

mine environment. These instruments include: Portable methane detectors, air sampling pumps, oxygen deficiency meters, air velocity meters, carbon monoxide detectors, hydrogen sulfide detectors, powered respirators and accessories, toxic gas detectors, portable two-way radios, laser surveying instruments, mine rescue communications systems, photometers, temperature sensing devices, personal audible and visual alarms, heat detection systems, voice amplifiers, position sensing devices, tape recorders, pressure sensing devices, data recording instruments, electrical diagnostic test instruments, sound level meters, sound level calibrators, audio dosimeters, and cable fault detectors.

MSHA has issued approvals for a number of instruments that were already listed (approved) by an independent laboratory at the time of application for MSHA approval. Examples of some of these instruments are: Motorola MT2000 and HT1000 Hand-held Radios; MSA Microgard Portable Alarm for warning of low levels of oxygen and high levels of methane; MSA Escort Elf Portable Pump for sampling of the mine atmosphere for dust; MSA Passport and Mini Series Personal Alarms for warning of high levels of toxic and combustible gases; Industrial Scientific Corporation Model SP402 Sampling Pump for remote monitoring of oxygen, toxic and combustible gases; and Industrial Scientific Corporation Model TMX410 Four-Gas Monitor for monitoring and warning of high levels of toxic and combustible gases and low levels of oxygen.

MSHA recognizes that there are many more products, including instruments, motors, explosion-proof enclosures, conveyor belts and hydraulic fluids, that are listed by independent laboratories that have not been submitted for MSHA approval. These products, used in other industries, can offer safety-related benefits to the mining industry and are considered potential candidates for the program that is created by this rule. By permitting acceptance of independent laboratory test and evaluation results, MSHA believes that some of these product manufacturers will be encouraged to submit their products for MSHA approval.

MSHA is also aware that many instruments and products have been listed (approved) by independent laboratories to Underwriter's Laboratories (UL) and Factory Mutual (FM) intrinsic safety standards for use in Class I (explosive gas-air mixtures) and Class II (explosive dust-air mixtures) atmospheres. Many of the same tests

and design requirements that MSHA uses under its intrinsic safety regulations are also used in the UL and FM standards. Under this final rule, applicants seeking MSHA approval of instruments or other products for intrinsic safety purposes could submit the results of any independent laboratory's testing and evaluation for intrinsic safety to MSHA as part of their applications. If, after review, MSHA determined that the testing already conducted was performed properly, MSHA could accept the test results and will not have to repeat testing in cases where the tests were the same. This will reduce costs and the time spent by manufacturers to obtain MSHA approval. If the review raised questions or concerns about the validity of test and evaluations submitted, MSHA will need to perform repeat testing. MSHA, of course, will conduct additional testing and evaluation where the UL and FM intrinsic safety requirements were not the same as MSHA's.

Under this final rule, MSHA will retain its testing and evaluation capabilities, but will offer applicants the alternative of submitting independent laboratory test and evaluation results for MSHA approval. MSHA will have the authority to accept the test and evaluation results in lieu of conducting its own tests and evaluations. MSHA also will have the authority to conduct or to observe any additional or repeat test and evaluation to ensure compliance with the MSHA requirements.

This final rule will also permit manufacturers to request MSHA approval based on non-MSHA product safety standards. This will occur only after MSHA has determined that such standards are equivalent to its applicable product approval requirements or can be modified to provide at least the same degree of protection as those MSHA requirements.

No approvals will be issued under part 6. Instead, any approval issued based on part 6 provisions will continue to be approved under the applicable product approval parts. The necessary conforming language to those other approval parts is published in this **Federal Register** notice of final rulemaking.

In developing this final rule, MSHA has made every effort to address the comments received on the October 17, 2002, revised proposal. Two commenters submitted comments regarding the revised proposed rule.

One commenter expressed its support for the revised proposed rule indicating that “\* \* \* the Revised Proposed Rule contained language which addressed all

of our concerns.” The commenter was in agreement with allowing manufacturers to utilize independent laboratory testing facilities while maintaining the test facility at MSHA. It agreed that requiring the use of OSHA's Nationally Recognized Testing Laboratories (NRTLs) which must conduct semi-annual audits was unnecessary since MSHA conducts its own audits. The commenter was also supportive of MSHA's proposal to approve equipment designed to non-MSHA product safety standards, particularly international standards, once MSHA has determined that they provide at least the same degree of protection, in their original or modified form, as MSHA's product approval requirements. The commenter indicated that the proposed provision on equivalency would assist in maintaining a single product line for use in multiple countries. This commenter also urged MSHA to “pursue working toward harmonizing with the world in regard to globalized standards,” specifically suggesting that MSHA join the IECEx scheme that permits one global standard and allows member countries to accept the certification issued by other member countries.

The second commenter expressed its concern regarding the competency of independent laboratories when compared with that of MSHA's own testing and evaluation capabilities. It indicated that MSHA and its predecessors have almost a century of experience and developed knowledge regarding the evaluation of mining products. The commenter recognized that independent laboratories may have the appropriate expertise to test to MSHA requirements, but asserted that the lack of mining-specific knowledge would reduce the industry's confidence in the test and evaluation results. This commenter was further concerned about the potential for “institutional atrophy” that could occur within MSHA with the reduction in testing and evaluation experience. The commenter expressed concern with a potential conflict of interest that could result from an independent laboratory being hired by a manufacturer. The commenter expressed similar concerns that a laboratory could be influenced to “gloss over negative aspects of a mining product” in an effort to keep the manufacturer as a customer.

MSHA has carefully evaluated the concern expressed about accepting third party testing results. Under this final rule, before an independent laboratory's test and evaluation results will be considered, the manufacturer must provide evidence to MSHA that the