

**DEPARTMENT OF LABOR****Mine Safety and Health Administration**

**30 CFR Parts 6, 7, 18, 19, 20, 22, 23, 27, 33, 35, and 36**

RIN 1219-AA87

**Testing and Evaluation by Independent Laboratories and Non-MSHA Product Safety Standards**

**AGENCY:** Mine Safety and Health Administration (MSHA), Department of Labor.

**ACTION:** Proposed rule, notice of hearing and close of comment period.

**SUMMARY:** This revised proposed rule would establish alternate requirements for testing and evaluation of products that MSHA approves for use in gassy underground mines. It is being published in response to comments received as the result of a 1994 proposed rule on the same subject. It would permit manufacturers of certain products, who seek MSHA approval, to use an independent laboratory to perform, in whole or part, the necessary testing and evaluation for approval. Testing and evaluation as used in this proposed rule means testing, evaluation, or both. This revised proposed rule would also permit manufacturers to have their products approved based on non-MSHA product safety standards. This would 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. The revised rule, as proposed, should increase the availability of a wider variety of mining products having enhanced safety features by reducing costs and broadening the market for mining equipment.

**DATES:** Comments must be received on or before December 31, 2002. Submit written comments on the information collection requirements by December 16, 2002.

Two public hearings will be held. One in Denver, Colorado on January 7, 2003 and another in Washington, Pennsylvania on January 9, 2003. The first hearing will begin at 9 a.m. and end after the last scheduled speaker appears; no later than 5 p.m. on January 7, 2003.

The second hearing will begin at 9 a.m. and end after the last scheduled speaker appears; no later than 5 p.m. on January 9, 2003. If individuals or organizations wish to make an oral presentation for the record, we ask that

you submit your request at least 5 days prior to the hearing dates. However, you do not have to make a written request to speak. Any unallotted time will be made available for persons making same-day requests.

The post-hearing comment period will close 30 days after the second public hearing on February 10, 2003.

**ADDRESSES:** *Comments.* Send comments on the revised proposed rule—

(1) By mail or hand delivery to MSHA, Office of Standards, Regulations and Variances, 1100 Wilson Boulevard, Room 2352, Arlington, VA 22209-3939;

(2) By facsimile to MSHA, Office of Standards, Regulations and Variances, 202-693-9441; or

(3) By electronic mail to [comments@msha.gov](mailto:comments@msha.gov). If possible, please supplement written comments with computer files on disk. You may contact MSHA with any format questions.

Send written comments on the information collection requirements to both MSHA and the Office of Management and Budget (OMB) as follows:

(1) To OMB by mail addressed to the Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, 725 17th Street, NW., Washington, DC 20503, Attn: Desk Officer for MSHA; and

(2) To MSHA by one of the following methods:

(a) By mail or hand delivery to MSHA, Office of Standards, Regulations and Variances, 1100 Wilson Boulevard, Room 2352, Arlington, VA 22209-3939;

(b) By facsimile to MSHA, at 202-693-9441; or

(c) By electronic mail to [comments@msha.gov](mailto:comments@msha.gov).

**Hearings.** (1) The hearing on January 7, 2003 will be held at the DoubleTree Hotel Denver, 3203 Quebec Street, Denver, Colorado 80207 (phone: (303) 321-3333).

(2) The hearing on January 9, 2003 will be held at the Holiday Inn Meadowlands, 340 Racetrack Road, Washington, Pennsylvania 15301 (phone: (724) 222-6200).

**FOR FURTHER INFORMATION CONTACT:** Marvin W. Nichols, Jr., Director, Office of Standards, Regulations, and Variances, MSHA, 1100 Wilson Boulevard, Room 2352, Arlington, Virginia 22209-3939. Mr. Nichols can be reached at [nichols-marvin@msha.gov](mailto:nichols-marvin@msha.gov) (Internet E-mail), 202-693-9440 (voice), or 202-693-9441 (facsimile).

**SUPPLEMENTARY INFORMATION:** You may obtain copies of the revised proposed rule and the Preliminary Regulatory Economic Analysis (PREA) in

alternative formats by calling the number in the **FOR FURTHER INFORMATION CONTACT** section above. The alternative formats available are either a large print version of these documents or electronic files that can be sent to you either on a computer disk or an attachment to an e-mail. The documents also are available on the Internet at <http://www.msha.gov/REGSINFO.HTM>. We intend to place the public comments on these documents on our website shortly after we receive them.

**I. Background**

From its creation by Congress in 1910, MSHA's predecessor, the Bureau of Mines, U.S. Department of Interior (Bureau), was responsible for the testing and evaluation of mining products. Under the Federal Mine Safety and Health Act of 1977 (Mine Act), MSHA is responsible for prescribing the technical design, construction, and the test requirements for certain products used in underground mines, and for testing and evaluating them for approval based on those requirements. These technical requirements are set forth in the Agency's approval regulations in 30 CFR parts 7 through 36.

MSHA's approval regulations govern the process through which manufacturers may obtain MSHA approval, certification, acceptance or evaluation of certain products for use in underground mines. Each of these separate approval actions has specific application procedures and technical requirements for testing and evaluation. MSHA currently conducts the testing and evaluation of products for a fee paid by the applicant. Following MSHA approval, manufacturers must ensure that the product continues to conform to the technical requirements tested, evaluated, and approved by MSHA.

When MSHA receives an application for approval of a product for use in underground mines, every aspect of the documentation package is reviewed to determine whether the technical requirements of the applicable provisions of 30 CFR parts 15 through 36 have been met. Each drawing and specification in the package is cross-checked against these requirements and, for some products, samples of the product or parts of the product are disassembled and examined by MSHA for conformity with the drawings and specifications. After MSHA verifies that an applicant's product complies with the design and construction requirements, MSHA then tests the product to determine whether it performs according to the approval requirements, unless the design obviates the need for testing. If the product

passes the tests and meets all MSHA requirements, MSHA issues an approval for the product.

Once MSHA has approved a product, the manufacturer is authorized to place an MSHA approval marking on the product that identifies it as approved for use in underground mines. Use of the MSHA marking obligates the manufacturer to maintain the quality of the product as approved. The MSHA marking indicates to the mining community that the product has been manufactured according to the drawings and specifications upon which the approval was based. Any proposed change to an approved product that causes it to differ from the design or construction described in the original documentation approved by MSHA must be submitted to the Agency for approval prior to implementation of the change. If MSHA approves the change, the Agency issues an extension of approval or a notice of acceptance of the modified product to the manufacturer.

In the mid-1980s, the Agency reviewed its product approval program to determine whether it could be restructured to provide improved safety to miners without increasing cost to the applicant. That review resulted in the promulgation in 1988 of 30 CFR part 7, Testing by Applicant or Third-Party, which represented MSHA's first departure from its role of front-end prototype testing of products for approval, by substituting manufacturer or third-party testing of a limited number of products for the testing that previously had been conducted by MSHA.

The objectives of the program were to permit MSHA to redirect its resources to its post-approval product audit functions, as well as to the review of technological improvements in mining products. The Agency's shift in emphasis was intended to enhance the safety of products in mines by providing the mining community a greater assurance that approved products in mines continue to be manufactured as approved, by detecting any problems in manufactured products more effectively, and by enabling a more expeditious introduction of new technology.

Products selected as suitable for applicant or third-party testing under part 7 were those with characteristics which could be objectively tested in a routine and readily reproducible manner, with no elements of subjective analysis. Products whose testing results depend on the experience, judgement, and knowledge of the personnel executing the tests, such as testing a complex intrinsically safe circuit, were not included in the part 7 program.

Under part 7, all product testing is conducted according to MSHA-specified tests and procedures, using calibrated and accurate instruments. Moreover, the product testing is subject to Agency. Part 7 is not a self-certification program. The part 7 concept shifts only the testing of certain 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 revised proposed rule would not affect the testing aspects of part 7. Part 7, unlike the other approval parts, would continue to permit testing by the applicant or by third party laboratories that are not necessarily independent from the manufacturer.

## II. 1994 Proposed Rule

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 the 1994 proposed rule, 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 advance 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 rule was not published as a final rule. Instead, MSHA is publishing this revised proposed rule (hereafter referred to as the proposed rule).

## III. Discussion of Proposed Rule

### A. Introduction

The proposed rule would provide a number of significant improvements to the 1994 proposed rule. There were two major concerns expressed by a large number of commenters, primarily representing product manufacturers and mine operators. They objected to the requirement to employ the services of private sector laboratories, and expressed concern over the loss of expertise that MSHA would experience by ceasing to perform tests and evaluations. There was also an overwhelming concern about the effects the mandatory nature of the 1994 proposed rule would have on their costs and turnaround times. Many commenters stated that they had previous experience in dealing with third party laboratories and, in general,

had experienced higher costs and longer turnaround times in those instances.

MSHA has revised the 1994 proposed rule to address these concerns, because we recognize 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 proposed rule would 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 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 system, 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 is aware 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 would be created by this rule. By permitting acceptance of independent laboratory test and evaluation results, MSHA believes that some of these product manufacturers would 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 proposed 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 would not have to repeat testing in cases where the tests were the same. This would 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 would need to perform repeat testing. MSHA, of course, would conduct additional testing and evaluation where the UL and FM intrinsic safety requirements were not the same as MSHA's.

The most significant change from the 1994 proposed rule is that MSHA would retain its testing and evaluation capabilities, but would offer applicants the alternative of submitting an independent laboratory test and evaluation report for MSHA approval. MSHA would have the authority to accept the test and evaluation results in lieu of conducting its own. MSHA also would have the authority to conduct or to observe any additional or repeat test and evaluation to ensure compliance with the MSHA requirements.

MSHA carefully analyzed the comments received in response to the 1994 proposed rule and responded in many instances by revising it. The resultant proposed rule would offer the alternative approval program as well as the equivalency requirements in essentially the 1994 proposed form.

Some commenters expressed concern that MSHA might lose expertise if independent laboratories performed all testing and evaluation. This proposed rule would retain a major role for MSHA. MSHA would be analyzing non-MSHA product safety standards to determine equivalency. This proposed rule would allow MSHA, at the request of the applicant, to approve products based either on its approval regulations or non-MSHA product safety standards that have been determined to be equivalent. Most importantly, MSHA would remain the approval authority, whether MSHA or an independent laboratory does the testing and evaluation.

In developing this proposed rule, MSHA has made every effort to address the comments received on the 1994 proposed rulemaking. Comments addressing both the costs and the benefits of each provision, as well as revisions and deletions, were carefully evaluated against the statutory requirement that nothing in this proposed rule shall reduce the protection afforded miners by an existing mandatory health or safety standard.

#### *B. Section-by-Section Discussion*

The 1994 proposed rule, which would have required applicants to use independent laboratories to perform the product testing and evaluation necessary for issuance of MSHA's product approval, was intended to form the foundation of a modified approval program providing enhanced product user protection and more rapid introduction of new technology into the mining industry. The 1994 proposed rule would also have required applicants for product approval to submit to MSHA the test and evaluation data and results obtained from an independent laboratory recognized by OSHA as an NRTL. The 1994 proposed rule also would have permitted applicants to request MSHA approval based on testing and evaluation requirements other than MSHA's once MSHA determined the other requirements to be equivalent to its own requirements in their original or modified form.

MSHA received many comments on the 1994 proposed rule from interested parties, such as mining equipment manufacturers, mine operators, representatives of miners, professional associations, and laboratories. Many of these commenters also participated in the hearing and sent in post-hearing comments on a number of issues. MSHA has extensively modified the 1994 proposed rule based on these comments.

Under this proposed rule, manufacturers seeking MSHA approval could choose to have their products tested and evaluated either by an independent laboratory or by MSHA. MSHA would be able to accept the independent laboratory's test and evaluation results in lieu of performing its own. Also under this proposed rule, the equivalency concept would remain basically the same as originally proposed.

No approvals would be issued under part 6. Instead, any approval issued based on part 6 provisions would continue to be approved under the applicable product approval parts. The necessary conforming language is being proposed to those other approval parts in this **Federal Register** Notice of Proposed Rulemaking.

The following portion of the preamble discusses each provision of the proposed part 6 rule. The text of the proposed rule is included at the end of the document.

#### *Section 6.1 Purpose and Effective Date*

This section explains that the purpose of this proposal would be to establish an alternate program for testing and evaluation of products MSHA approves for use in gassy underground mines. It would permit manufacturers of certain products who seek MSHA approval to use an independent laboratory to perform, in whole or in part, the necessary testing and evaluation for approval. It also would permit manufacturers to request to have their products approved based on non-MSHA product safety standards once MSHA has determined that the non-MSHA product safety standards are equivalent to MSHA's applicable product approval requirements or can be modified to provide at least the same degree of protection as MSHA's requirements.

The provisions of this part would apply to any application for approval or extension of approval filed under 30 CFR parts 18, 19, 20, 22, 23, 27, 33, 35, or 36, and received by MSHA after the effective date of this rule. It would be effective 60 days after publication of the final rule in the **Federal Register**.

#### *Section 6.2 Definitions*

This section of the proposed rule would define and clarify the key terms used in part 6. The 1994 proposed rule included definitions for "approval" and "evaluation." Commenters on the 1994 proposed rule did not direct any comments to these definitions. The definition of "approval" remains unchanged. The definition for "evaluation" was removed because

MSHA believes the term is self-explanatory.

The additional definitions are provided to clarify certain terms that were not defined in the 1994 proposed rule or to address new terms that were not included in the 1994 proposed rule. These would include "applicant," "approval holder," "equivalent non-MSHA product safety standard," "independent laboratory," "post-approval product audit" and "product safety standard."

*Applicant.* This term would be used to describe an individual or organization that manufactures or controls the assembly of a product and that applies to MSHA for approval of that product.

*Approval.* This term would be used to describe a written document issued by MSHA which states that a product has met the applicable requirements of part 18, 19, 20, 22, 23, 27, 33, 35, or 36. The definition would be based on the existing definitions of "approval" in the parts specified above. It is expanded to include "certification" and "acceptance" because these terms also are used to denote MSHA approval.

*Approval holder.* This term would be used to describe an applicant whose application for approval of a product under part 18, 19, 20, 22, 23, 27, 33, 35, or 36 of this chapter has been approved by MSHA.

*Equivalent non-MSHA product safety standard.* This term would be used to describe a non-MSHA product safety standard, or group of standards, that is determined by MSHA to provide at least the same degree of protection as the applicable MSHA product approval requirements in parts 18, 19, 20, 22, 23, 27, 33, 35, and 36, or which in modified form, provides at least the same degree of protection.

*Independent Laboratory.* This term would be used to describe a laboratory that: (1) Has been recognized by a laboratory accrediting organization (e.g., OSHA NRTL Program, American Association for Laboratory Accreditation (A2LA), International Electrotechnical Commission (IEC), etc.) to test and evaluate products to a product safety standard, and (2) is free from commercial, financial, and other pressures that may influence the results of the testing and evaluation process.

*Post-approval product audit.* This term applies to the examination, testing, or both, by MSHA of approved products selected by MSHA to determine whether those products meet the applicable product approval requirements and have been manufactured as approved.

*Product safety standard.* This term would be used to describe a document,

or group of documents that specify the requirements for the testing and evaluation of a product for use in explosive gas and dust atmospheres, and, when appropriate, include documents addressing the flammability properties of products.

#### *Section 6.10 Use of Independent Laboratories*

Under paragraph (a) of the proposed rule, manufacturers who seek approval of certain products would be permitted to use an independent laboratory to perform, in whole or in part, the necessary testing and evaluation for MSHA product approval. Thus, this proposed rule would no longer require manufacturers to use independent laboratories. Instead, it would give manufacturers the option of having either MSHA or an independent laboratory do the testing and evaluation.

Also, under this proposed rule, if independent laboratories were used, applicants would need to submit, as part of the approval application, four items set out in subparagraphs (1), (2), (3), and (4) of section 6.10(a). They would include written evidence of the laboratory's independence and current recognition by a laboratory accrediting organization; a complete technical explanation of how the product complies with each requirement in the applicable MSHA product approval requirements; identification of components or features of the product that are critical to the safety of the product; and all documentation, including drawings and specifications, which are required by the applicable approval part under this chapter.

The language in the 1994 proposed rule, requiring that testing and evaluation of products submitted to MSHA for approval be conducted only by an independent laboratory recognized as a NRTL under OSHA's program, has not been included. There was disagreement with the Agency's 1994 proposal to require that manufacturers use NRTLS to test and evaluate their products prior to requesting MSHA approval. The comments were in two general categories: First, commenters noted that the use of NRTLS would be mandatory; and second, that the 1994 proposal relied exclusively on NRTLS instead of a broader category of independent laboratories.

One commenter stated that it was not opposed to MSHA's acceptance of results produced by a NRTL if MSHA preserved the option for manufacturers to submit their products to MSHA for testing. Various commenters expressed concern that the exclusive use of NRTLS

could create a monopoly. Other commenters expressed concern about the small number of NRTLs and the cost of the equipment necessary to test specialized mining products. These commenters feared that the NRTLs would find it too costly to duplicate MSHA testing equipment, especially when the number of products requiring such testing would be small. Further, they expressed concern that NRTLs would tend to specialize in only one kind of testing, resulting in a monopoly and inhibiting competition. It was also their contention that NRTLs would be unable to respond to numerous requests from competing manufacturers, and would thus reduce the availability of competitive products and limit the mining industry to a few suppliers. Such specialization could also cause bottlenecks in testing and evaluation if multiple manufacturers sought approval concurrently. They also feared that the laboratories would face competing demands for resources and that laboratories might give priority to non-mining industry products. This proposed rule would allow manufacturers to choose whether to have MSHA conduct the testing and evaluation or to have an independent laboratory, recognized by a laboratory accrediting organization, do so. The laboratory would not have to be a NRTL.

Although it is no longer proposing that an independent laboratory used be recognized under OSHA's NRTL program, the Agency determined that it would be essential for the laboratories performing testing and evaluation to be recognized by a laboratory accrediting organization. This is based on comments asserting the need for a system to be in place to determine the qualifications of laboratories. MSHA agrees that competent laboratory accrediting organizations exist and continues to believe that it should not establish its own program and duplicate the work of others. One commenter recommended this by stating, "[r]ecognizing existing programs [third-party certification programs] should be a significant cost reduction to already overburdened government agencies."

While MSHA does not want to establish its own laboratory accreditation program, the Agency believes there are two essential qualifications that laboratories would have to meet in order for MSHA and the mining community to have assurance that any product, tested and evaluated by third party laboratories, would be safe in the mining environment. First, MSHA believes that the laboratory must be independent of commercial, financial, or other pressures that could

influence the results of the testing and evaluation process. Independence of the testing laboratory from the manufacturer is essential for MSHA and the mining public to have confidence in the results of testing and evaluation conducted outside the Agency's Approval and Certification Center. Second, MSHA would need some evidence that the laboratory is competent to test and evaluate to a particular product safety standard. This proposed rule would permit MSHA to accept testing and evaluation performed by an independent laboratory provided that MSHA receives written evidence of the laboratory's independence and current recognition by a laboratory accrediting organization. MSHA agrees with commenters that there are a number of capable accrediting organizations already in existence and is proposing to accept testing and evaluation by independent laboratories that are accredited by any one of them.

Some commenters pointed to MSHA's existing regulation at 30 CFR part 7 that allows self-testing in certain circumstances, and advocated expansion of that program. However, that regulation clearly spells out the circumstances under which MSHA allows manufacturer testing. The Agency limited such testing to only products that could be objectively tested in a routine and readily reproducible manner, with no elements of subjective analysis. With part 7, MSHA provides the exact testing procedure and components or products either pass or fail. It is not a self-certification program. MSHA continues to evaluate the test results and issue the approval.

This part 6 proposed rule would not allow manufacturer testing and evaluation because of the broad range of products covered by it and because the testing and evaluation often requires subjective analysis. For this type of testing and evaluation, MSHA prefers the use of third party, rather than manufacturer, testing and evaluation results. The use of a third party to conduct the testing would increase confidence in the objectivity of the test results.

As indicated in the prior discussion on proposed definitions, this proposed rule defines an independent laboratory as a laboratory that has been recognized by a laboratory accrediting organization to test and evaluate products to a product safety standard and is free from commercial, financial, and other pressures that may influence the results of the testing and evaluation process.

Several commenters expressed concern that results from foreign laboratories would be eliminated with

the required use of NRTLs. A commenter suggested that test results for products certified in other countries should be accepted by MSHA in lieu of our tests because many manufacturers market products which have already been certified in other countries for use in underground mines. Another commenter suggested that MSHA would have to add enhancements to the Approval and Certification Center test facilities to accommodate different tests. One commenter stated that MSHA should accept testing by U.S. and non-U.S. facilities as an alternative to MSHA testing.

On the other hand, one commenter objected to any foreign laboratories performing testing and evaluation for MSHA product approvals. This commenter did not believe that a sufficient level of protection could be maintained over products tested in foreign countries for use in U.S. mines. The commenter stated that it would be much more difficult for MSHA to maintain oversight of the quality of foreign laboratories' work. This commenter expressed concern that most foreign laboratories would be inclined to serve the interest of their own countries rather than conform to U.S. approval requirements, especially if the rejection of a product would mean a loss in foreign trade for the country where the laboratory was located. This commenter questioned how MSHA would ensure that foreign laboratories would have the facilities, equipment, and qualified persons to conduct the testing or that test parameters would be met.

MSHA recognizes that some foreign laboratories would meet the criteria for independent laboratories. Therefore, a manufacturer could choose to use a foreign laboratory that has been accredited by a recognized accrediting organization such as the IEC to perform testing and evaluation to MSHA's requirements. Guide 17025 of the International Organization for Standardization (ISO)/IEC "General requirements for the competence of testing and calibration laboratories" and ISO/IEC Guide 65 "General requirements for bodies operating product certification systems" are the main documents used both nationally and internationally by organizations which accredit laboratories. Moreover, the United States is a member of the World Trade Organization (WTO). The Technical Barriers to Trade Agreement applies to members of the WTO and requires members to ensure that technical regulations are not prepared, adopted, or applied with a view to or with the effect of creating unnecessary

obstacles to international trade. This means that, under the agreement, standards could not be promulgated that would discriminate between foreign and domestic manufacturers and laboratories. Therefore, under this proposed rule, a manufacturer could choose to use independent laboratories recognized under OSHA's NRTL program or laboratories accredited by other national or foreign accrediting organizations.

Additionally, commenters expressed concern that MSHA would lose its expertise if the Agency did not continue to test and evaluate products as part of the approval process. In response to these concerns, MSHA emphasizes that it would continue to test and evaluate products at the manufacturers' request. It would also need to retain testing and evaluation capability for the purposes of post-product approval audits, accident investigations, and for purposes of technical assistance. In addition, as discussed later in § 6.20 of this proposed rule, MSHA would be evaluating other non-MSHA product safety standards to determine equivalency, increasing its testing and evaluation expertise.

Commenters cited many concerns about increased costs. They cited a significant increase in the cost of testing and evaluation done by independent laboratories compared to the fees imposed by MSHA. MSHA's costs are set through a process that determines the direct and indirect hourly costs for the testing, evaluation, and approval of a product. MSHA does not include profit in the fees. MSHA considered the disparity in costs between MSHA and independent laboratories for product testing and evaluation in revising the 1994 proposed rule. Since the revised proposal would no longer require the use of independent laboratories to perform all testing and evaluation for MSHA approval, these increased costs would be eliminated.

MSHA has considered all of these objections to the exclusive mandatory use of NRTLs, and this proposed rule addresses those objections. The proposed rule would allow the optional use of a wide network of independent laboratories, eliminating the concern about monopolies. It also would provide manufacturers the option to have MSHA perform some or all of the testing and evaluation necessary for approval. MSHA believes that assessing other non-MSHA product safety standards' equivalency to MSHA's approval requirements and continuing its responsibility for product audits would have maintained MSHA's expertise. Under this proposed rule, the Agency

would continue to be involved in direct product testing and evaluation if manufacturers choose to submit their products to MSHA for testing and evaluation, thus obviating the concern about MSHA expertise. MSHA would also be investigating new technology. By eliminating the requirement for exclusive use of NRTLs, MSHA addresses the concerns raised about audits, cost, and creation of monopolies.

Paragraph (b) of this proposed rule, like the 1994 proposed rule, would require that product testing and evaluation performed by independent laboratories for purposes of MSHA approval comply with MSHA product approval requirements. The proposed rule would not permit an independent laboratory to change a testing standard or any elements incorporated into the standard. This is due to the critical nature of the testing and evaluation of products to be used in a potentially hazardous underground mining environment.

Paragraph (c) of this proposed rule would require product testing to be conducted or witnessed by the independent laboratory's personnel. Revised paragraph (c) would replace the language in the 1994 proposed paragraph (b) that would have required all testing to be conducted at the laboratory site. Generally, commenters were in disagreement with that 1994 proposed requirement. They gave examples of products that could not be transported to a laboratory. That requirement was derived from an OSHA NRTL policy that has since been changed. MSHA considered the comments and has decided to permit off-site testing as long as it is conducted or witnessed by personnel of the independent laboratory.

Under paragraph (d) of this proposed rule, MSHA would notify applicants, after the review of information required under paragraph (a), if additional information and testing would be required. The applicant would be required to provide the information, arrange any additional or repeat tests and notify MSHA of the location, date, and time of the test(s). MSHA could observe additional testing conducted by an independent laboratory. Further, MSHA could decide to conduct the additional or repeated tests at the applicant's expense. The applicant would have to supply any additional components necessary for testing and evaluation. Without a complete application, MSHA would be unable to initiate the technical review of the product.

After determining that an application package is complete, MSHA would

initiate a technical review to ensure that the independent laboratory's testing and evaluation results were both reasonable and appropriate for the particular product. If the technical review of the package indicated deficiencies resulting from inadequate data, illogical or unreasonable testing or evaluation results, or the omission of required information, the applicant would be notified of the discrepancy and given a reasonable period of time to provide the needed information and correct the apparent deficiency. If MSHA determined that additional or repeat testing would be required, the applicant would have to arrange for any additional or repeat tests and notify MSHA of the location, date and time of the test(s). MSHA could elect to observe additional testing conducted by an independent laboratory or MSHA could conduct the additional or repeat tests at the applicant's expense. The applicant would need to supply any additional components necessary for testing and evaluation.

Following the administrative and technical reviews of the product approval package, MSHA would issue an approval, or a notice denying approval, to the applicant. A notice denying approval would state the reasons on which the denial was based. If an approval were issued, the approval holder would be authorized and required to place an MSHA marking on the product which signifies to the user of the product that it is approved for use in gassy underground mines. The product drawings and specifications, the independent laboratory's testing and evaluation results and its statement of product compliance with the applicable approval requirements, as well as written evidence of the laboratory's independence and current recognition by an accrediting organization, would be retained in the approval file at MSHA's Approval and Certification Center.

Section 6.10(d) of the 1994 proposed rule would have required that approved products tested and evaluated by NRTLs display both the NRTL and the MSHA marks. Commenters objected to what they considered duplicative and confusing markings and raised issues about changes to products, liability, and proper use of a registered certification mark. Because this proposed rule would eliminate the required use of NRTLs to test and evaluate, the 1994 proposed rule provision for a NRTL marking would no longer be necessary. As a result, the revised proposed rule would not require that manufacturers use the mark of the independent laboratory that tested and evaluated the product or its

components. However, nothing in this proposed rule would prohibit a manufacturer from using the mark of an independent laboratory if it chose to do so, as long as it carries the MSHA mark as well. Since the MSHA marking is the only marking that approval holders would be required to place on approved products, the marking provision of § 6.10(d) of the 1994 proposed rule has been deleted in this proposed rule because each applicable approval part contains its own marking requirement. Further, the requirement that a reference be made on the NRTL marking to the test standard used in testing and evaluation of the product for MSHA approval has also been deleted.

Paragraph (e) in the 1994 proposed rule would have required internal audits, performed by a NRTL as part of the quality control program required by the OSHA accreditation, to be made available for review by MSHA. Additionally, the 1994 proposed paragraph (f) would have required NRTLs recognized by OSHA to perform MSHA testing and evaluation to formulate and implement a "follow-up" program in accordance with the OSHA requirements of 29 CFR 1910.7(b)(2). The 1994 proposed paragraph (g) would also have required that NRTLs make available to MSHA for review information gathered by a NRTL during manufacturing site inspections or field audits of manufactured products approved by MSHA. These three provisions, relating to the mandatory use of NRTLs, have not been included in this proposed rule since MSHA is no longer requiring the exclusive use of NRTLs.

Revised proposed paragraph (e), consistent with the 1994 proposed paragraph (g), would require that approval holders of products approved based on independent laboratory testing and evaluation make such products available for audit upon request by MSHA. This would not occur more than once a year, except for cause. Such an audit would be conducted at a mutually agreeable site at no cost to MSHA. This is to ensure that products bearing the MSHA marking meet the approval requirements and are manufactured in accordance with the approved drawings and specifications. Commenters were concerned that the frequency of audits required by the NRTL would lead to excessive costs and operational delays caused by the diversion of resources and the frequent presence of auditors on site. These commenters maintained that NRTL audits would duplicate audits conducted by MSHA. In response to comments, MSHA has deleted the requirement for the exclusive use of

NRTLs in the proposed rule and, by doing so, has eliminated the need for NRTL-mandated audits. Although MSHA would no longer specifically require manufacturers to adhere to audits required by independent laboratories, MSHA recognizes that most manufacturers who elect to have their products listed (approved) by independent laboratories generally accept those laboratories' audit requirements to maintain their listing.

MSHA would continue to conduct audits as part of its post-approval product audit program. MSHA conducts audits to ensure conformity with the technical requirements upon which the approval was based. Approved products to be audited by MSHA would be selected by the Agency as representative of those distributed for use in underground mines. When an approved product is requested by MSHA for audit from the approval holder, the Agency would arrange to examine and evaluate it at a mutually agreed upon time and location and would permit the approval holder to observe audit-related tests conducted. This examination and evaluation could take place at an MSHA facility, at the manufacturer's plant or distribution center, or at any other place agreed upon by MSHA and the approval holder. The approval holder would be able to obtain the report resulting from such audits.

A commenter expressed concern that MSHA's post-approval product audits would serve only to remove foreign approved products after a defective product is found and had possibly caused serious harm. The commenter suggested that the rule should provide "proactive" protection that is designed to root out such problems before they cause injury and destruction, particularly when MSHA-approved foreign products are involved. In response, MSHA believes that safeguards would be in place to detect a problem prior to a product being placed in a mine. The independent laboratory, either foreign or domestic, would have to be recognized by a laboratory accrediting organization, such as OSHA's NRTL Program, A2LA, or IEC, to test and evaluate products to specific product safety standards.

Additionally, product testing and evaluation performed by both foreign and domestic laboratories for purposes of MSHA approval would have to comply with MSHA product approval requirements. In this regard, under this proposed rule, MSHA would carefully review all product testing and evaluation reports submitted in support of product approval applications prior to an approval decision being made.

This would ensure that such testing and evaluation had been performed in accordance with MSHA procedures and requirements. Finally, the manufacturer would be ultimately responsible for any product, under any of the approval parts covered, regardless of who performs the testing (*i.e.*, foreign or domestic independent laboratory or MSHA). Once the product is in the mine, the mine operator is required to maintain the product in approved condition.

This proposed rule would allow MSHA to more effectively determine whether products are, in fact, being manufactured as approved. MSHA, not the manufacturer, would select the product. MSHA also would continue to obtain approved products from sources other than the manufacturer. This approach is particularly useful for products that are "one of a kind" or of limited distribution. Because these products are not readily found at mine suppliers or distributors, they would be difficult to locate without the assistance of the approval holder.

In determining which approved products would be subject to audit at any particular time, MSHA would consider a variety of factors such as whether the manufacturer has previously produced the approved product or similar products, whether the approved product is new or part of a new product line, or whether the approved product is intended for a unique application or limited distribution. Other considerations could include product complexity, the manufacturer's previous product audit results, product population in the mining community, and the time since the last audit or since the product was first approved.

Based on MSHA's experience, the Agency anticipates few instances in which more than one approved product would be required to be audited "for cause" from any one manufacturer in any one year. There are circumstances or causes, however, under which additional products for audit may be necessary to ascertain compliance with the technical requirements upon which an approval was based. Examples of such circumstances include verified complaints about the safety of an approved product, evidence of product changes that have not been approved, audit test results that warrant further testing to determine compliance, and evaluation of corrective action taken by an approval holder. Under these circumstances, the approval holder would have to provide, at no cost to MSHA, additional approved products so the Agency could ensure that the

approval holder is meeting its obligation to manufacture the product as approved.

When discrepancies are found during MSHA audits of approved products, MSHA would require that the manufacturer take all necessary corrective actions. These actions could include, but are not limited to, the approval holder recalling or retrofitting the approved product involved, and issuing notices of such action to users. Revocation of the approval by MSHA may result when discrepancies in approved products are not corrected.

Revised paragraph (f), is based in part on the 1994 proposed paragraph (f). It would require approval holders to notify MSHA of all product defects they discover, once products are approved. We received very little comment on this section of the 1994 proposed rule. It would be retained as revised proposed paragraph (f).

One commenter suggested that MSHA be more specific about what is considered a "defect." A defect is a nonconformance with the MSHA approved design, including any drawings and specifications. There are varying degrees of significance of defects. It would be MSHA's intent that all defects be reported to the Agency.

Because the use of products with defects could create hazards underground, immediate notification should be made by expedient means, such as by telephone, e-mail, or fax. The telephone notification should be followed-up in writing. The oral and written notification should include a description of the nature and extent of the problem.

In the 1994 proposed rule, paragraph (h) would have required that approval holders submit to MSHA any change to an approved product from the documentation on file at MSHA that affects the technical requirements of the applicable product approval part. MSHA recognizes that changes to approved products are addressed in the individual approval parts. Therefore, the 1994 proposed provision was not included in this revised proposed rule.

In response to comments, it is not the Agency's intent to change its current method of handling requests for modification of approval. MSHA would continue to accept changes through its Revised Approval Modification Program (RAMP), which replaced the Stamped Notification Acceptance Program (SNAP) and the Stamped Revision Acceptance (SRA) program.

The 1994 proposed paragraph (i) would have established the basis and procedures for revocation of NRTL recognition. One commenter asked what would happen if a laboratory's

recognition was revoked by OSHA and wanted to know the effect on the approvals (listings) granted by that laboratory. This provision has been deleted in this proposed rule because MSHA would no longer be requiring NRTL recognition. Moreover, revocation of a NRTL recognition or accreditation of an independent laboratory may not necessarily impact the validity of the approval. However, if MSHA believes that the reason for the revocation could affect the safety of products tested, MSHA would take appropriate action on a case-by-case basis. The Agency reserves the right, under every applicable part, to rescind, for cause, any product approval, certification, acceptance, or extension granted under that part.

#### *Section 6.20 MSHA Acceptance of Equivalent Non-MSHA Product Safety Standards.*

Section 6.20(a) of this proposed rule is similar to the 1994 proposed § 6.20(a) and states that MSHA would accept non-MSHA product safety standards, or group of standards, as equivalent after determining that they: (1) provide at least the same degree of protection as MSHA's product approval requirements set forth for the product in other parts of this chapter; or (2) can be modified to provide at least the same degree of protection as those MSHA requirements.

Paragraph (b) of this proposed rule provides that MSHA would publish its intent to review any non-MSHA product safety standard for equivalency in the **Federal Register** for the purpose of soliciting public input. This provision has been added in response to comments to the 1994 proposed rule. Many commenters expressed a desire to have input into the equivalency decision-making process. One commenter even proposed that the Agency use the Mine Act's section 101(c) process for petitions for modification of standards. Although MSHA has provided for public input into the equivalency process, it has not accepted the suggestion that the agency use the section 101(c) procedures. Section 101(c) provides that mine operators or miner representatives, not equipment manufacturers, may request that MSHA accept a safety practice that varies from that prescribed by a standard as long as it provides at least the same measure of protection to the miners. MSHA does not interpret this section to allow equipment manufacturers to petition the Agency for the use of non-MSHA product safety standards for products to be used in multiple mines. MSHA encourages public input in the equivalency process.

It would solicit such input through a **Federal Register** notice once it decides to evaluate a particular standard or group of standards for equivalency. Because MSHA is solely responsible for the approval of mining products under the Mine Act, MSHA would retain the ultimate decision on equivalency.

Paragraph (c) of this proposed rule would require that MSHA publish a listing of all final equivalency determinations in this part 6 and the applicable approval parts. The listing would state whether MSHA accepts the non-MSHA product safety standards in their original form, or would require modifications to demonstrate equivalency. If modifications were required, they would also be provided in the listing. MSHA would notify the public of each equivalency determination and would publish a summary of the basis for its determination in the **Federal Register**. MSHA would provide complete equivalency determination reports upon request to the Approval and Certification Center.

Paragraph (d) of this proposed rule would require that after MSHA has determined that non-MSHA product safety standards are equivalent and has notified the public of such determinations in the **Federal Register**, applicants could seek MSHA product approval based on such non-MSHA product safety standards.

Non-MSHA product safety standards would be considered equivalent when MSHA determines that, in their original or modified form, they provide at least the same degree of protection as MSHA's product approval requirements in parts 18, 19, 20, 22, 23, 27, 33, 35 or 36 of this chapter.

The Agency believes that this proposed rule would encourage a more rapid introduction of mining products embodying new technology with enhanced safety features. In addition, testing and evaluation to "equivalent" standards, that provide at least the same degree of protection to miners as those in the various MSHA product approval regulations could achieve multiple objectives. These would include metric conversion, greater compatibility with international standards, and a more competitive posture for U.S. products in the international market.

There was general agreement with the concept of MSHA approving products based on equivalent non-MSHA product safety standards, but many concerns about how it would be implemented. One commenter stated, "We certainly advocate expanding the design and testing standards that MSHA can accept." The commenter went on to

point out practical problems in doing so. Another commenter stated that its organization "advocates MSHA acceptance of standards other than those developed exclusively by the agency as the basis for approval of products," but then stated that MSHA should limit the number of standards for which they would make equivalency determinations. Others echoed this opinion.

Commenters expressed concern about how MSHA would select the standards to receive priority for equivalency determinations. MSHA agrees with commenters that there should be a system for determining the order in which MSHA selects standards for equivalency determinations. Revised proposed § 6.20 provides that MSHA would determine which non-MSHA product safety standards, or groups of standards, were equivalent or could be modified to be equivalent. The decision to perform an equivalency evaluation would be based on MSHA's determination of the overall value of conducting the evaluation. It is MSHA's intention to base its decision on factors such as the number of potential applications for approval using a particular non-MSHA product safety standard, the number of potential products affected, and its knowledge of the standard and the potential for it being equivalent. MSHA began this process some time ago in order to compare its approval requirements to those of other organizations because of the increasing use of those non-MSHA product safety standards in international trade and because of requests from the public. The equivalency analysis would be conducted by the Agency's Approval and Certification Center using personnel with expertise in the approval requirements involved.

Many commenters asked that MSHA adopt international standards without requiring any modifications. They argued that standards such as those of the IEC are widely accepted, even where they differ from MSHA's. It should be noted that most countries that utilize the base IEC standards modify them through national deviations that recognize each country's unique conditions and needs. These national deviations sometime conflict with each other, making adoption of a single global standard impractical. In addition, the base IEC standards may not provide at least the same degree of protection as MSHA's existing product approval requirements. MSHA's equivalency determinations would be based on the objectives of its product approval requirements and the hazards they were

designed to address. Section 101(a)(9) of the Mine Act provides that no new standard can reduce the protection afforded miners by an existing standard. For this reason, MSHA must assure that any non-MSHA product safety standard provides at least the same degree of protection for the miners who may use the product approved under that standard. MSHA cannot accept product safety standards, domestic or international, without determining whether they are equivalent or whether some modifications to those product safety standards are needed to achieve the objectives of the existing MSHA product approval requirements. While certain standards, including those accepted by other mining agencies, may be equivalent, MSHA must make that determination on a standard-by-standard basis. It is MSHA's belief that certain product safety standards may well be equivalent without modifications; others may require modification. The Agency would have to do a systematic analysis first to make this determination.

MSHA's equivalency analysis would compare the subject product safety standards, whether domestic or international, and MSHA's applicable product approval requirements. Where they differ, each difference would be examined to assess its effect on overall safety, and the differences as a whole would be assessed. Where the differences do not impact the objectives of the MSHA requirements, MSHA would issue a determination that the standard is equivalent to MSHA's approval requirements. However, if certain design criteria or performance requirements fail to meet MSHA's objectives or could diminish the safety of the product in underground mines, MSHA would specify the modifications necessary to reconcile the differences between the two so that at least the same degree of protection is provided.

Some commenters argued for the use of international standards and suggested that MSHA take a more active role on international standards committees to assure that product safety standards issued by these bodies reflect MSHA requirements, making it unnecessary for MSHA to add modifications. Others were concerned that MSHA would select the most stringent requirements from the MSHA approval requirements and from the non-MSHA product safety standards of other bodies, thus creating a hybrid regulation which would be more stringent, but not necessarily safer. Others stated that MSHA had not demonstrated that its approval requirements were safer than those of other bodies.

Under this proposed rule, when MSHA evaluates a product safety standard to determine equivalency, the Agency would be looking at the standard as a whole and whether it meets the objectives of MSHA's applicable product approval requirements. The Agency recognizes that some non-MSHA product safety standards may have more stringent provisions than MSHA's comparable approval requirements. However, it is not the Agency's intention to require more stringent protections where a non-MSHA product safety standard may afford them. MSHA intends to require modifications only where the non-MSHA standard does not provide equivalent protection. For manufacturers who choose to design products to more stringent standards, for purposes other than MSHA approval, this proposed rule would provide the vehicle for them to obtain MSHA approval even if their products were not designed specifically to MSHA's approval requirements. It is not the Agency's intention to develop a "hybrid" regulation, choosing the most stringent requirements from both the MSHA requirements and non-MSHA standards, as some commenters feared. The wording in the 1994 proposed § 6.20(b) would have required modifications to provide the "same or a greater degree of protection" as the applicable product approval requirements. This proposed rule, on the other hand, would require modifications to provide at least the same degree of protection as MSHA's product approval requirements.

One commenter expressed concern that MSHA would require the use of its procedures for equivalent standards, by way of modifications, thus creating a standard that would be the same as MSHA's. MSHA does not plan to specify test procedures or protocols for non-MSHA product safety standards determined to be equivalent. The equivalency determination would be based on the overall safety provided by the standard and the ability of the standard to address the hazards the MSHA requirements were designed to address. A non-MSHA product safety standard could be considered equivalent even though all or portions of its testing and evaluation requirements and procedures may differ from MSHA's requirements.

Under this proposed rule, after MSHA has determined that equivalent requirements exist or that certain requirements, other than those in MSHA approval regulations, can be modified to provide at least the same degree of protection, the applicant would be given

the option of requesting that MSHA base its approval on the equivalent, non-MSHA product safety standard, instead of on MSHA's applicable product approval requirements. This option would benefit manufacturers by permitting them to design products to a single set of requirements for sale in multiple markets (domestic and international as well as mining and non-mining applications).

Because this proposed rule would permit approval of mining equipment intended to compete in multiple market areas with differing approval requirements, the approved product design would incorporate the highest level of safety required by any of the intended market areas. For example, if the target areas include mining and non-mining markets, and the non-mining market has a product safety standard with more stringent approval requirements than MSHA for a specific product, MSHA could, at the request of the applicant, issue an approval based on the more stringent requirements. The approval documentation would state that the product fulfills both the more stringent requirements in the non-mining standard and MSHA's approval requirements. In this case, the approved product sold in mining markets would provide a greater degree of protection than that specified by MSHA under existing requirements. Should the non-mining market have product safety standards which are, in some aspects, less stringent than those of MSHA, the applicant would be required to fulfill the non-mining standards' requirements and, in addition, all other requirements deemed necessary to ensure that the product provides at least the same degree of protection demanded by the MSHA approval requirements. In this situation, the approved product would exceed the safety requirements of the non-mining standard and meet those of MSHA's. The same analysis would apply if the targeted areas were foreign and domestic markets.

In these situations, MSHA's approval documentation would show that the product had fulfilled the requirements of any non-MSHA product safety standard and those of MSHA. In the first instance, the product marketed in the non-mining application would embody a higher level of safety, while in the second instance it would embody equivalent safety. In no case would the product provide less protection than mandated by MSHA approval requirements.

The following example illustrates how MSHA would evaluate non-MSHA product safety standards to determine if they provide at least the same degree of

protection as MSHA's product approval requirements. MSHA's approval regulation under 30 CFR part 18 performs explosion testing of explosion-proof enclosures using a methane-in-air mixture. The IEC explosion-proof enclosure standard (IEC 60079-1) requires the use of more sensitive test gases. That standard specifies the use of methane to determine "reference pressures" and uses a hydrogen/methane fuel mixture to test for flame propagation. The tests used in both MSHA requirements and the IEC standard produce higher pressures/temperatures than would occur during normal operation.

One obvious difference in the two test protocols is MSHA's criterion to observe for the "discharge of flame" (hot glowing gases) during any of the tests. The IEC standard does not have this requirement. The reason for this difference is that MSHA tests enclosures "as manufactured" without any intentional gaps and, unlike the IEC, does not require flamepath gaps to be enlarged to the maximum specified by design. Therefore, during MSHA testing, flamepaths are not forced open to any appreciable amount, unless there are defects or weaknesses in the enclosure. This is important because MSHA's requirements do not contain provisions for regular prototype pressure testing to supplement the explosion tests, as do the IEC requirements. Such pressure testing is specifically designed to identify faulty products over a broader range of pressures than can be achieved by the MSHA explosion testing protocol.

Considering the above discussion, MSHA's explosion testing protocol, with combustible mixtures of methane as the test gas and using the discharge of flame as an additional criterion to flame propagation for test failure, sets a high evaluation standard for explosion-proof enclosures used on mining equipment in the U.S. However, testing is accomplished without introducing intentional flamepath flange gaps. In contrast, the IEC standard requires that tests be conducted with flamepath gaps intentionally enlarged to within 80% to 100% of the maximum specified design. Thus, the IEC test standard allows for luminous flame to pass, but with insufficient energy to ignite the surrounding atmosphere and uses a more easily ignitable test gas than methane. This concession is significant when flamepath gaps are purposely enlarged for testing. Such a practice could produce non-incendive luminous gas discharges during testing, which would be considered unacceptable under MSHA test protocols. MSHA has

no evidence that such a non-incendive luminous gas discharge is unsafe. The MSHA requirement and the IEC standard could be considered equivalent because the MSHA requirement to observe no discharge of flame is offset by the IEC's use of a more easily ignitable test gas and intentional gap enlargement.

With all other factors equal, MSHA could consider the explosion test specified by IEC to be equivalent to the explosion test procedure followed by MSHA in fulfillment of 30 CFR 18.62. In this manner a single test could verify conformity to the test requirements of both product standards with no reduction of safety in either case. This example highlights the methods that would be employed by MSHA when determining if a non-MSHA product safety standard provides at least the same degree of protection as MSHA's product approval requirements. In like fashion, other differences between MSHA requirements and the IEC standards would be analyzed to determine if they are equivalent or if modifications to the IEC standards would be required.

This same process would be applied to all non-MSHA product safety standards that would be evaluated for equivalency. For example, MSHA requires that a component in an intrinsically safe circuit be tested to determine that it would not overheat under fault conditions and ignite a layer of coal dust. UL requires the product to be marked with a maximum temperature rating (also called a "T-Code") or tested using a different ignitable dust or gas. MSHA would determine if the temperature rating is below the minimum ignition temperature of a coal dust layer or if the specified dust layer (e.g., grain dust) used in the test has a lower ignition temperature than a coal dust layer currently used in MSHA tests. If equivalency could not be determined, MSHA would require an additional test using a layer of a specified type and size of coal dust to ensure at least the same degree of protection is provided.

MSHA anticipates that savings from use of equivalent non-MSHA product safety standards could reduce the manufacturer's unit cost by permitting more standardized construction and, thus, improve the manufacturer's competitive position. This, together with the need to provide products meeting the highest level of safety demanded by the market areas of interest, could encourage a more rapid introduction of mining products embodying new technology with enhanced safety features. In general, this

proposed rule should provide increased opportunity for direct competition leading to improved safety and performance quality in mining products.

Many commenters agreed that the equivalency provision would permit manufacturers to design a machine or product to a single set of requirements, rather than designing separate machines to comply with the separate requirements of each market place in which business is sought. However, a few commenters were concerned that foreign manufacturers would have an advantage over U.S. manufacturers. One commenter stated that "if a foreign manufacturer's product(s) met different standards, which MSHA considered equal to or more stringent than the proposed U.S. standard and was granted "equivalency" before domestic manufacturers were able to have their revised specifications tested and approved, the foreign manufacturer would enjoy a competitive advantage in the U.S. market." The commenter believed that rather than not discriminating between U.S. and foreign manufacturers, the 1994 proposed rule would actually discriminate against U.S. manufacturers. The commenter concluded that MSHA must not favor foreign manufacturers with the competitive advantage or weaken their own audit responsibility to grant unregulated equivalency. Another commenter stated that if a conveyor belt had been approved under a non-MSHA product safety standard which MSHA considered to be equivalent to its requirements, then the submission of those test results and approval details to MSHA would result in that manufacturer being granted an MSHA approval without requiring any MSHA review.

The Agency believes that these commenters misunderstood the intent of the provision. They interpreted the 1994 proposed language to mean that if a non-MSHA product safety standard was determined to be equivalent by MSHA, foreign manufacturers of that product would receive automatic approval by MSHA without further review of the product. This is not the case. Under both the 1994 proposed rule and this revised proposed rule, manufacturers would still be required to apply for MSHA approval of their products, but then could have MSHA base the approval on either MSHA approval requirements or the equivalent non-MSHA product safety standards. MSHA would retain the responsibility of approving or denying an application based on all information submitted in the application.

As is the case with existing MSHA approval regulations, this proposed rule would not discriminate between U.S. and foreign manufacturers. Any manufacturer, either domestic or foreign, wishing to acquire an MSHA product approval would be able to take advantage of this "equivalency" program.

Further, this proposed rule would be consistent with the North American Free Trade Agreement and the Agreement on Technical Barriers to Trade (TBT).

#### Equivalency Under Part 7

MSHA has proposed to add the equivalency concept to part 7 which would operate like the provision for equivalency in proposed § 6.20.

Under this new proposed section, § 7.2 would be amended by adding a new definition of "equivalent non-MSHA product safety standard." This term would be used to describe a non-MSHA product safety standard, or group of standards, that is determined by MSHA to provide at least the same degree of protection as the applicable MSHA technical requirements in the subparts of part 7. This definition would be essentially the same as that in § 6.2 of proposed part 6.

#### *Section 7.10 MSHA acceptance of equivalent non-MSHA product safety standards.*

New proposed § 7.10(a) is similar to the revised proposed § 6.20(a) and would provide that MSHA would accept non-MSHA product safety standards, or group of standards, as equivalent after determining that they: (1) Provide at least the same degree of protection as MSHA's technical requirements for the products in other subparts of this part; or (2) can be modified to provide at least the same degree of protection as those MSHA requirements.

Paragraph (b) of the new proposed § 7.10 would provide that MSHA publish its intent to review any non-MSHA product safety standard for equivalency in the **Federal Register** for the purpose of soliciting public input.

Paragraph (c) of the proposed § 7.10 would provide that MSHA publish a listing of all equivalency determinations for this part 7. The listing would state whether MSHA accepts the non-MSHA product safety standards in their original form, or would require modifications to demonstrate equivalency. If modifications were required, they would also be included in this listing for this part 7. MSHA would notify the public of each equivalency determination and would publish a summary of the basis for its

determination in the **Federal Register**. MSHA would provide complete equivalency determination reports upon request to the Approval and Certification Center.

Paragraph (d) of the new proposed § 7.10 would provide that after MSHA has determined that non-MSHA product safety standards are equivalent and has notified the public of such determinations, applicants could seek MSHA product approval based on such non-MSHA product safety standards.

MSHA is aware of some foreign and domestic non-MSHA product safety standards that could be used to test and evaluate products approved under the various subparts of part 7. These standards are used in other countries and other industries. Some of these non-MSHA product safety standards could provide at least the same degree of protection as MSHA requirements and could provide consistent, repeatable test results.

MSHA intends to operate its proposed equivalency program under part 7, the same as previously described in the discussion of proposed § 6.20 on equivalency.

#### Derivation Table

The following derivation table lists:

- (1) Each section number of this proposed rule and (2) The section number of the 1994 proposed rule from which the section is derived.

DERIVATION TABLE

This Proposed Rule	1994 Proposed Rule
6.1 .....	6.1 & 6.10
6.2 (revised) .....	6.2
6.10(a) (revised) .....	6.10(a)
6.10(b) (revised) .....	6.10(b)
6.10(c) (revised) .....	6.10(b)
6.10(d) (revised) .....	6.10(c)
Removed .....	6.10(d)
Removed .....	6.10(e)
6.10(e) (revised) .....	6.10(g)
6.10(f) (revised) .....	6.10(f)
Removed .....	6.10(h)
Removed .....	6.10(i)
6.20(a) (revised) .....	6.20(a) & (b)
6.20(b) .....	New
6.20(c) (revised) .....	6.20(c)
6.20(d) (revised) .....	6.20(a)
7.2 .....	New
7.10 .....	New
18.6(a)(2) (revised) ...	18.6(a)(2)
18.6(a)(3) (revised) ...	18.6(a)(3)
18.6(a)(4) (revised) ...	18.6(a)(4)
18.15(a)(2) revised) ..	18.15(a)(2)
19.3 (revised) .....	19.3
19.13(a)(revised) .....	19.13(a)
20.3 (revised) .....	20.3
20.14(a) revised) .....	20.14(a)
Removed .....	21.4(a), (b), & (c)
Removed .....	21.10(a)
22.4 (revised) .....	22.4
22.11(a) (revised) .....	22.11(a)

**DERIVATION TABLE—Continued**

This Proposed Rule	1994 Proposed Rule
23.3 (revised) .....	23.3
23.14(a) (revised) .....	23.14(a)
Removed .....	26.8(a)
Removed .....	26.19(a)
27.4(a) (revised) .....	27.4(a)
27.11(a)(revised) .....	27.11(a)
Removed .....	29.11(a)
Removed .....	29.35(a)
33.6(a) (revised) .....	33.6(a)
33.12(a) (revised) .....	33.12(a)
35.6(a) (revised) .....	35.6(a)
35.12(a)(revised) .....	35.12(a)
36.6(a) .....	New
36.12(a) .....	New

**Distribution Table**

The following distribution table lists: (1) each section number of the 1994 proposed rule and (2) the section number of this proposed rule which contains provisions derived from the corresponding 1994 proposed sections.

**DISTRIBUTION TABLE**

1994 Proposed Rule	This Proposed Rule
6.1 & 6.10 .....	6.1
6.2 .....	6.2 (revised)
6.10(a) .....	6.10(a) (revised)
6.10(b) .....	6.10(b), (c) (revised)
6.10(c) .....	6.10(d) (revised)
6.10(d) .....	Removed
6.10(e) .....	Removed
6.10(f) .....	6.10(f) (revised)
6.10(g) .....	6.10(e) (revised)
6.10(h) .....	Removed
6.10(i) .....	Removed
6.20(a) .....	6.20(a), (d) (revised)
6.20(b) .....	6.20(a) (revised)
6.20(c) .....	6.20(c) (revised)
18.6(a)(2) .....	18.6(a)(2) (revised)
18.6(a)(3) .....	18.6(a)(3) (revised)
18.6(a)(4) .....	18.6(a)(4) (revised)
18.15(a)(2) .....	18.15(a)(2) revised
19.3 .....	19.3 (revised)
19.13(a) .....	19.13(a) (revised)
20.3 .....	20.3 (revised)
20.14(a) .....	20.14(a) revised
21.4(a), (b), & (c) .....	Removed
21.10(a) .....	Removed
22.4 .....	22.4 (revised)
22.11(a) .....	22.11(a) (revised)
23.3 .....	23.3 (revised)
23.14(a) .....	23.14(a) (revised)
26.8(a) .....	Removed
26.19(a) .....	Removed
27.4(a) .....	27.4(a) (revised)
27.11(a) .....	27.11(a) (revised)
29.11(a) .....	Removed
29.35(a) .....	Removed
33.6(a) .....	33.6(a) (revised)
33.12(a) .....	33.12(a) (revised)
35.6(a) .....	35.6(a) (revised)
35.12(a) .....	35.12(a) (revised)

**IV. Paperwork Reduction Act**

This proposed rule would result in a total of approximately 29 burden hours

and \$645 dollars of related costs. A breakdown of the burden hours and related costs by provision and by applicant size can be found in Chapter VII of the Preliminary Regulatory Economic Analysis (PREA) supporting this proposed rule. The paperwork requirements for applications for approval by MSHA of products and equipment under 30 CFR parts 18, 19, 20, 22, 23, 27, 33, 35, and 36 are cleared under OMB Control Number 1219–0066. The PREA is located on our Web site at <http://www.msha.gov/REGSINFO.HTM>. Comments may be sent to the addresses listed in the **ADDRESSES** section of the preamble.

Under § 6.10 applicants would have to provide information stated in paragraphs (a)(1) through (a)(4) for MSHA to accept testing and evaluation performed by an independent laboratory. Currently, applicants must submit only information requested in paragraph (a)(4). If applicants choose to use independent laboratories, information requested in paragraphs (a)(1) through (a)(3) would be needed because MSHA would no longer be performing all the testing and evaluation associated with the approval application. Providing the information under § 6.10(a)(1) through (a)(3) would result in a total of approximately 24 burden hours and \$457 of associated costs.

Section 6.10(d) states that after review of the information required under paragraph (a)(1) through (a)(4), MSHA would notify the applicant if additional information and testing were required. If an independent laboratory conducts any additional or repeat testing, then the applicant would have to send the test results to MSHA. Sending any additional or repeat testing results to MSHA under § 6.10(d) would result in a total of 2 burden hours and \$39 of associated costs.

Section 6.10(g) states that, once the product is approved, the approval holder would have to notify MSHA of all product defects of which the approval holder is aware. Notification is assumed to be in the form of a letter to MSHA. Notifying MSHA of product defects under § 6.10(g) would result in a total of 3 burden hours and \$149 of associated costs.

**V. Executive Order 12866***A. Compliance Costs*

Executive Order 12866 requires that regulatory agencies assess both the costs and benefits of proposed regulations. MSHA has determined that this proposed rule does not meet the criteria of an economically significant

regulatory action pursuant to Executive Order 12866 § 3(f)(1) in that it would not have an effect on the economy of \$100 million or otherwise have any material adverse effect. Although this proposed rule is not an economically significant action, MSHA has completed a PREA in which the economic impact of the proposed rule is estimated. For a complete breakdown of the compliance costs for this proposed rule see Chapter IV of the PREA. The PREA is available from MSHA and is summarized as follows.

The proposed rule would result in an annual net cost savings of about \$1.5 million. Applicants seeking MSHA product approval employing 500 or fewer workers would realize a net cost savings of \$0.66 million. Applicants employing more than 500 workers would realize a net cost savings of \$0.86 million.

The net cost savings of \$0.66 million, for applicants employing 500 or fewer workers, would consist of cost savings of \$0.68 million and compliance costs of \$0.02 million. The net cost savings of \$0.86 million, for applicants employing more than 500 workers, would consist of cost savings of \$0.88 million and compliance costs of \$0.02 million.

*B. Benefits*

This proposed rule should encourage non-mining manufacturers with products that could be applicable to mining to apply for approvals. The proposed modification of the approval process would expedite the introduction of technologically-advanced products into the mine, thus improving miner safety. Finally, the rule would reduce applicants' costs by eliminating repeat testing and evaluation and the need for multiple product lines. For a more complete discussion of the Benefits of this proposed rule, see Chapter III of the PREA.

**VI. Regulatory Flexibility Act (RFA) and Small Business Regulatory Enforcement Fairness Act (SBREFA)**

The Regulatory Flexibility Act (RFA) requires regulatory agencies to consider a rule's economic impact on small entities. Under the RFA, MSHA must use the Small Business Administration's (SBA's) criterion for a small entity in determining a rule's economic impact unless, after consultation with the SBA Office of Advocacy, MSHA establishes an alternative definition for a small entity and publishes that definition in the **Federal Register** for notice and comment.

For the mining industry, SBA defines "small" as a mine with 500 or fewer workers. In addition, most applicants

(manufacturers) that file for an MSHA approval for their products operate in industries such as those involved in measurement, analysis, controlling instruments, photographic instruments, commercial and industrial lighting fixtures, and conveyors. SBA considers the small business size standard for such industries to be 500 or fewer employees. To ensure that this proposed rule conforms to the RFA, MSHA has analyzed the economic impact of the proposed rule on small entities that are defined as those employing 500 or fewer workers.

#### *A. Factual Basis for Certification*

Based on its analysis, MSHA has preliminarily determined that this proposed rule would not have a significant economic impact on a substantial number of small entities. MSHA has so certified this finding to the SBA. The factual basis for this certification is discussed in Chapter V of the PREA.

#### *B. Unfunded Mandates Reform Act of 1995*

For purposes of the Unfunded Mandates Reform Act of 1995, the revised proposed rule does not include any Federal mandate that would result in increased expenditures by State, local, or tribal governments, or increased expenditures by the private sector of more than \$100 million. MSHA is not aware of any State, local, or tribal governments which manufacture products applicable to mining.

#### *C. Executive Order 13132 (Federalism)*

MSHA has reviewed this proposed rule in accordance with Executive Order 13132 regarding federalism, and has determined that it would not have "federalism implications." The proposed rule would not "have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government." MSHA is not aware of any State or local governments which manufacture products applicable to mining.

#### *D. Executive Order 13045 (Health and Safety Effect on Children)*

In accordance with Executive Order 13045, MSHA has evaluated the environmental health and safety effect of this proposed rule on children. The Agency has determined that the proposed rule would not have an adverse impact on children.

#### *E. Executive Order 13175 (Indian Tribal Governments)*

MSHA certifies that this proposed rule would not impose substantial direct compliance costs on Indian tribal governments. MSHA is not aware of any tribal governments which manufacture products applicable to mining.

#### *F. Executive Order 12630 (Governmental Actions and Interference with Constitutionally Protected Property Rights)*

This proposed rule is not subject to Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights, because it would not involve implementation of a policy with takings implications.

#### *G. Executive Order 12988 (Civil Justice Reform)*

The Agency has reviewed Executive Order 12988, Civil Justice Reform, and determined that this proposed rule would not unduly burden the Federal court system. The proposed rule has been written so as to provide a clear legal standard for affected conduct, and has been reviewed carefully to eliminate drafting errors and ambiguities.

#### *H. Executive Order 13211 (Energy)*

In accordance with Executive Order 13211, MSHA has reviewed this proposed rule for its energy impacts. MSHA has determined that this proposed rule would not have any adverse effects on energy supply, distribution, or use.

#### *I. Executive Order 13272 (Proper Consideration of Small Entities in Agency Rulemaking)*

In accordance with Executive Order 13272, MSHA has thoroughly reviewed the proposed rule to assess and take appropriate account of its potential impact on small businesses, small governmental jurisdictions, and small organizations. As discussed in Chapter V of the PREA, MSHA has determined that the proposed rule would not have a significant economic impact on a substantial number of small entities.

### **VII. Conduct of Public Hearings**

The hearings will be conducted in an informal manner. Although formal rules of evidence or cross examination will not apply, the presiding official may exercise discretion to ensure the orderly progress of the hearing and may exclude irrelevant or unduly repetitious material and questions.

The hearings will begin with an opening statement from MSHA, followed by an opportunity for members

of the public to make oral presentations. The hearing panel may ask questions of speakers. At the discretion of the presiding official, the time allocated to speakers for their presentation may be limited.

The hearings will begin at 9 a.m. and end after the last scheduled speaker appears; and in any event, not later than 5 p.m.

A verbatim transcript of the proceedings will be prepared and made a part of the rulemaking record. Copies of the transcript will be available to the public. The transcript will also be available on MSHA's Web page at <http://www.msha.gov>, under Statutory and Regulatory Information.

MSHA will accept post-hearing written comments and other appropriate data for the record from any interested party, including those not presenting oral statements. Written comments will be included in the rulemaking record.

### **VIII. Close of Post-hearing Comment Period**

The post-hearing comment period will close on February 10, 2003.

### **List of Subjects in 30 CFR Parts 6, 7, 18, 19, 20, 22, 23, 27, 33, 35, and 36**

Mine safety and health, Testing and evaluation by independent laboratories and the use of equivalent Non-MSHA product safety standards, Testing by applicant or third party.

Signed at Arlington, Virginia, this 4th day of October, 2002.

**John R. Caylor,**  
Deputy Assistant Secretary of Labor for Mine Safety and Health.

For the reasons set out in the preamble, chapter I of title 30 of the Code of Federal Regulations is proposed to be amended as follows:

1. Part 6 is added to read as follows:

### **PART 6—TESTING AND EVALUATION BY INDEPENDENT LABORATORIES AND THE USE OF EQUIVALENT NON-MSHA PRODUCT SAFETY STANDARDS**

Sec.

6.1 Purpose and effective date.

6.2 Definitions.

6.10 Use of independent laboratories.

6.20 MSHA acceptance of equivalent non-MSHA product safety standards.

**Authority:** 30 U.S.C. 957.

#### **§ 6.1 Purpose and effective date.**

This part sets out alternate requirements for testing and evaluation of products MSHA approves for use in gassy underground mines. It permits manufacturers of certain products who seek MSHA approval to use an

independent laboratory to perform, in whole or part, the necessary testing and evaluation for approval. It also permits manufacturers to have their products approved based on non-MSHA product safety standards once MSHA has determined that the non-MSHA standards are equivalent to MSHA's applicable product approval requirements or can be modified to provide at least the same degree of protection as those MSHA requirements. The provisions of this part may be used by applicants for product approval under parts 18, 19, 20, 22, 23, 27, 33, 35, and 36 of this chapter. This part is effective [60 days after publication of the final rule in the **Federal Register**.]

#### **§ 6.2 Definitions.**

The following definitions apply in this part.

*Applicant.* This term is used to describe an individual or organization that manufactures or controls the assembly of a product and that applies to MSHA for approval of that product.

*Approval.* This term is used to describe a written document issued by MSHA which states that a product has met the applicable requirements of part 18, 19, 20, 22, 23, 27, 33, 35, or 36 of this chapter. The definition is based on the existing definitions of "approval" in the parts specified above. It also includes "certification" and "acceptance" because these terms also are used to denote MSHA approval.

*Approval holder.* An applicant whose application for approval of a product under parts 18, 19, 20, 22, 23, 27, 33, 35 or 36 of this chapter has been approved by MSHA.

*Equivalent non-MSHA product safety standards.* A non-MSHA product safety standard, or group of standards, that is determined by MSHA to provide at least the same degree of protection as the applicable MSHA product approval requirements in parts 18, 19, 20, 22, 23, 27, 33, 35, and 36 of this chapter, or which in modified form provide at least the same degree of protection.

*Independent laboratory.* A laboratory that:

(1) Has been recognized by a laboratory accrediting organization to test and evaluate products to a product safety standard, and

(2) Is free from commercial, financial, and other pressures that may influence the results of the testing and evaluation process.

*Post-approval product audit.* This term applies to the examination, testing, or both, by MSHA of approved products selected by MSHA to determine whether those products meet the applicable

product approval requirements and have been manufactured as approved.

*Product safety standard.* A document, or group of documents, that specifies the requirements for the testing and evaluation of a product for use in explosive gas and dust atmospheres, and, when appropriate, includes documents addressing the flammability properties of products.

#### **§ 6.10 Use of independent laboratories.**

(a) MSHA will accept testing and evaluation performed by an independent laboratory for purposes of MSHA product approval provided that MSHA receives as part of the application:

(1) Written evidence of the laboratory's independence and current recognition by a laboratory accrediting organization;

(2) Complete technical explanation of how the product complies with each requirement in the applicable MSHA product approval requirements;

(3) Identification of components or features of the product that are critical to the safety of the product; and

(4) All documentation, including drawings and specifications, as submitted to the independent laboratory by the applicant and as required by the applicable part under this chapter.

(b) Product testing and evaluation performed by independent laboratories for purposes of MSHA approval must comply with the applicable MSHA product approval requirements.

(c) Product testing and evaluation must be conducted or witnessed by the laboratory's personnel.

(d) After review of the information required under paragraphs (a)(1) through (a)(4) of this section, MSHA will notify the applicant if additional information or testing is required. The applicant must provide this information, arrange any additional or repeat tests and notify MSHA of the location, date, and time of the test(s). MSHA may observe any additional testing conducted by an independent laboratory. Further, MSHA may decide to conduct the additional or repeated tests at the applicant's expense. The applicant must supply any additional components necessary for testing and evaluation.

(e) Upon request by MSHA, but not more than once a year, except for cause, approval holders of products approved based on independent laboratory testing and evaluation must make such products available for post-approval audit at a mutually agreeable site at no cost to MSHA.

(f) Once the product is approved, the approval holder must notify MSHA of

all product defects of which they become aware.

#### **§ 6.20 MSHA acceptance of equivalent non-MSHA product safety standards.**

(a) MSHA will accept non-MSHA product safety standards, or groups of standards, as equivalent after determining that they:

(1) Provide at least the same degree of protection as MSHA's product approval requirements in parts 18, 19, 20, 22, 23, 27, 33, 35 or 36 of this chapter; or

(2) Can be modified to provide at least the same degree of protection as those MSHA requirements.

(b) MSHA will publish its intent to review any non-MSHA product safety standard for equivalency in the **Federal Register** for the purpose of soliciting public input.

(c) A listing of all equivalency determinations will be published in this part 6 and the applicable approval parts. The listing will state whether MSHA accepts the non-MSHA product safety standards in their original form, or whether MSHA will require modifications to demonstrate equivalency. If modifications are required, they will be provided in the listing. MSHA will notify the public of each equivalency determination and will publish a summary of the basis for its determination. MSHA will provide equivalency determination reports to the public upon request to the Approval and Certification Center.

(d) After MSHA has determined that non-MSHA product safety standards are equivalent and has notified the public of such determinations, applicants may seek MSHA product approval based on such non-MSHA product safety standards.

### **PART 7—TESTING BY APPLICANT OR THIRD PARTY**

2. The authority citation for part 7 continues to read as follows:

**Authority:** 30 U.S.C. 957.

3. Amend § 7.2 by adding a new definition to read as follows:

#### **§ 7.2 Definitions.**

\* \* \* \* \*

*Equivalent non-MSHA product safety standards.* A non-MSHA product safety standard, or group of standards, that is determined by MSHA to provide at least the same degree of protection as the applicable MSHA product technical requirements in the subparts of this part, or can be modified to provide at least the same degree of protection as those MSHA requirements.

\* \* \* \* \*

4. Amend subpart A by adding a new 7.10 to read as follows:

**§ 7.10 MSHA acceptance of equivalent non-MSHA product safety standards.**

(a) MSHA will accept non-MSHA product safety standards, or groups of standards, as equivalent after determining that they:

(1) Provide at least the same degree of protection as MSHA's applicable technical requirements for a product in the subparts of this part; or

(2) Can be modified to provide at least the same degree of protection as those MSHA requirements.

(b) MSHA will publish its intent to review any non-MSHA product safety standard for equivalency in the **Federal Register** for the purpose of soliciting public input.

(c) A listing of all equivalency determinations will be published in this part 7. The listing will state whether MSHA accepts the non-MSHA product safety standards in their original form, or whether MSHA will require modifications to demonstrate equivalency. If modifications are required, they will be provided in the listing. MSHA will notify the public of each equivalency determination and will publish a summary of the basis for its determination. MSHA will provide equivalency determination reports to the public upon request to the Approval and Certification Center.

(d) After MSHA has determined that non-MSHA product safety standards are equivalent and has notified the public of such determinations, applicants may seek MSHA product approval based on such non-MSHA product safety standards.

**PART 18—ELECTRIC MOTOR-DRIVEN MINE EQUIPMENT AND ACCESSORIES**

5. The authority citation for part 18 continues to read as follows:

**Authority:** 30 U.S.C. 957, 961.

5-a. Amend § 18.6 by revising paragraph (a) to read as follows:

**§ 18.6 Applications.**

(a)(1) Investigation leading to approval, certification, extension thereof, or acceptance of hose or conveyor belt, will be undertaken by MSHA only pursuant to a written application accompanied by a check, bank draft, or money order, payable to the U.S. Mine Safety and Health Administration to cover the fees. The application shall be accompanied by all necessary drawings, specifications, descriptions, and related materials, as set out in this part.

(2) Where the applicant for approval has used an independent laboratory under part 6 of this chapter to perform, in whole or in part, the necessary testing and evaluation for approval under this part, the applicant shall include the information required in 30 CFR 6.10(a).

(3) An applicant may request testing and evaluation to non-MSHA product safety standards which have been determined by MSHA to be equivalent, under § 6.20 of this chapter, to MSHA's product approval requirements under this part.

(4) The application, all related documents, and all correspondence concerning it shall be addressed to the Approval and Certification Center, Rural Route #1, Box 251, Industrial Park Road, Triadelphia, WV 26059.

\* \* \* \* \*

6. Amend § 18.15 by revising paragraph (a) to read as follows:

**§ 18.15 Changes after approval or certification.**

\* \* \* \* \*

(a)(1) Application shall be made as for an original approval or letter of certification requesting that the existing approval or certification be extended to cover the proposed changes and shall be accompanied by drawings, specifications, and related information, showing the changes in detail.

(2) Where the applicant for approval has used an independent laboratory under part 6 of this chapter to perform, in whole or in part, the necessary testing and evaluation for approval of changes to an approved or certified product under this part, the applicant shall include the information required in 30 CFR 6.10(a).

\* \* \* \* \*

**PART 19—ELECTRIC CAP LAMPS**

7. The authority citation for part 19 continues to read as follows:

**Authority:** 30 U.S.C. 957, 961.

\* \* \* \* \*

7-a. Revise § 19.3 to read as follows:

**§ 19.3 Applications.**

(a) Before MSHA will undertake the active investigation leading to approval of any lamp, the manufacturer shall make application by letter for an investigation leading to approval of its lamp. This application must be accompanied by a check, bank draft, or money order, payable to U.S. Mine Safety and Health Administration, to cover all the necessary fees, shall be sent to Approval and Certification Center, Rural Route #1, Box 251, Industrial Park Road, Triadelphia, WV 26059, together with the required drawings, one complete lamp, and instructions for its operation.

26059, together with the required drawings, one complete lamp, and instructions for its operation.

(b) Where the applicant for approval has used an independent laboratory under part 6 of this chapter to perform, in whole or in part, the necessary testing and evaluation for approval under this part, the applicant shall include the information required in 30 CFR 6.10(a).

(c) An applicant may request testing and evaluation to non-MSHA product safety standards which have been determined by MSHA to be equivalent, under § 6.20 of this chapter, to MSHA's product approval requirements under this part.

8. Amend § 19.13 by revising paragraph (a) to read as follows:

**§ 19.13 Instructions for handling future changes in lamp design.**

\* \* \* \* \*

(a)(1) The manufacturer shall write to the Approval and Certification Center, Rural Route #1, Box 251, Industrial Park Road, Triadelphia, WV 26059, requesting an extension of the original approval and stating the change or changes desired. With this letter the manufacturer should submit a revised drawing or drawings showing the changes in detail, and one of each of changed lamp parts.

(2) Where the applicant for approval has used an independent laboratory under part 6 of this chapter to perform, in whole or in part, the necessary testing and evaluation for approval of changes to an approved product under this part, the applicant shall include the information required in 30 CFR 6.10(a).

\* \* \* \* \*

**PART 20—ELECTRIC MINE LAMPS OTHER THAN STANDARD CAP LAMPS**

9. The authority citation for part 20 continues to read as follows:

**Authority:** 30 U.S.C. 957, 961.

9-a. Revise § 20.3 to read as follows:

**§ 20.3 Applications.**

(a) Before MSHA will undertake the active investigation leading to approval of any lamp, the manufacturer shall make application by letter for an investigation of the lamp. This application must be accompanied by a check, bank draft, or money order, payable to the U.S. Mine Safety and Health Administration, to cover all the necessary fees. It shall be sent to the Approval and Certification Center, Rural Route #1, Box 251, Industrial Park Road, Triadelphia, WV 26059, together with the required drawings, one complete lamp, and instructions for its operation.

(b) Where the applicant for approval has used an independent laboratory under part 6 of this chapter to perform, in whole or in part, the necessary testing and evaluation necessary for approval under this part, the applicant shall include the information required in 30 CFR 6.10(a).

(c) An applicant may request testing and evaluation to non-MSHA product safety standards which have been determined by MSHA to be equivalent, under § 6.20 of this chapter, to MSHA's product approval requirements under this part.

10. Amend § 20.14 by revising paragraph (a) to read as follows:

**§ 20.14 Instructions for handling future changes in lamp design.**

\* \* \* \* \*

(a)(1) The manufacturer shall write to the Approval and Certification Center, Rural Route #1, Box 251, Industrial Park Road, Triadelphia, WV 26059, requesting an extension of the original approval and describing the change or changes proposed. With this letter the manufacturer should submit a revised drawing or drawings showing the changes in detail, and one of each of the changed lamp parts.

(2) Where the applicant for approval has used an independent laboratory under part 6 of this chapter to perform, in whole or in part, the necessary testing and evaluation for approval of changes to an approved product under this part, the applicant shall include the information required in 30 CFR 6.10(a).

\* \* \* \* \*

**PART 22—PORTABLE METHANE DETECTORS**

11. The authority citation for part 22 continues to read as follows:

**Authority:** 30 U.S.C. 957, 961.

11-a. Revise § 22.4 to read as follows:

**§ 22.4 Applications.**

(a) Before MSHA will undertake the active investigation leading to approval of any methane detector, the manufacturer shall make application by letter for an investigation leading to approval of the detector. This application must be accompanied by a check, bank draft, or money order, payable to the U.S. Mine Safety and Health Administration, to cover all the necessary fees. It shall be sent to the Approval and Certification Center, Rural Route #1, Box 251, Industrial Park Road, Triadelphia, WV 26059, together with the required drawings, one complete detector, and instructions for its operation.

(b) Where the applicant for approval has used an independent laboratory under part 6 of this chapter to perform, in whole or in part, the necessary testing and evaluation for approval under this part, the applicant shall include the information required in 30 CFR 6.10(a).

(c) An applicant may request testing and evaluation to non-MSHA product safety standards which have been determined by MSHA to be equivalent, under § 6.20 of this chapter, to MSHA's product approval requirements under this part.

12. Section 22.11 is amended by revising paragraph (a) to read as follows:

**§ 22.11 Instructions on handling future changes in design.**

\* \* \* \* \*

(a)(1) The manufacturer must write to the Approval and Certification Center, Rural Route #1, Box 251, Industrial Park Road, Triadelphia, WV 26059, requesting an extension of the original approval and stating the change or changes desired. With this request, the manufacturer should submit a revised drawing or drawings showing changes in detail, together with one of each of the parts affected.

(2) Where the applicant for approval has used an independent laboratory under part 6 of this chapter to perform, in whole or in part, the necessary testing and evaluation for approval of changes to an approved product under this part, the applicant shall include the information required in 30 CFR 6.10(a).

\* \* \* \* \*

**PART 23—TELEPHONES AND SIGNALING DEVICES**

13. The authority citation for part 23 continues to read as follows:

**Authority:** 30 U.S.C. 957, 961.

13-a. Revise § 23.3 to read as follows:

**§ 23.3 Applications.**

(a) Before MSHA will undertake the active investigation leading to approval of any telephone or signaling device, the manufacturer shall make application by letter for an investigation leading to approval of the device. This application must be accompanied by a check, bank draft, or money order, payable to the U.S. Mine Safety and Health Administration, to cover all the necessary fees. It shall be sent to the Approval and Certification Center, Rural Route #1, Box 251, Industrial Park Road, Triadelphia, WV 26059, together with the required drawings, one complete telephone or signaling device, and instructions for its operation.

(b) Where the applicant for approval has used an independent laboratory

under part 6 of this chapter to perform, in whole or in part, the necessary testing and evaluation for approval under this part, the applicant shall include the information required in 30 CFR 6.10(a).

(c) An applicant may request testing and evaluation to non-MSHA product safety standards which have been determined by MSHA to be equivalent, under § 6.20 of this chapter, to MSHA's product approval requirements under this part.

14. Amend § 23.14 by revising paragraph (a) to read as follows:

**§ 23.14 Instructions for handling future changes in design.**

\* \* \* \* \*

(a)(1) The manufacturer shall write to the Approval and Certification Center, Rural Route #1, Box 251, Industrial Park Road, Triadelphia, WV 26059, requesting an extension of the original approval and stating the change or changes desired. With this request, the manufacturer should submit a revised drawing or drawings showing the changes in detail, together with one of each of the parts affected.

(2) Where the applicant for approval has used an independent laboratory under part 6 of this chapter to perform, in whole or in part, the necessary testing and evaluation for approval of changes to an approved product under this part, the applicant shall include the information required in 30 CFR 6.10(a).

\* \* \* \* \*

**PART 27—METHANE-MONITORING SYSTEMS**

15. The authority citation for part 27 continues to read as follows:

**Authority:** 30 U.S.C. 957, 961.

15-a. Amend § 27.4 by revising paragraph (a) to read as follows:

**§ 27.4 Applications.**

(a)(1) No investigation or testing for certification will be undertaken by MSHA except pursuant to a written application must be accompanied by all drawings, specifications, descriptions, and related materials and also a check, bank draft, or money order payable to the U.S. Mine Safety and Health Administration, to cover the fees. The application and all related matters and correspondence concerning it shall be addressed to the Approval and Certification Center, Rural Route #1, Box 251, Industrial Park Road, Triadelphia, WV 26059.

(2) Where the applicant for approval has used an independent laboratory under part 6 of this chapter to perform, in whole or in part, the necessary testing and evaluation for approval under this

part, the applicant shall include the information required in 30 CFR 6.10(a).

(3) An applicant may request testing and evaluation to non-MSHA product safety standards which have been determined by MSHA to be equivalent, under § 6.20 of this chapter, to the product approval requirements under this part.

\* \* \* \* \*

16. Amend 27.11 by revising paragraph (a) to read as follows:

#### **§ 27.11 Extension of certification.**

\* \* \* \* \*

(a)(1) Application shall be made as for an original certification, requesting that the existing certification be extended to cover the proposed changes. The application shall include complete drawings, specifications, and related data, showing the changes in detail.

(2) Where the applicant for approval has used an independent laboratory under part 6 of this chapter to perform, in whole or in part, the necessary testing and evaluation for approval of changes to an approved product under this part, the applicant shall include the information required in 30 CFR 6.10(a).

\* \* \* \* \*

#### **PART 33—DUST COLLECTORS FOR USE IN CONNECTION WITH ROCK DRILLING IN COAL MINES**

17. The authority citation for part 33 continues to read as follows:

**Authority:** 30 U.S.C. 957, 961.

17-a. Amend § 33.6 by revising paragraph (a) to read as follows:

#### **§ 33.6 Applications.**

(a)(1) No investigation or testing will be undertaken by MSHA except pursuant to a written application, which must be (except as otherwise provided in paragraph (e) of this section) accompanied by a check, bank draft, or money order, payable to the U.S. Mine Safety and Health Administration, to cover the fees, and all prescribed drawings, specifications, and all related materials. The application and all related matters and all correspondence concerning it shall be sent to the Approval and Certification Center, Rural Route #1, Box 251, Industrial Park Road, Triadelphia, WV 26059.

(2) Where the applicant for approval has used an independent laboratory under part 6 of this chapter to perform, in whole or in part, the necessary testing and evaluation for approval under this part, the applicant shall include the information required in 30 CFR 6.10(a).

(3) An applicant may request testing and evaluation to non-MSHA product safety standards which have been

determined by MSHA to be equivalent, under § 6.20 of this chapter, to MSHA's product approval requirements under this part.

\* \* \* \* \*

18. Amend § 33.12 by revising paragraph (a) to read as follows:

#### **§ 33.12 Changes after certification.**

\* \* \* \* \*

(a)(1) Application shall be made as for an original certificate, requesting that the existing certification be extended to cover the proposed changes, and shall be accompanied by drawings, specifications, and related data showing the changes in detail.

(2) Where the applicant for approval has used an independent laboratory under part 6 of this chapter to perform, in whole or in part, the necessary testing and evaluation for approval of changes to an approved product under this part, the applicant shall include the information required in 30 CFR 6.10(a).

\* \* \* \* \*

#### **PART 35—FIRE-RESISTANT HYDRAULIC FLUIDS**

19. The authority citation for part 35 continues to read as follows:

**Authority:** 30 U.S.C. 957, 961.

19-a. Amend § 35.6 by revising paragraph (a) to read as follows:

#### **§ 35.6 Applications.**

(a)(1) No investigation or testing will be undertaken by MSHA except pursuant to a written application, which must be accompanied by a check, bank draft, or money order, payable to the U.S. Mine Safety and Health Administration, to cover the fees, and all descriptions, specifications, test samples, and related materials. The application and all related matters and correspondence concerning it shall be sent to the Approval and Certification Center, Rural Route #1, Box 251, Industrial Park Road, Triadelphia, WV 26059.

(2) Where the applicant for approval has used an independent laboratory under part 6 of this chapter to perform, in whole or in part, the necessary testing and evaluation for approval under this part, the applicant shall include the information required in 30 CFR 6.10(a).

(3) An applicant may request testing and evaluation to non-MSHA product safety standards which have been determined by MSHA to be equivalent, under § 6.20 of this chapter, to MSHA's product approval requirements under this part.

\* \* \* \* \*

20. Amend § 35.12 by revising paragraph (a) to read as follows:

#### **§ 35.12 Changes after certification.**

\* \* \* \* \*

(a)(1) Application shall be made, as for an original certificate of approval, requesting that the existing certification be extended to cover the proposed change. The application shall be accompanied by specifications and related material as in the case of an original application.

(2) Where the applicant for approval has used an independent laboratory under part 6 of this chapter to perform, in whole or in part, the necessary testing and evaluation for approval of changes to an approved product under this part, the applicant shall include the information required in 30 CFR 6.10(a).

\* \* \* \* \*

#### **PART 36—APPROVAL REQUIREMENTS FOR PERMISSIBLE MOBILE DIESEL-POWERED TRANSPORTATION EQUIPMENT**

21. The authority for part 36 continues to read as follows:

**Authority:** 30 U.S.C. 957, 961.

21-a. Amend § 36.6 by revising paragraph (a) to read as follows:

#### **§ 36.6 Applications.**

(a)(1) No investigation or testing will be undertaken by MSHA except pursuant to a written application, which must be accompanied by a check, bank draft, or money order, payable to the U.S. Mine Safety and Health Administration, to cover the fees, and all descriptions, specifications, test samples, and related materials. The application and all related matters and correspondence concerning it shall be sent to the Approval and Certification Center, Rural Route #1, Box 251, Industrial Park Road, Triadelphia, WV 26059.

(2) Where the applicant for approval has used an independent laboratory under part 6 of this chapter to perform, in whole or in part, the necessary testing and evaluation for approval under this part, the applicant shall include the information required in 30 CFR 6.10(a).

(3) An applicant may request testing and evaluation to non-MSHA product safety standards which have been determined by MSHA to be equivalent, under § 6.20 of this chapter, to MSHA's product approval requirements under this part.

\* \* \* \* \*

22. Amend § 36.12 by revising paragraph (a) to read as follows:

#### **§ 36.12 Changes after certification.**

\* \* \* \* \*

(a)(1) Application shall be made, as for an original certificate of approval,

requesting that the existing certification be extended to cover the proposed change. The application shall be accompanied by specifications and related material as in the case of an original application.

(2) Where the applicant for approval has used an independent laboratory under part 6 of this chapter to perform, in whole or in part, the necessary testing and evaluation for approval of changes to an approved product under this part,

the applicant shall include the information required in 30 CFR 6.10(a).

\* \* \* \* \*

[FR Doc. 02-25879 Filed 10-16-02; 8:45 am]

**BILLING CODE 4510-43-P**