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PROGRAM POLICY LETTER NO. P12-V-01

FROM: KEVIN G. STRICKLIN
Administrator for
Coal Mine Safety and Health

SUBJECT: Reissue of P09-V-08 - Procedures for Revoking MSHA
Certifications to Take Respirable Dust Samples or to Maintain and
Calibrate Approved Dust Sampling Devices

Scope

This Program Policy Letter (PPL) applies to all Mine Safety and Health Administration (MSHA) personnel, mine operators, independent contractors, contractor sampling services and other interested parties.

Purpose

This PPL establishes administrative procedures for revoking an individual's MSHA certification to take respirable dust samples or to maintain and calibrate approved dust sampling devices under 30 Code of Federal Regulations (C.F.R.) parts 70, 71, and 90.

Policy

The District Manager may revoke a certification if he or she has good cause to believe that the certified person has violated the existing requirements. Unless there are mitigating circumstances, a certified person generally would not be eligible to reapply for certification for one year following the date of the revocation letter. However, case-specific conditions should be considered in deciding if and when a person may reapply for certification. Certifications may be revoked for violation of sampling, maintenance and calibration requirements regarding: (1) maintenance and calibration of sampling devices; (2) testing and examination of sampling devices immediately before each sampling shift; (3) distribution and proper placement of sampling devices, sample collection, and collection of sampling devices used to take dust samples; (4) performing onshift examinations of sampling devices; (5) removal of the filter cassette from sampling devices; (6) completing and signing the dust card that is provided by the manufacturer for each filter cassette; and (7) transmitting samples to MSHA.

Failure to properly carry out any of these prescribed procedures may result in the initiation of formal revocation procedures. Evidence compiled by MSHA through visual examination and physical testing of sampling devices, observation, review of available records, and/or interviews revealing inadequate knowledge of requirements will serve as the basis for initiating the revocation process. The evidence will become part of the administrative record establishing the justification for the proposed revocation action. If the evidence does not support a proposed revocation, a notice of deficiency may be appropriate. Revocation of a certification will prohibit the person from performing any of the duties for which that certification is required under 30 C.F.R. parts 70, 71 and 90.

When there is a decision to revoke a person's certification(s), including any decision that may involve possible criminal prosecution, the District should immediately initiate the following administrative procedures.

A. Proposed Revocation or Notice of Deficiency to the Certified Person

The District Manager should send, by certified mail with return receipt requested, a letter proposing revocation or a notice of deficiency to the certified person. This letter should clearly state the following:

1. Proposed action.
2. Specific issue(s) that prompted the proposed action.
3. Specific reason(s) for the issue(s).
4. Certified person's right to submit documentary evidence to, and request an information meeting with, the District to discuss the proposed action.
5. If the certified person fails to respond within 30 days to a letter proposing revocation, the District should send a notice of revocation.

This initial letter must contain sufficient information specifying the basis of the proposed revocation or notice of deficiency and what has to be done to achieve compliance on the matter with the District. Based on the specific issues prompting the proposed action, the certified person may be required to take remedial action determined by the District to maintain his or her certification.

The proposed revocation or notice of deficiency should arise as the result of a recommendation from an inspector, special investigator, health specialist or other person involved in the fact-finding. Since the District Manager makes the final decision, the District Manager should not be the recommending official in the

proceedings. Additionally, since the Administrator for Coal Mine Safety and Health is the deciding official for any appeal, the Administrator should have no role in the District's process.

B. Information Meeting or Submission from the Certified Person

1. Information Meeting

The certified person has 30 calendar days from the date of the notice of proposed action to request an information meeting. This meeting should be at a place convenient to the certified person. If practical, consider using conferencing technology.

If there is an information meeting, the District Manager or a representative of the District Manager must perform or include the following steps in the meeting:

- a. Restate the proposed action.
- b. Restate the issues and determine if the certified person understands the issues and their consequences.
- c. Restate and explain the reasons for the action and present the supporting information or a thorough summary of the information.
- d. Advise that the certified person can be accompanied by a representative.
- e. Allow the certified person to present information and witnesses.
- f. Advise of the District's date to make the decision and of the certified person's appeal rights.
- g. Advise that the administrative record remains "open" for 15 calendar days, if necessary, so the certified person can submit additional information.

The meeting should be tape recorded with the consent of the certified person. If consent cannot be obtained, detailed notes should be taken. Make the parties aware of the recording or the notes. A meeting summary should be prepared and signed and dated by the MSHA person who prepared it. If possible, all other participants should sign and date the summary.

2. Submission of Information from the Certified Person

The certified person may submit documentary evidence in place of, or in addition to, an information meeting. The District must receive this submission, in writing, within 30 calendar days from the date of the initial letter (or within 15 calendar days after the information meeting). When the District receives the submission, the District will stamp the submission with the date of receipt.

3. After Information Meeting

After holding an information meeting or receiving a written submission, the District Manager must:

- a. Review and evaluate all records including notes, tapes, documents or written submissions.
- b. Send one of four written responses to the certified person with the results of the review:
 - 1) A "clean bill" letter if the record satisfies the deficiency or issue(s);
 - 2) Notice of remedial action needed to maintain certification;
 - 3) Notice of revocation; or
 - 4) A letter requesting additional information needed to make a decision.

C. Decision on Revocation

Base the decision on the administrative record and credibility of witnesses. The administrative record should contain:

1. Correspondence from the District and the certified person
2. Witness statements
3. Supporting documents
 - a. maintenance and calibration records
 - b. certified dust data cards
 - c. sampling custody records
 - d. courses of instruction in both respirable dust sampling and the maintenance and calibration of sampling equipment
 - e. time and attendance sheets, etc.

- f. copies of related citations
- 4. Personnel information
- 5. District and investigation reports
 - a. inspector/training specialist report
 - b. available special investigation material, etc.
- 6. Meeting notes (preferably signed and dated), transcripts, or tape recordings. As will be discussed, the administrative record will be made available for the certified person to review. For this reason, confidential witness statements should not be part of the administrative revocation record. Sufficient non-confidential information should be gathered to independently support the revocation action. If confidential statements are needed for a criminal investigation, a separate file should be created for that action.
- 7. Inspector or training specialist notes

D. Notice of Revocation

The notice of revocation must be in writing and contain:

- 1. Statement of the decision or action
- 2. Specific reason(s) or issue(s) for the revocation (§§ 70. 204(a), 71.204(a), 90.204(a), 70.204(d), 71.204(d), 90.204(d); etc.)
- 3. Statement that the decision will take effect 30 calendar days from the date of the notice of revocation
- 4. Statement of the right to appeal
- 5. Statement that filing the appeal will stay the effective date of the decision until the Administrator for Coal Mine Safety and Health renders his decision
- 6. Statement that the administrative record is available for review at the District Office and a copy is available upon request
- 7. Notification of when the person may reapply for certification. Send the notice of revocation to the individual by certified mail with return receipt requested. All correspondence to a certified person should

be sent to that person only (not to supervisors or other mine personnel) unless the person designates, in writing, a representative

E. Appeals Procedure

A certified person may appeal the revocation decision to the Administrator for Coal Mine Safety and Health. The individual has 30 calendar days from the date of the revocation notice to file an appeal. Upon request from the Administrator, the District will forward a copy of the administrative record to the Administrator. The Administrator will make a decision based on that record. Since the Administrator makes the final appellate decision, he or she must not participate in any of the prior processes. Any National Office staff who have given advice or participated in the District level proceeding must not participate at the Administrator's level.

The following are examples of Administrator's responses:

1. *Appeal is denied.* The District decision is upheld and the revocation stands.
2. *Appeal is granted.* The District will not revoke the individual's MSHA certification.
3. *Administrator requires an additional meeting or information.* District assists as necessary.
4. *Administrator refers the matter back to the District with appropriate instructions.* The Administrator may base this action on new information that was not available to, or considered by, the District Manager. The District takes appropriate action based on instructions from the Administrator.

F. Inform Operators and Other MSHA Districts

If the Administrator denies the appeal, or upon expiration of the time available for appeal, the District will immediately notify, in writing, the affected mine operator(s) that employs the revoked certified person or who use the sampling contractor whose MSHA certification was revoked. The District will also notify other MSHA District Offices of the revocation.

G. Applying for Recertification after Revocation

Unless there are mitigating circumstances, a certified person cannot reapply for recertification for 12 months following issuance of the notice of revocation. These conditions will vary depending upon factors specific to each case. Some factors to

consider include the basis for revocation and the individual's record as a certified person for dust sampling or for maintenance and calibration of approved dust sampling devices. The request for recertification must be made in writing to the District Manager. In addition, individuals seeking to be recertified may be required to attend an MSHA training course and will be required to pass the MSHA examination on sampling or on maintenance and calibration procedures for respirable dust sampling equipment.

H. Criminal Proceedings

In those cases where the willful conduct of a certified person warrants possible criminal prosecution, the District will follow the procedures in the Special Investigations Procedures Handbook (Chapter 4, Section 110 Investigations).

Background

Proper maintenance, calibration and use of approved dust sampling devices are an essential part of protecting miners' health. Accordingly, to safeguard the integrity of the sampling process, 30 C.F.R. parts 70, 71 and 90 require these tasks to be performed only by persons certified by MSHA. Since certified persons perform an important function in providing a healthful environment, failure of certified persons to carry out the tasks prescribed in 30 C.F.R. parts 70, 71 and 90 places miners at risk and erodes miner confidence and support in the program. The preamble to these rules published in 1980 (45 FR 23996, April 8, 1980) made clear that MSHA may revoke these certifications if the sampling, maintenance and calibration procedures prescribed by these rules are not strictly followed by certified persons.

Authority

The Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 801 et seq.; and 30 C.F.R. §§ 70.202 and 70.203, 71.202 and 71.203, 90.202 and 90.203.

Filing Instructions

This PPL should be filed behind the tab marked "Program Policy Letters" at the back of Volume V of the Program Policy Manual.

Internet Availability

This PPL may be viewed on the [MSHA home page](#) and choosing "Compliance Info" and "Program Policy Letters."

Issuing Offices and Contact Persons

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