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PETITIONS FOR MODIFICATION Coal Mine Safety and Health and Metal and Nonmetal Mine Safety and Health

PREFACE

This Handbook sets forth the Mine Safety and Health Administration's (MSHA) procedures and instructions for filing, processing and investigating petitions for modification (PFMs) of mandatory safety standards (herein referred to as "standards") in accordance with Section 101(c) of the Federal Mine Safety and Health Act of 1977 (Mine Act) and Title 30 of the Code of Federal Regulations, Part 44. Previously issued procedures and instructions on this subject matter are superseded by this handbook.

Kevin Stricklin

Kevin G. Stricklin
Administrator for
Coal Mine Safety and Health

Felix Quintana

Felix A. Quintana
Administrator for
Metal and Nonmetal Mine Safety and Health

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CHAPTER 1 - INTRODUCTION

A mine operator or a representative of miners may petition the appropriate Administrator to modify the application of any mandatory safety standard. The Administrator for Coal or for Metal and Nonmetal causes an investigation to be made into the merits of the petition and issues a proposed decision and order (PDO). This PDO is subject to appeal. The Administrator can move to amend issued decisions and orders and amend or revoke granted modifications. A granted modification, together with any special terms and conditions in the final decision and order, has the same effect as a mandatory safety standard at the subject mine.

A. Authority

1. Federal Mine Safety and Health Act of 1977 (Mine Act), Section 101(c) states that:
Upon petition by the operator or the representative of miners, the Secretary may modify the application of any mandatory safety standard to a coal or other mine if the Secretary determines that an alternative method for achieving the result of such standard exists which will at all times guarantee no less than the same measure of protection afforded the miners of such mine by such standard, or that the application of such standard to such mine will result in a diminution of safety to the miners in such mine. Upon receipt of such petition the Secretary shall publish notice thereof and give notice to the operator or the representative of miners in the affected mine, as appropriate, and shall cause such investigation to be made as he deems appropriate. Such investigation shall provide an opportunity for a public hearing at the request of such operator or representative or other interested party, to enable the operator or the representative of miners in such mine or other interested party to present information relating to the modification of such standard. Before granting any exception to a mandatory safety standard, the findings of the Secretary or his authorized representative shall be made public and shall be available to the representative of the miners at the affected mine. The Secretary shall issue a decision incorporating his findings of fact therein, and send a copy thereof to the operator or the representative of the miners, as appropriate. Any such hearing shall be of record and shall be subject to section 554 of title 5 of the United States Code.
2. Part 44, Title 30, Code of Federal Regulations. Part 44, entitled “Rules of Practice for Petitions for Modification of Mandatory Safety Standards,” sets forth procedures for filing, processing, and deciding petitions filed under Section 101(c) of the Mine Act for modifying applications of any mandatory safety standard to a coal or other mine. Part 44 further sets forth procedures for revoking and amending granted modifications. Section 44.13 delegates to the Administrator the authority to issue Proposed Decisions and Orders (PDOs) based upon all available information, including the results of investigation. Section 44.14 provides that the petitioner or party other than the petitioner may request a hearing of a proposed decision or order within 30 days after service of

the proposed decision or order. Section 44.16 provides the Administrator with the authority to grant or deny applications for temporary relief and relief to give effect to proposed decisions and orders. Section 44.52(b) delegates to the Administrator the authority to issue proposed decisions and orders revoking granted modifications. Section 44.53 provides the Administrator with the authority to issue amended proposed decisions and orders.

- B. Purpose. The purpose of this handbook is to provide guidelines for the preparation and processing of petitions, amendments, dismissals, and revocations; to provide procedures for conducting investigations of petitions and revocations; and to ensure that supporting documentation is developed during investigations.
- C. Responsibility. Procedures for Petitions for Modifications (PFM).
1. The Director, Office of Standards, Regulations and Variances (OSRV) ensures that each petition meets the requirements of 30 C.F.R. pt. 44, acknowledges receipt of petitions, publishes notice of the petition in the Federal Register, and publishes a summary report of each granted modification in the Federal Register.
 2. The Administrator causes an investigation to be made into the merits of each petition for modification and issues a decision and order for each petition, request for relief, revocation, or dismissal.
 3. The Division of Safety for Coal or the Division of Safety and Health for Metal and Nonmetal Petition Coordinator coordinates the petition process, coordinates review by the Solicitors' Office (SOL), and ensures preparation of a PDO for Administrator's signature.
 4. The Chief, Division of Safety for Coal or the Chief, Division of Safety and Health for Metal and Nonmetal reviews each petition and revocation case file, reviews PDOs prepared for the Administrator's signature, and oversees the petition process.
 5. The District Manager (DM) causes an investigation to be conducted and an investigation report with supporting documentation to be prepared and forwarded to the Chief, Division of Safety for Coal or the Chief, Division of Safety and Health for Metal and Nonmetal. When requested by the Coal Safety Division Chief, the DM causes a proposed PDO to be prepared and forwarded to the Safety Division Chief (Coal Only).
 6. District investigators investigate initial PFMs and, at times, determine compliance with the terms and conditions of each granted modification. They

make recommendations to amend or revoke a modification if (1) the terms and conditions have not been implemented, (2) the conditions in the mine have changed, or (3) the mine or an area of the mine is permanently abandoned.

7. As appropriate, the Office of the Solicitor (SOL) reviews proposed decisions and orders for legal sufficiency and represents MSHA in all administrative proceedings.

CHAPTER 2 - FILING A PETITION

A. Basis for Filing a Petition (30 C.F.R. § 44.4). The Administrator may modify the application of any mandatory safety standard upon a determination that:

1. An alternative method of achieving the result of the standard exists that will at all times guarantee no less than the same measure of protection afforded by the standard; or
2. Application of the standard will result in a diminution of safety to the miners.

In some cases, granting a petition based on a diminution of safety without providing an alternative method may create a void in the intent of the safety standard. The Administrator may consider a combination of an alternative method and diminution of safety. In such instances, the petitioner may request a modification based on conditions 1 and 2 above.

When a modification of a standard is granted for an alternative method that will at all times provide the same or a greater degree of safety to miners, the operator can use the alternative method or continue to follow the requirements of that safety standard. However, if the operator does not implement the alternative method within twelve months, an investigation should be initiated to determine if the order granting the modification should be amended or revoked.

When a modification is granted based on a finding that the application of the standard will result in a diminution of safety to the miners, the final decision and order must be implemented and complied with at the mine until the Decision and Order is revoked.

B. Who May File a Petition (30 C.F.R. § 44.10). A petition may be filed by an operator or by any representative of the miners at a mine.

C. Where to File (30 C.F.R. § 44.10). Petitions are filed with the Director, OSRV, Mine Safety and Health Administration, 1100 Wilson Boulevard, Suite 2350, Arlington, Virginia 22209-3939. Petitions may also be filed electronically by e-mail at <mailto:petitionsformodification@msha.gov>.

D. What a Petition Must Contain (30 C.F.R. § 44.11). OSRV may return petitions which do not contain the information required by 30 C.F.R. § 44.11 as described below:

1. Name and address of the petitioner.
 2. The mailing address and mine identification number of the mine or mines affected.
 3. The mandatory safety standard to which the petition is directed.
 4. A concise statement of the modification requested, and whether the petitioner proposes to establish an alternative method in lieu of the mandatory safety standard or alleges that application of the standard will result in a diminution of safety to the miners affected or requests relief based on both criteria.
 5. A detailed statement of the facts (including the details of the alternative method proposed) to establish the grounds upon which the modification is based.
 6. Identification of any representative of the miners at the mine, if the petitioner is a mine operator.
- E. Notification by Petitioner to Other Parties (30 C.F.R. § 44.10). An operator must give a copy of any petition filed to the representative of the miners at the mine or the representative of the miners must give a copy of any petition filed to the operator, as appropriate. This can be done either personally or by registered or certified mail, return receipt requested. If the petitioner fails to state in the petition that a copy was served on the other party (representative of the miners or operator), the petition may be returned by OSRV.
- F. Posting of Petition (30 C.F.R. § 44.9). If there is no representative of miners, the mine operator must post a copy of the petition on the mine bulletin board until such time as there is a ruling on the petition. MSHA district investigators must determine if a copy of the petition has been posted before starting their investigation.
- G. Petition Requests for More Than One Standard or Petitions Granted at More Than One Mine (30 C.F.R. § 44.11(b)). A petitioner cannot request modification of more than one safety standard in a single petition. However, Agency regulations allow a petitioner to request modification of a single standard at more than one of the petitioner's mines, providing identical issues of law and fact exist at each mine. Filing a separate petition for each mine is preferred, however, as determining whether to grant or deny petitions at multiple mines complicates and lengthens the decision-making process.
- H. Modification of Standard Subject to Waiver. A petition cannot be filed if the regulation specifically delegates authority to the District Manager to grant a waiver of the standard, unless it is accompanied by correspondence from the District

Manager denying the request for the waiver and explaining the reasons for the denial.

I. Modification of Standards that are later Renumbered with no Substantive Change.

Modifications for safety standards that are renumbered, but remain substantively unchanged, remain valid. It is not necessary to request a new modification or to seek an amendment. However, any violation of the modification must be cited under the revised standard number.

J. OSRV Processing Procedures.

1. Upon receipt of a petition, or a request to amend an existing modification, the OSRV petition coordinator documents the date of receipt and reviews the petition to be sure that all required information is included. The coordinator assigns a docket number and acknowledges receipt of the petition with a letter to the petitioner, or if necessary, requests additional information.
2. The Director of OSRV publishes a notice of the petition in the Federal Register in order to give interested parties an opportunity to comment. The notice is usually forwarded to the Federal Register within 15 working days of receipt of the petition. The notice states that the petition has been filed, identifies the petitioner and the mine(s) involved, cites the mandatory safety standard, states the proposed alternative method and/or the petitioner's contention that application of the standard will result in a diminution of safety to the miners, and summarizes the facts alleged by the petitioner to justify the requested modification. The notice advises the representative of miners and other interested parties that they may comment in writing or provide information within 30 calendar days of the date of publication in the Federal Register.
3. The OSRV petition coordinator prepares a case file for all petitions or requests to amend existing modifications. The case file is forwarded to the Chief, Division of Safety for Coal or the Chief, Division of Safety and Health for Metal and Nonmetal immediately after the notice is published in the Federal Register. At a minimum, the case file should contain:
 - a. The original petition for modification.
 - b. A copy of the Federal Register notice.
 - c. Certification of service to miners' representative or operator or certification of posting the petition on the mine bulletin board.
 - d. Correspondence between OSRV and the petitioner.

4. Incomplete petitions are not assigned a docket number until the petition is complete. Incomplete petitions may be dismissed by OSRV without prejudice if the petitioner does not provide the necessary information within 30 calendar days.
5. The Director of OSRV publishes quarterly summary reports of all granted modifications in the Federal Register.

CHAPTER 3 - INVESTIGATION AND ISSUANCE OF ADMINISTRATOR'S DECISION

A. Investigation and Preparation of the Proposed Decision (30 C.F.R. § 44.13).

The Administrator causes an investigation to be made as to the merits of the petition. As soon as practicable after the investigation is complete, the Administrator issues a proposed decision and order (PDO). The PDO becomes final and effective 30 calendar days after service, unless a hearing is requested.

The district office conducts the investigation and prepares a report that includes all supporting documentation. The district office prepares a draft PDO if the Safety Division requests one in the transmittal memorandum to the district (Coal only). If such a request is made, an example of the most recent PDO addressing similar issues will be attached to the transmittal memo. If the district office prepares a draft PDO, it must be transmitted electronically (i.e. via email) to the Petition Coordinator in the Division of Safety for Coal or the Division of Safety and Health for Metal and Nonmetal.

The Petition Coordinator in the Division of Safety for Coal or the Division of Safety and Health for Metal and Nonmetal manages the petition process, coordinates SOL review, and prepares a PDO for the Administrator to sign.

B. Timeliness of Processing. All petitions must be processed promptly.

The district investigation, the report, all supporting documentation, and the draft PDO (if requested) must be forwarded to the Division of Safety for Coal or the Division of Safety and Health for Metal and Nonmetal within 45 calendar days of receipt of the transmittal memo and petition. If the 45-day deadline cannot be met, the district coordinator must notify the Petition Coordinator in the Division of Safety for Coal or the Division of Safety and Health for Metal and Nonmetal by email, explaining the reason(s) for the delay and request additional time to complete the investigation.

The Division of Safety for Coal or the Division of Safety and Health for Metal and Nonmetal must complete review of the case file and have the final draft PDO prepared within 45 days of receipt of the investigation report from the District Manager. If the 45-day deadline cannot be met, the reviewer must notify the Chief, Division of Safety for Coal or the Chief, Division of Safety and Health for Metal and Nonmetal by email, explaining the reason(s) for the delay, and request additional time to complete the draft PDO.

C. Communications Regarding Petitions. All discussions, by telephone, in person, by email, fax, or by other means with any party to the petition, both internal and

external, must be documented and included in the case file. Discussions with SOL for advice need not be documented.

D. Official Record. The official record of the petition is the case file prepared by OSRV and forwarded to the Division of Safety for Coal or the Division of Safety and Health for Metal and Nonmetal. The Division of Safety for Coal or the Division of Safety and Health for Metal and Nonmetal maintains the case file. At a minimum, the case file should contain:

1. The original petition for modification;
2. A copy of the Federal Register notice;
3. Certification of service to miners' representative or operator or certification of posting the petition on the mine bulletin board;
4. Correspondence between OSRV and the petitioner;
5. Any comments received from interested parties;
6. The transmittal memorandum to district and district notification of receipt with the name of the investigator(s) to whom the investigation is assigned;
7. The district investigation report and draft PDO if requested;
8. Division of Safety for Coal or the Division of Safety and Health for Metal and Nonmetal's documentation of the review of investigation report;
9. The Administrator's PDO and certified mail receipt from petitioner; and
10. Requests for and results of a hearing, if any.

A copy of the PDO is forwarded to the district when the decision and order is issued.

E. Management Controls. The Division of Safety for Coal or the Division of Safety and Health for Metal and Nonmetal tracks every petition and produces periodic reports to monitor the status and ensure the timely processing of every petition.

F. Receipt of Petition for Modification from OSRV by Division of Safety for Coal or the Division of Safety and Health for Metal and Nonmetal.

Information about the petition is entered into the tracking system upon receipt from OSRV. The petition is assigned to the Division of Safety for Coal or the Division of

Safety and Health for Metal and Nonmetal for initial review, to determine if the standard is, in fact, subject to modification under 30 C.F.R. Part 44. A memorandum and a copy of the petition are sent to the District Manager in which the mine(s) is/are located directing that an investigation be made. The Division of Safety for Coal or the Division of Safety and Health for Metal and Nonmetal provides assistance, when requested, to the district coordinator during the investigation.

- G. District Receipt of Petition from Division of Safety for Coal or the Division of Safety and Health for Metal and Nonmetal. When the petition is received at the district office, it is assigned to a qualified investigator by the district coordinator. The District confirms receipt in an email or memo to the Chief, Division of Safety for Coal or the Chief, Division of Safety and Health for Metal and Nonmetal providing the name of the district coordinator(s) and the investigator(s).
- H. Scope of Investigation and Report. The investigation report must identify all hazards and address all practices and conditions relevant to the standard that is the subject of the petition. In addition, the report must address any impact the proposed modification may have on other safety or health standards. If additional special terms and conditions will be needed in the PDO, they must be included in the investigation report and supported by factual information or evidence, drawings, photographs, maps, and an explanation for all special terms and conditions. The investigation report must include factual information to support all conclusions.
- I. Purpose of the Investigation. The purpose of the investigation is to determine the accuracy of the facts alleged by the petitioner and to provide sufficient information to determine whether:
1. An alternative method of achieving the results of such standard exists that will at all times guarantee no less than the same measure of protection afforded the miners of such mine by such standard; or
 2. The application of such standard to such mine will result in a diminution of safety to the miners in such mine; or
 3. A combination of (1) and (2).
- J. Pre-Investigation Review. Before initiating the investigation, the petition, any supporting documentation, regulations, policies, and similar modifications granted must be reviewed. Any modifications in effect at the mine must be identified. The investigator should initiate discussions with the District coordinator and, if necessary, the Division of Safety for Coal or the Division of Safety and Health for

Metal and Nonmetal to discuss the merits of the petition, ask questions, or obtain necessary information.

K. Procedures for Conducting Investigation.

1. Before the on-site investigation is started, the investigator must meet with all interested parties to explain the scope of the investigation and how the investigation will be conducted. The time and date of this meeting may be prearranged.
2. The investigator will determine if a copy of the petition has been posted on the mine bulletin board. If a copy of the petition has not been posted the investigation cannot continue until after a copy has been posted.
3. The investigator must interview the miners' representative or a representative number of miners affected by the petition and record their opinions. If a representative of the miners filed the petition, the operator must be interviewed and the operator's opinion recorded.
4. The investigation must cover all areas of the mine, including future or projected areas that may be affected by the petition.
5. Where necessary, accurate measurements, samples, photographs, drawings, charts, or other factual information must be obtained to support the conclusions in the investigation report.
6. When an alternative method is proposed, the investigation must address each allegation as it applies to the mine. If possible, the alternative method should be tested under controlled conditions.

Where the alternative method involves new equipment that has not yet been installed, all drawings, specifications, descriptions, brochures, pamphlets, or other technical information must be reviewed. Once the equipment is installed, it must be inspected to be sure it conforms to this information before it is operated.

7. If the petition alleges a diminution of safety, each allegation of the petition must be addressed and factual information must be included in the investigation report regarding these allegations.
8. The investigator must not make comments or offer any opinion to the operator, miners' representative, or any miner as to whether the petition will be granted or denied.

9. The investigator must also not respond to inquiries from attorneys representing any party. Inquiries such as these must be referred to the District Manager or the Chief, Division of Safety for Coal or the Chief, Division of Safety and Health for Metal and Nonmetal.
10. If a petition to amend an existing modification has been assigned a new Docket Number, a complete investigation must be conducted with a report of findings.
11. The District Manager or the Chief, Division of Safety for Coal or the Chief, Division of Safety and Health for Metal and Nonmetal may request assistance from the Office of Technical Support or Educational Policy and Development. Any reports, findings, or information from these office(s) should be referenced in the investigation report and must be included in the petition file.

L. Procedures to be Followed When Investigations Cannot or Should Not Be Conducted.

1. If the petitioner decides to withdraw the petition, the investigator should inform the petitioner that they must forward a written request to the Chief, Division of Safety for Coal or the Chief, Division of Safety and Health for Metal and Nonmetal or the Administrator. The district coordinator must immediately email the Division of Safety for Coal or the Division of Safety and Health for Metal and Nonmetal Petition Coordinator that the operator intends to withdraw the petition.
2. If the mine changes ownership and mining conditions have not changed, a new investigation is not necessary. However, the investigator should contact the new owner to confirm that the modification is still wanted. If the new owner does not wish to keep the petition, the investigator must inform the new owner that a written request to withdraw the application for the PDO must be sent to the Chief, Division of Safety for Coal or the Chief, Division of Safety and Health for Metal and Nonmetal or the Administrator.
3. The district coordinator must notify the Division of Safety for Coal or the Division of Safety and Health for Metal and Nonmetal Petition Coordinator by email or in writing if it is not possible to conduct the investigation in a timely manner because:
 - a. The mine is active, but not producing;
 - b. The mine is not working and the operator is unable to give a definite date as to when production will resume;

- c. The entire mine, or the relevant area(s) of the mine, is sealed for any reason;
- d. The investigator is denied entry; or
- e. The mine is temporarily or permanently abandoned.

M. Preparation of Investigation Report. The investigator(s) prepare(s) an investigation report through the District Manager. It is reviewed by the district petition coordinator and submitted to the Division of Safety for Coal or the Division of Safety and Health for Metal and Nonmetal Petition Coordinator. The report must include the following:

1. Date(s) of investigation
2. Names of each person participating in the investigation
 - a. Name of each representative of miners or a statement there was no representative of miners or a statement that they declined to participate in the investigation,
 - b. Number of miners interviewed and a written summary of their comments, and
 - c. Number of supervisors interviewed and a written summary of their comments.
3. Brief description of mine
 - a. The number of working sections or areas for underground mines or pits for surface mines and the number of miners;
 - b. Conditions, equipment, and/or mining method(s) affecting the petition;
 - c. Area and equipment affected by the petition. Equipment must be identified by manufacturer, model number, and serial number; and
 - d. Number of miners affected (all shifts).
4. Statement that the petition or the proposed amendment to an existing modification is based on one of the following:

- a. Alternative method
 - b. Diminution of safety
 - c. Both criteria (a) and (b)
5. Allegations that form the basis of the petition:
- a. Each stipulation of the petition must be addressed. For example, if the petitioner requests that an alternative method be approved, all aspects of this alternative method must be explored to determine if the proposed method guarantees at all times at least the same measure of safety as the standard or a greater degree of safety than the standard. If a diminution of safety is alleged, the investigation should determine whether a diminution of safety exists or if it can be eliminated by a reasonable change to the mining method or equipment. In either case, a determination must be made if either method has an adverse affect on any other areas of the mine or 30 C.F.R. § requirements;
 - b. Each finding in the report must be supported with factual evidence; and
 - c. The report must indicate whether Part 46 or 48 training plans must be revised to incorporate changed conditions or practices that may result from granting the proposed method.
6. Time or designated area restrictions, if any, must also be addressed; and
7. Sufficient information must be included to support any additional terms and conditions that are recommended for inclusion in the PDO.

Investigators should not include any statements or recommendations in the investigation report or offer any opinions to the operator, any miner, the representative of miners or any other interested party concerning whether the petition will or will not be granted.

The investigation report must contain sufficient factual information to support granting or denying the petition. The conclusion of the PDO will be based upon the factual information in the investigation report.

Investigation reports for new technology or equipment must be discussed with the district coordinator and the Division of Safety for Coal or the Division of Safety and Health for Metal and Nonmetal Petition Coordinator. The district coordinator must work closely with the investigator. The Division of Safety for Coal or the Division of

Safety and Health for Metal and Nonmetal Petition Coordinator and District Manager may obtain assistance from Technical Support and Educational Policy and Development.

When the investigation report is complete and has been reviewed by the district petition coordinator and approved by the District Manager, the report is forwarded to the Chief, Division of Safety for Coal or the Chief, Division of Safety and Health for Metal and Nonmetal. To expedite this process, an electronic copy of the investigation report may be emailed to the Division of Safety for Coal or the Division of Safety and Health for Metal and Nonmetal Petition Coordinator. The draft PDO (if requested) must be emailed to the Division of Safety for Coal or the Division of Safety and Health for Metal and Nonmetal Petition Coordinator.

N. Preparation and Issuance of Proposed Decision and Order. The petition file can be based upon a petition for modification, a request to amend or revoke an existing modification, or a request to dismiss or withdraw a petition.

1. When the investigation report is received by the Division of Safety for Coal or the Division of Safety and Health for Metal and Nonmetal, the file should be reviewed to ensure it contains:
 - a. The original petition
 - b. A complete copy of the investigation report
 - c. Any written comments by interested parties
 - d. Any other information, such as:
 - (1) The Agency's policy and position;
 - (2) Technical reports and studies;
 - (3) Appropriate information regarding relevant standards;
 - (4) MSHA's decisions regarding past petitions; and
 - (5) Mine history (accidents, compliance, etc.).
2. If the file is complete and can support MSHA's determination, a final PDO will be drafted for review and signature by the appropriate Administrator. See Appendix A for an example granted PDO, Appendix B for an example denied PDO, and Appendix C for an example Order to Dismiss.

3. If a hearing is requested within 30 days after a PDO is issued, the Division of Safety for Coal or the Division of Safety and Health for Metal and Nonmetal will:
 - a. Submit copies of the required elements of the petition file to the appropriate Administrative Law Judge (ALJ) and to SOL with a transmittal letter;
 - b. Provide technical support for the assigned SOL attorney;
 - c. Monitor the status of case; and
 - d. Serve as expert witnesses, if requested.
- O. Posting of Final Decisions and Orders. Section 44.5(b) of 30 C.F.R. requires that a copy of every final action granting a petition for modification or a summary thereof be posted on the bulletin board of the mine affected by the petition. The information is to be posted by the mine operator and maintained for as long as the modification remains in effect. If a summary of the final action is posted on the mine bulletin board, a copy of the full decision must be kept at the affected mine office and made available to the miners.

After the PDO becomes effective, the Division of Safety for Coal or the Division of Safety and Health for Metal and Nonmetal forwards the electronic version of the document to the webmaster so that it may be posted on the MSHA website.

CHAPTER 4 - RELIEF FROM STANDARDS THAT ARE THE SUBJECT OF PETITIONS FOR MODIFICATION

Three mechanisms are provided by 30 C.F.R. pt. 44 to provide faster relief from the application of a standard than that available in the normal petition for modification process. These mechanisms are request for expedited investigation; application for temporary relief; and application for relief to give effect. For each application, the standard must be the subject of a petition for modification for which the Administrator has not made a final decision.

A. Request for Expedited or Extended Investigations (30 C.F.R. § 44.13(a)).

Parties may file for an expedited investigation or an extended investigation. Such requests will be granted at the Administrator's discretion for good cause shown. These requests may be filed any time prior to the issuance of the proposed decision and order. The Administrator will continue to require that petitions be filed in a timely fashion, in advance of when the requested modification will be needed.

1. Request for Expedited Investigation.

- a. Basis. Requests for expedited investigation will be closely reviewed to determine if good cause is shown and that, in most instances, some unplanned event that could not have reasonably been anticipated occurred that supports the request for expedited treatment.
- b. Priority. Together with applications for temporary relief (discussed below), petitions with granted requests for expedited processing will receive the highest priority. Such petitions should be investigated immediately and the investigation reports and proposed decisions and orders prepared promptly.
- c. Procedures for Processing. The Division of Safety for Coal or the Division of Safety and Health for Metal and Nonmetal will review requests for expedited investigations. As part of the evaluation of the request for expedited investigation, the Division of Safety for Coal or the Division of Safety and Health for Metal and Nonmetal will normally consult with the district to ascertain the conditions and practices at the mine and other relevant facts to the request. Petitions with granted requests for expediency will be faxed or emailed to the district. The investigation should be conducted and the report written within 20 days of receipt of the petition. Investigation reports will be express mailed to the Division of Safety for Coal or the Division of Safety and Health for Metal and Nonmetal. The proposed decision and order will be prepared and signed within 30 calendar days from receipt of the investigation report.

2. Request for Extended Investigation.

- a. Basis. Requests for extended investigations will be closely reviewed to determine if good cause is shown. Good cause may be shown by the presentation of issues that are novel or complex. Examples of such issues include the need to study the feasibility of modifying equipment or applying new technology or to conduct a more in-depth investigation of mining conditions or practices.
- b. Procedures for processing. The Division of Safety for Coal or the Division of Safety and Health for Metal and Nonmetal will review requests for extended investigations. As part of the evaluation of the request for extended investigation, the Division of Safety for Coal or the Division of Safety and Health for Metal and Nonmetal will normally consult with the district to ascertain the conditions and practices at the mine and other facts relevant to the request. For petitions with granted requests for extended investigations, the 45-day time frame for investigating and preparing the report of investigation may be waived, depending on the individual circumstances surrounding the petition.

B. Application for Temporary Relief (30 C.F.R. § 44.16).

1. Criteria. Petitioner may file an application for temporary relief from enforcement of a safety standard. Temporary relief may be granted by the Administrator only upon finding that application of the standard will result in a diminution of safety to the miners at the mine. Such applications may be granted only when the criteria set out in 30 C.F.R. § 44.16(e) are addressed in the petition. Those criteria are:
 - a. The application is filed in good faith;
 - b. Relief will not adversely affect the health or safety of miners at the affected mine;
 - c. An identifiable hazard to miners exists in the mine which is caused by application of the standard at the mine;
 - d. Other means will be used to reasonably address the hazard against which the original standard was designed to protect; and
 - e. Compliance with the standard while the petition is pending will expose miners to the identifiable hazard upon which the application is based.

2. Filing, Responses, and Decision. Applications for temporary relief may be filed with the Administrator any time prior to the issuance of the PDO. Parties to the petition may file a written response to the application within 15 days of receipt of the application. If the Administrator does not issue a decision within 60 days of the filing of the application, the application will be considered denied. Granted applications for temporary relief become effective immediately.
3. Effect of Appeal. Appeals of granted applications for temporary relief will result in the application and petition being referred to the Chief Administrative Law Judge (ALJ) for hearing and decision. After referral of the application and petition to the Chief ALJ, no further decision will be issued by the Administrator. Requests for hearing must be made within 15 days of the Administrator's decision. If a request for temporary relief is granted, the relief will remain in effect until modified, affirmed, or set aside by an ALJ. However, the granted relief will not remain in effect for more than 1 year, unless renewed or affirmed by the ALJ.
4. Priority. Together with requests for expedited investigations (discussed above), petitions with granted applications for temporary relief will receive the highest priority. Such petitions and applications must be investigated immediately and the investigation reports and proposed decisions and orders prepared promptly.
5. Procedures for Processing. The Division of Safety for Coal or the Division of Safety and Health for Metal and Nonmetal will review each application for temporary relief to determine if the application is filed for a petition involving a diminution of safety and if the applicant addressed the five criteria set forth in 30 C.F.R. § 44.16(e) (listed above). The request is forwarded for review by the SOL. As part of the evaluation of the application for temporary relief, the Division of Safety for Coal or the Division of Safety and Health for Metal and Nonmetal will normally consult with the district to ascertain the conditions and practices at the mine and other facts relevant to the application. When the review reveals that the application for temporary relief reasonably addresses the criteria, the application will be forwarded to the district with the petition by fax or email.

The investigation of the petition must be conducted and the report written within 20 calendar days of receipt. The merits of the application for temporary relief must be addressed in a separate memorandum to the Chief, Division of Safety for Coal or the Chief, Division of Safety and Health for Metal and Nonmetal I. The report and memorandum must be faxed or emailed to the Division of Safety for Coal or the Division of Safety and Health for Metal and Nonmetal.

The Coal Division of Safety or Metal and Nonmetal Division of Safety and Health will prepare the decision on the application for temporary relief. (See sample Order of Relief, Appendix D) The decision must be prepared and signed 20 days from receipt of the fax or email investigation report and temporary relief memorandum. The decision and order will not be signed prior to the twentieth day following receipt of the application for temporary relief so that comments submitted can be considered. The Division of Safety for Coal or the Division of Safety and Health for Metal and Nonmetal will notify the district by fax or email of the decision regarding the application, and, in cases when the application is granted, that the relief is effective. Districts will also be notified immediately by email if the temporary relief decision is appealed.

If a request for hearing is received, the application for temporary relief and the petition record, including any PDO that may have been issued, will be referred to the Chief ALJ for the Department of Labor. A citation issued at the mine for a violation of the standard that is the subject of the petition may be extended based on a decision granting an application for temporary relief until after a final Agency decision is made on the merits of the petition.

C. Application for Relief to Give Effect (30 C.F.R. § 44.16(k) - (m)).

1. Basis. Petitioner may file an application for relief to give effect to the proposed decision and order until it becomes final. Such relief may be granted when:
 - a. A good faith representation is made that no party is expected to contest the PDO granting the modification; and
 - b. Exceptional circumstances occur due to unforeseen events and waiting until the 30-day contest period expires would unnecessarily disrupt mining, dislocate the workforce, or unduly injure the interests of the parties.
2. Filing, Effective Date, and Appeal. An application to give effect may be filed any time after the issuance of the PDO. If an application to give effect is granted, the PDO becomes effective the seventh day after relief was granted, unless the PDO is appealed. If a request for hearing is filed, the granted relief will expire immediately.
3. Procedures for Processing. The Division of Safety for Coal or the Division of Safety and Health for Metal and Nonmetal will review applications for relief to give effect. As part of the evaluation of the application for relief to give effect, the Division of Safety for Coal or the Division of Safety and Health for Metal and Nonmetal will normally consult with the district to ascertain the circumstances at the mine and other facts relevant to the application. After the Division of Safety

for Coal or the Division of Safety and Health for Metal and Nonmetal consults with or the application is reviewed by SOL, the Division of Safety for Coal or the Division of Safety and Health for Metal and Nonmetal will notify the district by fax or email whether the application was granted, the day the PDO becomes effective, and if the PDO is under appeal.

CHAPTER 5 - APPEALS AND PARTIAL APPEALS

Appeals and Partial Appeals (30 C.F.R. § 44.13, 44.14, 44.15, and 44.33).

Any interested party to the petition may request a hearing after the Administrator for Coal or Metal and Nonmetal issues his PDO. Such hearing will be conducted by a Department of Labor Administrative Law Judge (ALJ). The ALJ's decision may be appealed to the Assistant Secretary of Labor for Mine Safety and Health. A decision of the Assistant Secretary of Labor may be appealed to the United States Court of Appeals.

A. Appeals to an Administrative Law Judge

1. Filing. Proposed decisions and orders will become effective 35 days (30-day contest period plus 5 days mailing) after the issuance of the PDO. Requests for hearing must be filed with the appropriate Administrator, Mine Safety and Health Administration, 1100 Wilson Boulevard, Arlington, Virginia 22209-3939.
2. Contents of Hearing Request. The request shall contain a concise summary of position on the issues of fact or law desired to be raised by the party requesting the hearing, including specific objections to the proposed decision. In addition, a party other than the petitioner may comment upon all issues of fact or law presented in the petition.
3. Effect of Appeal. Except as provided in Section 44.14(c), which addresses partial appeals, a PDO is not operative during an appeal to an ALJ and a decision of an ALJ is not operative during an appeal to the Assistant Secretary of Labor.
4. Effect of Partial Appeals. Any party may file a request for hearing based on objection to one or more terms and conditions of a PDO granting a petition. During the course of any partial appeal, the PDO can take effect. However, all terms and conditions must be complied with, including those being appealed.
5. Procedures for Processing. The Division of Safety for Coal or the Division of Safety and Health for Metal and Nonmetal submits copies of the required elements of the petition file, including a copy of the request for hearing, to the appropriate Administrative Law Judge (ALJ) and to SOL with a transmittal letter within 5 working days of receipt of a request for hearing. The Administrator for Coal or Metal and Nonmetal is represented by SOL during the appeal process. The Division of Safety for Coal or the Division of Safety and Health for Metal and Nonmetal provides witnesses, evidence, and other necessary assistance for the hearing.

6. MSHA Implementation of ALJ Hearing Orders.
As a result of the hearing, the ALJ will issue an Order. The Order will either grant or deny the petition. The Order is sent to the respondents and their attorneys and is effective 35 days (30 days plus 5 days mailing) after issuance unless appealed to the Assistant Secretary of Labor for Mine Safety and Health.
7. The Division of Safety for Coal or the Division of Safety and Health for Metal and Nonmetal Petition Coordinator, upon receipt of the ALJ's Order, places a copy in the petition file and provides a copy to the district. In some instances, the ALJ's Order will remand the case back to the Administrator for further consideration.

B. Appeals to the Assistant Secretary for Mine Safety and Health

1. Filing. An ALJ's initial decision will be effective 35 days (30-day contest period plus 5 days for mailing) after its issuance unless it is appealed to the Assistant Secretary of Labor for Mine Safety and Health. Any interested party to the petition may file an appeal 30 days after service with the Assistant Secretary, Mine Safety and Health Administration, 1100 Wilson Boulevard, Arlington, Virginia 22209-3939.
2. Contents of Appeal and Statement of Objections. The appeal shall consist of a notice of appeal. Within 20 days after filing the notice of appeal, the appellant shall file a statement of objections as provided in 30 C.F.R. § 44.33. Within 20 days after service of the statement of objections, any other party may file a statement in response as provided in Section 44.33.
3. Effect of Appeal. Except as provided in Section 44.14(c) which addresses partial appeals, an ALJ's initial decision is not operative pending an appeal to the Assistant Secretary of Labor.
4. Effect of Partial Appeals. Any party may file a notice of appeal of one or more terms and conditions of the ALJ's initial decision. During the course of any partial appeal, the ALJ's decision can take effect. All terms and conditions must be complied with, including those being appealed.
5. MSHA Implementation of the Decision of the Assistant Secretary of Labor. The Assistant Secretary of Labor will either grant or deny the petition, which is sent to the respondents and their attorneys. SOL forwards the Decision and attachments to the Administrator for Coal or Metal and Nonmetal. The decision is effective after its issuance unless it has been appealed to a United States Court of Appeals and a stay has been granted.

Upon receipt of the Assistant Secretary's decision, the appropriate Division of Safety for Coal or the Division of Safety and Health for Metal and Nonmetal staff member places a copy of the decision in the petition file and provides a copy to the District Manager.

In some instances, the Assistant Secretary of Labor may remand the petition to the Administrator for further consideration.

Consistent with 30 U.S.C. § 811(d), any interested party may appeal the Assistant Secretary of Labor's decision to an appropriate United States Court of Appeals prior to the 60th day after its issuance.

CHAPTER 6 – REVOCATION OF GRANTED MODIFICATIONS

A granted modification may be revoked when there has been a change in circumstances or the findings that originally supported the modification are no longer valid.

The Division of Safety for Coal or the Division of Safety and Health for Metal and Nonmetal, as appropriate, reviews the petition and the revocation case file, consults or meets with SOL, and prepares a decision and order. If a mine is abandoned and sealed, granted modifications must be revoked.

- A. Petition for Revocation (30 C.F.R. § 44.52(a)). Any party to a proceeding in which a modification of a mandatory safety standard has been granted, including the Administrator, may request that a granted modification be revoked. Such petition shall be filed with the Chief Administrative Law Judge.
- B. Revocation by the Administrator (30 C.F.R. § 44.52(b)). The Administrator may initiate revocation proceedings of an earlier granted modification by issuing a new PDO revoking that modification. Such order will become effective 35 days (30-day contest period plus 5 days for mailing) after the issuance of the PDO unless the decision is appealed. See Appendix G for a sample Decision and Order to Revoke. The appeals process for proposed decisions and orders revoking modifications is identical to the appeals process for proposed decisions and orders granting, denying, or dismissing petitions.
 1. Basis (30 C.F.R. § 44.52(c)). Revocation of a granted modification must be based on a change in circumstances or because the findings that originally supported the decision are no longer valid. Revocation of a granted modification will be considered when:
 - a. The findings and conditions that justified the modification have changed such that the modification is no longer warranted;
 - b. The area of the mine to which the modification applies is no longer used or traveled;
 - c. The equipment to which the modification applies has been removed from the mine, has been permanently removed from service, or has been replaced with other equipment to which the decision does not apply.
 - d. The physical environment, such as the mining height, has changed such that the modification is no longer appropriate;

- e. The method of mining has changed such that the modification is no longer appropriate;
- f. The modification has not been implemented at the mine within 12 months after the date of issue;
- g. The operator repeatedly, or substantially, fails to comply with the terms of the modification; and/or
- h. The operator or miner's representative files a request for revocation.

When a mine is permanently abandoned, the district should notify the Division of Safety for Coal or the Division of Safety and Health for Metal and Nonmetal in writing and recommend that modifications previously granted at the mine be revoked.

2. District Investigation. MSHA inspectors review the mine files and related information before beginning every mandated mine inspection. All granted petitions for modification must be identified and evaluated during this review and the subsequent inspection should determine if they are still warranted.

The inspector, through his supervisor, should notify the District Manager if the granted modification is no longer appropriate or is not in use, in which case it should be considered for revocation.

If the District Manager determines that revocation is warranted, he may request an investigation. The investigation report must be completed within 45 days and provide the facts and explain the reasoning for revocation. (See Appendix E, Sample Investigative Report) In cases involving a change in conditions or circumstances, the report must address the facts at the time the modification was granted and how they have changed. The report should include drawings, maps, photographs, manufacturer's specification sheets, and/or other documents to support the contention that the granted decision should be revoked. A memorandum from the District Manager requesting revocation of the decision to grant the modification with the investigative report, if requested, must be transmitted to the Chief, Division of Safety for Coal or the Chief, Division of Safety and Health for Metal and Nonmetal (See Appendix F, sample Memorandum to Administrator)

3. Preparation and Issuance of Proposed Decision and Order. The district should prepare a draft PDO to revoke the order granting the modification. (See Appendix G, sample Decision and Order to Revoke) This draft must be

sent electronically (i.e., via email) to the Division of Safety for Coal or the Division of Safety and Health for Metal and Nonmetal Petition Coordinator. The Division of Safety for Coal or the Division of Safety and Health for Metal and Nonmetal reviews the request for revocation in consultation with SOL and makes any necessary changes to the draft PDO. If revocation is not warranted, the Division of Safety for Coal or the Division of Safety and Health for Metal and Nonmetal may prepare a memorandum to the District Manager that explains the rationale.

4. Modifications Superseded by New or Revised Standards. Orders granting modifications can be superseded by new or revised safety standards. Copies or summaries of modifications no longer in effect must be removed from mine bulletin boards, MSHA Uniform Mine Files, and all files and databases. When a granted modification is superseded by a new or revised standard, publication of the change in the Federal Register serves as notification to all interested parties. No Decision and Order to Revoke is to be issued.

CHAPTER 7 - AMENDING GRANTED MODIFICATIONS

Amended Modification (30 C.F.R. § 44.53). The Administrator may propose to revise the terms or conditions of a granted modification based on a change in circumstances or because the findings that originally supported the modification are no longer valid.

- A. Basis. An amended PDO may be issued when field experience or current research demonstrates that new or modified terms and conditions should be implemented.
- B. Proposed Decision and Order. The amended PDO will include a statement of reasons supporting the proposed amendment. In alternative method cases, the amended decision and order must at all times provide at least the same measure of protection afforded to the miners at the mine as provided by the standard. In cases involving a diminution of safety, application of the standard as written must still result in a diminution of safety to the miners at the mine and the amended decision and order must not reduce the level of protection afforded the miners by the original decision and order.

Amended proposed decisions and orders will be effective 35 days (30 days plus 5 days mailing) after the issuance of the decision and order, unless a hearing is requested.

- C. Appeals. The appeals process for an amended PDO is identical to the appeals process for the original PDO. The scope of the appeal will be limited to the amended terms and conditions proposed by the Administrator. The original modification will remain in effect until final resolution of the amended PDO.
- D. Procedures for Processing. The Division of Safety for Coal or the Division of Safety and Health for Metal and Nonmetal obtains a new docket number from OSRV. The original granted modification should be revoked after being superseded by the amended petition. The reason for the revocation would be that the findings and conditions that justified the modification have changed and the modification is no longer warranted.
- E. Modifications Cannot Be Transferred. A modification is granted to a particular mine. It cannot be transferred to a different mine. A new petition request must be filed by the mine operator if the operator wishes to add or change the mine(s) to which the granted modification applies.

LIST OF APPENDICES

- Appendix A Sample -PDO to Grant
- Appendix B Sample -PDO to Deny
- Appendix C Sample - Order of Dismissal
- Appendix D Sample - Order of Relief to Give Effect
- Appendix E Sample - Investigative Report Format
- Appendix F Sample - Memorandum to Administrator Requesting Modification be Revoked
- Appendix G Sample - Decision and Order to Revoke

Appendix A - Sample PDO to Grant

[Date Issued]

In the matter of
Any Mining Company
Mine Name
I.D. No. XX-XXXXX

Petition for Modification

Docket No. M-XXXX-XXX-C or M

PROPOSED DECISION AND ORDER

On November 22, 2005, a petition was filed seeking a modification of the application of 30 C.F.R. § 75.312(c) to Any Mining Company's Mine Name, located in (County, State). *The Petitioner alleges that the proposed alternative method will at all times provide the same measure of protection as the standard.*

AND/OR

The petitioner alleges that application of the petitioned standard at the mine will result in a diminution of safety to the miners.

MSHA personnel conducted an investigation of the petition and filed a report of their findings with the Administrator for Coal Mine Safety and Health. After a careful review of the entire record, including the petition and MSHA's investigative report, this Proposed Decision and Order (PDO) is issued.

Finding of Fact and Conclusion of Law

The alternative method proposed by the Petitioner (as amended by the recommendations of MSHA) will at all times guarantee no less than the same measure of protection afforded the miners under 30 C.F.R. § 75.312(c). The standard reads, in relevant part,

(c) At least every 31 days, the automatic fan signal device for each main mine fan shall be tested by stopping the fan. Only persons necessary to evaluate the effect of the fan stoppage or restart, or to perform maintenance or repair work that cannot otherwise be made while the fan is operating, shall be permitted underground.

The petitioner proposes an alternate method of performing the tests without shutting down the fan and without removing the miners from the mine. The petitioner's alternative method will result in the fan alarm signal being verified by a responsible

person at a surface location where the responsible person is always on duty whenever anyone is underground. A report of all tests will be recorded.

According to the MSHA report of investigation for the petition for modification, Mine Name is a large mine with a complex ventilation system. Any delay of a fan restart beyond 15 minutes after shutdown for testing could result in a lengthy restart of the mine operating systems. MSHA's investigation of the petitioner's alternative method for compliance with 30 C.F.R. § 75.312(c) revealed that a valve would be installed in the system monitoring the water gauge of the fan pressure monitoring system. The water gauge installed at the mine is actually a Magnehelic gauge with electronic pickups, which are integrated into the atmospheric monitoring system (AMS). When the valve is closed, the AMS will detect zero fan pressure and activate the alarm.

When the fan stoppage signal system is tested, an audible fan signal alarm sounds at the location where a responsible person is on duty, verifying the performance of the fan alarm signal system. The responsible person is provided with two-way communication to working sections and workstations.

On the basis of the petition, the findings of MSHA's investigations, and the recommendations of MSHA, Any Mining Company is granted a modification of the application of 30 C.F.R. § 75.312(c) to its Mine Name.

ORDER

Wherefore, pursuant to the authority delegated by the Secretary of Labor to the Administrator for Coal Mine Safety and Health, and pursuant to Section 101(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C., § 811(c), it is ordered that Any Mining Company's Petition for Modification of the application of 30 C.F.R. § 75.312(c) in the Mine Name is hereby:

GRANTED, for tests of the automatic fan stoppage signal device to be performed without shutting down the mine fan, without removing the miners from the mine, and conditioned upon compliance with the following terms and conditions:

1. The main mine fan subject to this PDO shall be provided with a valve installed in the system monitoring the water gauge of the fan-pressure monitoring system. Testing of the fan signal shall be performed by closing the valve installed in the fan-pressure monitoring gauge and verifying that it activates a relay in the fan-monitoring AMS. The AMS shall activate an alarm at a location where a responsible person is always on duty whenever anyone is underground. This responsible person shall

have two-way communication with all working sections and workstations.

2. The activation of the fan signal shall be verified by a responsible person at the location where the responsible person is always on duty whenever anyone is underground.
3. Every six (6) months, each automatic fan signal device and signal alarm shall be tested by stopping the fan to ensure that the automatic signal device causes the alarm to activate when the fan shuts down.
4. The petitioner shall notify the MSHA District Manager when the fan is equipped with the fan alarm signal system. This permits MSHA to make an inspection prior to testing the alarm in accordance with the PDO. If required by the District Manager, the test procedure shall be demonstrated and the fan shall be shut down during this MSHA inspection to verify that the automatic fan signal activates an alarm at the location of the responsible person.
5. Until the fan is equipped in compliance with this PDO, the miners must be removed from the mine for the testing of any fan not yet equipped as required.
6. By the end of the shift on which the test of the automatic fan signal devices is completed, the person(s) performing the test(s) shall record the result of the test(s) in a secure book. The record book shall be retained at a surface location at the mine for at least one year and shall be made available for inspection by an authorized representative of the Secretary and the representative of the miners. Such recording shall also indicate the general repair of the system.
7. Within 60 days of issue of this PDO, the Petitioner shall submit proposed revisions for its approved 30 C.F.R. Part 48 training plan to the District Manager. These proposed revisions shall include initial and refresher training regarding compliance with this PDO. In addition, miners who are to perform the tests under this PDO must be specifically trained on the proper method of testing upon initial assignment to these responsibilities and at least annually thereafter.

Any party to this action desiring a hearing on this matter must file in accordance with 30 C.F.R. § 44.14, within 30 days. The request for hearing must be filed with the Administrator for Coal Mine Safety and Health, 1100 Wilson Boulevard, Arlington, Virginia 22209-3939.

If a hearing is requested, the request shall contain a concise summary of position concerning the issues of fact or law desired to be raised by the party requesting the hearing, including specific objections to the proposed decision. A party other than Petitioner who has requested a hearing shall also comment upon all issues of fact or law at issue in the petition, and any party to this action requesting a hearing may indicate a desired hearing site. If no request for a hearing is filed within 30 days after service thereof, this Decision and Order will become final and must be posted by the operator on the mine bulletin board at the mine.

Typed Name
Deputy Administrator for
Coal Mine Safety and Health

or

Typed Name
Administrator for
Metal and Nonmetal Mine Safety and Health

Certificate of Service

I hereby certify that a copy of this proposed decision was served personally or mailed, postage prepaid, this _____ day of _____, 20XX, to:

Name
Mining Company
Address

Miners Representative/ Union
Address

Typed Name
Mine Safety and Health Technician

cc: State Mine Inspection Agency
bcc: District Manager
OSRV
Case File

Appendix B - Sample PDO to Deny

[Date Issued]

In the matter of
Any Mining Company
Mine Name
I.D. No. XX-XXXXX

Petition for Modification

Docket No. M-XXXX-XXX-M or C

PROPOSED DECISION AND ORDER

On October 4, 2002, Any Mining Company filed a petition pursuant to Section 101(c) of the Federal Mine Safety and Health Act of 1977 (Mine Act), 30 U.S.C. § 811(c) and 30 C.F.R. pt. 44. The petition sought a modification of the application of mandatory safety standard 30 C.F.R. § § 57.11052(d), (refuge areas), at the (Mine Name) (ID No. XX) located in (County and State). The mine is an underground limestone mine using conventional mining methods.

The relevant standard, 30 C.F.R. § 57.11052(d), Refuge Areas, provides:

Refuge areas shall be ----

(d) Provided with compressed air lines, water lines, suitable hand tools, and stopping materials.

The Petition proposes an alternative method of maintaining five 5-gallon plastic water bottles in the refuge area rather than maintaining a water line as required by the standard. The petition alleges that the alternative method will at all times guarantee not less than the same measure of protection as the standard.

The MSHA District Office conducted an investigation and filed a report with the Administrator for Metal and Nonmetal Mine Safety and Health. After a careful review of the entire record, including the petition and MSHA's investigative report, this Proposed Decision and Order is issued.

Findings of Fact and Conclusion of Law

The Petitioner proposes to maintain five 5-gallon plastic bottles of water in the refuge chamber as an alternative to providing a water line. The petition states that no more than ten miners are anticipated to seek refuge in the chamber during a mine emergency and that the duration of any mine emergency is not anticipated to exceed four days.

The petition states “research has indicated that the general rule of thumb for the daily amount of water requirements for humans is 64 ounces.” At this rate of water usage, ten miners would use 640 ounces or 20 gallons in four days. The petition states that 25 gallons of water would be maintained in the refuge chamber. The petitioner states that the storage of five 5-gallon plastic bottles of water in the refuge chamber will provide no less than the same measure of protection as a water line.

The standard requires a refuge chamber for use when miners are unable to escape from the mine in an emergency. The investigation report indicates that a secondary escapeway is currently under construction. A water line is required to provide an unlimited quantity of water for miners. If there is a mine emergency during which miners must remain in the refuge chamber for extended periods of time, a water line provides an unlimited supply of water. Using the estimates provided in the petition, the refuge chamber would contain water sufficient for only about four days for the ten miners who would need the refuge area in a mine emergency. Consequently, five 5-gallon plastic water bottles do not provide the same measure of protection for miners as the water line required by the standard.

The petition states that there are no water lines on the property to deliver portable water to the refuge chamber. However, water is available at the mine. Further, the petition states that it would be difficult to keep the water lines to the refuge chamber from freezing during the winter months because the water line would not be buried. This can be avoided by burying the water line, maintaining a dry system, using heat tape, exhausting air in the decline in order to warm the pipe, as well as use of the downcomer hole.

Finally, the petition states that the water line could be damaged in the event of a rock fall and subject to breakage by a ground fall. Use of the downcomer hole would eliminate these hazards.

The petition does not provide an alternative method of compliance that will at all times guarantee no less than the same level of protection to the miners.

ORDER

Wherefore, pursuant to the authority delegated to the Administrator for Metal and Nonmetal, and pursuant to Section 101(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 811(c), it is ordered that a modification of 30 C.F.R. § 57.11052(d) based upon an alternative method of maintaining bottled water in the refuge chamber in lieu of water lines as required by the standard at the Any Mining Underground Mine is hereby:

DENIED

Any party to this action desiring a hearing on this matter must file in accordance with 30 C.F.R. § 44.14, within 30 days. The request for hearing must be filed with the Administrator for Metal and Nonmetal Mine Safety and Health, 1100 Wilson Boulevard, Arlington, Virginia 22209-3939.

If a hearing is requested, the request shall contain a concise summary of position concerning the issues of fact or law desired to be raised by the party requesting the hearing, including specific objections to the proposed decision. A party other than Petitioner who has requested a hearing shall also comment upon all issues of fact or law at issue in the petition, and any party to this action requesting a hearing may indicate a desired hearing site. If no request for a hearing is filed within 30 days after service thereof, this Decision and Order will become final and must be posted by the operator on the mine bulletin board at the mine.

Typed Name
Administrator for
Metal and Nonmetal Mine Safety and Health

or

Typed Name
Deputy Administrator for
Coal Mine Safety and Health

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Proposed Decision and Order was served personally or mailed, postage prepaid, this _____ day of _____, 20XX to:

Name
Mining Company
Mine Name
Address

Miners Representative/Union
Address

Typed Name
Mine Safety and Health Technician

cc: State Mine Inspection Agency
bcc: District Manager
OSRV
Case File

Appendix C - Sample Order of Dismissal

[Date Issued]

In the matter of
Mining Company
Mine Name

Petition for Modification

I.D. No. XX-XXXXX

Docket No. M-XXXX-XXX-M or C

PROPOSED ORDER OF DISMISSAL

On October 24, 2005, (Mining Company) filed a petition pursuant to Section 101(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 811(c) and 30 C.F.R. pt. 44. The petitioner sought a modification of the application of mandatory safety standard 30 C.F.R. § 75.364(b)(1), at the Mine Name, located in (County, State).

On December 5, 2005, MSHA headquarters received a memorandum from the district office indicating that the area being petitioned was no longer a return air course and, as such, no longer required a petition. Therefore, the petition is not needed and should be dismissed. On December 5, 2005, MSHA received a letter from the petitioner requesting that the petition and the request for temporary relief be withdrawn.

Therefore, pursuant to the authority delegated by the Secretary of Labor to the Administrator for (Coal or Metal and Nonmetal) Mine Safety and Health, Mining Company's Petition for Modification of 30 C.F.R. § 75.364(b)(1) at its Mine Name is hereby:

DISMISSED.

Any party to this action desiring a hearing on this matter must file in accordance with 30 C.F.R. § 44.14, within 30 days. The request for hearing must be filed with the Administrator for (Coal or Metal and Nonmetal) Mine Safety and Health, 1100 Wilson Boulevard, Arlington, Virginia 22209-3939.

If a hearing is requested, the request shall contain a concise summary of position concerning the issues of fact or law desired to be raised by the party requesting the hearing, including specific objections to the proposed decision. A party other than Petitioner who has requested a hearing shall also comment upon all issues of fact or law at issue in the petition, and any party to this action requesting a hearing may indicate a desired hearing site. If no request for a hearing is filed within 30 days after service thereof, the Order of Dismissal will become final.

Typed Name
Chief, Safety Division for
Coal Mine Safety and Health

or

Typed Name
Administrator for
Metal and Nonmetal Mine Safety and Health

Certificate of Service

I hereby certify that a copy of this order of dismissal was served personally or mailed, postage prepaid, this ____ day of _____, 20XX, to:

Name
Mining Company
Mine Name
Address

Miners Representative/Union
Address

Typed Name
Mine Safety and Health Technician

cc: State Mine Inspection Agency
bcc: District Manager
OSRV
Case File

Appendix D - Sample Order of Relief to Give Effect

[Date Issued]

In the matter of
Any Mining Company
Mine No. 2
I.D. No. XX-XXXXX

Petition for Modification

Docket No. M-XXXX-XXX-C or M

ORDER OF RELIEF TO GIVE EFFECT

By petition for modification filed on December 19, 2002, and subsequent requests for amendment filed on February 13, 2003, August 13, 2003, and September 13, 2003, Petitioner requested modification of the application of 30 C.F.R. § (Applicable Standard Section). On September 18, 2003, MSHA issued a Proposed Decision and Order granting Any Mining Company's petition to modify 30 C.F.R. § (Applicable Standard Section) at its No. 2 Mine.

By letter filed on September 24, 2003, Petitioner requested Relief to Give Effect to the Proposed Decision and Order, alleging that exceptional circumstances exist, that no party is expected to contest the granting of the petition, and that an unnecessary disruption and significant economic loss will occur in the absence of such relief. After a careful review of the entire record and the circumstances at the No. 2 Mine, as well as the August 9, 2003, letter from the (Miners Labor Affiliation, if any) indicating it would not contest the granting of the petition for modification, this decision is issued.

ORDER

Wherefore, pursuant to the authority delegated by the Secretary of Labor to the Administrator for (Coal or Metal and Nonmetal) Mine Safety and Health, and pursuant to Section 101(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. Sec. 811(c), it is ordered that Any Mining Company's application for Relief to Give Effect to the September 18, 2003 Proposed Decision and Order granting modification of 30 C.F.R. § (Applicable Standard Section) in the No. 2 Mine is hereby:

GRANTED

This decision will be effective on the seventh day following the issuance date above. If any party to this action requests a hearing on the September 18, 2003, Proposed Decision and Order in accordance with 30 C.F.R. § 44.14 before the seventh day following the issuance date above, the relief will not become effective. If any party to this action requests a hearing on the Proposed Decision and Order in accordance with 30 C.F.R. § 44.14 after relief becomes effective, the relief will expire immediately.

Deputy Administrator for
Coal Mine Safety and Health

-or-

Administrator for
Metal and Nonmetal
Mine Safety and Health

Certificate of Service

I hereby certify that a copy of this order of relief to give effect was served personally or mailed, postage prepaid, this _____ day of _____, 20XX, to:

Name
Mining Company
Mine Name
Address

Miners Representative/Union
Address

Typed Name
Mine Safety and Health Technician

cc: State Mine Inspection Agency
bcc: District Manager
OSRV
Case File

Appendix E - Sample Investigative Report Format

[Date]

MEMORANDUM FOR DISTRICT MANAGER

FROM: [INVESTIGATOR(S) NAME(S)]

SUBJECT: Investigative Report of Petition for Modification of 30 C.F.R. § (Applicable Standard Section), No. 1 Mine, I.D. No. XX-XXXXX, Any Mining Company, M-XXXX-XXX-C or M

On October 2, 2002, [NAME OF INVESTIGATOR(S)] conducted an investigation of the subject petition which had been identified as potentially no longer being needed due to [change of conditions, not having been implemented, and/or repeated failure to comply]. The following persons participated in the investigation:

[NAME(s)] - [TITLE(s)]

The miners are not represented by a labor union and there is no miner's representative. However, comments were solicited from eight miners.

The No. 1 Mine was opened into the - - - - - bed by means of three drift openings in March 1989 by Any Mining Company. The mine employs 20 persons on two shifts per day. The mine has two working sections utilizing continuous mining machines and produces an average of 2,000 raw tons of material per day. The bed ranges from 46 to 52 inches in height. The mine is ventilated by one fan operating exhausting, producing 100,000 cubic feet of air per minute. Only traces of methane have been detected in bottle samples.

On [DATE] a petition for modification, Docket No. M-XXXX-XXX-C or M, was granted to the No. 1 Mine, Any Mining Company. The petition was granted based on a diminution of safety where the mining height was not sufficient to allow the safe installation of cabs or canopies on the mine's electric face equipment. The petition and supporting investigative report indicates that the average mining height at that time was 46 inches and undulations of the roof and bottom were prevalent. The petition granted a modification of 30 C.F.R. § (standard number) for all of the section equipment except the XXXXXXXXX Scoop or LHD.

The following equipment was being used on the working sections at the time of the investigation:

No. 1 Section

- 1 - XXXXXXXXXX Mining Machine
Frame Height - XX inches
- 1 - XXXX Roof Bolting Machine
Frame Height - XX inches
- 2 - XXXXXXXXXX Haulage Vehicle
Frame Height - XX inches
- 1 - XXXXXXXXXX Scoop or LHD
Frame Height- XX inches

2 Left Section

- 1 - XXXXXXXXXX Mining Machine
Frame Height - XX inches
- 1 - XXXXXXXXXX Roof Bolting Machine
Frame Height - XX inches
- 3 - XXXXXXXXXX Haulage Vehicles
Frame Height - XX inches

<p>NOTE: When equipment is involved, the model and serial number must be included.</p>

Examination of the working sections revealed that both sections were operating with uniform 50 inches of measured mining height and the previous undulations of the roof and bottom had diminished. All equipment was found operating with cabs or canopies installed and clearance between the roof and the top of the canopy(s) was between 2 and 5 inches. Inquiries of the miners revealed that, although the miners preferred to not have the cabs or canopies installed, they had little problem with operating the equipment with them on. A discussion was held with the mine manager on the likelihood that the observed conditions would continue. A review of core drilling data for the area projected to be mined in the next 2 years showed the coal seam to continue to be a uniform 51 to 53 inches, with the elevation of the mine floor showing a uniform gradual dip and strike.

A review of the earlier factors upon which the subject petition was granted revealed that the lower mining heights and seam undulations were directly related to a localized geological formation. It was determined that this type of formation does not exist in any other areas of the mining property. Finally, the mine operator indicated that because of the conditions in the area where the mining height is 46 inches, second mining will not be conducted in this area.

Attachments: [copy of petition]
[copy of inspector's memorandum]

Appendix F
Sample Memorandum to Administrator Requesting Modification be Revoked

[DATE]

MEMORANDUM FOR [THE ADMINISTRATOR]

FROM: [DISTRICT MANAGER]

SUBJECT: Request for Revocation of Petition for Modification of
30 C.F.R. § (Applicable Standard Section), No. 1 Mine,
I.D. No. 53-01234, Any Mining Company, Docket No.
M-XXXX-XXX-C or M

An investigation of the subject petition was conducted on October 3, 2002 and revealed that the modification granted under Docket No. M-XXXX-XXX-C or M is no longer needed at the No. 1 Mine, Any Mining Company. Based on the findings of the attached investigative report, I am requesting that the subject petition be revoked.

Attachments [copy of investigation report]
[copy of inspector's memorandum]

For coal mines, a draft PDO should be sent to Division of Safety for Coal electronically
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Appendix G - Sample Decision and Order to Revoke

In the matter of:

Petition for Modification

Operator

Mine Name

I.D. No.

<u>Docket No.</u>	<u>30 C.F.R.</u>	<u>Granted</u>	<u>Finalized</u>
M-1970-188-C	75.1400	September 3, 1974	October 3, 1974
M-1983-055-C	75.364(b)(2)	April 2, 1984	May 3, 1984
M-1990-004-C	75.1909(b)(6)	November 3, 1990	December 3, 1990

PROPOSED DECISION AND ORDER TO REVOKE

MSHA records indicate that underground workings of the referenced mine have been permanently abandoned and the surface openings to the mine sealed. MSHA has determined that the mining conditions have changed and that the modifications are no longer needed at the referenced mine. Wherefore, pursuant to the authority delegated by the Secretary of Labor to the Administrator for (Coal or Metal and Nonmetal) Mine Safety and Health, and pursuant to section 101(c) of the Federal Mine Safety Health Act of 1977, 30 U.S.C. § 811(c), the modifications as they apply to the referenced mine are hereby:

REVOKED

Pursuant to 30 C.F.R. § 44.52, revocations of the granted modifications will become final 30 days after service of this Proposed Decision and Order to Revoke, unless a hearing is requested on the Decision and Order. Any party to this action desiring a hearing on this matter must file in accordance with 30 C.F.R. § 44.14, within 30 days. The request for hearing must be filed with the Administrator for (Coal or Metal and Nonmetal) Mine Safety and Health, 1100 Wilson Boulevard, Arlington, Virginia 22209-3939.

If a hearing is requested, the request shall contain a concise summary of the position on the issues of fact or law desired to be raised by the party requesting the hearing, including specific objections to the proposed decision. A party other than Petitioner who has requested a hearing shall also comment upon all issues of fact or law presented in the petition, and any party to this action requesting a hearing may indicate a desired hearing site.

If no request for a hearing is filed within 30 days after service thereof, the Order to Revoke will become final.

Typed Name
Chief, Division of Safety
Coal Mine Safety and Health

-or-

Typed Name
Administrator for
Metal and Nonmetal Mine Safety and Health

Certificate of Service

I hereby certify that a copy of this Order to Revoke was served or mailed, postage prepaid, this _____ day of _____, 20XX, to:

Name
Mine Name
Mining Company
Address

Miners Representative/Union
Address

Typed Name
Mine Safety and Health Technician

cc: State Mine Inspection Agency
bcc: District Manager
OSRV
Case File