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MSHA - Whose Plan Is It?

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***As seen in the March issue of *COAL USA* magazine.**

The frequency of this question being posed to coal lawyers has increased dramatically in the past few years. In particular, issues about ventilation and respirable dust compliance as well as extended cuts have frequently been raised in the context of plan disputes. The question that arises from the discussion of these issues is simply "what do we do if we disagree with MSHA about a plan provision?" In addition to the time-honored approach of requesting a meeting with the District Manager and seeking to work things out[1], there is another procedure that exists in MSHA's Program Policy Manual which addresses this topic.

Areas of Concern to Operators

A typical type of letter we have seen observes that there are certain individual sample analysis results for the subject mining unit (sometimes for samples taken a year or more before the date of the letter) which cause the District Manager to question the adequacy of the mine's methane and dust control plan[2]. Such letters often include the request or requirement from the District Manager for the operator to promptly amend or revise its plan. In a like vein, some Districts have used such alleged respirable dust issues to request the deletion of previously approved extended cuts.

While MSHA's Program Policy Manual at Volume V gives the District Manager discretion to initiate a mine plan change, the ultimate issue is whether there are provisions in the plan which are not suitable to the particular conditions at the mine. It is not uncommon that the data reveals what appear to be isolated analysis results that may have been attributable to a particular and limited geological anomaly that may not justify a mine plan revision. In fact, the Program Policy Manual requires that there be written notification from the District Manager to the operator which should identify the reason why the changes are needed. Importantly, the operator is to be given an opportunity to meet with the District personnel to discuss any proposed changes and if justified to set a reasonable time for the operator to submit revised plan provisions to the District.

Unlike respirable dust analysis, which for purposes of 30 C.F.R. §70.100 has come to require the average of five valid samples (and not simply a single shift sample), MSHA has historically altered and reduced an operation's respirable dust standard on the basis of a single shift sample with a quartz content in excess of 5%. For operators, it sometimes seems that once a reduced respirable dust standard has become established, getting a re-evaluation based on a more current quartz analysis may not be easily obtained since MSHA controls the timing of the gathering and designation of samples that will be analyzed for quartz content.

One important bit of information for operators dealing with a reduced respirable dust standard due to quartz is found at MSHA's Handbook Series, Chapter 1, Respirable Dust, at page 1.29. Paragraph 2. provides, in part, that "If the sampled entity is on a reduced standard, the inspector will delay any enforcement action until the results of quartz analysis are received. …" The practical application of this provision is that if the

quartz analysis of a more current sample (contemporaneously taken with the samples being gathered by MSHA to measure compliance) would reveal a result that if used as the 30 C.F.R. §70.101 value would result in a reduced respirable dust standard that would not be exceeded by the current average concentration results, no enforcement action should be taken. And although untested to our knowledge, this concept would seem to lend relevancy and credibility to an operator's request that MSHA utilize quartz analysis results for samples taken after the sample which was used under 30 C.F.R. §70.101 to establish the reduced standard. Be aware if you start down this path that you will likely meet resistance from MSHA and once again our advice would be to not wait for an issue to arise but keep good records of when samples are collected, review the MSHA data retrieval system for results and if samples were taken that you believe should have been analyzed for quartz, you may want to make an inquiry of the "health" inspector from your District.

Another important provision for operators to be aware of is also found in Chapter 1 of the MSHA Handbook Series at page 1.48 which addresses an operator's right to request a reevaluation of the applicable quartz level. In our experience, if an entity is on a reduced respirable dust standard it is not often that MSHA will initiate discussions about a reevaluation of the quartz level and operators need to consider being proactive on this topic.

Abatement issues are also critical and operators should know that 30 C.F.R. §70.201(d) provides in part:

"… the operator shall take corrective action to lower the concentration of respirable dust within the permissible concentration and then sample each production shift until five valid respirable dust samples are taken."

We have seen MSHA ignore the plain language of this regulatory provision and require operators to submit plan changes, which MSHA must approve of, before any sampling is allowed to ascertain compliance. However, we have also found that many operators have yielded the discussion on this topic by having already included provisions in their plans that expressly provide for such a protocol.

Operators should also be aware of Program Information Bulletin ("PIB"), No. P09-31, issued on August 25, 2009, which among other things, seeks to clarify the sampling procedure for an operator which has received a respirable dust citation under Part 70 or 71. This PIB explains that the last sentence of 30 C.F.R. §70.201(d) does require samples to be taken on each production shift when abatement is being sought, rather than what has become an accepted practice in many locations of samples being collected only on one production shift per day (and typically the same shift - e.g., on day shift for each of five consecutive days).

An additional resource reference for operator awareness is MSHA PIB No. P07-20, issued on July 31, 2007 which gives operators the opportunity, if the defined protocol is precisely followed, for "operator" samples with less than 0.45 mg weight gain to be analyzed for quartz at the MSHA lab, just as MSHA collected samples with less than 0.45 mg weight gain may be so analyzed.

While the plan dispute provisions of MSHA's Program Policy Manual, as briefly discussed above, might be called on to deal with such issues, the operator who has already included provisions in its plan that go beyond the regulatory scheme is held to those "higher" standards as the starting point of the inquiry and legal analysis, frequently making the operator's case much more difficult. Other typical issues that may be of an overreaching nature in these matters, depending on the mine specific conditions and factors (which are frequently lost in the shuffle) include: limiting or excluding extended cuts, changing from blowing to exhausting ventilation schemes, ironically in some instances, limiting or prohibiting the use of scrubbers, changes in water pressures, numbers of sprays, mean air velocities, quantity of air, etc.

Conclusion

Be cautious about what you agree to put in your plans, especially when abating a citation. Maintain your ventilation and dust controls, follow your preventative maintenance plans for cleaning screens and scrubbers and ductwork, check sprays and water lines, follow your roof control plan, strive for improvement, and be consistent with your follow-up.

Ultimately, know your rights, exercise them and stand your ground when you have reasonable and available data and information to support your position.

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(1) See 30 C.F.R. §§75.220(b)(2) and 75.370(c)(2) which provide for operators to have an opportunity to discuss the issues with the District Manager for roof control and ventilation plans, respectively.
(2) Despite legal precedent which has held that single shift samples are scientifically inadequate to support an enforcement action and which, among other reasons, is why MSHA protocol requires an average of five valid samples to substantiate a respirable dust violation under 30 C.F.R. §70.100 or §70.101.