

DEPARTMENT OF LABOR

Mine Safety and Health Administration

30 CFR Parts 56, 57, and 66

[1219-AB41]

Alcohol- and Drug-Free Mines: Policy, Prohibitions, Testing, Training, and Assistance

AGENCY: Mine Safety and Health Administration (MSHA), Labor.

ACTION: Proposed rule.

SUMMARY: The proposed rule would replace the existing metal and nonmetal standards for the possession and use of intoxicating beverages and narcotics and establish a standard for all mines. The proposed rule would designate the substances that cannot be possessed on mine property or used while performing safety-sensitive job duties, except when used according to a valid prescription. Mine operators would be required to establish an alcohol- and drug-free mine program, which includes a written policy, employee education, supervisory training, alcohol- and drug-testing for miners that perform safety-sensitive job duties and their supervisors, and referrals to assistance for miners who violate the policy. The proposed rule would also require those who violate the prohibitions to be removed from the performance of safety-sensitive job duties until they complete the recommended treatment and their alcohol- and drug-free status is confirmed by a return-to-duty test.

DATES: All comments must be received by midnight eastern standard time on October 8, 2008.

ADDRESSES: Comments must be clearly identified with "RIN 1219-AB41" and may be sent by any of the following methods:

(1) *Federal e-Rulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

(2) *Electronic mail:* zzMSHA-comments@dol.gov. Include "RIN 1219-AB41" in the subject line of the message.

(3) *Facsimile:* 202-693-9441. Include "RIN 1219-AB41" in the subject line of the message.

(4) *Regular Mail:* MSHA, Office of Standards, Regulations, and Variances, 1100 Wilson Boulevard, Room 2350, Arlington, Virginia 22209-3939.

(5) *Hand Delivery or Courier:* MSHA, Office of Standards, Regulations, and Variances, 1100 Wilson Boulevard, Room 2350, Arlington, Virginia. Sign in at the receptionist's desk on the 21st floor.

Comments can be accessed electronically at <http://www.msha.gov> under the *Rules and Regs* link. MSHA will post all comments on the Internet without change, including any personal information provided. Comments may also be reviewed at the Office of Standards, Regulations, and Variances, 1100 Wilson Boulevard, Room 2350, Arlington, Virginia. Sign in at the receptionist's desk on the 21st floor.

MSHA maintains a list that enables subscribers to receive e-mail notification when rulemaking documents are published in the **Federal Register**. To subscribe, go to <http://www.msha.gov/subscriptions/subscribe.aspx>.

Information Collection Requirements: Comments concerning the information collection requirements of this proposed rule must be clearly identified with "RIN 1219-AB41" and sent to both the Office of Management and Budget (OMB) and MSHA. Comments to OMB may be sent by mail addressed to the Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, 725 17th Street, NW., Washington, DC 20503, Attn: Desk Officer for MSHA. Comments to MSHA may be transmitted either electronically to zzMSHA-comments@dol.gov, by facsimile to (202) 693-9441, or by regular mail, hand delivery, or courier to MSHA, Office of Standards, Regulations, and Variances, 1100 Wilson Blvd., Room 2350, Arlington, Virginia 22209-3939.

FOR FURTHER INFORMATION CONTACT: Elena Carr at carr.elena@dol.gov (E-mail), 202-693-5959 (Voice).

SUPPLEMENTARY INFORMATION: The outline of this proposal is as follows:

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I. Introduction

The Mine Safety and Health Administration's (MSHA) mission is to administer and enforce the provisions of the Federal Mine Safety and Health Act of 1977 (Mine Act), as amended by the Mine Improvement and New Emergency Response Act of 2006 (MINER Act), and includes promoting improved safety and health conditions in the nation's mines. Under the Mine Act, MSHA is required to develop improved mandatory safety and health standards for coal and metal/nonmetal mines. The misuse of alcohol and/or drugs is a risk to miner safety. Because mining is inherently dangerous, MSHA is proposing a standard to address this risk.

Currently, MSHA's mine accident investigations do not routinely include inquiries into the use of alcohol or drugs as contributing factors. Consequently, there may have been accidents in which alcohol or drugs were involved but were not reported to inspectors or identified during MSHA investigations. A preliminary review of fatal and non-fatal mine accident records revealed a number of instances in which alcohol or drugs or drug paraphernalia were found or reported, or where the post-accident toxicology screen revealed the presence of alcohol or drugs.

The U.S. Department of Health and Human Services, Substance Abuse and Mental Health Services Administration's (SAMHSA) 2006 National Survey on Drug Use and Health¹ reports that in 2006, of the 17.9 million illicit drug² users age 18 and

¹ The 2006 National Survey on Drug Use and Health (NSDUH) is the annual survey and primary source of information on the use of illicit drugs, alcohol, and tobacco in the civilian, non-institutionalized population of the United States aged 12 years or older.

² The survey defined current illicit drug use as the non-medical use of marijuana/hashish, cocaine (including crack), heroin, hallucinogens, inhalants

over, 13.4 million (74.9 percent) were employed.³ Similarly, among 54 million adult binge drinkers, 42.9 million (79.4 percent) were employed, and among 16.3 million persons reporting heavy alcohol use, 12.9 million (79.2 percent) were employed.⁴ Also, in 2006, of the 20.6 million adults classified with substance dependence or abuse, 12.7 million (61.5 percent) were employed full-time.⁵ Furthermore, among the U.S. working age population (ages 18–64) diagnosed with a substance use disorder, 62.7 percent were employed full-time.⁶

According to a 1998 analysis of available toxicology reports across a variety of occupations and within different industries, the Bureau of Labor Statistics (BLS) estimated that as many as one in five workplace fatalities had a positive test for alcohol or drugs.⁷ BLS reported that alcohol was the substance found most often, appearing in 48 percent of positive reports.⁸

SAMHSA's June 2007 *Worker Substance Use and Workplace Policies and Programs Report*⁹ shows alcohol and other drug use and abuse by standard occupational and industry classifications. Illicit drug use was reported at 15.1 percent and heavy alcohol use was reported at 17.8 percent among full-time workers aged 18–64 in the construction, trade, and excavation occupational group.¹⁰ The data also show that in the mining¹¹ industry, 13.3

or prescription-type drugs. Non-medical use is defined as the use of prescription-type drugs not prescribed for the respondent by a physician or used only for the experience or feeling they caused. Non-medical use of any prescription-type pain reliever, sedative, stimulant, or tranquilizer does not include over-the-counter drugs. Non-medical use of stimulants includes methamphetamine use.

³ Substance Abuse and Mental Health Services Administration (2007). *Results from the 2006 National Survey on Drug Use and Health: National Findings* (Office of Applied Studies, NSDUH Series H–32, DHHS Publication No. SMA 07–4293). Rockville, MD.

⁴ Ibid.

⁵ Ibid.

⁶ Ibid.

⁷ Weber, W., and Cox, C. "Work-Related Fatal Injuries in 1998," *Compensation and Working Conditions*, Spring 2001, pp. 27–29.

⁸ Ibid.

⁹ Substance Abuse and Mental Health Services Administration (2007). *The Worker Substance Use and Workplace Policies and Programs Report* presents findings on substance abuse among workers and on workplace drug policy and programs from the 2002, 2003, and 2004 National Surveys on Drug Use and Health. (Office of Applied Studies, Analytic Series: A–29.)

¹⁰ The Standard Occupation System categorizes occupations into 21 groups. The Construction Trades and Extraction Workers group includes mining.

¹¹ The NAICS, which replaced the Standard Industry Classification (SIC), categorizes all industries into 19 major groups and is used to classify industries in the *Report*.

percent of full-time miners were heavy alcohol users and 7.3 percent admitted that they used illicit drugs within the past month. This does not mean that those surveyed admitted to either being under the influence or having used alcohol or drugs at work or immediately prior to work. However, the statistics do suggest a cause for employer concern since there are no guarantees that those who drink heavily or abuse drugs will constrain such behaviors, which have the potential to seriously jeopardize mine safety, to off-duty hours.

Using alcohol and/or drugs can affect a miner's coordination and judgment significantly at a time when he or she needs to be alert, aware, and capable of performing tasks where there is substantial risk of injury to oneself or others. Even prescription medications may affect a miner's perception and reaction time. Mining is a complicated and hazardous occupation, and a clear focus on the work at hand is a crucial component of mine safety. Miners under the influence of alcohol and/or prohibited drugs endanger themselves as well as their co-workers. This is of particular concern since many fatal and non-fatal mining accidents involve the operation of some type of equipment, tool, or machinery.

A number of mine operators recognize this problem, and require applicants for employment to submit to and pass a pre-employment drug screening. At the Keeping America's Mines Alcohol and Drug Free summit held on December 18, 2004, some mine operators stated that a number of job applicants are unable to pass the initial drug screen.¹²

To the extent that misuse of alcohol and/or abuse of drugs by miners is prevalent in the community, as evidenced by the survey data referenced above, and given the inherent risks in mining that would only be compounded by the dangers of alcohol or drug use at the worksite, MSHA has determined the need to protect the safety of all miners by issuing a rule that prohibits miners from using, possessing, or being under the influence of alcohol or drugs when performing safety-sensitive job duties.

II. Background

The Mine Act¹³ expressly states that the health and safety of the miner is the first priority and concern of all in the coal or other mining industry. The prevention of deaths and serious injuries from unsafe and unhealthful

¹² This summit was hosted by the states of Kentucky, Virginia and West Virginia and by the U.S. Department of Labor, Mine Safety and Health Administration.

¹³ Public Law 91–173, as amended by Public Law 95–164.

conditions and practices in the coal or other mines continues to be one of the many priorities of the Act. Section 101(a) of the Act authorizes the Secretary of Labor to develop, promulgate, and revise as may be appropriate improved mandatory health or safety standards for the protection of life and prevention of injuries in coal or other mines.

The presence and use of intoxicating beverages and narcotics is currently prohibited in both the surface and underground metal and nonmetal mine regulations found at 30 CFR 56.20001 and 57.20001. The current regulation states: "Intoxicating beverages and narcotics shall not be permitted or used in or around mines. Persons under the influence of alcohol or narcotics shall not be permitted on the job." The regulations do not contain a similar requirement for coal mines.

During the 30 years from 1978 to early 2008, a total of 270 citations were issued for violations of these alcohol and drug prohibitions. Of these, 242 (89.6 percent) were at surface mines and 28 (10.4 percent) were at underground mines. Between January 1, 2000 and June 30, 2005, penalties were assessed for 75 violations of section 56.20001 and for three violations of section 57.20001 of the regulations.

Since the late 1980s, a proactive federal government has implemented a number of programs aimed at reducing the use of alcohol and drugs in the workplace. The Anti-Drug Abuse Act of 1986 (Pub. L. 99–570), directed the Secretary of Labor to initiate efforts to address the issue. Subsequently in 1986, Executive Order 12564, Drug-Free Federal Workplace, established federal drug-free workplaces by making it a condition of employment for all federal employees to refrain from using illegal drugs. The Drug-Free Workplace Act of 1988, 41 U.S.C. 701, *et seq.*, required federal contractors and grantees to have drug-free workplaces, and the Drug-Free Workplace Act of 1998, 15 U.S.C. 654, established grant programs that assist small businesses in developing drug-free workplace programs. To protect public safety, the Omnibus Transportation Employee Testing Act of 1991, Public Law 102–143, required transportation industry employers to conduct alcohol- and drug-testing for employees in "safety-sensitive" positions, creating a model that many non-regulated employers now follow.¹⁴

¹⁴ The U.S. Department of Transportation's drug-testing regulations (49 CFR part 40) and several mode-specific regulations were published in 1988 and were initially based on the agency's general

Continued

MSHA has addressed the issue of alcohol and drug misuse since the 1990s. In recent years MSHA, in close collaboration with the Department of Labor's (DOL) Working Partners program,¹⁵ has taken the lead and initiated a number of education and outreach efforts to raise awareness in the mining industry of the safety hazards stemming from the use of alcohol and drugs. MSHA and the Joseph A. Holmes Safety Association partnered and established the Professional Miner Program to recognize miners who have worked injury-free for at least three years. Miners who have been recognized as Professional Miners sign a pledge that includes a commitment to "work to ensure a safe, healthy, and alcohol- and drug-free workplace." To date, approximately 24,252 miners (roughly six percent of the mining workforce) have taken this pledge.

Each of MSHA's 51 metal and nonmetal program field offices routinely holds meetings that include presentations and discussions of alcohol and drug abuse to raise awareness and provide information to mine operators. MSHA also participates in a DOL drug-free workplace alliance that provides union members and the construction and mining industries with information, guidance, and access to training resources that will help them understand the benefits of drug-free workplace programs and protect employee health and safety.

Since 2006, MSHA has encouraged mine operators and miners to participate in the National Drug-Free Work Week, which takes place in October. A number of mine operators have voluntarily implemented drug-free mine programs, and many report that these programs have improved mine safety and reduced workers' compensation costs. In addition, some of these mine operators have told MSHA that employees at their mines are supportive of these programs. However, the adoption of these programs is far from being an industry-wide practice. Many miners, particularly those working in small mines, are not likely to have access to these programs.

In December 2004, MSHA co-sponsored with the states of Kentucky, Virginia, and West Virginia, a one-day summit for individuals involved with coal mining operations and activities in

the Southern Appalachian region. The summit brought together industry, labor, state and federal government officials, and public health experts to share information, expertise, and experience in dealing with the misuse of alcohol and drugs by miners. At the summit, industry representatives expressed concerns about the problems related to the use of alcohol and drugs in mines. Several coal mine operators described the effectiveness of their drug-free mine programs and expressed their concern that such programs were not universal in the industry. Also at the summit, Lajuana Wilcher, Secretary of Kentucky's Environmental and Public Protection Cabinet, announced plans to form a Mine Substance Abuse Task Force to address the increasing concern about alcohol and drug abuse in the mining industry. The Task Force, charged with gathering and evaluating pertinent information on substance abuse and its impact on the health and safety of miners, issued a Final Report in December 2005, which included recommendations for state and federal regulatory agencies as well as the mining industry on how to eliminate substance abuse among miners. Kentucky and Virginia have since adopted many of the recommendations in their new state laws that require drug-testing as part of the miner certification process.

Because of concern that misuse of alcohol and drugs compromises miner safety, in October 2005, DOL published an advance notice of proposed rulemaking (ANPRM) entitled, "Use of or Impairment from Alcohol and Other Drugs on Mine Property," to inform the public that MSHA was considering a rule to address substance abuse in the mines and to gather information. Seven public information gathering meetings were also held in October and November 2005 to get additional public input.¹⁶ Comments were sought on the following key issues: The nature, extent, and impact of the problem; what substances should be prohibited; how to address/determine impairment; whether training on workplace substance abuse should be required and, if so, what training should be required; whether/how to address substance abuse in accident investigations; what the critical/effective elements of drug-free mine programs are; and what the costs/benefits of requiring and/or

implementing drug-free mine programs would be.

Although many of those commenting through oral or written statements agreed that there is a need for MSHA to take action to address substance abuse in the mines, most reports were anecdotal and data were not provided to specifically quantify the extent of the problem in the U.S. mining industry.

Since the ANPRM was published in 2005, two states have passed drug-testing laws (Kentucky in July 2006 and Virginia in April 2007) that require miners to submit to drug-testing in order to obtain and maintain their state miner's certification. A similar law was proposed in West Virginia in February 2006, but was not adopted. A subsequent version was proposed in January 2008 and is currently under consideration by the West Virginia state House Judiciary Committee.¹⁷

The 2006 Kentucky law requires that all applicants for mining certifications pass alcohol- and drug-tests administered by the state before a certification will be issued. Tests are conducted for eleven drugs: amphetamines, barbiturates, benzodiazepines, cocaine, marijuana, methadone, methaqualone, opiates, oxycodone, phencyclidine, and propoxyphene. The law gives the state authority to conduct post-accident alcohol- and drug-testing in the event of a serious mine accident, serious physical injury, or fatality. Although the state law does not require mining companies to do so, those that adopt a drug-free mine program, certified by the state's Office of Mine Safety and Licensing (OMSL), and include drug-testing and an employee assistance program (EAP), are eligible for a 5 percent credit on workers' compensation premiums. Mine operators are required to report miners who violate their substance abuse policy to the Kentucky OMSL. Although currently certified miners are not routinely tested by the state, the law requires annual education and training on alcohol and drug abuse for both miners and supervisors.

Training must be conducted by approved sources and may be provided on the owner's or licensee's site or at a private training site. In addition, employers are required to pay the miners when they attend and pay for the training. The year 2007 marked the

safety responsibilities rather than as a response to specific statutory authorization.

¹⁵ The Department of Labor's Working Partners program is an education and outreach initiative that equips employers and unions with information and tools to effectively address workplace alcohol and drug problems.

¹⁶ The public information gathering meetings were held in Salt Lake City, Utah; St. Louis, Missouri; Birmingham, Alabama; Lexington, Kentucky; Charleston, West Virginia; Pittsburgh, Pennsylvania; and Arlington, Virginia.

¹⁷ Although there are a variety of specialty certifications that miners are required to get in order to perform certain mining functions, only a handful of states (Kentucky, Virginia, West Virginia, Pennsylvania, Oklahoma, and Colorado) require a general miner certification in order to be employed as a miner.

lowest number of mining fatalities in Kentucky history and this law is credited with causing the improvement. In the time since the law was enacted, there have been seven fatal accidents. The required toxicology reports were completed in all cases and showed evidence of recent drug use in at least one of these fatal accident cases.

According to Kentucky state officials, approximately 17,100 certified miners are actively working in Kentucky's 526 licensed mines. Since the drug-testing law was enacted, a total of 11,930 pre-certification tests have been conducted. The number of positive pre-certification tests is not known because of how Kentucky tracks the data. Since the law's inception, there have been 459 reported violations of the industry's drug-free requirement, which have affected certifications as follows: 170 certifications remain suspended, 109 are on probation, 56 have been rescinded, 89 are revoked, 22 are permanently revoked, and 13 probationary periods were completed. Employers are not required to report or record the type of drugs for which miners tested positive.

The 2007 Virginia law requires mine operators to implement a substance abuse screening policy and program for all miners. At a minimum, the programs must include a pre-employment, 11-drug urine test (the same panel that Kentucky uses). The law also requires that testing be conducted as part of an accident investigation if reasonable cause exists to suspect drug involvement or that drugs were a contributing factor to a serious accident. Mine operators are required to notify the state mining board of any failure of a pre-employment substance abuse screening test, or when a miner is discharged due to a violation of the company's substance or alcohol abuse policies (e.g., a miner testing positive for intoxication while on duty status, or a miner testing positive for use of a prohibited substance without an appropriate prescription). Upon notification, any certifications held by the miner are temporarily suspended pending a hearing before the Virginia Board of Coal Mining Examiners.

According to state officials, there are 4,290 certified miners and 244 licensed mines in Virginia. To date, there have been 90 positive tests reported by companies and 3 positive tests reported as a result of an inspector-ordered test after an accident investigation. Of these, 41 have had their certificate suspended (including those waiting for their scheduled hearings), 25 certificates have been revoked, and 19 have been reinstated. Twenty-nine miners have been referred to treatment.

III. Discussion of the Proposed Rule

A. Nature, Extent, and Impact of the Problem

Employment in the mining industry during this decade has been steady at around 340,410 in about 23,054 mines (including contractors). In 2007, the Bureau of Labor Statistics reports that the industry sectors with the highest fatal occupational injury rates were agriculture, forestry, fishing and hunting (29.6 percent),¹⁸ mining (27.8 percent),¹⁹ and coal mining (49.5 percent).²⁰ It should be noted that BLS data includes oil and gas extraction, mining, and support activities for mining. While the extent of the alcohol and drug problem in mining has not been directly measured, there appears to be abuse and negative consequences in mines. Abuse of alcohol and drugs is pervasive in society and mining worksites are not immune. In fact, many communities hard-hit by drugs are those where mining is the main industry. Data collected by SAMHSA from individuals employed in the mining industry suggest that a significant number of mine operators perform pre-employment tests and perform random testing to discourage use among employed miners. Specifically, within the mining industry, nearly four out of five workers report that companies perform alcohol and drug tests on a pre-employment basis, which is nearly double the reported all-industry average. Similarly, nearly three-quarters of those working in the mine industry report random testing, which is more than double the reported all-industry average (of nearly 30 percent). These data suggest that alcohol and drug use by miners is a significant enough threat to safety to compel mine operators to voluntarily choose to conduct alcohol- and drug-testing.²¹

Since 2005, a number of media articles have highlighted drug use in the coal mines, with seven articles published since January 2007. The articles appeared mostly in local newspapers, covering situations in Virginia, Kentucky, and West Virginia.²²

¹⁸ Number and Rate of Fatal Occupational Injuries, by Industry Sector, 2006—U.S. Bureau of Labor Statistics, U.S. Department of Labor.

¹⁹ Ibid.

²⁰ U.S. Department of Labor, Bureau of Labor Statistics, Census of Fatal Occupational Injuries, 2006.

²¹ Data are extracted from on-line tables from the SAMHSA 2002, 2003, and 2004 National Surveys on Drug Use and Health.

²² The sources include: *The Washington Post*, *USA Today*, *The Charleston Gazette*, *The Courier-Journal* (Louisville, KY), *Harlan Daily Enterprise*, *The State Journal* (Charleston, WV), and *Coal Age Magazine*.

An extensive front-page article discussing drugs and drug addiction in the mines of western Virginia was published in *The Washington Post* in January 2008 and republished throughout various regional papers. Several articles suggest that miners misuse drugs (mainly prescription painkillers) after becoming addicted to them during treatment for chronic work-related pain and injuries.

Some articles also mention fatalities and serious injuries in three separate mining accidents where drugs were discovered on-site or observed via post-accident drug screening, even though the investigation reports did not necessarily consider drug use to be a contributing factor to the accidents.

In the 2005 ANPRM, MSHA sought comments on the nature, extent, and impact of substance abuse in the mining workplace. The ANPRM also sought comments on the most prevalent substances used; how widely they are used in the mine; the severity of the risks associated with alcohol or drug use by mine workers; and the link between accidents or injuries and alcohol or drug use.

Many of the 65 written and oral comments received from mine operators, mining associations, and mine workers acknowledge the existence of an alcohol and drug problem that endangers mine safety. The commenters cited a number of factors regarding the prevalence of alcohol or drugs in the mining workplace. Other commenters suggested that the geographic location of mines and whether mine operators are committed to testing and alcohol- and drug-free workplaces impacts the misuse of alcohol and drugs in the mining workplace. Two commenters stated that the use of illegal drugs was most prevalent among job applicants and new hires. Another commenter stated that alcohol abuse is a problem that most often affects older workers.

A majority of the commenters agreed that the use or misuse of alcohol and drugs poses a severe or significant risk to miners' safety. FMC Corp. stated that "miners, both surface and underground, operate expensive and dangerous equipment on a routine basis, and the use of drugs or alcohol can severely impact an individual's judgment and put co-workers and equipment at risk." Another commenter, Graymont Western US, Inc., noted that "the severity of the risk imposed by a miner impaired due to alcohol or substance abuse cannot be overstated" and "the potential hazards associated with mining are known and well documented." Thus, "permitting an impaired individual to work in an

environment where, for example, methane gas is liberated or on or around machinery capable of causing bodily harm cannot be tolerated.” The International Coal Group (ICG) “believe[s] that the abuse of a controlled substance creates a very serious risk to the health and safety of all miners.” ICG further states that “the individual places themselves and others around them in a dangerous situation [and] [a]llowing an individual to work in an environment under the influence of a control[led] substance could affect the safe operation of machinery and the sound judgment needed to make critical decisions in performing all work task[s] in a safe manner.”

A former Nevada underground miner suggested that the work shifts, travel time to and from work, lack of sleep, and chronic pain contribute to the abuse of alcohol and drugs by miners. Another commenter specifically stated that alcohol and drug abuse exists and that “mining companies must deal with the amount of alcohol and drug abuse, the types of illicit drugs abused, and the fact that the amount and types of prescription drugs abused varies greatly by location and time.”

The drugs of concern specifically mentioned by commenters include alcohol, marijuana, cocaine, opiates, methamphetamines, and prescription painkillers (notably methadone and oxycodone). Concern was expressed not only about the non-medical use of prescription painkillers, but also about the impact that legally used medications could have on impairment of job functioning.

The United Mine Workers of America (UMWA), on behalf of the Navajo Nation, expressed concern about a lack of substantial evidence that would directly link a particular accident to the use of peyote or natural herbs. Furthermore, the UMWA also questioned the accuracy of some of the ANPRM preamble statements and indicated that they would like to see “data that says where the problems are, and how they exist and what we should do from there.”

Although a subsequent internal DOL review of accident reports failed to reveal a significant number of cases where alcohol or drugs were determined to be causative factors, it did reveal a lack of consistency in whether and how alcohol and drug tests are performed and in the investigative process used to determine whether alcohol or drugs may have been factors. In fact, currently accident investigations do not routinely include an inquiry into the use of alcohol or drugs and this is a failure that the proposed rule intends to address.

Although there are limited data, anecdotal reports suggest a relationship between alcohol and drug use and mine accidents. Increased concern about the issue arose in 2003 after a blasting accident at an Eastern Kentucky coal mine (Cody Mining Co. in Floyd County) in which one miner was killed and another seriously injured. Marijuana was found at the scene, and a witness reported having seen the miners snorting crushed painkillers. An autopsy of the dead miner confirmed the presence of painkillers. The surviving miner was not tested, and there was no federal or state requirement to do so. In December 2005, a 29-year-old miner (at No. 3 Mine of HandD Mining, Inc.) died after an overloaded coal hauler severed his legs. Although no discussion was included in the fatality report about whether drug use may have contributed to the accident, the hauler’s driver and the dead miner both tested positive for painkillers and marijuana.

Another incident occurred at Langley Hill Quarry where a truck driver apparently fell from a parked truck onto a concrete pad, sustained facial and skull fractures and died sometime later. The report noted that “medical records showed a blood alcohol concentration (BAC) level of 0.04 percent,” but went on to conclude “it could not be determined why or exactly from where [the driver] fell. There was no apparent need to have climbed onto the handrail or the rear of the truck.” No explanation was given for why the BAC level does not specifically appear in the conclusion as a causal or contributing factor despite the fact that a 0.04 percent BAC, under the DOT regulations, is considered high enough to cause impairment and is a violation of the DOT drug rule.

At East Volunteer, a victim was operating a malfunctioning telescopic lift and was pinned between the lift platform rail and part of the ceiling infrastructure. The victim was noted in the report, under the “human factors” section, as having a toxicology analysis that “revealed methamphetamine intoxication,” but it was not mentioned in the root-cause analysis or conclusion. It is reasonable to question whether the victim’s intoxication may have impacted his observation skills as the malfunction was happening and possibly slowed his decision-making on how to respond.

An alcohol- and drug-free mine program as proposed in this rule will contribute to the prevention of such incidents and provide all miners, regardless of what state they work in and the size of the mine they work for,

equal safety protection from working alongside miners under the influence of alcohol and/or drugs on the job. More uniform testing and reporting would address the need to collect data about the frequency of post-accident tests that reveal alcohol or drug involvement.

B. Effective Strategies for Addressing Alcohol and Drug Problems in Mining

The ANPRM also sought data on the effectiveness of drug-free workplace programs to improve safety in the mine. Although numerous commenters expressed the belief that drug-free mine programs that include drug-testing and education were effective strategies for protecting mine safety, few compelling data were received. However, numerous mine industry employers and two state governments (Kentucky and Virginia, as discussed previously) have instituted drug-free mine programs that require drug-testing and have passed anti-drug laws specifically targeted to the mining industry and report success of these efforts.

Several commenters cited their low number of positive results on post-accident alcohol and drug tests as evidence of the effectiveness of their overall drug-free mine programs. Oxbow Mining reported that “two relatively minor accidents occurred in which the injured tested positive for illegal drugs (THC/marijuana), [and] in both cases the injured were terminated from employment.” Another commenter uses post-accident testing and noted that “if we were not conducting this testing, it is reasonable to believe the problem would be much greater.”

There was a general agreement that alcohol- and drug-free mine programs are desirable. Nonetheless several commenters opined that the issue of alcohol and drugs in the mine could not be solved through additional rulemaking. More than one commenter believed there was no reason for MSHA to issue regulations either because coal companies have already adopted or implemented drug-free workplace programs or because they do not believe the problem to be pervasive. Still others expressed support for regulations that would standardize the expectation and enforcement of an alcohol- and drug-free workforce throughout the industry. The comments did include widespread support for MSHA to provide educational information and resources that would allow mine operators the flexibility to develop programs tailored to the needs of their workers and specific worksites.

C. Basis of Proposal

Mining is inherently dangerous and the misuse of alcohol and drugs increases the risk of accident, injury, or death. It is reasonable to expect that any diminution of a miner's attentiveness, concentration, dexterity, balance, or reaction time could play a contributing, if not causative, role in an accident. No one disputes that a miner who is under the influence of alcohol and/or drugs is an unacceptable safety risk. Though some mine operators have programs in place to address this hazard, the implementation of alcohol- and drug-free mine programs is far from universal. There is a need for consistency and uniformity across all types of mining environments (whether coal or metal/nonmetal, surface or underground) with regard to the regulatory prohibitions against alcohol and drugs.

The proposed rule would provide a consistent baseline for the mining industry and afford safety for all miners. Only two states currently require such programs, and even those requirements are inconsistent. Although both Virginia and Kentucky test miners for eleven drugs, only Kentucky tests for alcohol. The question could be posed as to why miners in Virginia should have to work in environments that could be less safe than those in Kentucky where more comprehensive testing programs are in place. Also, unregulated mines in states bordering those with laws could attract miners who want to avoid testing programs, thus increasing their chances of experiencing avoidable accidents and other safety hazards. Inconsistencies also exist within MSHA's current standard prohibiting the use of intoxicating beverages and narcotics in or around mines. The current standard applies only to metal and nonmetal mines, but not to coal mines. This proposal would bring consistency for alcohol- and drug-testing and treatment referral and offer the same measure of safety for all miners in all states.

The proposal is intended to prevent the safety risks that can result from the use of alcohol and drugs by those who work on mine property. Thus, under the proposed rule, possession of alcohol or drugs on mine property as well as any use of alcohol or drugs that might compromise safety while working in safety-sensitive job duties (*i.e.*, activities where a lapse of critical concentration could result in an accident, serious injury, or death) is prohibited.

Alcohol- and drug-testing is a common practice in many industries, and most private sector employers have a great deal of latitude about whether to

drug test and how to do so. Several federal agencies (including the Departments of Defense and Energy, the Nuclear Regulatory Commission, and the National Aeronautics and Space Administration) have regulations that require contractors, grantees, and licensees to have fitness-for-duty requirements or drug-free workplace programs that include a variety of testing requirements, such as pre-employment, random, post-accident, and reasonable suspicion testing. The U.S. Department of Transportation (DOT) requires alcohol- and drug-testing of over 12 million workers performing designated safety-sensitive job duties in the aviation, trucking, railroad, mass transit, and pipeline industries and has codified its testing program requirements at 49 CFR part 40 ("part 40"). The Coast Guard, which began requiring alcohol- and drug-testing when it was an agency under DOT, has continued to require testing that follows DOT part 40 even though it is now under the Department of Homeland Security.

Because of the Government's interest in public safety, DOT developed and implemented alcohol- and drug-testing regulations covering the transportation industry in 1989 in the absence of specific authority to do so. Subsequently, Congress passed the Omnibus Transportation Employee Testing Act of 1991 that requires transportation industry employers who have covered employees (*i.e.*, employees in safety-sensitive positions) to have drug-free workplace programs which include both alcohol- and drug-testing. Similarly, many of the jobs in mines are safety-sensitive in that a momentary lapse of attention at a critical moment could cause significant injury not only to the individual but to many others. Thus, it is reasonable to expect that MSHA would act to ensure that, while on the job, miners are protected from alcohol and drug misuse of their colleagues. Furthermore, making alcohol- and drug-testing a standard part of an accident investigation and reporting the results would go a long way toward providing better information about the extent to which alcohol and drug use contributes to accidents in the mining industry.

The proposed rule would give needed guidelines, procedures, and training materials to mine operators who have not yet adopted or implemented a drug-free mine program. This proposal would incorporate the DOT part 40 testing procedures. While there are some variations based on identified needs within the mining industry, the proposed rule requires testing under the

same circumstances as DOT (pre-employment, random, post-accident, and reasonable suspicion). Similarly, the proposed rule requires removal from the performance of safety-sensitive job duties and follows the same process of referring miners who test positive to Substance Abuse Professionals (SAP) and requiring return-to-duty and follow-up testing in order to resume performance of safety-sensitive job duties. The proposed employee and supervisor training requirements are also similar in content to the DOT rule and are intended to help the mine operator, supervisors, and miners recognize and know how to handle the signs of alcohol and drug use in the mine so that workers who are intoxicated or under the influence can be removed from the job site and sent for testing when indicated.

IV. Section-by-Section Discussion

Summary of Rule: The proposed rule would be 30 CFR subchapter N (Uniform Mine Safety Regulations) part 66 and would replace the existing metal and nonmetal standards at 30 CFR 56.20001 and 57.20001. This subchapter establishes safety regulations that apply to all mines: Coal and metal/nonmetal; surface and underground.

MSHA recognizes that the existing regulations found at 30 CFR 56.20001 and 57.20001 have shortcomings in that the existing provisions do not specify what substances are prohibited or require employers to take action when miners violate the regulations. Nor do the regulations require mine operators to train miners about the dangers that alcohol and drug use can bring into the mining environment. This proposed rule seeks to address these shortcomings and provide clear and actionable guidance for mine operators.

The proposed rule would prohibit possession of alcohol or drugs on mine property; prohibit the use of or impairment from alcohol and a specific array of drugs; require alcohol- and drug-testing of miners who perform safety-sensitive job duties and their supervisors; and require that mine operators implement alcohol- and drug-free mine programs that consist of a written policy, employee education, supervisory training, alcohol- and drug-testing for miners that perform safety-sensitive job duties and their supervisors, and referrals to assistance for miners who violate the policy.

The proposed rule defines safety-sensitive job duties and specifies that those performing or supervising such duties would be subject to alcohol- and drug-testing under the following circumstances: Pre-Employment;

randomly at unannounced times; post-accident if the miner may have contributed to the accident; based on reasonable suspicion that a miner has used a prohibited substance; and as part of a return-to-duty process for miners who have violated the rule. At a minimum, testing would be performed for the following: Alcohol, amphetamines (including methamphetamines), barbiturates, benzodiazepines (e.g., Valium, Librium, Xanax), cannabinoids (THC/marijuana), cocaine, methadone, opiates (heroin, opium, codeine, morphine), phencyclidine (PCP), propoxyphene (e.g., Darvon), and synthetic and semi-synthetic opioids (hydrocodone, hydromorphone, oxycodone, and oxycodone). Testing would also be required for any additional drugs subsequently designated by the Secretary of Labor, and nothing in the rule restricts mine operators from testing for additional drugs beyond those for which the rule requires testing.

The proposed rule would require mine operators, at a minimum, to remove those miners who violate the prohibitions from the performance of safety-sensitive job duties until the miner completes the recommended treatment and their alcohol- and drug-free status is confirmed by a return-to-duty test. Although the proposed rule requires mine operators to provide one opportunity for those violating the rule to get help and retain their job, it leaves it to the mine operator to determine the disciplinary consequences for subsequent violations. The alcohol- and drug-testing and return-to-duty procedures are specified in the proposed rule. Alcohol- and drug-testing would need to be conducted consistently with procedures incorporated by reference from DOT part 40, except in those places where specifically modified by this rule.

Effective Date and Implementing Language: The proposed rule would allow mine operators who do not have an existing alcohol- and drug-free mine program in place one year from its effective date to implement its requirements. In the event a mine operator already has an alcohol- and drug-free mine program in place that tests for at least the substances specified by the rule, the mine operator would be considered to be in compliance with the proposed rule provided the prohibitions and training requirements are consistent with those in the rule even if differing drug-testing technologies are being used. However, mine operators with pre-existing drug-free mine programs would need to come into compliance with all requirements of the rule,

including drug-testing procedures and technologies, within two years of the rule's effective date. The rule would not require mine operators to conduct pre-employment testing of incumbent workers, except prior to moving a worker from a position that does not involve the performance of safety-sensitive job duties to a position that does require the performance of such duties. The proposed rule would require its training requirements for supervisors and miners to be met within 30 days of implementation of the mine's drug-free workplace program.

The decision to allow a phase-in of the new requirements is based on MSHA's desire to allow the mining industry adequate time to understand and implement the new regulatory provisions. MSHA considers one year to be an appropriate timeframe for the industry to reach compliance, given that many large mine operators already have drug-free mine and drug-testing programs in place, and that MSHA intends to provide significant compliance assistance tools, including policy templates and training materials, to the many small mine operators who do not already have such programs. The decision to consider existing programs as in compliance with the rule for a two-year period is based on the desire to minimize the regulatory burden to mine operators that already have programs deemed effective and in keeping with the purpose of this proposed rule. MSHA invites comments about the proposed amount of time allowed for implementation.

Subpart A—General

Section 66.1 Purpose

This rule is intended to protect mining's most precious resource—the miner—by preventing accidents, injuries, and fatalities at the mine associated with the misuse of alcohol and drugs. The rule would require mine operators to establish programs designed to help prevent accidents, injuries, and fatalities that could result from miners being under the influence of alcohol and/or drugs while on the job.

Section 66.2 Applicability

The mine operator would be responsible for compliance with these alcohol and drug requirements which apply to all miners performing safety-sensitive job duties and their supervisors. All coal and metal/nonmetal, surface and underground mines would be covered by the proposed rule. If the misuse of alcohol/drugs is seen as compromising safety in

metal/nonmetal mines and therefore require regulation (Sections 56.20001 and 57.20001), then alcohol and drugs should be similarly regarded as having the potential to compromise safety in coal mines.

In response to the ANPRM's request for opinions on whether or not to revise the existing metal and nonmetal standard, which states that intoxicating beverages and narcotics shall not be permitted or used in or around mines and persons under the influence of alcohol or narcotics shall not be permitted on the job, there was general agreement among commenters that any revision of this standard, or any new standard, should address both the coal and metal/nonmetal sectors. In addition, the rule would apply to all mine operators, regardless of size of workforce, as a way to ensure increased protection for all miners. Commenters to the ANPRM expressed a view that it would be unfair for the rule's prohibitions to be applied selectively.

MSHA recognizes that the overall responsibility for mine safety rests with mine operators. MSHA also understands that miners play a key role in achieving mine safety and health. Thus, the alcohol- and drug-testing and training provisions would have applicability to both mine operators and those miners who perform safety-sensitive job duties and their supervisors.

Although the general prohibitions against using or possessing alcohol and/or drugs while on mine property apply to everyone working at mines, the alcohol- and drug-testing and training provisions of the proposed rule would apply only to workers assigned to perform safety-sensitive job duties and their supervisors. This limitation of coverage is intended to strike a balance between MSHA's statutory responsibility to protect the safety of miners and a desire not to propose blanket requirements applicable to miners who do not perform safety-sensitive job duties.

Another issue that MSHA considered in specifying the applicability of the rule is that of whether the rule and all of its requirements should apply to anyone performing safety-sensitive job duties, even if for a brief amount of time, or whether the rule should apply only to those who regularly or routinely perform safety-sensitive job duties. To be consistent with other safety requirements, MSHA proposes that the alcohol- and drug-testing and training requirements will apply to all those required to take comprehensive safety training under 30 CFR parts 46 and 48 ("part 46/48"), since they already take into consideration the frequency and

regularity of exposure to safety hazards in the mines. MSHA seeks comments about the determination of who performs safety-sensitive job duties and is, therefore, required to be tested and trained.

Section 66.3 Definitions

Because this proposed rule uses a number of terms that have specific meanings in the context of the implementation of alcohol- and drug-free workplace programs, this section of the proposed rule defines and clarifies the key terms used in the Uniform Mine Regulations found at 30 CFR Subchapter N, part 66.

Subpart B—Prohibitions

Section 66.100 Prohibited Substances

This section designates the substances that shall not be permitted in or around mine property and that cannot be used while performing safety-sensitive job duties, except, in the case of prescription medications, when they are used as authorized by a physician.

Consistent with the DOT rule and with all other federal drug-free workplace requirements, MSHA's proposed rule would prohibit the use, and require testing for, the following five controlled substances (commonly known as illicit drugs or the "SAMHSA-5"):

- Amphetamines (including methamphetamines),
- Cannabinoids (marijuana/THC),
- Cocaine,
- Opiates (e.g., heroin, opium, codeine, morphine), and
- Phencyclidine (PCP).

In addition, it is proposed that the unauthorized use of the following controlled substances also be prohibited:

- Barbiturates,
- Benzodiazepines (e.g., Valium, Librium, Xanax),
- Methadone,
- Propoxyphene (e.g., Darvon), and
- Synthetic and semi-synthetic opioids (i.e., hydrocodone, hydromorphone, oxycodone).

Consistent with DOT safety regulations, MSHA also proposes prohibiting being under the influence of, using, or possessing alcohol on mine property.

Because new drugs emerge that can be subject to abuse, and trends change as to what drugs are widely abused, the proposed rule includes an opportunity for additional substances to be added to the list of prohibited substances as designated by the Secretary.

Under the Controlled Substances Act it is illegal for individuals to use any of

the proposed controlled substances, except when used pursuant to a valid prescription, regardless of where a person is at the time of use. Thus, the proposed rule's prohibition simply reflects existing federal law.

It is widely recognized that using illicit drugs or misusing prescription drugs can alter a person's ability to function, make decisions, and exercise the judgment necessary to ensure their safety and that of those around them when working in the mining environment. It is also widely recognized that alcohol, despite being legal, can impact a person's ability to work safely in a high-hazard environment.

The ANPRM asked for information, evidence-based or anecdotal, about which substances are used most prevalently by miners and create the most significant safety hazards at mines. A number of commenters, including mine operators and industry trade associations, specifically mentioned that the following drugs were prevalent and of concern: Alcohol, marijuana, cocaine, opiates, methamphetamines and prescription painkillers, notably methadone and oxycodone.

Commenters' concerns about prescription painkillers reflect recent data that indicate they are a growing problem. According to the 2006 National Survey on Drug Use and Health (NSDUH), prescription drug misuse was the second-ranking drug threat in terms of prevalence, with 7.0 million (2.8 percent) persons aged 12 or older using prescription-type psychotherapeutic drugs non-medically in the past month. Of these, 5.2 million used pain relievers, an increase from 4.7 million in 2005. Furthermore, past month non-medical use of prescription-type drugs among young adults increased from 5.4 percent in 2002 to 6.4 percent in 2006. This was primarily due to an increase in the rate of pain reliever use, which was 4.1 percent in 2002 and 4.9 percent in 2006. However, non-medical use of tranquilizers also increased over the five-year period (from 1.6 to 2.0 percent). Furthermore, data from Quest Diagnostics' *Drug Testing Index*® indicate that positive workplace drug results for amphetamines—stimulants that can include prescription drugs or diet aids—increased more than 7 percent from 2006 to 2007.

The Final Report of the Mine Substance Abuse Task Force, issued in December 2005, indicates that rates of prescription drug misuse in the Appalachian mining region may be higher than the national findings. The task force was charged with gathering

and evaluating pertinent information on alcohol and drug abuse and its impact on the health and safety of miners in Virginia, West Virginia, and Kentucky and developing recommendations for state and federal agencies and the mining industry. During the group's deliberations, testimony indicated drug dependency among miners can develop from the legitimate use of prescribed painkillers. This was further supported by a Virginia Department of Health report that identified the average drug abuser in southwest Virginia as a 37-year-old male with a history of drug abuse and treatment for pain or chronic illness, with nearly one-fourth of abusers working in construction or mining jobs.

Based on its findings, the Mine Substance Abuse Task Force recommended in its Final Report a testing protocol that included illegal drugs, alcohol, and prescription drugs used illegally or in excess of therapeutic levels. Furthermore, when the International Brotherhood of Boilermakers, a union representing 65,000 workers in a variety of trades, including mining, implemented a drug-testing program for its members in 1995, it chose to test for presence of illegal drugs as well as misuse of prescription drugs. Since that time, the union reports decreased worksite accidents involving its members. A similar program operated by the International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers also tests members for prescription drug misuse.

Furthermore, the U.S. Drug Enforcement Administration (DEA) has reported that counties in eastern Kentucky lead the nation in terms of grams of narcotic pain medications distributed on a per capita basis, and that aside from marijuana cultivation and trafficking, the trafficking and misuse of prescription drugs may be the most significant current drug threat within the Appalachia High Intensity Drug Trafficking Area (HIDTA), which encompasses counties in Kentucky and West Virginia.

Commenters to the ANPRM expressed concern not only about the non-medical use of prescription painkillers, but also about the impact that even legally used prescription medications could have on functioning and whether individuals on such painkillers can safely operate mining equipment. Also, most commenters, including those representing trade associations, mine operators, and miners, specifically referenced alcohol. Although the proposed rule does not prohibit the use of prescription drugs that may have

impairing side effects, as long as they are being prescribed by a physician, MSHA is interested in further comments about experiences and concerns about the use of such substances in mining.

According to the "Worker Substance Use and Workplace Policies and Programs" report prepared by SAMHSA, alcohol problems are 50 percent more prevalent in the mining industry than in other industries.

The intent of the proposed rule is to improve safety in the nation's mines. MSHA proposes to prohibit misuse of alcohol and prescription drugs and use of drugs on mine property based on their known incompatibility with safe working conditions as well as observations from the industry and data indicating a high prevalence of such behavior in mining regions. At the same time, MSHA recognizes that drugs of concern may vary from location to location and change over time. It is MSHA's desire to establish a standard addressing specific drugs, but the agency also wishes to allow for flexibility should other drugs not specified in this rule threaten worker safety. 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 the need arises. Public comment also is sought from individuals and entities that have experience and data regarding the specific drug compounds to be tested for within these drug groups and classes; the target parent drug and/or metabolite(s) to be tested for; the quantitated concentrations of these drugs and/or metabolites to determine an initial test presumptive positive result and a separate confirmed test result; along with the best practices and recommendations for training and certification of Medical Review Officers (MRO) in reviewing the laboratory test results for miners and differentiating use in accordance with a valid medical prescription versus illicit use.

Section 66.101 Prohibited Behaviors

This section would specify the prohibited behaviors and what is considered evidence of those behaviors, and thus a violation of the rule. Under the proposed rule the possession and use of prohibited substances on or around mine property is not permitted, unless the miner possesses a valid prescription that requires use while on mine property. In addition, reporting for or remaining on duty under the influence of or impaired by these substances would be prohibited under the proposed rule. A Blood Alcohol Concentration (BAC) level of 0.04

percent or greater would be considered verification of being under the influence of or impaired by alcohol, and a positive drug test above the cut-off levels, without a legitimate medical explanation, would constitute verification of use of a prohibited substance. MSHA proposes using the same BAC level for alcohol and cut-off levels for other substances as are used by DOT to indicate the levels at which a violation of the rule is considered to occur. However, in order to simplify the procedures and minimize confusion, MSHA has chosen not to adopt the bifurcated system used by DOT which requires temporary removal from performing safety-sensitive job duties if the BAC level on an alcohol test is between .02 and .039. MSHA believes that enforcing the 0.04 percent BAC level, which is well below what is considered under the influence by state laws governing driving under the influence, is sufficiently protective.

As MSHA's regulatory authority relates to safety, the proposed rule is intended to prevent possession and misuse of alcohol or drugs that negatively impact mine safety. It is important to note that this qualification may also relate to the use of these substances off of mine property, for example, prior to starting a work shift, since the use of prohibited substances could have extended effects that persist on the job, and therefore compromise safety. Thus, any misuse of prohibited substances that would result in effects that can compromise safety while working would constitute a violation of the rule.

The proposed rule would also prohibit miners from refusing to submit to an alcohol or drug test or attempting to alter the results of such a test. The inclusion of this provision follows the DOT model and is necessary in order to maintain the integrity of the rule's intent and its effectiveness.

Subpart C—Drug-Free Mine Program Requirement

Section 66.200 Purpose and Scope

The proposed rule would require each mine operator to implement the following five elements of an alcohol- and drug-free program: A written policy, employee education, supervisory training, alcohol- and drug-testing for miners that perform safety-sensitive job duties and their supervisors, and referrals to assistance for miners who violate the policy. A sample model alcohol- and drug-free mine policy statement and samples of training materials are available from MSHA or the Web site at <http://www.msha.gov>.

Even absent a regulation requiring such a program, commonly called a drug-free workplace program, many mine operators have voluntarily implemented them. In fact, many, including several that responded to the ANPRM, report that these programs have improved workplace safety and reduced workers' compensation costs and non-fatal days lost. Some commenters to the ANPRM also said a perception exists among miners with alcohol and/or drug problems that absent such a program there are no real consequences of their behavior and therefore, the scope of the problem is larger at mines without programs in place. While some miners will not be dissuaded from using prohibited substances by any efforts, some commenters felt that adoption of drug-free mine programs explains why fewer positive tests are seen in their operations and why miners who have tested positive in the past choose to remain clean. Thus, MSHA believes that having programs in place at all mines would be in the best interest of all miners in order to improve safety.

The elements of a drug-free mine program that would be required by the proposed rule reflect the well-established "five-step" model the federal government has used for its own drug-free workplace program since the 1980s and encourages private sector organizations to adopt through advisory programs run by both the U.S. Department of Labor and the U.S. Department of Health and Human Services/Substance Abuse and Mental Health Services Administration. Many of the mine operators responding to the ANPRM described the adoption of these elements.

Section 66.201 Written Policy

A written policy forms the foundation for a drug-free mine program. The proposed rule would require each mine operator to develop a written policy and provide it to all miners covered by the rule. Each mine's policy could be tailored; however, each one would, at a minimum, address the purpose of the rule and policy; contain a clear description of the prohibited behaviors under the rule; outline the means, including testing, for determining if the policy has been violated; include an explanation of the consequences for violating the policy; and requirements for training. It was generally agreed upon by ANPRM commenters that a policy is the most logical vehicle for clearly communicating to miners what is expected of them. Written policies are standard practice for safety policies in mining as well as other industries.

Furthermore, MSHA intends to assist mine operators in developing their policy by providing a sample template that can be used to address all required elements that can be tailored to include optional elements at the mine operator's discretion. A mine operator must ensure that every miner has been informed of the policy. The proposed rule requires that a mine operator must provide a copy of the written policy to the miners' representative or post the policy on a bulletin board in a common area in the event that the miners' do not have a representative. Mine operators may also choose to distribute the policy during the alcohol and drug-free awareness training sessions or distribute the policy in an electronic format; however, these additional means of distribution are not required. The rule would require that the policy be reviewed during training sessions and made available upon request. MSHA invites comments on how the policy should be provided to miners.

Section 66.202 Education and Awareness Program for Nonsupervisory Miners

Under this section of the proposed rule each mine operator would be required to implement an education and awareness program for nonsupervisory miners to provide them with the information they need to fully understand and comply with the rule. Those miners currently required to take comprehensive safety training under parts 46 and 48 would be required to take the training required by the proposed rule. The proposed required amount of time for this training would be 60 minutes for new hires and 30 minutes annually for all nonsupervisory miners. Topics addressed would include a review of the policy requirements; generalized information about the nature of alcoholism and drug addiction; its impact on work performance, health, and personal life; and types of help available for individuals with alcohol and/or drug problems.

Many commenters to the ANPRM support this type of training for miners. One commenter from the workplace drug prevention field stressed the importance of educating miners so that they fully understand the safety issues regarding alcohol and drug abuse rather than simply preaching about how bad alcohol and drugs can be. Another commenter, a safety director for a coal company, felt that education was important to encourage those with alcohol or drug problems to seek help, but cautioned against modifying MSHA's existing training requirements.

By contrast, a number of other commenters from within the mining industry specifically suggested such training should be incorporated into MSHA's existing training.

Although concerned about the number of required topics that already must be covered under parts 46 and 48, MSHA believes that it is appropriate to include education on alcohol and drug awareness in the required safety training both for new miners and as part of the annual refresher training. However, the proposed rule would require that the time allotted to this training be added to the total number of hours required under parts 46 and 48 so that there is sufficient time to cover all necessary training topics. The ANPRM did not specifically ask the public to comment on how much time should be dedicated to new miner and annual refresher training on alcohol and drugs, or the specific training media or methods that would be most suitable, and few commenters volunteered such information in their comments. MSHA is proposing to follow the standard established by the state of Kentucky, which requires 60 minutes of initial substance abuse training for new miners. This is also consistent with the Federal Transit Administration (FTA) requirement of 60 minutes of initial training on the alcohol- and drug-testing rule. In addition, MSHA is proposing 30 minutes annually thereafter for nonsupervisory miners to review the requirements and to remind miners of help that is available. MSHA believes this is appropriate given the need to regularly remind miners of the necessity of following any other safety practice. Furthermore, it is believed that doing so annually may encourage those with problems to seek help before they violate policy or create safety hazards. MSHA invites comments about the amount of employee education that is needed.

The proposal would require that the training be delivered by a competent person knowledgeable about workplace substance abuse, this rule's requirements, and the mine operator's policy. MSHA has already developed a number of materials that can be used to fulfill this employee education requirement. However, the training may be delivered using various technology or methods. Videos or other audio-visual materials may be used to supplement interactive training but cannot be used as a sole means of training.

MSHA invites comments about the amount and type of training for nonsupervisory 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.

Section 66.203 Training Program for Supervisors

Under this section of the proposed rule each operator would be required to implement a training program for supervisors to make them aware of their responsibilities in ensuring compliance with the rule; recognize and deal with miners who have performance problems that may be related to alcohol and/or drugs; understand how to refer miners to available assistance; and know how to make determinations for requiring a reasonable suspicion or post-accident test.

The majority of commenters to the ANPRM support this type of training. Of particular note was concern that if supervisors are responsible for making referrals for alcohol- and/or drug-testing based on reasonable suspicion, they must be adequately trained on how to make that determination. Several mine operators who commented said they already have a training program for supervisors and provided information about their programs.

MSHA is proposing that a minimum of two hours of initial training be provided to each supervisor with an additional one hour of training annually thereafter. The proposal would require that the training be delivered by a competent person knowledgeable about workplace substance abuse, this rule's requirements, and the mine operator's policy. MSHA has already developed a number of materials that can be used to fulfill this employee education requirement. However, the training may be delivered using various technology or methods. Videos or other audio-visual materials may be used to supplement interactive training but cannot be used as a sole means of training.

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.

Although all those who are in a position to observe and direct the work activities of others may have opportunities to discover reasons to suspect a miner is misusing substances, and hence benefit from reasonable suspicion training, it may not be wise to spread the authority to initiate such tests too broadly. MSHA proposes to leave it to the mine operators to determine who must receive this training. MSHA seeks comments on this proposal.

Section 66.204 Miner Assistance Following Admission of Use of Prohibited Substances

This section of the rule discusses actions that must be taken by mine operators following the admission of use of prohibited substances by miners. Mine operators are required to make such miners aware of available assistance through an employee or miner assistance program, a Substance Abuse Professional (SAP), and/or other qualified community-based resources.

MSHA recognizes the desire of mine operators to retain skilled miners who address and subsequently recover from their alcohol and/or drug problems. Information received in response to the ANPRM and anecdotally from the 2004 Summit and other sources suggests that mine operators may be able to return certain miners to work without compromising safety if they have taken advantage of access to appropriate treatment, continuing care, and supportive services. Several mine operators with existing Employee Assistance Programs (EAP) reported an approximately 50 percent success rate.

It is MSHA's intention to encourage miners to voluntarily seek assistance, but not to allow them to do so to avoid testing or other requirements under the proposed rule. MSHA invites comments on this provision. Because MSHA believes that alcohol and drug use is a serious safety problem and that addiction is a treatable disease, recognizes that mine operators need to retain experienced miners, and understands the critical roles mines play in the vitality of their local economies, 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 assistance provisions required by this rule.

Subpart D—Alcohol- and Drug-Testing Requirements

Section 66.300 Purpose and Scope

Although the ANPRM did not specifically ask for comments about the advisability of alcohol- and drug-testing, it did ask for comments about how impairment from prohibited substances should be determined. Drug-testing was the majority response, although some commenters noted that drug-testing in and of itself does not determine impairment, most commenters agreed that testing can be an effective deterrent to being impaired on the job, which ultimately is the positive effect desired.

Based on ANPRM comments received, as well as anecdotal information from the 2004 Summit, MSHA believes that alcohol- and drug-testing is an effective deterrent to impairment on the job, and therefore section 66.303 of the proposed rule would require mine operators to conduct alcohol- and drug-testing in certain specified circumstances. Similar drug-testing rules for miners were recently adopted by the states of Virginia and Kentucky. Furthermore, drug-testing is a safety practice widely used by many private-sector operators, particularly those in industries considered high hazard, and data indicate its positive effects. Notably, a study of the construction industry workplaces that conduct drug-testing revealed that they experienced a 51 percent reduction in injury rates (from 8.92 incidents per 200,000 down to 4.36 incidents per 200,000) within two years of implementation, compared with a 14 percent average decline in injury rates among construction companies in general.²³

Although there is widespread recognition among commenters about the merits of alcohol- and drug-testing, there were many concerns expressed about the various types of alcohol- and drug-testing and the exact procedures to be used. These specific concerns are discussed in the preamble relative to each type of testing that MSHA is proposing. Some ANPRM comments, including those from union representatives and trade associations, opposed any regulatory requirement for mine operators to conduct alcohol- and drug-testing. For example, a representative from the UMWA expressed skepticism that an alcohol- and drug-testing rule was necessary, citing the lack of data showing that alcohol or drugs significantly contribute to mining accidents and opines that such a rule would be unenforceable. Although he did not expressly state an opposition to alcohol- and drug-testing, he did suggest that to be effective, MSHA should do the testing itself rather than relying on the mine operators to do so. Many commenters representing mine operators expressed confidence in existing company alcohol- and drug-testing programs and felt there was no need for MSHA to impose a burdensome requirement in this area.

MSHA proposes to incorporate the DOT part 40 alcohol- and drug-testing procedures. Mine operators should read "MSHA" where these procedures refer

to "DOT." Consistent with DOT part 40, MSHA is offering mine operators the option to use service agents to perform the functions required by this subpart including services for collection of urine specimens, a certified Breath Alcohol Technician (BAT), a laboratory, Medical Review Officer (MRO), and a Substance Abuse Professional (SAP). The proposed rule includes definitions for the various types of service agents. However, MSHA, unlike DOT part 40, proposes testing for ten substances rather than five.

The proposed rule's requirements prescribe breath testing for alcohol and urine collection procedures for drug-testing; however, it is MSHA's intent to follow the U.S. Department of Health and Human Services' (HHS) lead should alternative testing procedures be approved for federal programs. MSHA is aware that some mine operators are already testing using alternative methods such as point of collection devices and alternative specimens and seeks comments and information on what their experience has been. This information will help MSHA determine whether existing mine operator programs differ significantly from proposed requirements.

The proposed rule contains a requirement that mine operators use only HHS-certified laboratories to test collected samples. HHS-certified laboratories must comply with the applicable provisions of HHS' Mandatory Guidelines for Federal Workplace Drug Testing Programs concerning accessioning and processing urine specimens. These provisions require laboratories to conduct validity testing to determine whether certain adulterants or foreign substances have been added to the specimen to mask or destroy the drug or drug metabolite that the specimen may contain as well as determine if the specimen was diluted. However, since HHS currently only certifies laboratories to test for the five illicit drugs for which federal agencies test, MSHA also proposes to require that laboratories that conduct testing under this rule be certified by the College of American Pathology (CAP) to perform Forensic Urine Drug Testing for the additional substances specified by this rule.

Although MSHA proposes to adopt DOT part 40 requirements, it does not propose to monitor or review the performance of service agents, including laboratories, used by mine operators to comply with the rule's requirements. Rather, MSHA intends for mine operators to contract with service agents who deliver quality services, possess appropriate certifications, and follow

²³ Minchin, Jr., R.E., Glagola, C.R., Guo, K. and Languell, J.L. "Case for Drug Testing of Construction Workers," *Journal of Management in Engineering* 22.1 (January 2006): 43-50.

part 40 requirements for the collection, processing, and analysis of specimens and the reporting of results. By relying on experienced and qualified service agents who adhere to and are being monitored by existing HHS and DOT standards, MSHA believes that the accuracy, validity, reliability, and integrity of the testing process will be maintained.

Section 66.301 Substances Subject to Mandatory Testing, and Section 66.302 Additional Testing

These sections identify the substances for which testing would be required. They are alcohol and ten drugs: amphetamines (including methamphetamines), barbiturates, benzodiazepines (e.g., Valium, Librium, Xanax), cannabinoids (marijuana/THC), cocaine, methadone, opiates (e.g., heroin, opium, codeine, morphine), phencyclidine (PCP), propoxyphene (e.g., Darvon), and synthetic and semi-synthetic opioids (hydrocodone, hydromorphone, oxycodone, and oxycodone). This “ten-panel” drug test is commonly used and both Virginia and Kentucky state laws already require testing of miners for these drugs. The

decision to include these drugs is based in part on indications from commenters to the ANPRM who have extensive experience in the alcohol- and drug-testing field. Commenters in the mine industry also highlighted the need to address alcohol and prescription drug abuse. Findings from federal drug-use surveys and 2008 data from the Quest *Drug Testing Index*[®] show that prescription drug-abuse is rising in the workforce, substantiating other ANPRM comments. It is worth noting that many private industry employers, including numerous mine operators, already test for these drugs. As previously indicated, HHS/SAMHSA has already established workplace drug-testing cut-off values for amphetamines, cannabinoids, cocaine, opiates, and phencyclidine, which are commonly referred to as the “SAMHSA-5.” At present, there are no federal workplace drug-testing standards for barbiturates, benzodiazepines, propoxyphene, methadone, or synthetic/semi-synthetic opioids, all of which can be legally prescribed.

Testing for abuse of prescription drugs is complicated, in that determinations of abuse can only be

made after ascertaining: (1) Whether the individual being tested has a legitimate prescription; and (2) if a legitimate prescription exists, whether the individual is using the medication in accordance with the prescriber’s instructions. In many instances, this is a case-by-case determination that can only be made by examining the half-life²⁴ of the medication; the prescribed dosage; and the individual’s metabolic rate, and comparing this information to the amount of medication in an individual’s system at the time of testing. Any deviations from the expected levels may indicate possible abuse. Various laboratories and industries have developed testing cut-off levels based on the concentration levels at which these substances can be detected via urine testing. Although each case will require individual analysis, MSHA has proposed cut-off levels based on the range of levels being used by major laboratories and industries currently testing for these substances. The tables below show commonly used cut-off levels for these substances.

Screening

	DOL (proposed) (ng/ml)	Quest Diagnostics (ng/ml)	European workplace standards (ng/ml) ²⁵
<i>Screening</i>			
Barbiturates	300	300	200
Benzodiazepines	300	300	200
Propoxyphene	300	300	300
Methadone	300	300	300
Synthetic and Semi-synthetic Opioids	300	(*)	n/a
<i>Confirmation</i>			
Barbiturates	200	200	150
Benzodiazepines	200	200	100
Propoxyphene	200	200	300
Methadone	200	200	300
Synthetic and Semi-synthetic Opioids	300	(*)	n/a

* Varies.

Data on cut-off levels for other synthetic and semi-synthetic opioids were less readily available. Six laboratories offering urine testing for oxycodone can detect levels of 100 ng/ml of this substance in subjects’ urine.

This list of prohibited substances could be revised in the future at the Secretary’s discretion and as changes in drug-abuse trends occur. Nothing in the rule prohibits mine operators from testing for additional drugs under their own authority. Though it is advisable that any additional drugs be referenced

in the mine operators’ drug-free workplace policy statements and that testing be conducted consistent with established professional standards, the rule does not speak to such matters. It is allowable for mine operators who choose to test for additional drugs to use the same sample to do so. However, though the mine operator may choose to treat positive tests for the additional drugs the same way as for those tested under this rule, it is not required. In other words, it is not considered a violation of this part for a miner to use

drugs not specified in the rule though it may violate other laws. Comments received during the ANPRM process noted that there may be times when drugs abused by miners may not be among those specified in a rule. By not restricting mine operators from testing for the use of additional drugs, the rule would enable mine operators to tailor their drug-testing policy and program as appropriate for their communities and to adapt it as needed based on changing trends in drug use. It also reflects standard latitude given to most private

²⁴ This is the period of time required for the concentration or amount of drug in the body to be reduced by one-half.

²⁵ Caplan, Y.H. & Huestis, M.A. (Eds.) (2007). *Workplace Testing*. In S. Karch (Ed.) *Drug Abuse*

Handbook, 2nd Edition. Boca Raton: Taylor & Francis Group, LLC.

sector companies. MSHA invites comments about the required panel of drugs subject to mandatory testing.

Section 66.303 Circumstances Under Which Testing Will Be Required

The proposed rule would follow the DOT part 40 testing guidelines and require testing in the following circumstances: Pre-employment testing, random testing, post-accident testing, reasonable suspicion testing, and as part of a return-to-duty and follow-up process for miners found to be in violation of the alcohol and drug prohibitions.

MSHA invites comments about the circumstances under which testing is warranted, and should therefore, be required.

Section 66.304 Pre-employment Testing

The proposed rule would require mine operators to ensure that each miner take a pre-employment alcohol and drug-test and produce a negative result before performing safety-sensitive job duties. Pre-employment testing includes testing new applicants for safety-sensitive positions as well as incumbent miners if they are switching from positions that do not involve safety-sensitive job duties to positions that involve safety-sensitive job duties. The purpose of pre-employment testing is to prevent hiring those who are unable to abstain long enough to be able to pass such a test, and to discourage those who actively use drugs from applying. Because pre-employment testing for alcohol cannot be conducted pursuant to the Americans with Disabilities Act (ADA) until after a conditional offer of employment has been made, the proposed rule would require that mine operators conduct alcohol tests only after such an offer has been made, but before a miner performs safety-sensitive job duties. Since the ADA does not impose similar restrictions on drug-testing, mine operators can conduct those tests at any time in the application and hiring process and do not need to wait until a conditional offer of employment has been made.

Pre-employment testing is widely used in the private sector and several mine operators responding to the ANPRM reported that they already conduct such testing. Although some commenters expressed concerns that pre-employment alcohol- and drug-testing would make it difficult for them to hire experienced miners due to labor shortages in some areas, others remarked that pre-employment testing alone is not sufficient to keep drug users

out of the mine since even habitual drug users can usually abstain long enough to produce the required negative result.

Most agreed, however, that pre-employment testing is a necessary element of an effective alcohol- and drug-free mine program. MSHA agrees that pre-employment alcohol- and drug-testing sends a clear message that misuse of alcohol and drugs will not be tolerated and discourages many with alcohol and/or drug problems from applying, and therefore proposes to require such testing as part of the proposed rule. Under the proposal, an applicant could not be hired if their alcohol test result is a BAC of 0.04 percent or above.

Although mine operators may choose to require that all miners who will be performing safety-sensitive job duties and their supervisors submit to alcohol- and drug-tests when the program is initiated, the rule will not require that incumbent workers take pre-employment tests to continue performing their safety-sensitive job duties. MSHA invites comments about the proposed pre-employment alcohol- and drug-testing provisions.

Section 66.305 Random Testing

For the purposes of this rule, random testing is unannounced testing performed on miners who perform safety-sensitive job duties and their supervisors, whose unique identifying information (e.g., an employee number) has been placed in a testing pool from which a scientifically arbitrary selection is made. The purpose of random testing is to deter current miners from using drugs illegally or coming to work impaired by alcohol or drugs. Many commenters expressed support for adopting random testing because of its strong deterrent effect and also shared that many of their existing programs require random testing at various annual rates. Although some commenters expressed skepticism about whether random testing is always truly random, and expressed fear that it can be used to target specific individuals, most confirmed that when done according to correct procedures, it can be an effective way to deter use provided that everyone is equally subject to such testing. Some expressed belief that it is, in fact, a more objective method of determining who gets tested than relying on supervisors to recommend drug tests based on reasonable suspicion, which, even with adequate training, is a subjective judgment.

In order to get an indication of random alcohol- and drug-testing rates used by mining industry operators, we reviewed the policies shared during the

2004 Summit, comments made during the 2005 ANPRM public meetings, and written submissions received in response to the ANPRM. Thirteen stakeholders were identified with random alcohol- and/or drug-testing programs, and 11 of these volunteered the percentages used. There was a wide variation in rates used, ranging from 1 percent to 100 percent. Most companies who shared this information were testing in the range of 10 percent to 30 percent annually.

After considering the broad spectrum of experiences with random testing, including those of DOT and the federal agency programs, MSHA is proposing to include it as a required element of the alcohol- and drug-testing rule and proposes to require that a minimum of 10 percent of miners that perform safety-sensitive job duties and their supervisors be randomly tested each year. The rule proposes to allow mine operators discretion to test at higher rates, and MSHA proposes to leave to the mine operator's discretion the frequency at which random testing is done so long as the floor of 10 percent is reached each calendar year. The rule would require that random testing be done on an unannounced, unpredictable schedule. Miners who are on leave or otherwise absent from the workplace would be tested at the next available opportunity (e.g., immediately upon their return to work).

MSHA recognizes that small mine operators may not have a pool of miners large enough to set up a meaningful random selection pool and so we would allow mine operators to fulfill the random testing requirement by forming or joining consortia for that purpose.

MSHA invites comments about the floor rate at which testing would be conducted and what options, including joining consortia, are viable for small mine operators to fulfill the random testing requirement of the proposal.

Section 66.306 Post-accident Testing

The proposed rule would require that post-accident tests be conducted by mine operators whenever an accident or occupational injury must be reported to MSHA. MSHA proposes that for fatalities and non-fatalities all surviving miners involved in any work activity that could have contributed to the accident or occupational injury be tested for alcohol and drug use as soon as practical, but no later than eight hours after the incident for alcohol and 32 hours for drugs. The differing testing windows are proposed because alcohol clears the system much more quickly than drugs. An alcohol-test result obtained beyond the eight-hour window

would not tell an investigator anything about whether the miner was under the influence at the time of the incident. The proposed rule leaves the decision about who must be tested to the mine operators, but proposes a broad reach such that anyone who could possibly have contributed to the accident could be tested. It is the intent of the proposal that mine operators make the decision to test as quickly and objectively as possible, because delay in conducting tests makes the results irrelevant to the accident investigation. Because it would be useful to collect information about whether the victim in a fatality had used alcohol or drugs in order to determine the cause and to prevent future accidents, MSHA is proposing to require post-mortem toxicology testing of the deceased. Although some states require approval of the next of kin in order to conduct and release autopsy results, a toxicology test is not nearly as invasive as an autopsy. Therefore, MSHA believes its authority to investigate following fatalities extends to requiring the performance of toxicology tests, for at least the same substances for which others are tested following an accident.

Although the proposed rule requires mine operators to make the decisions about when and whom to test following a reportable accident, MSHA proposes to give its investigators authority to require such tests if they arrive within the testing window (eight hours for alcohol and 32 hours for drugs) and determine that additional miners not already tested by the operator may have contributed to the accident. All post-accident tests would be performed at the mine operator's expense. The proposed rule also would require that post-accident tests would not be allowed to delay the delivery of necessary medical attention to injured miners. MSHA invites comments on the proposed post-accident testing provisions.

Testing following an accident can help determine whether alcohol and/or drugs were a factor in the accident. It is important to note that although the result of post-accident testing may determine recent drug or alcohol use, it cannot in and of itself prove that impairment from those substances caused the accident. The ANPRM specifically asked for comments about whether alcohol and drug inquiries should be added to post-accident investigations and, if so, what types of inquiries should be made. Several commenters supported post-accident alcohol- and drug-testing as part of these investigations. MSHA has not proposed specific changes to the accident investigation process (see 30 CFR 50.11), but 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. 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 the accident, and the frequency of all accidents/injuries where tests reveal some alcohol or drug involvement.

Section 66.307 Reasonable Suspicion Testing

Reasonable suspicion testing is conducted when a supervisor documents observable signs and symptoms that lead him or her to suspect alcohol or drug use. Such testing is a tool that supervisors can use to confirm or rule out alcohol or drugs as the cause of performance problems and behaviors that in and of themselves could create hazards. Under the proposed rule, if a test is positive the miner can, at least upon the first such violation, be referred to evaluation and treatment in order to get the help needed to be able to return to safe and productive work.

A number of those speaking at ANPRM public meetings discussed the pros and cons of reasonable suspicion testing. Most agreed that it was a useful tool available to management to verify suspected alcohol or drug use. However, several expressed their reservations about whether supervisors, even with considerable training, can readily identify when someone is impaired by drugs, noting that alcohol is much easier to detect since there is generally an odor one can smell. Others stated that there is so much subjective judgment required to make a reasonable suspicion determination that such testing is problematic to implement—especially within a regulatory framework. Some noted that even when reasonable suspicion testing is required, as it is under the DOT regulations, supervisors often fail to utilize this option. Many commenters to the ANPRM underscored the importance of providing adequate training to supervisors on how to make such determinations.

MSHA believes reasonable suspicion testing is necessary to allow individual mines to respond quickly and appropriately to individual situations. Thus, the proposed rule would require mine operators to include reasonable suspicion testing in their alcohol- and drug-free mine program. It specifies that mine operators' determinations to conduct reasonable suspicion tests must

be based on specific, contemporaneous, articulable observations concerning the appearance, behavior, speech, or body odors of the miners and that only those trained in making these determinations could do so. The proposed rule leaves it to the mine operator's discretion to determine who should be trained and authorized as a supervisor to make these determinations.

Subpart E—Operator Responsibilities, Actions, and Consequences

Under the proposed rule, mine operators would generally be cited for failure to comply with the requirements to institute an alcohol- and drug-free mine policy and program. Several of those commenting on the ANPRM expressed concern about whether mine operators should be held accountable for the actions of miners who violate the policy prohibiting use of alcohol or drugs while performing safety-sensitive job duties. 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. MSHA invites comments as to the appropriate means for enforcing the provisions of this proposed rule.

Section 66.400 Consequences to Miner for Failing an Alcohol or Drug Test or Refusal To Test

Several commenters said that an alcohol and drug regulation should hold individual miners accountable for their actions rather than place responsibility solely on mine operators, and several of these commenters referenced the smoking materials prohibition as a precedent for doing so. A number of ANPRM commenters, including the National Mining Association (NMA) and the National Stone Sand and Gravel Association (NSSGA), specifically suggested that some form of monetary penalty, like the fines for smoking, should be levied on miners who violate prohibitions against using or being under the influence of alcohol and drugs at the mine.

This proposed rule would not impose a monetary penalty on miners possessing, using or being under the influence of alcohol or drugs while at work. Rather, the proposed rule would require that miners who violate the alcohol and drug prohibitions be

immediately removed from performing safety-sensitive job duties and not allowed to perform such duties until their alcohol- and drug-free status is assured, as specified in section 66.406. The process for removal, referral and potential return to work has been modeled on the provisions of the DOT rule.

Section 66.401 Operator Actions Pending Receipt of Test Results

This section of the proposed rule specifies what actions mine operators would be required to take while awaiting the results of alcohol or drug tests. For those miners who are sent for testing based on random selection, mine operators would be required to allow miners to immediately return to performance of duties. However, in those cases where a miner is sent for testing either because the mine operator has determined that there is reason to suspect that the miner has been misusing prohibited substances or that he/she may have contributed to the cause of an accident, the mine operator would be required to remove the miner from performing safety-sensitive job duties until the test results are received. Doing so protects other miners from potential hazards when there is a reason to suspect that the miner being tested has been misusing prohibited substances. It is left to the mine operators' discretion whether or not the miner can perform other non-safety-sensitive job duties in the interim. The proposed rule would require that miners suspended from performing safety-sensitive job duties pending results all be treated in the same manner with respect to this policy and that no action adversely affecting the miner's pay and benefits pending the completion of the process would be taken. Whether or not the miner is paid during the suspension if the ultimate verified test result is positive, is left to the mine operator's discretion subject to labor-management agreements. MSHA believes that removing those who are tested for a reasonable suspicion or after involvement in an accident while awaiting the results is necessary to protect the safety of all miners.

Section 66.402 Substantiating Legitimate Use of Otherwise Prohibited Substances

This proposed section states that it is up to the mine operator to make sure that miners have ample opportunity to demonstrate that any use of prohibited substances (as defined in this rule) has been authorized by a physician. It further specifies that the possession of a valid prescription alone is not

sufficient proof of legitimate use. This provision allows the miner an opportunity to provide evidence that the prohibited substance(s) has been legitimately prescribed and allows the MRO to conduct a medical interview of each miner following a confirmed positive test; review the miner's medical history; and consider not only the possession of a valid prescription, but any other relevant biomedical factors presented by the miner. The MRO may also direct miners to undergo further medical evaluation and/or contact the miner's physician or other relevant personnel for further information. It is not the intent of this provision to have the MRO determine whether the use of a given substance is compatible with the performance of safety-sensitive job duties, as this is a determination that is best made by the miner's physician.

MSHA has modeled this provision on the DOT MRO review process and invites comments on the application of this process within the mining industry, specifically for those instances in which positive test results are received for prescription drug use that is legitimate and appropriate, but for which the MRO believes there may be safety concerns based on the nature of the medication. MSHA is also interested in learning from mine operators who already test for these additional substances about their experience differentiating legitimate from unauthorized use and for dealing with discovery of use of substances that, even when used as authorized, may have impairing effects incompatible with performance of safety-sensitive job duties.

Section 66.403 Operator Actions After Receiving Verified Test Results

This section specifies the actions mine operators must take upon receiving a verified alcohol- or drug-test result. For alcohol tests with a resulting BAC of 0.04 percent or higher or drug test results that are verified by the MRO as positive, adulterated or substituted, the mine operator must immediately remove the miner from performance of safety-sensitive job duties and refer him or her to an SAP without waiting for the subsequent results of any split specimen testing. However, the mine operator is not required to provide referral assistance upon any subsequent offenses.

MSHA invites comments about the provisions on what action mine operators must take upon receiving alcohol- and drug-test results.

Section 66.404 Evaluation and Referral

This section specifies that in each case of an alcohol- and drug-free mine policy violation the miner would be provided with a listing of SAPs. However, the proposed rule would only require mine operators to offer job security to those miners who violate the alcohol- and drug-free mine policy for the first time provided they follow the SAP treatment recommendations and required return-to-duty procedures. For subsequent offenses, mine operators would have the discretion to specify disciplinary consequences, up to and including termination. Although MSHA believes it may be in the mine operator's interest to pay for SAP and treatment services in order to retain experienced miners, it is left up to the mine operator's discretion and collective bargaining agreements whether or not to do so.

Many mine operators who responded to the ANPRM said they find offering assistance to those with alcohol and drug problems, most commonly through an Employee Assistance Program (EAP), a successful avenue for returning miners to work and assisting mine operators in retaining valued employees. In addition, one commenter expressed the opinion that rehabilitated miners are often an improvement to safety and a positive model to others. Several responders also commented on the value of an established avenue for employee assistance in emergency situations involving alcohol and drugs. Given this, the proposed rule prescribes a process through which miners who violate their employer's alcohol- and drug-free mine policy would, on first offense, be referred for assessment by a Substance Abuse Professional (SAP) and referred for treatment as appropriate, and following this, be offered the opportunity to return to duty provided compliance with certain requirements.

However, it is important to note that EAP programs include a range of services that go beyond those required to achieve recovery from alcohol and drug problems, and consequently MSHA believes that a more targeted approach is best for addressing the alcohol and drug issues outlined in the proposed rule. Therefore, MSHA only requires that mine operators make SAP services available rather than comprehensive EAPs. The proposed rule also allows the mine operator to make these services available to miners who have not violated the policy, as well as to those who have violated it more than once, as determined by the mine operator's policy.

It is also important to note that although EAPs can perform SAP functions, the drug testing and compliance monitoring function of SAPs (as specified in this proposed rule), falls outside the scope of a typical EAP practice. Therefore, simply having an EAP would not necessarily meet this requirement unless the EAP agrees to perform the SAP monitoring functions. We invite comments on the inclusion of SAP functions without EAPs.

Section 66.405 Return-to-Duty Process

The proposed rule also specifies that prior to returning to performing safety-sensitive job duties, miners must follow the treatment recommendations of the SAP, be re-evaluated by the SAP, and comply with the testing requirements established by the SAP. Miners and operators must abide by the recommendations of the agreed upon qualified SAP and may not seek a second opinion from another SAP following the initial evaluation.

Although the SAP verifies compliance with the recommended treatment, it is the mine operator who decides whether the miner will return to work performing safety-sensitive job duties. However, the proposed rule specifies that a miner who has successfully completed the recommended treatment and passed the return-to-duty tests may not be discharged for his/her first offense.

Several mine operators shared that their current policies include similar provisions. MSHA believes the proposed rule incorporates appropriate accountability but invites comments about the consequences that would be imposed upon miners by the proposed rule. MSHA also invites comments about the evaluation and referral process and the role of the SAP in recommending treatment and determining compliance.

Section 66.406 Return-to-Duty Testing and Follow-Up Testing

Return-to-duty testing is a one-time announced test that is required when a miner who tested positive in the past has completed required treatment and is ready to return to a position that involves performing safety-sensitive job duties. Follow-up testing is conducted periodically after a miner returns to work after completing treatment. It is administered on an unannounced, unpredictable basis for a pre-specified period of time. A number of commenters remarked on the importance of return-to-duty and follow-up testing to monitor compliance and provide assurances that those who have previously violated the alcohol-

and drug-free mine policy do not return to using prohibited substances.

MSHA's proposed rule includes return-to-duty and follow-up testing as a protection for mine operators and miners. MSHA proposes adopting this process as a way for mine operators to allow qualified, skilled miners to return to jobs where they are needed, while also providing protections to ensure they are safe to do so.

Specifically, the proposed rule would require miners to have a verified negative return-to-duty drug-test and an alcohol-test reading of less than a BAC of 0.04 percent before returning to the performance of safety-sensitive job duties. The number and frequency of follow-up tests would be solely determined by the SAP with a minimum of six unannounced tests in the first 12 months following return to work and continuing for a maximum of 24 months. MSHA invites comments about the provisions for return-to-duty and follow-up testing.

Subpart F—Recordkeeping and Reporting

Section 66.500 Recordkeeping Requirements

The proposed rule specifies that records of alcohol- and drug-tests would be protected as confidential communication between the mine operator and the miner. The proposed rule also prohibits sharing such records with others and requires secure storage so that they cannot be accessed by unauthorized individuals. MSHA believes this provision is necessary to ensure the privacy of individuals.

MSHA, the mining industry, and individual mine operators can all benefit from establishing an accurate quantifiable baseline of alcohol and drug problems, and tracking the trends over time that result from the proposed rule. Consequently, the proposed rule would require mine operators to keep records on the number of miners in safety-sensitive job positions that are covered by the rule and results from the various types of tests performed. An alcohol- and drug-free mine program would be required to be made available upon request. Under the proposal, MSHA would be able to analyze the information, which could add to an understanding of the extent of alcohol and drug abuse among miners and to what degree such use contributes to accidents and injuries.

Under the proposed rule, MSHA would require policy violation information (including drug-testing results) be kept consistent with existing record retention requirements. The

agency seeks comments about what records would need to be kept and for how long a period of time.

In addition, it is proposed that post-accident test results would be required to be included in reports of injuries and accidents as well as fatalities.

Although MSHA is not currently proposing specific changes to 30 CFR part 50, it is the intent to consider how best to reflect the results of post-accident drug-testing. In order to assess whether alcohol or drugs have been identified as contributing causes of accidents in the past and to understand how evidence of such use was addressed in accident reports, a review was conducted of those identifiable available fatal and non-fatal accident reports where alcohol or drugs were mentioned. Although it was not possible to determine with certainty, this examination suggested that there are more accidents (both fatal and non-fatal) than reflected in reports where alcohol or drugs are a contributing or root cause. This is based on the observation that, in both the non-fatal and fatal accident reports, there was a lack of uniformity concerning how alcohol and/or drug factors were considered and reported. Specifically, there was no regularity as to:

- Procedures and/or criteria for investigating the role of alcohol/drugs;
- The type of information provided from the investigations concerning alcohol/drugs; and
- How the information about alcohol/drugs is reported (*i.e.*, there is no standard template).

Since the mining industry currently lacks a uniform policy concerning when alcohol- and/or drug-testing is conducted after accidents or injuries, it is not surprising that there is inconsistent reporting of such data. Making alcohol- and drug-tests a standard part of an accident investigation and reporting the results could go a long way toward providing better information about the extent to which alcohol and drug use contributes to accidents in the mining industry. However, the test results alone will not sufficiently determine the role of a substance in an accident. Rather, the industry must consider the test results in light of the facts of the accident and the effects of the particular substance in question. To fully understand the role of alcohol or drugs, it might be helpful to develop a standard set of procedures/criteria for investigating the role of alcohol/drugs in non-fatal and fatal accidents and establish a taxonomy structure for information gathering and reporting.

In addition, investigators may lack the level of expertise needed to reliably:

- Identify alcohol and drug “evidence” at the post-accident scene;
- Interpret the meaning of alcohol- and drug-test results; and
- Assess whether identified alcohol/ drug involvement and their effects could have contributed to the fatality outcome by affecting behaviors such as attention, concentration, judgment, decision-making, or motor skills.

Therefore, it might be helpful to more systematically capture and report how alcohol and/or drugs are identified/ tested positive, even when not deemed to be a contributory or root cause. Furthermore, an explanation of why the alcohol/drug use was ruled out or discounted would be informative. Finally, it may be useful to provide training to investigators so that they recognize signs that alcohol and/or drugs may have been involved and know what questions to ask about possible involvement when investigating accidents. MSHA invites comments about how best to reflect post-accident test results in required reports following both fatal and non-fatal accidents.

V. Executive Order 12866

Executive Order (E.O.) 12866 requires that regulatory agencies assess both the costs and benefits of regulations. To comply with this requirement, MSHA has prepared a Preliminary Regulatory Economic Analysis (PREA) for this proposed rule. The PREA examines the costs and benefits of the proposed requirements for coal and metal/non metal (M/NM) mine operators to establish an alcohol- and drug-free mine program that includes a written policy, employee education, supervisory training, alcohol- and drug-testing for miners who perform safety-sensitive job duties and their supervisors, referrals to assistance for miners who violate the policy, and recordkeeping provisions. General administrative and clerical personnel are not covered by these proposed requirements.

The PREA also contains supporting data and explanation for the summary economic materials presented in this preamble, including data on the mining industry, feasibility, small business impacts, and paperwork. The PREA is located on MSHA’s Web site at <http://www.msha.gov/REGSINFO.HTM>. A copy of the PREA can be obtained from MSHA’s Office of Standards, Regulations and Variances at the address in the **ADDRESSES** section of the preamble. MSHA requests comments on all the estimates of costs and benefits present in this PREA and on the data

and assumptions the agency used to develop estimates.

Under E.O. 12866, a significant regulatory action is one meeting any of a number of specified conditions, including the following: Having an annual effect on the economy of \$100 million or more, creating a serious inconsistency or interfering with an action of another agency, materially altering the budgetary impact of entitlements or the rights of entitlement recipients, or raising novel legal or policy issues. Based on the PREA, MSHA has determined that this proposed rule would not have an annual effect of \$100 million or more on the economy; therefore, it is not an economically significant regulatory action. However, MSHA has concluded that the proposed rule is otherwise significant because it raises novel legal or policy issues.

A. Population at Risk

The proposed rule establishes new standards for all mine operators. With respect to the coal mining industry, the proposed rule would apply to 2,013 coal mines employing 80,256 miners and to 2,966 coal contractors with an additional 36,227 non-office employees, using MSHA’s Office of Program Evaluation and Information Resources (PEIR) data for 2007. With respect to the M/NM mines, the proposed rule would apply to 12,773 M/NM mines employing 159,644 miners and to 5,302 M/NM contractors with an additional 64,333 non-office employees, using PEIR data for 2007. Office workers who have only clerical or administrative duties are not covered by the proposed requirements for drug-testing or training. In total, this rule would apply to approximately 23,054 mine operators (*i.e.*, mines and contractors) and 340,460 miners (*i.e.*, miners and non-office employees of contractors).

B. Benefits

The use of alcohol and drugs in the workplace negatively affects U.S. industry through lost productivity, workplace accidents and injuries, employee absenteeism, low morale, and increased illness. The loss to U.S. companies due to employees’ alcohol and drug use and related problems is estimated at billions of dollars per year. This proposed rule would require mine operators to establish an alcohol- and drug-free workplace program to prevent workplace accidents, injuries and fatalities in mines caused by the use or abuse of alcohol and/or drugs.

MSHA currently prohibits the use of intoxicating beverages and narcotics in or around M/NM mines; and persons

under the influence of alcohol or narcotics are not permitted on the job site. However, since these requirements only apply to M/NM operators, MSHA believes that uniform policies and procedures are needed to prevent the misuse of alcohol and drugs that could impair the functioning of miners and result in the injury or death in both coal and M/NM mines.

A major benefit from this rulemaking would be the prevention of injuries and fatalities resulting from accidents caused by neglect or error on the part of individuals whose judgment or motor skills may be impaired by the use of alcohol and/or drugs. MSHA’s reporting process does routinely include inquiries into the use of alcohol or drugs as contributing factors in mine accidents. Consequently, there may have been accidents in which alcohol or drugs were involved but were not reported to inspectors or identified during MSHA investigations. A preliminary review by MSHA of fatal and non-fatal mine accident records revealed a number of instances in which alcohol, drugs, or drug paraphernalia were found or reported at the scene, or where the post-accident toxicology screens of those involved in an accident revealed the presence of alcohol or drugs.

The U.S. Department of Health and Human Services, Substance Abuse and Mental Health Services Administration’s (SAMHSA) 2006 National Survey on Drug Use and Health²⁶ reports that in 2006, of the 17.9 million current illicit drug²⁷ users age 18 and over, 13.4 million (74.9 percent) were employed.²⁸ Similarly, among 54 million adult binge drinkers, 42.9 million (79.4 percent) were employed, and among 16.3 million persons reporting heavy alcohol use, 12.9 million (79.2 percent) were employed.²⁹ Also, in 2006, of the 20.6

²⁶ The 2006 National Survey on Drug Use and Health (NSDUH) is the annual survey and primary source of information on the use of illicit drugs, alcohol, and tobacco in the civilian, non-institutionalized population of the United States aged 12 years old or older.

²⁷ The survey defined current illicit drug use as the non-medical use of marijuana/hashish, cocaine (including crack), heroin, hallucinogens, inhalants or prescription-type drugs. Non-medical use is defined as the use of prescription-type drugs not prescribed for the respondent by a physician or used only for the experience or feeling they caused. Non-medical use of any prescription-type pain reliever, sedative, stimulant, or tranquilizer does not include over-the-counter drugs. Non-medical use of stimulants includes methamphetamine use.

²⁸ Substance Abuse and Mental Health Services Administration. (2007). *Results from the 2006 National Survey on Drug Use and Health: National Findings* (Office of Applied Studies, NSDUH Series H-32, DHHS Publication No. SMA 07-4293). Rockville, MD.

²⁹ *Ibid.*

million adults classified with substance dependence or abuse, 12.7 million (61.5 percent) were employed full-time.³⁰ Furthermore, among the U.S. working age population (ages 18–64) diagnosed with a substance use disorder, 62.7 percent were employed full-time.³¹

In a 1998 analysis of available toxicology reports across a variety of occupations and within different industries, the Bureau of Labor Statistics (BLS) estimated that as many as one in five workplace fatalities had a positive test for alcohol or drugs.³² BLS reported that alcohol was the substance found most often, appearing in 48 percent of positive reports.³³

SAMHSA's June 2007 *Worker Substance Use and Workplace Policies and Programs Report*³⁴ shows alcohol and drug use and abuse by standard occupational and industry classifications. Illicit drug use was reported at 15.1 percent and heavy alcohol use was 17.8 percent among full-time workers aged 18–64 in the construction, trade, and excavation occupational group.³⁵ The data also show that in the mining³⁶ industry, 13.3 percent of full-time miners were heavy alcohol users and 7.3 percent admitted that they used illicit drugs within the past month. This does not mean that those surveyed admitted to either being under the influence or having used alcohol or drugs at work or immediately prior to work. However, the statistics do suggest a cause for employer concern since there are no guarantees that those who drink heavily or use illicit drugs would constrain such behaviors, which have the potential to seriously

jeopardize mine safety, to off-duty hours. Many firms find that addressing alcohol and drug use is well worth the time and money involved in a drug-testing program. For example, after MSHA published its 2005 ANPRM, an industry representative said, "The principle benefit is it's a safe workplace due to employees operating out of the influence of drugs or alcohol." A commenter from a trade association said, "The costs to a mine operation of substance abuse in worker health and safety, as well as production losses, are already a powerful incentive to maintain an effective substance abuse program."

The purpose of the requirements in the proposed rule is to establish alcohol- and drug-free mine programs in all mine operations. These programs are designed to help prevent accidents, injuries, and fatalities resulting from the misuse of alcohol and use of prohibited drugs by miners who perform safety-sensitive job duties on mine property. An alcohol- and drug-free mine program that includes a written policy, employee education, supervisory training, alcohol- and drug-testing for miners that perform safety-sensitive job duties and their supervisors, and referrals to assistance for miners who violate the policy, would decrease injuries and fatalities. The number of fatalities associated with alcohol or drugs is difficult to quantify due to a lack of consistency in reporting the possibility of alcohol or drug involvement in injuries and fatalities.

MSHA's analysis of fatal accidents from 1975 to 2007 revealed that 24 of 978 reported deaths involved alcohol or drugs. From 1983 through 2007, there were 593,047 non-fatal accidents reported, with 56 possibly involving alcohol or drugs. MSHA believes these figures under-represent the negative effects of alcohol and drugs in the mines because of a current lack of uniformity in investigation and particularly in reporting procedures.

Mine operators are not currently required to have an alcohol- and drug-free mine program for preventing the use of alcohol and drugs that could impair the function of miners and result in the injury or death of themselves or their coworkers. However, MSHA believes this proposed rule would benefit both mine operators and miners in the following ways:

(1) Mine operators would not have to hire new miners who cannot pass a pre-employment test, so all mine operators would benefit from not hiring persons shown to misuse alcohol and/or drugs. (2) Small mines in particular would benefit by implementing drug-testing procedures, since many small mines currently do not test for drug use and hence employ those unable to pass pre-employment drug-tests required by larger mines. (3) All mine operators across the country would be subject to consistent requirements. (4) Miners would benefit by having job security in the event that they self-disclose an alcohol or drug problem or seek treatment upon their first positive alcohol-or drug-test.

Not implementing this rule would allow accidents related to alcohol and drugs, including cases where innocent co-workers are harmed, to continue to be underreported and possibly allow accidents related to alcohol and drugs to go unabated.

C. Compliance Costs

MSHA estimated the first-year costs and the annual recurring costs of the proposed rule. MSHA estimated costs to mine operators on the following proposed provisions: Establish an alcohol- and drug-free mine program that includes a written policy, employee education, supervisory training, alcohol- and drug-testing for miners that perform safety-sensitive duties and their supervisors, referrals to assistance for miners who violate the policy, and record retention.

MSHA estimates that the total cost for the initial year of the proposed rule would be approximately \$16,008,983 for all coal and M/NM mine operators and mine contractors. Of the \$16.0 million, MSHA estimates approximately \$1,253,065 in costs are related to the establishment of an alcohol- and drug-free mine program that includes a written policy, \$7,150,544 in costs are for the alcohol- and drug-testing; \$6,840,971 in costs are related to training requirements, and \$764,402 are related to the record retention provisions. Table 1 provides a summary of the approximate first year costs of the proposed rule by mine size and proposed provision.

³⁰ Ibid.

³¹ Ibid.

³² Weber, W., and Cox, C. "Work-Related Fatal Injuries in 1998" *Compensation and Working Conditions*, Spring 2001, pp. 27–29.

³³ Ibid.

³⁴ Substance Abuse and Mental Health Services Administration (2007). *The Worker Substance Use and Workplace Policies and Programs Report* presents findings on substance use among workers and on workplace drug policy and programs from the 2002, 2003, and 2004 National Surveys of Drug Use and Health. (Office of Applied Studies, Analytic Series: A–29).

³⁵ The Standard Occupation System categorizes occupations into 21 groups. The Construction Trades and Extraction Workers group includes mining.

³⁶ The NAICS, which replaced the Standard Industry Classification (SIC), categorizes all industries into 19 major groups and is used to classify industries in the *Report*.

TABLE 1—SUMMARY OF THE APPROXIMATE FIRST YEAR COSTS

Proposed provisions	Employees			Total first year costs
	1–19	20–500	501+	
Written policy	\$1,074,099	\$178,490	\$476	\$1,253,065
Alcohol and drug testing	2,479,298	4,512,894	158,352	7,150,544
Training	2,291,625	4,396,829	152,517	6,840,971
Recordkeeping	309,012	401,312	54,079	764,403
Total First Year Costs	6,154,034	9,489,524	365,424	16,008,983

MSHA estimated annual recurring cost thereafter for all mine operators and contractors is \$13,008,951. Of the \$13.0 million, MSHA estimates approximately

\$7,150,544 in costs are for the alcohol- and drug-testing; \$5,094,004 in costs are related to training requirements, and \$764,402 are related to the record

retention provisions. Table 2 provides a summary of the approximate annual recurring costs of the proposed rule by mine size and proposed provision.

TABLE 2—SUMMARY OF THE APPROXIMATE ANNUAL RECURRING COSTS

Proposed provisions	Employees			Total annual recurring costs
	1–19	20–500	501+	
Alcohol and drug testing	\$2,479,298	\$4,512,894	\$158,352	\$7,150,544
Training	1,712,395	3,268,844	112,765	5,094,004
Recordkeeping	309,012	401,312	54,079	764,403
Total Annual Recurring Costs	4,500,705	8,183,050	325,196	13,008,951

D. Feasibility

MSHA has concluded that the requirements of the proposed rule are technologically and economically feasible within the coal and M/NM mining sectors.

This proposed rule is not a technology-forcing standard and does not involve activities on the frontier of scientific knowledge. In addition, the proposed rule would not require the purchase of any machinery or equipment to implement these standards. Therefore, we have concluded that this proposed rule is technologically feasible.

The estimated compliance cost of the proposed rule for all mines in the first year is \$16.0 million and in subsequent years the annual recurring cost is approximately \$13.0 million, which is 0.00016 percent and 0.00013 percent, respectively, of its annual revenue of \$99.4 billion. MSHA concludes that the final rule would be economically feasible for both the coal and M/NM industries because the annual recurring compliance costs are well below one percent of the estimated annual revenue for all mines.

VI. Regulatory Flexibility Act and Small Business Regulatory Enforcement Fairness Act

In accordance with the Regulatory Flexibility Act (RFA) of 1980, as amended by the Small Business Regulatory Enforcement Fairness Act

(SBREFA), MSHA has analyzed the impact of the proposed rule on small entities. Based on the analysis, MSHA certifies that the proposed rule does not have a significant economic impact on a substantial number of small entities. The factual basis for this certification is presented in the PREA and summarized below.

A. Definition of a Small Mine

Under the RFA, in analyzing the impact of a rule on small entities, MSHA must use the Small Business Administration's (SBA) definition for a small entity or, after consultation with the SBA Office of Advocacy, establish an alternative definition for the mining industry by publishing that definition in the **Federal Register** for notice and comment. MSHA has not established an alternative definition, and hence is required to use the SBA's definition. The SBA defines a small entity in the mining industry as an establishment with 500 or fewer employees (13 CFR 121.201). This analysis complies with the legal requirements of the RFA for an analysis of the impacts on "small entities." MSHA concludes that it can certify that the final rule would not have a significant economic impact on a substantial number of small entities.

B. Factual Basis for Certification

MSHA's analysis of the economic impact on "small entities" begins with a "screening" analysis. The screening compares the estimated cost of a rule for

small entities to the estimated revenue. When the estimated cost is less than one percent of estimated revenue (for the size categories considered), MSHA believes it is generally appropriate to conclude that the proposed rule does not have a significant economic impact on a substantial number of small entities. If estimated costs are equal to or exceed one percent of revenues, MSHA would investigate whether further analysis is required.

Coal Mine Revenues

Revenues for coal mines are derived from data on underground and surface coal prices and tonnage. Total underground coal production in 2007 was approximately 349 million tons. The 2006 price of underground coal was \$38.28 per ton.³⁷ To estimate the 2007 price, the 2006 price was increased by 5.5 percent to \$40.37, using the Bureau of Labor Statistics producer price index for underground bituminous coal. Total estimated revenue in 2007 for underground coal production was \$14.1 billion. Multiplying tons by the 2007 price per ton, 2007 underground coal revenue, by mine size, is \$11.2 billion for mines with 1–500 employees.

Total surface coal production in 2007 was approximately 792 million tons. The 2006 price of surface coal was \$18.88 per ton.³⁸ To estimate the 2007

³⁷ U.S. DOE, EIA, "Annual Coal Report 2006," Table 28, October 2007.

³⁸ Ibid.

price, the 2006 price was increased by 8.7 percent to \$20.52, using the Bureau of Labor Statistics producer price index for surface bituminous coal. Total estimated revenue in 2007 for surface coal production was \$16.2 billion. Multiplying tons by the 2007 price per ton, 2007 surface coal revenue, by mine size, is \$11 billion for mines with 1–500 employees.

Underground and surface coal revenue is estimated to be approximately \$22.2 billion for mines with 1–500 employees. Underground and surface coal revenues for all mines are estimated to be \$30.3 million.

M/NM Mine Revenues

Total 2007 revenues for M/NM mines are estimated to be \$68 billion. Total M/NM 2007 employment hours are 362,707,747. Estimated revenues were divided by employment hours to arrive at an average of \$187.48 revenue per hour. Revenue for surface M/NM mines with 1–500 employees is approximately \$54.8 billion (292.6 million employment hours × \$187.48). Revenue for underground M/NM mines with 1–500 employees is approximately \$5.1 billion (27.2 million employment hours × \$187.48). Thus, revenues for surface and underground mines with 1–500 employees are estimated to be \$59.9 billion.

Results of Screening Analysis

The compliance cost of the proposed rule for coal mines and M/NM with 1–500 employees as a percent of revenues is 0.0192 percent for the first year and 0.0156 percent for ongoing years. This suggests that the proposed rule would not have a significant economic impact on a substantial number of small entities.

VII. Paperwork Reduction Act

This NPRM contains information collection provisions which are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (PRA). The title, description, and respondent description of the information collections are shown in the following paragraphs with an estimate of the annual reporting burden. Included in the estimate is the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

Title: Alcohol- and Drug-Free Mines: Policy, Prohibitions, Testing, Training, and Assistance.

Description: Alcohol- and Drug-Free Mines: Policy, Prohibitions, Testing, Training, and Assistance establishes a

requirement for mine operators to set up alcohol- and drug-free mine programs that include a written policy, employee education, supervisory training, alcohol- and drug-testing for miners that perform safety-sensitive job duties and their supervisors, and referrals to assistance for miners who violate the policy. The proposed rule would also require those who violate the prohibitions to be removed from the performance of safety-sensitive job duties until they complete the recommended treatment and their alcohol- and drug-free status is confirmed by a return-to-duty test. These guidelines are established under authority of 30 U.S.C. 811.

The proposed rule establishes paperwork requirements at section 66.201 and subpart F. In addition, certain paperwork requirements at section 66.300 are incorporated by reference from title 49 CFR part 40, *Procedures for Transportation Workplace Drug and Alcohol Testing Programs*.

This proposed rule requires that mine operators establish and implement a written alcohol- and drug-free mine policy and requires mine operators to keep and retain test records. The policy that can be based on a model provided by MSHA and posted in common areas accessible to miners should inform workers of the prohibitions against alcohol and drug use; the consequences for their use; and the existence of training requirements for certain miners and what those training requirements are. In addition, mine operators are required to maintain records of the following information: The number of workers in safety-sensitive positions; the total number of miners tested; the number of verified positive alcohol and drug tests for each substance; which miners were tested; testing dates; and test results. Mine operators are also required to maintain records of instances in which post-accident or reasonable suspicion testing is not conducted within the timeframes required by the rule. Such records should include an explanation of the reasons why testing was not conducted as required. Mine operators would be required to retain these records for at least three years.

By incorporating title 49 CFR part 40 by reference, these guidelines also require the OMB-approved federal Custody and Control Form (CCF) to document the integrity and security of alcohol- and drug-testing specimens from the time of collection through analysis.

Description of Respondents: Mine operators/or service agents acting on behalf of affected mine operators.

Response Burden Estimate: We anticipate the total annual response burden imposed by these guidelines to be 72,791 hours for the initial year and 49,737 hours per year thereafter. The initial year burden estimate is based on the following: (1) A mine owner is estimated to require an average of one hour to develop and post the required drug-free workplace policy using the MSHA sample. Based on a total of 23,054 mines, this results in 23,054 burden hours for development and posting of the policy. (2) The annual maintenance for non-substantive changes of the written policy is estimated at 0.167 burden hours per mine. Based on a total of 23,054, this results in 3,850 burden hours. (3) The annual recordkeeping to maintain test records is estimated at 0.167 burden hours per mine. Based on a total of 23,054 mines, this results in 3,850 burden hours for recordkeeping and retention. (4) We estimate the completion of 201,618 Alcohol Testing Forms and federal Custody and Control Forms each year. This is based on a total miner population of 340,460 with 10 percent of the population being subjected to random testing for alcohol and drugs and about 20 percent being subjected to other forms of testing for alcohol and drugs that include pre-employment, post-accident, reasonable suspicion, return-to-duty, and follow-up testing. The average response burden for the Alcohol Testing Forms is estimated at 0.167 burden hours per mine. This results in 16,835 burden hours (0.167 hours per form × 100,809 forms). The average response burden for completion of the federal Custody and Control Forms is estimated by the U.S. Department of Health and Human Services as 0.25 burden hours per form, computed as follows: 5 minutes for each donor (miner), 4 minutes for the collector, 3 minutes for the laboratory, and 3 minutes for the Medical Review Officer. This results in 25,202 hours of burden (0.25 hours per form × 100,809 forms).

The subsequent year estimate of 49,737 burden hours, where the burden associated with the development of the written policy is excluded, is based on 3,850 hours to maintain the written policy, 3,850 hours for recordkeeping and retention, 16,835 hours for completion of the Alcohol Testing Form and 25,202 hours for completion of the federal Custody and Control Form.

Individuals and organizations may submit comments on these burden estimates or any other aspect of these information collection provisions, including suggestions for reducing the

burden. MSHA is particularly interested in comments which:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
 - Enhance the quality, utility, and clarity of the information to be collected; and
 - Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submissions of responses.

VIII. Other Regulatory Considerations

A. The Unfunded Mandates Reform Act of 1995

MSHA has reviewed the proposed rule under the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1501 *et seq.*). MSHA has determined that the proposed rule would not include any federal mandate that may result in increased expenditures by state, local, or tribal governments, and it would not increase private-sector expenditures by more than \$100 million in any one year or significantly or uniquely affect small governments. Accordingly, the Unfunded Mandates Reform Act of 1995 requires no further agency action or analysis.

B. The Treasury and General Government Appropriations Act of 1999: Assessment of Federal Regulations and Policies on Families

This proposed rule will have no effect on family well-being or stability, marital commitment, parental rights or authority, or income or poverty of families and children. Accordingly, section 654 of the Treasury and General Government Appropriations Act of 1999 (5 U.S.C. 601 note) requires no further agency action or analysis.

C. Executive Order 12630: Government Actions and Interference With Constitutionally Protected Property Rights

This proposed rule would not implement a policy with takings implications. Accordingly, E.O. 12630, Governmental Actions and Interference with Constitutionally Protected Property

Rights, requires no further agency action or analysis.

D. Executive Order 12988: Civil Justice Reform

This proposed rule was written to provide a clear legal standard for affected conduct and was carefully reviewed to eliminate drafting errors and ambiguities, so as to minimize litigation and undue burden on the federal court system. Accordingly, this proposed rule meets the applicable standards provided in section 3 of E.O. 12988, Civil Justice Reform.

E. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks

This proposed rule would have no adverse impact on children. Accordingly, E.O. 13045, Protection of Children from Environmental Health Risks and Safety Risks, as amended by E.O. 13229 and 13296, requires no further agency action or analysis.

F. Executive Order 13132: Federalism

The proposed rule would not have "federalism implications" because it would not "have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government." Accordingly, E.O. 13132 requires no further agency action or analysis.

G. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This proposed rule would not have "tribal implications" because it does not "have substantial direct effects on one or more Indian tribes, on the relationship between the federal government and Indian tribes, or on the distribution of power and responsibilities between the federal government and Indian tribes." Accordingly, E.O. 13175, Consultation and Coordination with Indian Tribal Governments, requires no further agency action or analysis.

H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This proposed rule has been reviewed for its impact on the supply, distribution, and use of energy because it applies to the underground coal mining sector. This proposed rule will not impose any "significant energy action" because it will not be "likely to have a significant adverse effect on the supply, distribution, or use of energy

*** (including a shortfall in supply, price increases, and increased use of foreign supplies)." Accordingly, E.O. 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use, requires no further agency action or analysis.

I. Executive Order 13272: Proper Consideration of Small Entities in Agency Rulemaking

MSHA has reviewed the proposed rule to assess and take appropriate account of its potential impact on small businesses, small governmental jurisdictions, and small organizations. MSHA has determined and certified that the proposed rule does not have a significant economic impact on a substantial number of small entities.

List of Subjects

30 CFR Part 56

Chemicals, Electric power, Explosives, Fire prevention, Hazardous substances, Metals, Mine safety and health, Noise control, Reporting and recordkeeping requirements.

30 CFR Part 57

Chemicals, Electric power, Explosives, Fire prevention, Gases, Hazardous substances, Metals, Mine safety and health, Noise control, Radiation protection, Reporting and recordkeeping requirements.

30 CFR Part 66

Alcohol- and drug-testing, Mine safety and health, Reporting and recordkeeping requirements.

Dated: August 28, 2008.

Richard E. Stickler,

Acting Assistant Secretary for Mine Safety and Health.

For the reasons set forth in the preamble, and under the authority of the Federal Mine Safety and Health Act of 1977, MSHA is proposing to amend chapter I of title 30 of the Code of Federal Regulations as follows.

PART 56—SAFETY AND HEALTH STANDARDS—SURFACE METAL AND NON METAL MINES

1. The authority citation for part 56 continues to read as follows.

Authority: 30 U.S.C. 811.

Subpart S [Amended]

§ 56.20001 [Removed and Reserved]

2. Remove and reserve § 56.20001.

PART 57—SAFETY AND HEALTH STANDARDS—UNDERGROUND METAL AND NON METAL MINES

3. The authority citation for part 57 continues to read as follows.

Authority: 30 U.S.C. 811.

Subpart S [Amended]

§ 57.20001 [Removed and Reserved]

4. Remove and reserve § 57.20001.

5. A new subchapter N and a new part 66 are added to title 30 of the Code of Federal Regulations to read as follows.

30 CFR Subchapter N—Uniform Mine Safety Regulations

PART 66—ALCOHOL- AND DRUG-FREE MINES: POLICY, PROHIBITIONS, TESTING, TRAINING, AND ASSISTANCE

Sec.

Subpart A—General

- 66.1 Purpose.
- 66.2 Applicability.
- 66.3 Definitions.

Subpart B—Prohibitions

- 66.100 Prohibited substances.
- 66.101 Prohibited behaviors.

Subpart C—Alcohol- and Drug-Free Mine Program Requirement

- 66.200 Purpose and scope.
- 66.201 Written policy.
- 66.202 Education and awareness program for miners.
- 66.203 Training program for supervisors.
- 66.204 Miner assistance following admission of use of prohibited substances.

Subpart D—Alcohol- and Drug-Testing Requirements

- 66.300 Purpose and scope.
- 66.301 Substances subject to mandatory testing.
- 66.302 Additional testing.
- 66.303 Circumstances under which testing will be required.
- 66.304 Pre-employment testing.
- 66.305 Random testing.
- 66.306 Post-accident testing.
- 66.307 Reasonable suspicion testing.

Subpart E—Operator Responsibilities, Actions, and Consequences

- 66.400 Consequences to miner for failing an alcohol or drug test or refusal to test.
- 66.401 Operator actions pending receipt of test results.
- 66.402 Substantiating legitimate use of otherwise prohibited substances.
- 66.403 Operator actions after receiving verified test results.
- 66.404 Evaluation and referral.
- 66.405 Return-to-duty process.
- 66.406 Return-to-duty and follow-up testing.

Subpart F—Recordkeeping and Reporting

- 66.500 Recordkeeping requirements.

Authority: 30 U.S.C. 811.

30 CFR Subchapter N—Uniform Mine Safety Regulations

PART 66—ALCOHOL- AND DRUG-FREE MINES: POLICY, PROHIBITIONS, TESTING, TRAINING AND ASSISTANCE

Subpart A—General

§ 66.1 Purpose.

This part establishes the requirements for mine operators to develop an alcohol- and drug-free mine program to prevent accidents, injuries, and fatalities resulting from the misuse of prohibited substances by miners performing safety-sensitive job duties and their supervisors. Alcohol- and drug-free mine programs established prior to the effective date of this rule that include consistent policies, and alcohol- and drug-testing programs, and provide at least the same level of protection as these requirements, are in compliance with this standard.

§ 66.2 Applicability.

(a) The possession or misuse of prohibited substances, except when used according to a valid prescription, is prohibited for all persons on and around mine property.

(b) The alcohol- and drug-testing provisions in subpart D apply only to those miners who perform safety-sensitive job duties. Management and administrative personnel who supervise the performance of safety-sensitive job duties are also considered to hold safety-sensitive positions; however, general administrative and clerical personnel are not. Such determinations shall be made consistent with the requirements of 30 CFR parts 46 and 48 for who must take comprehensive miner training.

(c) Mine operators must inform all miners and contractors who perform work on their mine property of the requirements under this rule.

§ 66.3 Definitions.

As used in this part:

Adulterated specimen. A specimen that contains a substance that is not expected to be present in human urine, or contains a substance expected to be present but is at a concentration so high that it is not consistent with human urine.

Alcohol. The intoxicating agent in beverage alcohol, ethyl alcohol, or other low molecular weight alcohols including methyl and isopropyl alcohol.

Alcohol concentration. The alcohol in a volume of breath expressed in terms of grams of alcohol per 210 liters of

breath as indicated by a breath test under this part. This provides an indication of the blood alcohol concentration (BAC) level which is equated with impairment levels.

Breath Alcohol Technician (BAT). A person who instructs and assists miners in the alcohol-testing process and operates an evidential breath testing device. A BAT can be an employee of the mine operator. A BAT must have received qualifications training that includes training in alcohol-testing procedures and the operation of alcohol-testing devices.

Confirmed drug test. A confirmation test result received by a Medical Review Officer (MRO) from a laboratory.

Cut-off levels. The cut-off concentration of drug metabolite that is used for each drug class to call a urine specimen negative or positive. Based on the cut-off concentration used for each different drug class, a negative specimen is any specimen that contains no drug or whose apparent concentration of drug or drug metabolite is less than the cut-off concentration used for that drug or drug class.

Drug-free workplace program. A program that prohibits the possession or misuse of prohibited substances while working and includes five elements (written policy, education, training, testing, and referrals for assistance) designed to prevent impairing effects that can compromise workplace safety. This term is used interchangeably with an “alcohol- and drug-free workplace program” and “drug-free mine program.”

Employee Assistance Program (EAP). A worksite-focused program designed to assist in the identification and resolution of problems associated with personal problems, such as alcohol and/or drug abuse.

Follow-up testing. A minimum of six unannounced tests performed in the first 12 months on any miner who returns to safety-sensitive job duties after violating the alcohol- and drug-free workplace policy.

Initial drug test. The test used to differentiate a negative specimen from one that requires further testing for drugs or drug metabolites.

Laboratory. A U.S. laboratory certified by the U.S. Department of Health and Human Services (HHS), Substance Abuse and Mental Health Services Administration (SAMHSA) as meeting the minimum standards of subpart C of the HHS Mandatory Guidelines for Federal Workplace Drug Testing Programs and which is also certified by the College of American Pathologists (CAP) to perform Forensic Urine Drug Testing (FUDT).

Medical Review Officer (MRO). A licensed physician who is responsible for receiving and reviewing laboratory results generated by a mine operator's drug-testing program and evaluating medical explanations for certain drug test results. An MRO can be an employee of the mine operator or a service agent.

Persons performing safety-sensitive job duties. Those who perform job activities that are inherently dangerous on a regular and/or recurring basis and are required under 30 CFR parts 46 and 48 to take comprehensive miner training. Management and administrative personnel who supervise persons performing safety-sensitive job duties are also considered to perform safety-sensitive job duties. Therefore, throughout the rest of this part, the term "miner" is used to include such supervisors. General administrative and clerical personnel are not considered to perform safety-sensitive job duties.

Post-accident testing. Testing for the misuse of alcohol or drugs that is triggered either by an occupational injury or an accident that is done to help determine whether alcohol and/or drugs were a factor in the injury or accident.

Pre-employment testing. For alcohol: Testing of applicants after a conditional offer of employment has been made but prior to the first performance of safety-sensitive job duties. *For drugs:* Testing of applicants prior to the first performance of safety-sensitive job duties, irrespective of whether a conditional offer of employment has been made.

Prohibited substances. Alcohol, and the following controlled substances, except when used according to a valid prescription: Amphetamines (including methamphetamines), barbiturates, benzodiazepines (e.g., Valium, Librium, Xanax), cannabinoids (marijuana/THC), cocaine, methadone, opiates (e.g., heroin, opium, codeine, morphine), phencyclidine (PCP), propoxyphene (e.g., Darvon), synthetic/semi-synthetic opioids (i.e., hydrocodone, hydromorphone, oxycodone, oxycodone) and any other controlled substances designated by the Secretary.

Random testing. Unannounced testing of miners assigned to safety-sensitive job duties for use of alcohol or drugs selected through a scientifically arbitrary process without regard to personal identifying information.

Reasonable suspicion testing. Testing for alcohol or drugs conducted when a supervisor documents observable signs and symptoms that lead the supervisor to suspect alcohol or drug use in

violation of the alcohol- and drug-free workplace policy.

Return-to-duty testing. Testing performed on any miner before resuming safety-sensitive job duties after having failed to test negative for alcohol or drugs, or following admission of alcohol or drug use and after satisfactory completion of education and/or treatment prescribed by a Substance Abuse Professional (SAP).

Safety-sensitive job duties. Any type of work activity where a momentary lapse of critical concentration could result in an accident, injury, or death.

Service agent. Any person or entity possessing the required qualifications and/or certifications, other than an employee of the mine operator, who provides services specified under this part to mine operators in connection with MSHA alcohol- and drug-testing requirements, including but not limited to collectors, laboratories, MROs, Substance Abuse Professionals, or BATs.

Split specimen. In drug-testing, a part of the urine specimen that is sent to the laboratory but not analyzed. Rather, it is retained unopened so that it can be sent to a second laboratory in the event that a miner requests that it be tested because he or she disputes the results reported by the first laboratory and verified by the MRO.

Substance Abuse Professional (SAP). A specially trained and qualified person who evaluates miners who have violated a mine operator's alcohol- and drug-free workplace policy and makes recommendations concerning education, treatment, follow-up testing, and aftercare.

Substituted specimen. A specimen with creatinine and specific gravity values that are so diminished that they are not consistent with human urine.

Verified test. A drug-test result or validity testing result from a laboratory that has undergone review and final determination by an MRO.

Subpart B—Prohibitions

§ 66.100 Prohibited substances.

(a) Prohibited substances, except when conditions of paragraph (b) of this section are met, shall not be permitted or used on or around mine property.

(b) Miners who possess or have used a prohibited substance will not be in violation of this part provided that an MRO has determined that the miner has a valid prescription for the substance and is using it as prescribed.

§ 66.101 Prohibited behaviors.

(a) Miners determined to have used a prohibited substance and/or to be under

the influence of a prohibited substance as defined by § 66.3(p) shall not be allowed to perform safety-sensitive job duties.

(b) Specifically, miners must not report for duty or remain on duty if they:

(1) Are under the influence or impaired by alcohol as verifiable by a Blood Alcohol Concentration (BAC) of 0.04 percent or greater; or

(2) Have used a prohibited substance as verifiable by a positive drug test, unless an MRO has determined that the miner has a valid prescription for the prohibited substance and is using it as prescribed; or

(3) Have refused to submit to a drug or alcohol test or have adulterated or substituted his/her specimen in any such test.

Subpart C—Alcohol- and Drug-Free Mine Program Requirement

§ 66.200 Purpose and scope.

The mine operator shall establish a written alcohol- and drug-free mine program that includes a written policy, an education and awareness program for nonsupervisory miners, a training program for supervisors, alcohol- and drug-testing, and referrals for assistance for miners who violate this rule.

§ 66.201 Written policy.

(a) The alcohol- and drug-free mine program shall contain a written policy statement that shall be provided to all employees/miners and will inform them of the purpose of the policy; the prohibitions against the possession or use of prohibited substances; alcohol- and drug-testing requirements; the consequences of policy violations; and training requirements. The policy will also reference these regulations and identify which miners are subject to the alcohol- and drug-testing provisions.

(b) A mine operator must ensure that every miner has been informed of the policy. The proposed rule requires that a mine operator must provide a copy of the written policy to the miners' representative or post the policy on a bulletin board in a common area in the event that the miners do not have a representative. Mine operators may also choose to distribute the policy during the alcohol- and drug-free awareness training sessions or distribute the policy in an electronic format; however, these additional means of distribution are not required.

(c) Mine operators may use the sample model policy statement available from MSHA or from the Web site at <http://www.msha.gov>.

§ 66.202 Education and awareness program for nonsupervisory miners.

(a) Mine operators are required to provide education and awareness programs for nonsupervisory miners that meet the following requirements:

(1) Each newly hired miner must receive a minimum of 60 minutes of training before such miner is assigned to safety-sensitive job duties. The training must inform them of:

(i) The mine's alcohol- and drug-free mine policy, including alcohol- and drug-testing requirements;

(ii) The dangers of alcohol and drug use and the impact of such use on safety in the mine;

(iii) Actions to take when others are suspected of violating the policy; and

(iv) Information about any available drug counseling, rehabilitation, and employee assistance programs (EAPs).

(2) All nonsupervisory miners, on an annual basis, will receive a minimum of 30 minutes of training to review the elements in paragraph (a)(1) of this section.

(3) Training must be delivered by a competent person knowledgeable about workplace substance abuse, these regulatory requirements, and the mine operator's policy. Mine operators may use the training materials available from MSHA or the Web site at <http://www.msha.gov>.

(b) Training may be supplemented by written informational materials, including a list of company or community resources that miners can contact for assistance. Videos or other audio-visual materials may be used to supplement interactive training but cannot serve as the sole means of training.

(c) The training requirements in this part can be delivered as part of other new miner and annual nonsupervisory miner refresher training required under parts 46 and 48 of this chapter but must be delivered in addition to the other topics required and cannot displace other existing requirements of parts 46 and 48 of this chapter.

§ 66.203 Training program for supervisors.

(a) A training program for supervisors is required and must meet the following requirements:

(1) Every supervisor authorized by the mine operator to make reasonable suspicion and post-accident testing determinations shall receive an initial two hours of training and one hour annually, that, at a minimum:

(i) Reviews the topics covered in the nonsupervisory miner training described in § 66.202 (a)(1)(i) through (iv);

(ii) Makes them aware of their role in enforcing the alcohol- and drug-free workplace policy;

(iii) Reviews the physical, behavioral, and performance indicators of probable drug use or alcohol misuse and prepares them to recognize and adequately document their observation of these signs of alcohol or drug impairment;

(iv) Trains them to make reasonable suspicion determinations and what procedures to follow when such determinations are made;

(v) Trains them to make post-accident determinations and what procedures to follow when such determinations are made;

(vi) Trains them to make referrals to Substance Abuse Professionals or Employee Assistance Professionals and/or to community resources if they suspect a miner has an alcohol or drug problem but there has not been a known violation of the policy and there is insufficient evidence to warrant a reasonable suspicion test; and

(vii) Trains them on what constitutes safety-sensitive job duties so that they understand who is subject to drug-testing.

(2) All supervisors, on an annual basis, will receive a minimum of 60 minutes of training to review the elements in paragraph (a)(1) of this section.

(3) Training must be delivered by a competent person knowledgeable about workplace substance abuse, these regulatory requirements, and the mine operator's policy. Mine operators may use the training materials available from MSHA or the Web site at <http://www.msha.gov>.

(b) Training may be supplemented by written informational materials, including a list of company or community resources that miners can contact for assistance. Videos or other audio-visual materials may be used to supplement interactive training but cannot serve as the sole means of training.

§ 66.204 Miner assistance following admission of use of prohibited substances.

(a) Mine operators shall make miners and other employees who admit to the illegitimate and/or inappropriate use of prohibited substances aware of available assistance through an employee or miner assistance program, a Substance Abuse Professional (SAP), and/or other qualified community-based resources.

(b) Miners who voluntarily admit to the illegitimate and/or inappropriate use of prohibited substances prior to being testing and seek assistance shall not be considered as having violated the mine operator's policy but shall be subject to the return-to-duty process specified in

subpart E, §§ 66.405–406. However, a positive test result during the return-to-duty process will be considered as a violation of the mine operator's policy.

Subpart D—Alcohol- and Drug-Testing Requirements**§ 66.300 Purpose and scope.**

(a) Mine operators shall implement an alcohol- and drug-testing program that is valid, reliable, and protects the privacy and confidentiality of the individual to be tested.

(b) Mine operators must follow the U.S. Department of Transportation's (DOT) requirements found in 49 CFR part 40, Procedures for Transportation Workplace Drug Testing Programs, in which references to "DOT" shall be read as "MSHA" with the following exceptions: the split sample method of collection shall be used, and use of "bifurcated" alcohol level for testing is excluded.

(c) Mine operators are subject to all the requirements and procedures incorporated by part 66 and are responsible for the actions of their officials and representatives, and agents in carrying out these requirements.

(d) Mine operators shall designate those who will be responsible for receiving test results and other communications from the MRO or BAT consistent with the requirements of this part. This designee will also be authorized by the mine operator to take immediate action(s) to remove miners from safety-sensitive job duties, or cause miners to be removed from these covered duties, and to make required decisions in the testing and evaluation processes. Mine operators cannot use contracted service agents to perform these functions.

(e) A mine operator may use service agents to perform any of the other the functions required in this rule but may not designate or use a service agent to make drug-testing decisions or to receive alcohol-or drug-test results on behalf of the mine operator.

(f) A mine operator that uses a service agent is responsible for ensuring that service agents meet all requirements and procedures set forth in DOT's requirements found in 49 CFR part 40, except as modified by paragraph (b) of this section. Only laboratories certified by CAP as well as by HHS/SAMHSA shall be used to test collected samples.

§ 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/Semi-synthetic Opioids (oxymorphone, oxycodone, hydromorphone, hydrocodone).

§ 66.302 Additional testing.

The Secretary of Labor shall be permitted to designate additional substances for which all mine operators must test.

§ 66.303 Circumstances under which testing will be required.

Testing will be conducted in the following circumstances: Pre-employment; randomly at unannounced times; post-accident if the miner may have contributed to the accident; based on reasonable suspicion that a miner has used a prohibited substance; and as part of a return-to-duty process for miners who have violated the rule.

§ 66.304 Pre-employment testing.

(a) Any applicant for a safety-sensitive position must be tested for the presence of drugs before performing safety-sensitive job duties.

(b) Any applicant for a safety-sensitive position must receive an alcohol test after a conditional offer of employment has been made and before performing safety-sensitive job duties.

(c) The mine operator must treat all miners performing safety-sensitive job duties the same for the purpose of pre-employment alcohol- and drug-testing (*i.e.*, mine operators must not test some miners and not others). If it is unclear whether an applicant will be assigned to such duties, it is at the mine operator's discretion to test all applicants; or test only when it is known that the applicant will be assigned to perform safety-sensitive job duties.

(d) The mine operator must not allow a miner to begin performing safety-sensitive job duties if the result of the miner's test indicates a blood alcohol concentration of more than 0.04 percent or if he/she has used a prohibited substance without a valid prescription.

(e) Any incumbent miner who is to be transferred to a position involving the performance of safety-sensitive job duties must be tested for the presence of alcohol or drugs prior to beginning the performance of safety-sensitive job duties and must receive negative test results.

(f) An incumbent miner that has failed or refused a pre-employment alcohol- and drug-test administered under this part, shall not perform safety-sensitive job duties until that miner provides the mine operator proof of having successfully completed a referral, evaluation, and treatment plan, and tested negative on return-to-duty testing as described in subpart E, §§ 66.405–66.406.

(g) A mine operator shall have the discretion to conduct such testing on incumbent miners who are performing safety-sensitive job duties as of the effective date of this rule as long as all such miners are tested.

§ 66.305 Random testing.

Mine operators must randomly conduct unannounced alcohol and drug tests of their miners as described in paragraphs (a) through (e) of this section:

(a) A mine operator shall use random testing rates for alcohol and drugs of 10 percent. The random pool for unannounced alcohol and drug testing during each calendar year shall consist of miners who perform safety-sensitive job duties and their supervisors.

(b) Miners who are on leave or otherwise absent from the workplace will be tested at the next available opportunity, that is, immediately upon their return to work.

(c) Each mine operator shall ensure that random alcohol and drug tests conducted under this part are unannounced and unpredictable. The dates for administering random tests must be periodic and irregularly scheduled throughout the calendar year. The mine operator has the discretion to determine how frequently testing will occur but it must, at a minimum, meet the 10 percent floor established by this part.

(d) The selection of miners for random alcohol and drug testing shall be made by a scientifically valid method, such as a random number table or a computer-based random number generator that is matched with miners' payroll identification numbers, or other comparable unique identifying numbers. Under the selection process used, each miner shall have an equal chance of being tested each time selections are made.

(e) Each mine operator shall ensure that any miner performing a safety-sensitive duty at the time of the notification ceases to perform the safety-sensitive duty and proceeds to the testing site immediately.

§ 66.306 Post-accident testing.

(a) A mine operator is required to conduct alcohol and drug testing of certain miners after certain accidents or workplace injuries occur. Accidents and injuries requiring post-accident testing include occupational injuries requiring medical treatment beyond first aid and accidents that occur while a miner is operating a piece of equipment or performing a work activity that causes or contributes to an accident, injury, or death. Nothing in this section shall be construed to require the delay of necessary medical attention for the injured following an accident or to prohibit a miner from leaving the scene of an accident for the period necessary to obtain assistance in responding to the accident or to obtain necessary emergency medical care.

(1) *Fatal accidents.* As soon as is practicable following an accident involving the loss of human life, a mine operator shall conduct alcohol and drug tests on each surviving miner involved in any work activity that could have contributed to the accident, injury, or death as determined by the mine operator, using the best information available at the time of the decision. The mine operator shall also be authorized and required to have a toxicology test conducted on the deceased that at a minimum tests for all the substances listed in § 66.301.

(2) *Nonfatal accidents.* As soon as is practicable following an accident or occupational injury not involving the loss of human life, the mine operator shall conduct alcohol and drug tests on each miner involved in any work activity that could have contributed to the accident or injury, as determined by the mine operator, using the best information available at the time of the decision.

(b) A mine operator shall ensure that a miner required to be tested for alcohol under this section is tested as soon as is practical but within eight hours of the accident or injury. If an alcohol test is not administered within eight hours following the accident or injury, the mine operator shall cease attempts to conduct the test and prepare and maintain on file a record stating the reasons that the test was not promptly administered.

(c) A mine operator shall ensure that a miner required to be drug tested under this section is tested as soon as is practical but within 32 hours of the accident or injury. If a drug test is not administered within 32 hours following the accident or injury, the mine operator shall cease attempts to conduct the test and prepare and maintain on file a

record stating the reasons that the test was not promptly administered.

(d) A miner who is subject to post-accident testing who fails to remain readily available for such testing, including notifying the mine operator of his or her location if he or she leaves the scene of the accident prior to submission to such test, must be deemed by the employer to have refused to submit to testing.

(e) The results of blood, urine, or breath tests for the use of prohibited substances conducted by federal, state, or local officials having independent authority for the test, shall be considered to meet the requirements of this section provided such tests conform to the applicable federal, state, or local testing requirements, and that the test results are obtained by the mine operator. Such test results may be used only when the tests have been performed within the applicable time limits (eight hours for alcohol and 32 hours for drugs) and the mine operator has been unable to perform separate post-accident tests within those time periods.

(f) Mine operators shall determine when post-accident testing will be ordered and which miners will be tested. Those making such determinations must have received the necessary training (as specified in subpart C) needed to make such determinations prior to doing so.

(g) If MSHA investigators arrive at the scene of an accident within the 32-hour window and determine that miners not originally given a post-accident test may have contributed to the accident, the MSHA investigator can so order the mine operator to have such testing done at the mine operator's expense.

§ 66.307 Reasonable suspicion testing.

(a) A mine operator shall conduct an alcohol and/or drug test when the mine operator has reasonable suspicion to believe that the miner has misused a prohibited substance.

(b) A mine operator's determination that reasonable suspicion exists shall be based on specific, contemporaneous, articulable observations concerning the appearance, behavior, speech, or body odors of the miner. A supervisor, or other company official who is trained in detecting the signs and symptoms of the misuse of alcohol and/or drugs, must make the required observations.

(c) Testing is authorized under this section only if the observations required by paragraph (b) of this section are made during, immediately preceding, or just after the shift. A mine operator may direct a miner to undergo reasonable suspicion testing immediately before,

during, or after the miner is to perform safety-sensitive job duties.

(d) A mine operator shall ensure that a miner required to be tested for alcohol under this section is tested as soon as is practical but within eight hours of the mine operator's determination that reasonable suspicion exists. If an alcohol test is not administered within eight hours, the mine operator shall cease attempts to conduct the test and prepare and maintain on file a record stating the reasons that the test was not promptly administered.

(e) A mine operator shall ensure that a miner required to be tested for drugs under this section is tested as soon as is practical but within 32 hours of the mine operator's determination that reasonable suspicion exists. If a drug test is not administered within 32 hours, the mine operator shall cease attempts to conduct the test and prepare and maintain on file a record stating the reasons that the test was not promptly administered.

(f) Those authorized to make decisions on behalf of the mine operator as to when reasonable suspicion testing will be ordered and which miners will be tested will receive the necessary training needed to make such determinations prior to doing so as specified in subpart C. The mine operator will determine who is authorized to make these decisions.

(g) If the collection site is not on the mine property, miners being tested because of reasonable suspicion should not be allowed to drive themselves to the site, but rather shall be accompanied by authorized mine personnel.

Subpart E—Operator Responsibilities, Actions, and Consequences

§ 66.400 Consequences to miner for failing an alcohol or drug test or refusal to test.

(a) A mine operator, upon a miner's verified positive drug test result, an alcohol test with a result indicating a blood alcohol concentration of 0.04 percent or greater, a refusal to test (including by adulterating or substituting a urine specimen), or any other violation of the mine operator's policy prohibiting possession, impairment from or use of alcohol or drugs must not return the miner to the performance of safety-sensitive job duties until or unless the miner successfully completes the return-to-duty process of §§ 66.405 and 66.406 of this part. The miner may be assigned to duties that are not safety-sensitive at the mine operator's discretion.

(b) Mine operators shall not terminate miners who violate the mine operator's policy for the first time (e.g., by testing

positive for alcohol or drugs). Rather, those miners testing positive for the first time, who have not committed some other separate terminable offense, shall be provided job security while the miner seeks appropriate evaluation and treatment. The miner will be able to be reinstated and allowed to resume performance of safety-sensitive job duties provided the miner complies with return-to-duty requirements outlined in §§ 66.405 and 66.406.

(c) For subsequent violations of the mine operator's alcohol- and drug-free mine policy, the mine operator shall specify appropriate disciplinary steps, up to and including termination. At a minimum, miners shall not be allowed to perform safety-sensitive job duties until such time that they have satisfactorily complied with the return-to-duty process as specified in §§ 66.405 and 66.406 of this rule.

§ 66.401 Operator actions pending receipt of test results.

(a) Miners who have been selected for random testing shall be returned to duty immediately following the test and while awaiting the results.

(b) Miners who have been tested for alcohol and/or drugs based on reasonable suspicion or because the mine operator has determined that they may have contributed to an accident may be suspended from performance of safety-sensitive job duties until the verified test results have been received.

(c) All miners suspended from performing safety-sensitive job duties pending results should be treated in the same manner with respect to this rule and no action adversely affecting the miner's pay and benefits shall be taken pending the verified outcome of the testing process.

(d) In the event that a miner does not work at all during the suspension period (i.e., the miner is not assigned non-safety-sensitive job duties) and the test result is verified positive, mine operators may choose to withhold pay for the suspension period in accordance with mine operator policy and/or any existing labor-management agreement.

§ 66.402 Substantiating legitimate use of otherwise prohibited substances.

Although mine operators shall not receive test results until after an MRO has verified them, mine operators must ensure miners have adequate opportunity to demonstrate that their use of prescription drugs is legitimately authorized. However, possession of a valid prescription from a medical professional in and of itself may not constitute sufficient proof of legitimate and appropriate use. It is the

responsibility of the MRO to make this determination. If the miner asserts that the presence of a drug or drug metabolite in his/her specimen results from taking prescription medication, the MRO must review and take all reasonable and necessary steps to verify the authenticity of all medical records the miner provides. The MRO may contact the miner's physician or other relevant medical personnel and/or direct the miner to undergo further medical evaluation.

§ 66.403 Operator actions after receiving verified test results.

(a) A mine operator who receives a verified positive drug test result or a verified adulterated or substituted drug test result must immediately remove the miner involved from performing safety-sensitive job duties and refer the miner to a qualified SAP. Action must be taken upon receiving the initial report of the verified test result. A mine operator must not wait to receive the written report or the result of a split specimen test.

(b) A mine operator who receives a blood alcohol concentration test result of 0.04 percent or higher must immediately remove the miner involved from performing safety-sensitive job duties and refer the miner to a qualified SAP. A mine operator must not wait to receive the written report of the result of the test.

(c) A mine operator must not alter an alcohol or drug test result transmitted by a MRO or BAT.

(d) In the event that the MRO verifies that a test is negative or cancels the test:

(1) The miner will be immediately returned to the performance of safety-sensitive job duties if he/she has been removed based on reasonable suspicion;

(2) The miner will suffer no adverse personnel consequences or loss in pay; and

(3) No individually identifiable record that the employee had a confirmed laboratory positive, adulterated, or substituted test result will be retained. The record of the test will reflect that it was a negative test.

§ 66.404 Evaluation and referral.

(a) A miner who has failed a test for prohibited substances or refused or adulterated a test cannot perform safety-sensitive job duties until a SAP evaluation has been completed and the miner successfully complies with the SAP's recommendations for education and/or treatment.

(b) Mine operators must provide to each such miner (including an applicant or new miner) a listing of SAPs available to the miner and acceptable to

the mine operator. This listing should include the names, addresses, and telephone numbers of the available SAPs. The miner may avail himself or herself of the services of the SAP to receive an evaluation and referral for treatment. The miner shall be allowed to return to performance of safety-sensitive job duties following a first-violation violation and provided the miner complies with the return-to-duty and follow-up testing provisions found in §§ 66.405 and 66.406.

(c) The SAP's recommendation for assistance will serve as a referral source to assist the miner's entry into an education and/or treatment program.

(d) Miners who have failed or refused an alcohol or drug test may not seek a second SAP's evaluation in order to obtain a different recommendation, nor may a mine operator do so if the miner has already been evaluated by a qualified SAP. If the miner, contrary to this paragraph, has obtained a second SAP evaluation, mine operators may not rely on it for any purpose under this part. Only the SAP who made the initial evaluation may modify his or her initial evaluation and recommendations based on new or additional information (e.g., from an education or treatment program).

(e) While the SAP's referral shall always be made at the miner's first offense, employers may choose to offer additional opportunities for treatment and return-to-work, but must do so in a way that is uniform and consistent.

§ 66.405 Return-to-duty process.

(a) After miners testing positive for alcohol or drugs are assessed by a SAP and follow that SAP's educational or treatment recommendations, they may return to safety-sensitive job duties upon submitting to return-to-duty and follow-up testing as described in § 66.406.

(b) SAPs must re-evaluate the miner to determine if the miner has successfully carried out the recommended education and/or treatment so that the mine operator can decide whether to return the miner to safety-sensitive job duties.

(c) Should a SAP provide written notice that the miner has not successfully complied with the SAP's recommendations, the mine operator must not return the miner to the performance of safety-sensitive job duties and may take action consistent with company policy and/or labor-management agreements.

(d) Although the SAP can verify completion of or compliance with recommended treatment, it is the mine operator who decides whether to put the

miner back to work in a safety-sensitive position. However a miner who has successfully completed the recommended treatment and passed the return-to-duty tests may not be discharged for his/her first offense.

§ 66.406 Return-to-duty and follow-up testing.

(a) Miners must have an alcohol test with a blood alcohol concentration of less than 0.04 percent and a negative return-to-duty drug-test result before resuming performance of safety-sensitive job duties.

(b) A mine operator shall conduct follow-up testing of each miner who returns to duty, as follows:

(1) A SAP is the sole determiner of the number and frequency of follow-up tests needed for a particular miner and whether these tests will be for alcohol, drugs, or both. If the miner had a positive drug test, but the SAP evaluation or the treatment program professional determines that the miner also has an alcohol problem, a SAP shall require that the miner have follow-up tests for both alcohol and drugs.

(2) A SAP must establish a written follow-up testing plan for each miner who has committed a violation of this rule, and who seeks to resume the performance of safety-sensitive job duties only after the miner has successfully complied with recommendations for education and/or treatment.

(3) At a minimum, a miner will be subject to six unannounced follow-up tests in the first 12 months of resuming safety-sensitive job duties. It is possible, however, that the SAP may require more than six unannounced follow-up tests, and that the testing be continued for up to 24 months after the miner resumed his/her safety-sensitive job duties.

(4) The mine operator may not impose additional testing requirements (e.g., under company authority) on the miner that go beyond the SAP's follow-up testing plan.

(5) The mine operator must carry out the SAP's follow-up testing requirements and may not allow the miner to continue to perform safety-sensitive job duties unless follow-up testing is conducted as directed by the SAP. Mine operators failing to do so will be in violation of this rule.

(6) Mine operators have discretion in scheduling follow-up tests but must ensure that the tests are unannounced with no discernable pattern as to their timing, and that the miner is given no advance notice.

(7) Other tests conducted (e.g., those carried out under the random testing

program) cannot substitute for this follow-up testing requirement.

Subpart F—Recordkeeping and Reporting

§ 66.500 Recordkeeping requirements.

(a) Protection of employee records.

(1) Records of drug- or alcohol-test results received are confidential communications between the mine operator and the miner.

(2) If records are stored electronically, a mine operator must ensure that the records are secured.

(b) Mine operators must keep and retain the following test records for at least three years:

(1) The number of workers in safety-sensitive positions;

(2) The total number tested;

(3) The number of positive alcohol and drug tests for each substance; and

(4) A record of which miners were tested, the dates of their tests, their test results, and return-to-duty and follow-up test results; these records should be retained separately from aggregate data on violations and violation rates.

(c) In addition, mine operators are required to:

(1) Include post-accident test results in accident reports regardless of whether the test(s) are positive or negative.

(2) Annually compute and retain records of the percentage of positive random alcohol and drug tests.

(d) MSHA inspections:

(1) Mine operators' alcohol- and drug-free workplace policies and program descriptions should be made available to MSHA inspectors upon their request; however, this rule does not require routine review of alcohol- and drug-free workplace programs by MSHA inspectors.

(2) Any and all alcohol- or 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 as well as in determining the cause of accidents.

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