

U.S. Department of Labor

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Issue Date: 19 August 2013

IN THE MATTERS OF:

ANDALEX RESOURCES, INC.,
Aberdeen Mine No. 42-02028
Pinnacle Mine No. 42-01474
Petitioner,

Case Nos.: 2009-MSA-00002
2009-MSA-00003

v.

MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)
Party Opposing Petition

APPEARANCES:

Marco M. Rajkovich, Jr., Esq.
For Andalex Resources, Inc.

Mark Malecki, Esq.
Joshua P. Falk, Esq.
For the Mine Safety and Health Administration

BEFORE:

William S. Colwell
Associate Chief Administrative Law Judge

INITIAL DECISION

This is a consolidated matter involving the Mine Safety and Health Administration's ("MSHA's") proposed revocations of previously-granted modifications to mandatory mining standards at two mine sites operated by Andalex Resources, Incorporated ("Andalex" or "Petitioner") pursuant to the Federal Mine Health and Safety Act of 1977 at 30 U.S.C. § 811(c) (hereinafter referred to as the "Act"),¹ and its implementing regulation at 30

¹ This statute superseded the Federal Coal Mine Health and Safety Act of 1969, and the Federal Metal and Nonmetallic Mine Safety Act of 1966. Under the 1969 statute, an operator or representative of miners could petition for modification of a mandatory mining standard; however, the 1969 statute and its implementing regulations did not provide for

C.F.R. § 44.52(c). The plain language at § 44.52(c) provides the modification of a mandatory mining standard “may be revoked when there has been a change in circumstances or the findings that originally supported the modification are no longer valid.” 30 C.F.R. § 44.52(c).

Broadly stated, MSHA argues the two mine sites at issue, referred to as “Pinnacle” and “Aberdeen,” have been closed and “abandoned” such that the standard for revocation is met. On the other hand, Andalex maintains the two mine sites are merely in “temporary idle status,” and the previously-granted modifications should not be revoked because, when the mines reopen, Petitioner would have to reapply for the same modifications. This tribunal must determine whether MSHA’s proposed revocations are proper under 30 C.F.R. § 44.52(c).

I **Procedural history**

Originally, these cases were docketed on February 3, 2009. By letter dated February 20, 2009, the Solicitor requested time to engage in discussions with counsel for Andalex, stating the following:

We understand that these cases involve the potential revocation of modifications to certain standards applicable to the Aberdeen and Pinnacle Mines. Neither mine is in operation at present. Accordingly, the passage of time spent diligently attempting to resolve this matter without litigation will not harm the parties. The issues to be determined are whether the mines are abandoned or not, whether they will be reopened or not, and what if any affect the closure has on the status of the modifications.

Discussions between the parties occurred for nearly three years, and culminated in the filing of cross-motions for summary decision in December 2012, along with a *Joint Stipulation of Uncontested Facts* (“JSUF”), which was submitted on September 11, 2012. According to the JSUF, the two underground mine sites at issue have been sealed as of November 2008, pursuant to 30 C.F.R. § 75.1711. The JSUF also provides:

“revocation” of a previously-granted modification. See 30 C.F.R. §§ 301.30-301.33. It was only in the wake of the 1977 enactment that MSHA promulgated more detailed regulations in 1978 at 30 C.F.R. Part 44, which replaced the regulations at 43 C.F.R. §§ 4.550-4.553. Under these more detailed MSHA regulations, “revocation of modification” is addressed for the first time at 30 C.F.R. § 44.52.

While the underground portion of the mine is sealed, the surface portion of the Pinnacle mine is still active and subject to quarterly MSHA inspections due to a maintenance shop and other facilities that continue to serve some of the Petitioner's other properties.

JSUF at p. 3. Moreover, Petitioner filed "final mine maps for the Pinnacle and Aberdeen mines" in November 2008, which "indicate all openings of the mine(s) are sealed." JSUF at p. 4. The parties agree:

Some infrastructure, such as conveyor belt and structure, selected belt drives and pipes, were left underground in the Pinnacle and Aberdeen mines.

JSUF at p. 4.

II **History of the Act**

Federal legislation addressing mining health and safety hazards has been in place since July 1910, when Congress established a Bureau of Mines at the U.S. Department of Interior. However, nearly 70 years later, Congress noted unacceptable progress in mine safety, and it responded with the Federal Mine Safety and Health Act of 1977. As noted by the Supreme Court in *Donovan v. Dewey*, 452 U.S. 594 (1981), "it is undisputed that there is a substantial federal interest in improving the health and safety conditions in the Nation's underground and surface mines" and, at the time of enactment of the 1977 Act, "Congress was plainly aware that the mining industry is among the most hazardous in the country."

Under the 1977 Act, Congress empowered the Secretary of Labor with authority to establish "mandatory standards" designed to promote mine safety through a notice-and-comment rulemaking process. Once in place, these mandatory standards govern mining operations. Operators that fail to comply with the mandatory standards face the possibility of imposition of civil money penalties, and even closure of the mine, until compliance is achieved.

At the time of enactment of the 1977 Act, Congress also recognized that technological advances and improvements in mining operations necessitated inclusion of standards for "modifying" an existing mandatory standard. Specifically, the Act provides variances from existing mandatory standards may be granted under certain conditions, including where the Secretary of Labor:

. . . determines that an alternative method of 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.

30 U.S.C. § 811(c). The legislative history further provides:

In all cases, it is the Committee's expectation that such variances not be granted unless the petitioner can clearly demonstrate that miners who work under such variances will be exposed to no greater risks than they would be exposed to had no such variance been granted.

Cong. Rep. No. 95-181 (95th Cong. May 16, 1977).

III **Regulatory History**

Although the parties have not offered a review of the regulatory history of revocations, this tribunal conducted such a review in order to better understand how to interpret the standards at issue in revoking a modification; *to wit*, whether there has been a "change in circumstances," or whether "the findings that originally supported the modification are no longer valid."

The earliest version of 30 C.F.R. § 44.52, promulgated in July 1978, read as follows:

Any party to a proceeding under this part in which a petition for modification of a mandatory safety standard was granted may petition that the relief granted be revoked due to a change in circumstances, because the findings which justified the relief are no longer valid.

30 C.F.R. § 44.52 (1979). In the preamble to the regulation, the following is stated:

A suggestion was made that all modifications be reviewed annually by MSHA. Periodic review can be provided in appropriate cases by a requirement in the order of modification

that the modification be reviewed on a stated date. Review can also be accomplished by use of procedures for revocation of modification, at § 44.52.

43 Fed. Reg. 29517 (July 7, 1978). The preamble further provides, “[P]etitions for modification involve important considerations of miner safety . . .” 43 Fed. Reg. 29517 (July 7, 1978). And, “any variance from a mandatory safety standard . . . will remain in effect according to its terms unless modified or revoked.” 43 Fed. Reg. 29516 (July 7, 1978).

Ten years later, in 1989, the Department issued proposed amendments to the regulations pertaining to “Mine Safety and Health Administration’s Rules of Practice for Petitions for Modification of Mandatory Safety Standards.” 54 Fed. Reg. 19492 (May 5, 1989). And, in response to *International Union, UMWA v. Mine Safety and Health Administration*, 823 F.2d 608 (D.C. Cir. 1987), the Department revised its process for handling requests for “interim relief” from mandatory standards. 54 Fed. Reg. 19493 (May 5, 1989).

Then, in 1990, the final regulations addressing modifications of mandatory standards were issued. 55 Fed. Reg. 53430 (Dec. 28, 1990). According to the Department, the final rule:

. . . reflects a balance between . . . the length of time necessary for final disposition of some petition for modification cases and the need for the Agency to carefully evaluate the health and safety issues raised by all petitions for modification.

55 Fed. Reg. 53430 (Dec. 28, 1990). And, at the same time, the Department set forth a “clarification” of its revocation standard:

Under paragraph (b), the Administrator may propose to revoke a modification previously granted by the Administrator . . . by issuing a PDO revoking the original decision and order. The PDO will be required to include a statement of reasons supporting the revocation.

. . .

Paragraph (c) retains, with a clarifying disjunctive, the provision in the existing rule specifying the basis for a revocation. Revocation must be based upon a change of circumstances or because findings which originally supported the modification are no longer valid.

55 Fed. Reg. 53438 (Dec. 28, 1990). As such, the revised regulation at 30 U.S.C. § 44.52(c) reads as follows:

(c) Revocation of a granted modification must be based upon a change in circumstances or because findings which originally supported the modification are no longer valid.

30 U.S.C. § 44.52(c). This "clarification" is important. Use of the disjunctive here means there are *two* independent bases upon which a modification may be revoked, and a determination that "findings which originally supported the modification are no longer valid" is not a prerequisite for finding a "change in circumstances." The process for revocation was also streamlined, as noted in the preamble:

The new procedures in paragraph (b) of the final rule is based on a commenter's suggestion that the existing rule for revoking granted modifications is inadequate, and on the Agency's experience under the existing rule. According to the commenter, the Secretary is in the best position to evaluate the effectiveness of the modification and whether revocation is in order. The agency agrees, and does not believe that the existing rule provides a procedure for the Administrator which is consistent with the Administrator's responsibilities to enforce the terms of each modification and to manage the petition for modification program to ensure the best health and safety protection for all miners. MSHA also believes that the existing rule establishes a particularly cumbersome procedure, requiring the filing of a petition to revoke with the Chief Administrative Law Judge in all cases, even for those circumstances in which revocation of the petition is not opposed. MSHA believes that the final rule facilitates the Administrator's role as the overseer of granted modifications while ensuring the rights of the parties to a hearing on the issues raised by the revocation.

55 Fed. Reg. 53438 (Dec. 28, 1990).

Up to the point of the 1990 amendments, if an Administrator sought to make a change in a granted modification, s/he had two options: (1) ask the operator to file a petition to amend the modification; or (2) revoke the granted modification. Importantly, the 1990 amendments provided a *third* avenue for Administrators seeking to change granted modifications. The following is noted in the preamble:

The final rule provides a mechanism to the Administrator to more easily achieve necessary improvements to the terms and conditions of granted modifications. Under the final rule, this mechanism is available to the administrator in two limited circumstances derived from the revocation procedures in § 44.52. A change in circumstances which originally supported the terms and conditions of the modification must have occurred, or the Administrator must determine that findings which originally supported the terms and conditions of the modification are no longer valid.

. . .

In the Agency's view, the appropriate interval for review by the Administrator will vary with each modification, and will depend upon a number of factors, such as whether the petition implements new technology or presents other novel issues.

55 Fed. Reg. 53439 (Dec. 28, 1990). So, the new regulation at 30 C.F.R. § 44.53 allows the Administrator to *amend* an existing modification using similar, but not identical, criteria as is utilized for revocation:

(a) The Administrator may propose to revise the terms and conditions of a granted modification by issuing an amended proposed decision and order, along with a statement of reasons for the amended proposed decision and order, when one or both of the following occurs:

(1) A change in circumstances which originally supported the terms and conditions of the modification are no longer valid.

(2) The Administrator determines that findings which originally supported the terms and conditions of the modification are no longer valid.

30 C.F.R. § 44.53(a)(1) and (2). Here, it is noted the Administrator elected to revoke the previously-granted modifications rather than merely amend them as is now permitted. As will be discussed, this also is significant.

IV
Modifications at Pinnacle and Aberdeen Mines

At the crux of these matters are certain petitions for modification filed by Petitioner, which were approved by MSHA Administrators during a period of time from August 22, 1991 to December 15, 2005. According to the JSUF, the modifications concern, *inter alia*, water sprinkler systems, electronic testing and diagnostic equipment, diesel-powered equipment, and use of belt air in two-entry mining systems.

V
Cross-motions for summary decision

In a December 7, 2012, *Motion for Summary Decision*, counsel for Andalex asserts MSHA seeks to revoke the modifications at issue "based on an unfounded and erroneous assumption that 'the mining conditions have changed' and that the Petitions are 'no longer needed' at the mines." Counsel maintains, contrary to MSHA's position, the mine sites have not been abandoned; rather, they are in "temporary idle status." As a result, counsel argues revoking the modifications "at this juncture will only necessitate the same Petitions to be filed when mining resumes at the Mines."

In a *Cross-Motion for Summary Decision* filed on December 10, 2012, the Solicitor for MSHA asserts that the Pinnacle and Aberdeen mine sites have been abandoned and, therefore, revocation of the modifications is mandatory according to MSHA's Handbook Number PH08-I-2, titled "Petitions for Modification, Coal Mine Safety and Health and Metal and Nonmetal Safety and Health" (July 2008). As noted by the Solicitor, the Handbook sets forth certain factors that may be considered when determining whether to revoke a modification under 30 C.F.R. § 44.52(c). Notably, the Handbook provides, "If a mine is abandoned and sealed, granted modifications must be revoked."

The Solicitor maintains the Pinnacle and Aberdeen Mines were sealed pursuant to 30 C.F.R. § 75.711, which provides the:

. . . opening of any coal mine that is declared inactive by the operator, or is permanently closed, or abandoned for more than 90 days, shall be sealed . . .

30 C.F.R. § 75.1711. According to the Solicitor, because the mines have been sealed as of November 2008, they are "considered 'abandoned.'" The

Solicitor also submitted a *Response to Petitioner's Motion for Summary Decision* on January 15, 2013, asserting:

. . . the modifications are directly related to active mining . . . , to 'ventilation and equipment operation' as stated by Petitioner. The mines are no longer being ventilated and equipment is not being operated. The circumstance for issuing the modifications, active mining, has changed.

Response at p. 2.

In a January 11, 2013, *Response to MSHA's Cross-Motion for Summary Decision*, counsel for Andalex reiterates the "only 'change' that MSHA has established is that mining has temporarily ceased." Counsel asserts MSHA's Handbook "recognizes the distinction between temporarily idled mines and permanently abandoned mines, thus acknowledging that the temporary cessation of mining operations is not, in and of itself, adequate grounds for revocation of a petition." Counsel further argues:

While it is true that any mine could be reopened, whether it be temporarily idled, abandoned, or permanently abandoned, it is also true that, upon re-opening of the mine, MSHA could recommend revocation of any petitions for modification if, upon re-opening, MSHA can establish that the mining conditions have changed or that the safety findings that originally supported the petitions were no longer valid.

Response at pp. 2-3.

VI **Abandoned versus "temporary idle status"**

Neither the statute nor implementing regulations define a mine that is "abandoned" versus a mine that is in "temporary idle status." Counsel for Andalex argues the mines are temporarily idled, and will reopen in the future. The Solicitor states the mines have been sealed and inactive as of November 2008, and are deemed "abandoned" on this basis.

While sealing a mine, and the ensuing passage of time, are factors to consider in determining whether the mine is "abandoned," these are not the only factors relevant to such a determination. This tribunal accepts the two underground mine sites have been sealed and inactive as of November 2008 with no definitive plans to reopen the sites, but this does not compel a finding the underground mine sites are "abandoned." To the contrary, there

are other factors present in these cases, which militate against a finding of abandonment.

As previously noted, the JSUF provides that certain pieces of equipment remain underground at both mine sites. Counsel for Andalex submitted a June 20, 2008, letter from the Bureau of Land Management (BLM) at the U.S. Department of Interior, providing the following with regard to the Aberdeen mine site:

The temporary idling and securing the portal of this mine would allow for time to secure new leases to the west and pursue new technologies and systems to mine at the increasing depths of this property.

Counsel also submitted the March 28, 2008, *Notice and Order* by BLM, titled "Cessation of operations to permanently and fully idle the tower mine (also known as the Tower Mine Complex including Aberdeen, Tower, and Pinnacle Mines," which demonstrates the interconnectedness of the Pinnacle and Aberdeen mines. And, counsel submitted letters dated November 10, 2008, to MSHA from the Director of Engineering at UtahAmerican Energy, Incorporated, stating the Pinnacle and Aberdeen mines were "being temporarily idled at this time." As noted by counsel:

The surface openings of the mines were sealed, as required of all temporarily idled mines, to prevent unauthorized access into the mines. (citation omitted). However, the fact that the openings were temporarily sealed does not establish that the mining conditions have changed.

This tribunal agrees that mere sealing of the mines does not compel a finding the mines are abandoned, or that mining conditions have changed with regard to a particular modification.

With regard to the passage of time in these cases, the Solicitor acknowledges that a "temporarily idled" status may last longer than 90 days. Citing to the MSHA Handbook, the Solicitor notes temporarily idled status means "work of all miners has been terminated and production related activities have ceased," but the "mine still has recoverable reserves, it is anticipated that this is a temporary condition, and the mine will reopen in the future." While this tribunal understands, as asserted by the Solicitor, "[i]t is not MSHA's job to sit around for years waiting under the possibility that a miner operator" may reopen a mine, neither the controlling statute nor its regulations set forth a bright-line time deadline for purposes of determining when a mine is "abandoned."

Here, Andalex left certain pieces of equipment at both underground mine sites, and documentation demonstrates the mines were idled in order “to secure new leases to the west and pursue new technologies and systems to mine at the increasing depths of this property.” It is not feasible to place specific time limitations on these types of pursuits by Andalex. Although the passage of time is significant, and no plans are presently in place for reopening the mine sites, this tribunal cannot find the mines are “abandoned.”

VII

Propriety of revoking the modifications

Having determined the mines are not “abandoned,” this tribunal turns to the issue of whether revocation of the modifications at issue is proper on some other basis. Although the regulation at 30 C.F.R. § 44.52(c) provides a modification may be revoked based on a “change in circumstances,” or where “the findings that originally supported the modification are no longer valid,” these standards are left undefined in the regulations and case law.²

A. The MSHA Handbooks

The Solicitor cites to the 2008 version of the MSHA Handbook as support for revocation of the modifications. Looking at the history of the MSHA Handbook, a previous edition of the Handbook (Handbook Number PH89-I-1 dated May 1989) also addressed revocation of modifications. This edition of the Handbook provides, in part, the following:

When a District Manager believes a modification should be revoked or terminated and the operator is opposed to the action, an investigation should be made and a memorandum forwarded to the Administrator stating the reasons why all or part of the petition should be revoked or terminated.

The following is a partial listing of reasons that the operator or MSHA should consider for termination of the petition:

² On MSHA’s website, www.msha.gov/PETITIONS, certain agency determinations are published. Among these determinations are proposed decisions revoking previously-granted modifications for “nonuse,” “cessation of mining activities,” and/or removal of the equipment at issue. See *In Re Rock of Ages Quarries, Inc.*, Docket No. M-77-232-M (Acting Administrator Oct. 1, 1998); *In Re Hunt Midwest Mining, Inc.*, Docket No. M-95-07-M (Acting Administrator Oct. 16, 1998). However, these proposed decisions provide no discussion regarding the standards applicable to 30 C.F.R. § 44.52(c), or the factors properly considered in meeting these standards.

1. The mine or the area affected by the petition is abandoned.
2. Noncompliance with the terms of the petition.
3. Failure of the operator to implement the petition.
4. The petition cannot be served on the operator through normal procedures.

1989 Handbook at p. 5. The 2008 edition of the Handbook expanded the factors that may be considered to the following:

- 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 mines, 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.

2008 Handbook at pp. 25-26. The Handbook further provides, if a "mine is permanently abandoned, the district should . . . recommend that modifications previously granted at the mines be revoked." 2008 Handbook at p. 26.

Counsel for Andalex is correct in his argument that a departmental handbook, such as MSHA's Handbook in this case, may be persuasive, but it is not binding on this tribunal. However, absent statutory, regulatory, or case law guidance, this tribunal finds factors set forth in the 2008 Handbook are reasonable to consider in deciding whether to revoke a granted modification.

B. Discussion and conclusions

After assessing circumstances giving rise to the revocations at issue here, and in light of the fact that miner safety and health is of paramount importance, this tribunal affirms the revocations.

Although the evidence of record is insufficient to find the Aberdeen and Pinnacle mines have been "abandoned," it is undisputed that these mines have been non-operational and sealed as of November 2008. Looking at the various modifications granted by Administrators over the years for these mines, it is clear that these modifications included detailed terms and conditions, such as requirements pertaining to ongoing equipment inspections and/or training:

- Docket Nos. M-2005-050-C and M-2005-061-C (electronic testing and diagnostic equipment). The Administrator's terms and conditions included requirements that equipment be examined and results recorded "in the weekly examination of electrical equipment book" as well as "initial and annual refresher training" to "ensure that miners are aware of stipulations contained in this petition";
- Docket No. M-2000-026-6 (diesel-powered equipment). The Administrator set forth requirements for specific training of grader operators as well as "initial and refresher" training;
- Docket Nos. M-93-280-C and M-94-067-C (belt air in two-entry mining systems). Terms and conditions of the Administrator included requirements for designation and training of persons to operate the carbon monoxide detection system and firefighting and evacuation plan, submission of monthly reports of carbon monoxide data and early warning fire detection system evaluations, and visual inspection of monitoring systems "at least once each shift"; and

- Docket No. M-90-202-C (water sprinkler systems). The Administrator required an “annual functional test of each water sprinkler system.”

While it is reasonable that equipment inspections and training would not occur in a sealed, non-operational mine, it is also reasonable that such an extended period of dormancy at these two mines raises concerns by this tribunal regarding damage to, and/or deterioration of, the equipment at issue in the foregoing modifications. Moreover, an added complication here is one of the reasons put forth by Andalex for this period of dormancy; that is, “to secure new leases to the west and pursue new technologies and systems to mine at the increasing depths of this property.” This, in turn, indicates the possibility that, when these mines are reopened, their layout, depth, and grade may very well change.

This tribunal does not presume to have the technical expertise to predict the effect of any such changes on the modifications at issue in these matters. Suffice it to say, the modifications at issue involve maintenance, monitoring, and proper use of equipment, which would be critically important to the safety and health of miners. This equipment which, *if still present in its original state at these mine sites*, has been left unchecked at the mines for nearly five years. These variables present conditions that are not in alignment with the conditions under which the modifications were originally granted.

In originally granting the modifications, the Administrators studied conditions in the operating mines at the relevant times, and determined the modified manners of operating were “as safe and healthful” as the applicable, existing mandatory standards. Circumstances on the ground have changed since granting of the modification petitions. No inspections have occurred. No training has occurred. No monitoring of equipment has occurred. Indeed, according to the JSUF, only “[s]ome infrastructure, such as conveyor belt and structure, selected belt drives and pipes, were left underground in the Pinnacle and Aberdeen mines.” The specific equipment removed from these mines, and the effect of such removal, are unknown. And, none of the equipment has been operating in these two mines since their entrances were sealed as of November 2008. The future of these mines is unknown. No specific dates or plans for reopening the mines have been submitted to this tribunal, and the pursuit of “new technologies and systems to mine at the increasing depths of this property” indicates at least the possibility of changes in the physical mining environment and/or method of mining, which also warrant revocation of these modifications.

Understandably, Andalex opposes the revocations on grounds that, when operations resume at these sites, it does not want to have to expend time and resources obtaining the same modifications. However, this tribunal finds there is too much uncertainty regarding when, and under what conditions, these mines will become operational. Given that miner safety and health is at stake, MSHA Administrators, who have responsibilities for enforcing the terms of modifications and managing the modification program, must be afforded the opportunity to consider mining conditions at the time the mines are reopened and available for inspections and monitoring.

Based on review of the record and arguments of the parties, it is determined that revocations of the modifications are affirmed on grounds that circumstances have changed. Under the amended regulations, which clarified that revocation may be proper based on a "change in conditions" alone, this tribunal finds such a "change in conditions" has occurred here. The risks to miner safety and health are too great given the variables presented; *to wit*, removal of certain equipment, sealing the mines, the extended period of dormancy in mining activities at the sites, potential damage and/or deterioration of remaining equipment, and potential changes in the physical environment and/or methods of mining when the mines are reopened.

When Andalex determines the mine sites will be reopened, it may file appropriate modification petitions. At that time, the Administrator will have an opportunity to assess whether findings supporting a particular modification revoked here remain valid. If so, to the extent practicable, this should result in the Administrator's expedited consideration of the newly-filed modification petition. But, if the findings underlying one or more of the modifications revoked here are not valid due to, for example, changes in the mining environment or process, the Administrator must have the opportunity to determine whether to grant the modification petition based on a newly-developed record, including a new MSHA investigative report and recommendations. Accordingly,

ORDER

IT IS ORDERED that MSHA's *Cross-Motion for Summary Decision* is GRANTED and revocations of the previously-granted modifications are AFFIRMED; and

IT IS FURTHER ORDERED that the *Motion for Summary Decision* filed by Andalex Resources, Incorporated is DENIED.

William S. Colwell
Associate Chief Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Notice of Appeal ("Notice") with the Assistant Secretary of Labor for Mine Safety and Health within thirty (30) days after service of this "Initial Decision." See 30 C.F.R. § 44.33(a). The Assistant Secretary's address is: Assistant Secretary for Mine Safety and Health, U.S. Department of Labor, Room 2322 TT#2, 200 Constitution Avenue, NW, Washington, DC 20210. Once an appeal is filed, all inquiries and correspondence should be directed to the Assistant Secretary.

At the time you file the Notice with the Assistant Secretary, you must serve it on all parties. See 30 C.F.R. §§ 44.6 and 44.33(a). If a party is represented by an attorney, then service must be made on the attorney. See 30 C.F.R. § 44.6(c).

If no Notice is timely filed, then this "Initial Decision" becomes the final decision of the Secretary of Labor. See 30 C.F.R. § 44.32(a).