

products to the applicant or a third party. The evaluation of the test results and the issuance of the approval remain the responsibility of the Agency. This final rule will not affect the testing aspects of part 7. Part 7, unlike the other approval parts, will continue to permit testing by the applicant or by third party laboratories that are not necessarily independent from the manufacturer.

In 1993, MSHA initiated a further review of its approval and certification activities, including its part 7 applicant or third-party testing program. Based on this review, the Agency reaffirmed the objectives of the part 7 concept to increase post-approval product audits and direct more resources to evaluation of safety and technological improvements in products for use underground. However, MSHA determined that while the part 7 program was a step in the right direction, the limited scope of that program did not free up sufficient resources to allow MSHA to fully redirect its efforts to meet those objectives. After considering how best to accomplish those goals, the Agency decided to initiate rulemaking to modify MSHA's approval program in two ways, which it did in 1994. Under a 1994 proposed rule titled "Testing and Evaluation by Nationally Recognized Testing Laboratories and Use of Equivalent Testing and Evaluation Requirements," applicants seeking MSHA product approval would have been required to use independent laboratories recognized by the Occupational Safety and Health Administration (OSHA) under its Nationally-Recognized Testing Laboratories (NRTL) program for the required testing and evaluation. This would have been in place of MSHA testing and evaluation of products. As with the part 7 program, however, MSHA would have continued to verify that approval requirements were met and would have retained full responsibility for issuing the product approval. Thus, the 1994 proposed rule would not have constituted a self-certification program. Second, MSHA or appropriately recognized independent laboratories would have been permitted, upon an applicant's request, to test and evaluate a product for approval based on approval requirements other than the Agency's, as long as those requirements provided an equal or a greater degree of protection. This would have allowed MSHA to approve a product meeting the International Electrotechnical Commission's (IEC) approval standards, or some other approval requirements different from those specified in

MSHA's regulations, provided that MSHA first had determined that those requirements were equivalent or could be modified to provide protection equivalent to that afforded by products tested and evaluated according to MSHA approval requirements. In this way, the Agency could have taken advantage of revisions to product safety standards developed by other countries or standards development organizations to address technological advances or improvements in product safety. Such an approach would have permitted the introduction of a wider variety of improved products into U.S. mines more quickly than if the Agency had to undertake rulemaking to address each technological advancement or improvement in product safety, capability, and performance.

A notice of proposed rulemaking (NPRM) for a new part 6 was published on November 30, 1994 (59 FR 61376). The NPRM comment period was extended to February 21, 1995 (60 FR 8209). A Public Hearing Notice was published on October 10, 1995 (60 FR 52640), scheduling a public hearing for November 15, 1995. That hearing was rescheduled to April 30, 1996. (61 FR 15743). The post-hearing comment period ended on May 31, 1996. (61 FR 15743). The 1996 proposed rule was not published as a final rule.

MSHA introduced a revised proposed rule in the **Federal Register** on October 17, 2002. This revised proposed rule offered applicants for MSHA product approval alternate requirements for testing and evaluation of products that MSHA approves for use in gassy underground mines. Based on comments from the public to the 1994 proposed rule, the revised proposed rule provided a number of revisions to the original proposed rule. The major changes in the revised proposed rule are outlined below.

First, the revised proposal would be voluntary. Manufacturers could choose to use independent laboratories to perform all or part of the testing and evaluation necessary for approval, or could elect to have MSHA perform the necessary testing and evaluation. Second, applicants would not have to use only independent laboratories that were National Recognized Testing Laboratories under OSHA's program, but could choose an independent laboratory recognized by other laboratory accreditation programs, such as that of the American National Standards Institute (ANSI) or the International Electrotechnical Commission (IEC). Third, only MSHA would conduct required post-approval product audits. Audits conducted by

independent laboratories would not be required under the revised proposal. Fourth, only the MSHA mark would be required on MSHA-approved products, not both the MSHA and independent laboratory mark. Finally, the revised proposal would allow public input into the process of making equivalency determinations of non-MSHA product safety standards. MSHA would notify the public through publication in the **Federal Register** of MSHA's intent to review a particular non-MSHA standard for equivalency and provide an opportunity for public input on that issue.

However, like part 7, under both the 1994 proposed rule and the revised proposed rule, the review of any testing and evaluation performed by an independent laboratory and the issuance of the MSHA product approval would still remain the full responsibility of MSHA's Approval and Certification Center.

MSHA requested comments from the public (67 FR 64196). MSHA received two general comments regarding this revised proposed rule. The public comment period closed on December 31, 2002. MSHA held two public hearings. One was on January 7, 2003, in Denver, Colorado. The other hearing was held on January 9, 2003, in Washington, Pennsylvania. No comments or statements regarding the revised proposal were provided by any party at either of the public hearings. The post-hearing comment period closed on February 10, 2003.

## II. Discussion of Final Rule

### A. Introduction

Under this final rule, manufacturers seeking MSHA approval could choose to have their products tested and evaluated either by an independent laboratory or by MSHA. MSHA will be able to accept the independent laboratory's test and evaluation results in lieu of performing its own.

This final rule recognizes the industry's need to expedite the transfer of technology into the mining environment. This transfer should improve the health and safety of miners. The alternate program in this final rule will permit a manufacturer who has had a product tested and evaluated by an independent laboratory to submit the test reports and technical information to MSHA to obtain MSHA approval for the product.

MSHA is aware of certain instruments that are currently listed (approved) by independent laboratories for use in hazardous gas and dust atmospheres that may also be suitable for use in the