wilson Boulevard, Room 2350  
Arlington, Virginia 22209-3939

Re: **RIN 1219-AB41**

Dear Ladies and Gentlemen:

The subsidiaries of Alpha Natural Resources, Inc. (collectively referred to herein as "Alpha") operate 57 coal mines and 11 coal processing facilities and employ more than 3,800 people in the United States. Alpha is among the ten largest coal producers in the U.S. From the hiring of its first coal miners in 2002, Alpha has been an industry leader in workplace safety, and our accident rates have consistently been below the national average, as compared to operations of similar size and type.

We applaud MSHA for introduction of the proposed rule for alcohol and drug free mines. Although Alpha is pleased that MSHA has taken initiative on this important subject for the safety of the nation's coal miners, we believe that adoption of the Proposed Rule, as published, would diminish the level of work-place safety currently provided by Alpha's policy and state laws already in effect. In our view, the level of protection from the adverse effects of drugs and alcohol in the workplace, which is provided to miners employed in Alpha's coal mines and processing facilities, by our policy and such state laws, actually exceeds the level of such protection provided by MSHA's proposed regulations.

We believe that most, if not all, of our concerns regarding the proposed regulations could be addressed by MSHA's deletion of Section 66.400(b), as well as all other requirements that miners who violate the drug- and alcohol-free workplace program be referred for assistance, and addition of a provision, similar to the provision in Virginia's law, stating that the regulations shall not be construed to preclude an employer from developing or maintaining a drug and alcohol abuse policy, testing program, or substance abuse program that exceeds the minimum requirements set forth in the regulations. Likewise, MSHA's regulations should supplement, not replace effective state statutes, like those in Virginia and Kentucky, which currently protect miners from the adverse effects of drugs and alcohol in the workplace.

Alpha's Drug and Alcohol Abuse Policy has played a critical role in our success. All miners employed by Alpha are required to pass a pre-employment drug and alcohol screen and are subject to post-accident, random and reasonable suspicion drug and alcohol testing. Miners who

either refuse to submit to testing as required under the policy, alter or attempt to alter a test result, or produce a positive test result are subject to disciplinary action, up to and including termination.

As stated in the policy, Alpha encourages any employee who has a drug or alcohol abuse or dependence problem to seek professional assistance before the employee is required to submit to testing under the policy. Treatment and counseling are available under our medical plan, and employees who voluntarily seek treatment or counseling are granted leave and allowed to return to work, subject to verification of compliance with their rehabilitation program. However, if an employee “does not seek professional assistance before testing under [the] policy or an incident requiring disciplinary action occurs, Voluntary Rehabilitation under [the] policy will not be available to that employee.”

In our view, once an employee is required to submit to testing under the policy, it is too late for the employee to avoid disciplinary action for violation of the policy, by requesting professional assistance. As a supplier of coal to federal consumers, Alpha must comply with the Drug Free Work Place Act of 1988, and our policy is designed to achieve and maintain a work environment that is **completely free** from the adverse effects of drugs and alcohol. Our primary concern with MSHA’s Proposed Rule, entitled “Alcohol- and Drug-Free Mines: Policy, Prohibitions, Testing, Training, and Assistance,” as published in the Federal Register on September 8, 2008, is that Section 66.400 would diminish the consequences for a miner’s failure of a drug or alcohol test or refusal to submit to such testing, and thus diminish the effectiveness of Alpha’s long-standing policy.

Last July, the Virginia Coal Mine Safety Act was amended, requiring operators of all mines in Virginia to adopt a substance abuse screening policy and program, which, at a minimum, must include a pre-employment 11-panel drug screen. The Virginia law expressly states that it “shall not be construed to preclude an employer from developing or maintaining a drug and alcohol abuse policy, testing program, or substance abuse program that exceeds the minimum requirements set forth in this section.” See Virginia Code Section 45.1-161.87(G). The law further requires mine operators to notify the Chief of the Virginia Division of Mines when a miner tests positive for intoxication while on duty, and such notice “shall result in the immediate temporary suspension of all certificates held by the [miner], pending hearing before the Board of Coal Mining Examiners.” See Virginia Code Section 45.1-161.87(F). Thus, a miner who tests positive for intoxication while on duty is immediately disqualified from working in a Virginia coal mine, at least temporarily.

In July 2006, Kentucky adopted a similar law, which requires coal miners to provide proof of their drug- and alcohol-free status in order to qualify for the certification necessary to work in any Kentucky coal mine. See Kentucky Revised Statutes Section 351.182.

We strongly encourage the panel to consider deletion of Section 66.400(b), as well as all other requirements that miners who violate the drug- and alcohol-free workplace program be referred for assistance, and addition of a provision, similar to the provision in Virginia’s law, stating that the regulations shall not be construed to preclude an employer from developing or maintaining a

drug and alcohol abuse policy, testing program, or substance abuse program that exceeds the minimum requirements set forth in the regulations.

We appreciate the time and effort that the panel has expended in the development of this proposed rule and would like to thank MSHA in advance for your consideration of our comments, which are set forth in greater detail on the attachment marked as Exhibit A. We look forward to a productive partnership with MSHA in the development of the final rule to protect the health and safety of our miners. If you have any questions concerning these comments, please feel free to contact me at (276) 619-4059 or at [adupree@alphanr.com](mailto:adupree@alphanr.com).

Sincerely,

A handwritten signature in black ink, appearing to read "Allen Dupree", with a long horizontal flourish extending to the right.

Allen Dupree  
Vice President – Health and Safety  
Alpha Natural Resources, LLC

**Comments of  
Alpha Natural Resources, Inc.  
on MSHA's Proposed Rule  
RIN 1219-AB41**

Generally, the subsidiaries of Alpha Natural Resources, Inc. (collectively referred to herein as "Alpha") support MSHA's proposed regulation of miner fitness for the performance of safety-sensitive duties. However, the proposed rule would condone criminal activity and diminish miner safety, by prohibiting mine operators from terminating the employment of a miner who tests positive for being under the influence of a controlled substance above legal limits while on mine property. Alpha also encourages MSHA to modify the proposed rule to authorize mine operators to conduct the required testing using methods selected by the mine operator that may be more efficient or effective as compared to urine testing, such as breath, saliva and hair analysis, which has been recognized by the U.S. government General Accounting Office as being more reliable than urine testing (GAO/PEMD-93-18). MSHA's proposal to dictate the appropriate discipline for miners who violate a mine operator's drug- and alcohol-free workplace policy runs contrary to federal statutes, such as the Americans with Disabilities Act, which does not prohibit the termination of illegal drug users; other federal regulations, such as OSHA and DOT regulations, which do not prohibit employers from terminating workers who report for duty under the influence of alcohol or illegal drugs; and state statutes, such as the Kentucky and Virginia laws, which immediately disqualify any miner who tests positive for drugs or alcohol above the legal limits from working at a coal mine within their respective states. Alpha's Drug and Alcohol Abuse Policy encourages employees who have a drug or alcohol problem to seek professional assistance before testing is required under the policy. We believe the studies that have been done on this issue support our position that such professional assistance is most effective when sought voluntarily by the employee, rather than in connection with work-related testing, and we would encourage MSHA to reconsider its proposed regulation requiring a referral for professional assistance when a miner tests positive for being under the influence of alcohol or illegal drugs.

Specifically, with respect to the particular sections of the regulations proposed by MSHA, Alpha's comments are as follows:

**§66.2** The possession of alcohol, a legal substance, in or around mine property should not constitute a violation of the regulation. Transporting an unopened container of alcohol in a vehicle is a lawful activity and should not be regulated by MSHA, nor the obligation of mine operators to monitor. It is the use of alcohol, or being under its influence, that should be prohibited while on mine property. Alpha's Drug and Alcohol Abuse Policy prohibits employees from having .02% (grams per deciliter) Blood Alcohol Content while on mine property.

Likewise, it should not be a violation of MSHA's regulation for a miner to possess a controlled substance on mine property, provided that the miner has a valid physician's prescription for the substance.

- §66.3** The phrase “any other controlled substances designated by the Secretary” should be removed from the regulation as it is so overly broad and vague, that it renders the regulation at risk of being unconstitutional. If the Secretary desires to modify the list of substances for which mine operators must test their employees, such modification should be proposed and subjected to public comment before it becomes a rule governing the operation of U.S. coal mines.
- §66.200** The regulation should not require “referrals for assistance for miners who violate this rule” to be included in the mine operator’s program. Alpha has no objection to a requirement that employee assistance be available for employees who voluntarily request assistance **before** being required to submit to substance abuse testing. However, once a miner tests positive, refuses to be tested or alters or attempts to alter a test result, he or she should be subject to disciplinary action, up to and including discharge. The risk of termination of employment upon a first violation is the best deterrent to violation of the drug-free and alcohol-free work-place program.
- §66.204(a)** The proposed regulation should be modified to state that miners must be made aware that professional assistance is available if, and only if, a miner who has a drug or alcohol abuse problem voluntarily requests such assistance **before** testing is required under the drug-free and alcohol-free work-place program.
- §66.302** This section of the proposed regulation should be deleted from the final rule for the reasons set forth regarding Section 66.3 above.
- §66.305(c)** The proposed regulation should be modified to require that mine operators “use reasonable efforts” to ensure that random testing is unannounced and unpredictable, rather than stating that “each mine operator shall ensure” such unpredictability, which may be beyond the mine operator’s ability to control.
- The regulation should also be modified to clarify that the “10 percent floor established by this part” means 10 percent of the average number of miners employed at the mine during each calendar quarter for the immediately preceding twelve-month period.
- §66.305(e)** This subsection should be deleted from the proposed regulation because being selected for random testing does not indicate that a miner is impaired or otherwise unable to safely perform safety-sensitive duties. In fact, if done correctly, random selection for testing is completely consistent with and is done solely to confirm a miner’s fitness to perform a safety-sensitive job. Deletion of this subsection would also be consistent with Section 66.401(a).
- §66.306(a)** The proposed regulation should be modified to allow miners to “provide” as well as “obtain” assistance and emergency medical care in responding to an accident.

**§66.306(a)(1)** The proposed regulation should be modified to require the mine operator to conduct testing on each miner who, based on the mine operator's judgment, exercising reasonable discretion, is determined to have **probably** been involved in the accident or any activity that was the proximate cause of the accident. As proposed, the regulation is overly broad and vague because all miners at work in the mine when an accident occurs are arguably involved in work activity that "could have" contributed to the accident.

The last sentence of this Section of the proposed regulation should be deleted because a mine operator lacks the requisite control over deceased persons to conduct a toxicology test on the body. Only law enforcement officials and family members can order tests to be performed on deceased persons.

**§66.306(a)(2)** See the comment on Section 66.306(a)(1) above regarding the language: "could have" contributed to the accident.

**§66.306(g)** The proposed regulation should be modified by substituting the phrase: "to have probably" for the language: "may have." Consistent with search and seizure powers of law enforcement officials, under the U.S. Constitution, MSHA investigators should have "probable cause" to believe that a miner's actions contributed to an accident before ordering that the miner submit to post-accident testing.

**§66.307(a)** The proposed regulation should be modified to require testing when the mine operator has a reasonable suspicion that a miner is impaired or under the influence of drugs or alcohol while on mine property. The term "misused" is not defined and is subject to conflicting interpretations. Misuse that does not occur on mine property and that does not result in the miner having in his or her system while on duty any of the regulated substances, at prohibited levels, is beyond MSHA's jurisdiction and the mine operator's authority to detect.

**§66.307(g)** A mine operator lacks the legal authority to prevent a miner from driving. It is a crime in most, if not all, states for anyone, other than a law enforcement official, to deprive a person of his or her liberty. The proposed regulation should be modified to require that the mine operator offer the miner transportation to the testing site.

**§66.400(b)** This subsection should be deleted from the proposed regulation. Prohibiting mine operators from terminating employees who violate work-place safety policies is an unjustified interference in labor relations and undermines the mine operator's efforts to provide the safest work-site possible. A positive test result for .04 Blood Alcohol Content or illegal drug use should be a dischargable offense. Alpha's policy provides that a positive drug test may be reported to appropriate law enforcement officials for criminal prosecution. In Kentucky and Virginia, a miner who tests positive is *immediately ineligible to work at a coal mine* located within the subject state.

- §66.400(c)** Violation of the mine operator's policy should result in removal of the miner from safety-sensitive job duties. Discipline, up to and including discharge, should be within the discretion of the employer.
- §66.404(b)** The last sentence of this subsection should be deleted. See the comments on Section 66.400(b) above.
- §66.404(e)** This subsection should be deleted from the proposed regulation for the reasons set forth in the comments on Section 66.400(b) above. In its place, Alpha supports language consistent with the provision proposed by the National Mining Association: "Nothing in this part shall be construed as prohibiting mine operators from terminating the employment of any miner who violates the operator's drug- and alcohol-free work-place policy, including for a first offense."
- §66.405(d)** The last sentence should be deleted from this subsection of the proposed regulations for the reasons stated in the comments on Section 66.400(b) above.
- §66.406(b)(4)** As the entity having ultimate responsibility for the health and safety of all who enter its coal mine or coal processing facility, the operator must retain the discretion to impose any and all drug and alcohol testing it deems necessary to assure that such work-place is safe, even if such testing goes beyond the SAP's follow-up testing plan.
- §66.406(b)(6)** See the comments on Section 66.305(c) above.