

available repair point from the operator's principal place of operations to obtain these services; or

(2) Emergency repairs on the operator's aircraft if the aircraft cannot be safely operated to a location where an employee subject to the requirements of this appendix can perform the emergency repairs.

15. By adding a new § 135.249 to read as follows:

§ 135.249 Use of prohibited drugs.

(a) This section applies to persons who perform a function listed in Appendix I to Part 121 of this chapter for a certificate holder or an operator. For the purpose of this section, a person who performs such a function pursuant to a contract with the certificate holder or the operator is considered to be performing that function for the certificate holder or the operator.

(b) No certificate holder or operator may knowingly use any person to perform, nor may any person perform for a certificate holder or an operator, either directly or by contract, any function listed in Appendix I to Part 121 of this chapter while that person has a prohibited drug, as defined in that appendix, in his or her system.

(c) Except as provided in paragraph (d) of this section, no certificate holder or operator may knowingly use any person to perform, nor may any person perform for a certificate holder or an operator, either directly or by contract, any function listed in Appendix I to Part 121 of this chapter if that person has failed a test or refused to submit to a test required by that appendix given by any certificate holder or any operator.

(d) Paragraph (c) of this section does not apply to a person who has received a recommendation to be hired or to return to duty from a medical review officer in accordance with Appendix I to Part 121 of this chapter or who has received a special issuance medical certificate after evaluation by the Federal Air Surgeon for drug dependency in accordance with Part 67 of this chapter.

16. By adding a new § 135.251 to read as follows:

§ 135.251 Testing for prohibited drugs.

(a) Each certificate holder or operator shall test each of its employees who performs a function listed in Appendix I to Part 121 of this chapter in accordance with that appendix.

(b) No certificate holder or operator may use any contractor to perform a

function listed in Appendix I to Part 121 of this chapter unless that contractor tests each employee performing such a function for the certificate holder or operator in accordance with that appendix.

17. By adding a new § 135.353 to read as follows:

§ 135.353 Prohibited drugs.

(a) Each certificate holder or operator shall provide each employee performing a function listed in Appendix I to Part 121 of this chapter and his or her supervisor with the training specified in that appendix.

(b) No certificate holder or operator may use any contractor to perform a function specified in Appendix I to Part 121 of this chapter unless that contractor provides each of its employees performing that function for the certificate holder or the operator and his or her supervisor with the training specified in that appendix.

Issued in Washington, DC, on November 14, 1988.

T. Allan McArtor,
Administrator.

[FR Doc. 88-26609 Filed 11-15-88; 3:49 pm]

BILLING CODE 4910-13-M

The American Medical Association is a non-profit corporation organized for the purpose of promoting the interests of the medical profession and the public. It was founded in 1847 and has since that time been the leading organization of the medical profession in the United States. The Association is composed of more than 50,000 members, who are physicians, surgeons, dentists, and other medical practitioners. The Association's primary concern is the advancement of the medical profession and the improvement of the medical service to the public. It does this by publishing the *Journal of the American Medical Association*, which is one of the most important medical journals in the world. The Association also holds annual meetings, publishes a code of ethics, and advocates for the interests of the medical profession in the legislative and executive branches of the government. The Association's efforts have been instrumental in the development of the medical profession and the improvement of the medical service to the public.

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Test at Federal Register

**Monday
November 21, 1988**

Part IV

Department of Transportation

Coast Guard

46 CFR Parts 4, 5 and 16

**Programs for Chemical Drug and Alcohol
Testing of Commercial Vessel Personnel;
Final Rule**

DEPARTMENT OF TRANSPORTATION

Coast Guard

46 CFR Parts 4, 5 and 16

[CGD 86-067]

Programs for Chemical Drug and Alcohol Testing of Commercial Vessel Personnel

AGENCY: Coast Guard, DOT.

ACTION: Final Rule.

SUMMARY: These regulations require the establishment of anti-drug programs to reduce the incidence of drug abuse by commercial vessel personnel. These programs include pre-employment, periodic, random, post-accident and reasonable cause testing. The post-accident portion of the program also involves testing for alcohol use.

The Coast Guard believes these rules will discourage drug and alcohol use by commercial vessel personnel, reduce the potential for marine casualties related to drug and alcohol use, and enhance the safety of the maritime transportation industry.

EFFECTIVE DATE: This rule is effective on December 21, 1988.

FOR FURTHER INFORMATION CONTACT:

Commander John Koski, Project Manager, Marine Investigation Division (G-MMI), Office of Marine Safety, Security and Environmental Protection, U.S. Coast Guard Headquarters, 2100 Second Street, SW., Washington, DC 20593-0001, (202) 267-2215.

SUPPLEMENTARY INFORMATION: On July 8, 1988, the Coast Guard published a notice of proposed rulemaking, entitled "Programs for Chemical Drug and Alcohol Testing of Commercial Vessel Personnel," in the *Federal Register* (53 FR 25926).

On July 26, 1988, the Coast Guard announced in the *Federal Register* (53 FR 28024) a series of public hearings on the notice of proposed rulemaking. These hearings were held on August 10, 1988 in Houston, Texas; August 12, 1988 in Chicago, Illinois; August 19, 1988 in Washington, DC; and August 22, 1988 in San Francisco, California. A total of 80 individuals made statements on the proposed rules at these hearings. Each hearing was recorded, and copies of the tapes, along with any written statements and other materials provided, have been placed in the public docket. The Coast Guard also received a total of 246 letters commenting on the proposed rules. All of this information has been reviewed and considered in the development of the final rule.

The Office of the Secretary of the Department of Transportation is

publishing elsewhere in today's *Federal Register* an Interim Final Rule and request for comments entitled *Procedures for Transportation Workplace Drug Testing Programs*. These Procedures, which will be codified in 49 CFR Part 40, are based on Department of Health and Human Services Guidelines for Drug Testing, with appropriate modifications to allow them to apply to private industry and state and local governments. The new 49 CFR Part 40 provides detailed information for implementation of the drug testing requirements of this rule, setting forth requirements for such things as specimen collection procedures, laboratory procedures, and quality assurance.

Drafting Information

The principal persons involved in drafting this document are CDR John Koski, Project Manager, and Christena Green, Project Counsel, Office of Chief Counsel.

Background

The Coast Guard has explicit statutory authority to deny issuance of a license, certificate of registry, or merchant mariner's document to any individual who (1) has been convicted of violating a dangerous drug law of the United States or a state within 10 years of application, or (2) has ever been a user of, or addicted to, a dangerous drug (46 U.S.C. 7503). Similarly, the Coast Guard has statutory authority to revoke a license, certificate of registry, or merchant mariner's document of any individual who is, or has been, a user of, or addicted to, a dangerous drug (46 U.S.C. 7704(c)). The Coast Guard is further mandated to revoke the license, certificate of registry, or merchant mariner's document of any individual who has been convicted of violating a dangerous drug law of the United States or a state within a 10 year period before the beginning of the proceedings against that individual (46 U.S.C. 7704(b)). It is clear that these statutes intend to exclude drug users and violators of drug statutes from serving on U.S. merchant vessels.

As the Coast Guard stated in its notice of proposed rulemaking, these statutes are currently enforced by examining criminal conviction records of license and document applicants and holders, by the prosecution of those individuals operating a vessel negligently or while intoxicated, and through administrative remedies such as civil penalty actions and suspension and revocation proceedings. These methods are used, however, only after an incident occurs and the Coast Guard

obtains evidence on which to base remedial or punitive action.

This final rule is a logical extension of existing regulations to ensure a drug-free working environment in the maritime community. The regulations provide for positive and aggressive action to identify users of dangerous drugs before they are involved in incidents which bring them to the attention of the Coast Guard. The regulations are intended to ensure that users of dangerous drugs are not issued licenses, certificates of registry, or merchant mariner's documents, and are not accepted for employment on vessels engaged in commercial operations. Drug users and abusers will either be deterred from continued drug use or will be faced with sufficient probability of being identified in the workplace and precluded from employment in the industry when such use is detected through chemical testing.

Discussion of Comments*General Overview of Major Issues*

The Coast Guard received 246 written comments in response to the notice of proposed rulemaking. Despite the fact that some of these were received after the close of the comment period, all were considered in the formulation of these rules. In addition to the written responses, 80 individuals presented testimony at the four public hearings held by the Coast Guard.

All facets of the maritime industry presented their views, either as individuals, small operators, large corporations, unions, or associations. While there was universal support for a drug-free maritime working environment, there was serious concern about how the Coast Guard proposed to accomplish this goal.

Several sectors felt that the scope of the proposed regulations was too broad and would result in unbearable implementation costs, most notably among small operators. Many felt that only those people operating under the authority of a Coast Guard issued license or merchant mariner's document should be subjected to mandatory drug testing. Echoing this opinion, many others stated that employees serving aboard vessels in capacities which had nothing to do with the safe operation of the vessel should not be subject to the mandatory testing requirements.

Small operators and seasonal operators were seriously concerned that mandatory testing would result in shortages in their workforces, maintaining that potential employees would opt to go into other, equally well-

paying jobs which do not require them to be subjected to testing. In addition, a company administered testing program would erode the trust which has typically been established between management and the working members of small operations.

Commenters generally supported testing in conjunction with obtaining licenses and post-casualty testing, but felt that such programs should be administered by the Coast Guard and not private industry. There was a split of opinion regarding other types of testing (i.e., pre-employment, random, and reasonable cause): those companies and organizations which currently have effective anti-drug programs generally supported these types of testing, while those without such programs did not feel that all types of testing should be required. Even among those which had existing programs, there was concern that the strict parameters specified in the proposed rules would force them to abandon their programs in order to implement the procedures which are much more costly and more difficult to administer but, in their view, not necessarily more effective. Among individual commenters and labor unions, the opinion was almost universal that mandatory testing would be a violation of constitutional rights, with guilt being assumed until the individual could establish innocence.

Constitutional Issues

Numerous commenters questions the constitutionality of mandatory drug testing of maritime employees. Many commenters requested that the Coast Guard not proceed with this regulatory package until these issues have been resolved by the Supreme Court.

Response: Although the state of the case law is still evolving in rapid fashion and the Supreme Court has not resolved many of the relevant and complex issues, the Coast Guard is confident that testing of employees under this rule will withstand judicial scrutiny on constitutional grounds.

Of particular concern to the commenters is the relevance of the Fourth Amendment to drug testing. The principles of the Fourth Amendment to the U.S. Constitution are paramount in scrutinizing the fundamental legality of many drug testing programs. As a threshold matter, the Fourth Amendment applies to "searches" conducted or mandated by the government and protects individuals against "unreasonable searches and seizures." Action of a private party does not constitute State or Federal action unless there exists a close nexus between the State and the action in

question. See *Jackson v. Metropolitan Edison*, 419 U.S. 345 (1974); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972).

Assuming that drug testing programs called for under the final rule do implicate the government, a second issue then arises concerning whether urine tests under these programs are "searches" within the meaning of the Fourth Amendment. Although most courts to address the issue to date have ruled that toxicological testing of employees for the purpose of determining fitness for duty is a search within the meaning of the Fourth Amendment, the issue is not entirely settled. See *Wyman v. James*, 400 U.S. 309, 317-338 (1971) (government welfare caseworker's "home visit" as a precondition for assistance payments is not a Fourth Amendment search). See also, *Lovvorn v. City of Chattanooga*, 1988 U.S. App. Lexis 6952 (6th Cir. May 23, 1988) (Guy, J., dissenting); *National Treasury Employees Union v. von Raab*, 808 F.2d 1057, 1060, 1062 (5th Cir. 1987) (Higginbotham, J., concurring). Cf *Mack v. United States, F.B.I.*, 814 F.2d 120, 125 n.2 (2nd Cir. 1987).

Also assuming, *arguendo*, that urine tests of merchant vessel personnel for prohibited substances are "searches" within the meaning of the Fourth Amendment, it is clear that while searches ordinarily must be conducted pursuant to a warrant issued on probable cause grounds, such a requirement is not always necessary. *Almeida-Sanchez v. United States*, 413 U.S. 266, 277 (1973) (Powell, J., concurring). Where, for example, "the burden of obtaining a warrant is likely to frustrate the government purpose behind the search" "the Supreme Court has routinely held that a warrant is not required by the Fourth Amendment [citing *Camera v. Municipal Court*, 387 U.S. 523, 533 (1967)]. See e.g., *Griffin v. Wisconsin*, 107 S.Ct. 3164, 3167 (1987) (plurality opinion); *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985). The Supreme Court has likewise found that the probable cause standard is inappropriate where it would defeat the purpose that the search is designed to achieve. See e.g., *New Jersey v. T.L.O.*, 469 U.S. 325 at 340-342 (1976) (While "some quantum of individualized suspicion is usually a prerequisite to constitutional search or seizure" "the Fourth Amendment imposes no irreducible requirement of such suspicion" *United States v. Martinez-Fuerte*, 428 U.S. 543, 560-561).

Rather, "[t]he fundamental command of the Fourth Amendment is that searches and seizures be reasonable" "New Jersey v. T.L.O.", 469 U.S. 323

at 340. In determining the reasonableness of a search, the Supreme Court has repeatedly stressed the importance of the facts particular to the search while acknowledging that the test of reasonableness "is not capable of precise definition or mechanical application." *Bell v. Wolfish*, 441 U.S. 520, at 559 (1979). In analyzing a drug testing program, "what is reasonable depends on the context within which a search takes place." *New Jersey v. T.L.O.*, 469 U.S. 325, at 337.

In scrutinizing whether a particular search comports with the Fourth Amendment, courts have adopted a balancing test. In general, to support a claim that a search of an individual or the individual's property is reasonable, the government must demonstrate that, on balance, the public's legitimate interest in conducting the search outweighs the individual's legitimate expectation of privacy. See e.g., *United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985); *United States v. Villamonte-Marquez*, 462 U.S. 579, 588 (1983); *Delaware v. Prouse*, 440 U.S. 648, 653 (1979). Thus, the courts must "consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." *Bell v. Wolfish*, 441 U.S. 520, at 559.

Viewed in this light, it is beyond dispute that the public has an overriding interest in assuring that merchant vessel personnel performing duties which directly affect the safety of a vessel's navigation or operations do so free of prohibited substances. The drug problem in society in general and evidence of drug use in the maritime industry in particular are discussed elsewhere in the preamble of this final rule. The impairing effects of drugs and the substantial risks to public safety posed by merchant vessel personnel who use drugs underlies the compelling governmental interest in promulgating this rule.

In contrast, the drug testing requirements of the final rule involve a minimal invasion of privacy. As the Supreme Court has indicated, where searches are undertaken in situations where individualized suspicion is lacking, other safeguards must be relied upon to ensure that the discretion of the party conducting the search is properly defined and the scope of the search is limited. See *Delaware v. Prouse*, 440 U.S. 648, at 654-655; *New York v. Burger*, 107 S.Ct. 2636 (1987). The drug testing requirements of the final rule place constraints on an employer's discretion

in conducting drug testing. For example, the requirement for random drug testing calls for selection of an employee to be tested in a scientifically acceptable manner, such as use of a computer-based random number generator. Requirements for testing based on reasonable cause or post-accident testing also are severely circumscribed in order to limit an employer's discretion in administering these tests to employees.

The actual testing procedures that each employer is required to implement under this final rule also are narrowly tailored to respect an employee's reasonable expectations of privacy. The procedures governing collection of urine samples, as referenced in the final rule, are carefully designed to preserve privacy while protecting the integrity of the sample. The final rule contains a number of important employee safeguards, including privacy during collection under most types of tests, stringent laboratory safeguards, and provisions for challenging results.

Equally significant is the fact that urine drug testing of employees performing sensitive safety-related duties is to be conducted in the "context" of the employment relationship. As the Supreme Court has noted, "[t]he operational realities of the workplace * * * may make some employees' expectation of privacy unreasonable" *O'Connor v. Ortega*, 107 S.Ct. 1492 (1987). This is particularly important in circumstances where the employee works in an industry in which an employee's activities are subject to extensive regulation. Thus, persons who work in such "closely regulated" industries have a "reduced expectation of privacy" [*New York v. Burger*, 107 S.Ct. 2636 (1987)] and, "in effect consent [] to the restrictions placed upon them" [*Almeida-Sanchez v. United States*, 413 U.S. at 271]. For these reasons, two Federal Courts of Appeals have upheld urinalysis testing, in the absence of particularized suspicion, in industries where pervasive regulation has reduced an employee's expectation of privacy. See *Rushton v. Nebraska Public Power Dist.*, 844 F.2d 562, 566 (8th Cir. 1988) (nuclear plant operators); *Shoemaker v. Handel*, 795 F.2d 1136, 1142 (3rd Cir.), cert. denied, 479 U.S. 986 (1986) (jockeys); *Policemen's Benevolent Ass'n. Local 318 v. Township of Washington*, 1988 U.S. App. Lexis 8443 (3rd Cir. June 21, 1988) (police officers).

The Coast Guard recognizes that a number of Federal and State courts have rejected government-mandated drug testing program on Fourth Amendment grounds. However, even courts striking

drug testing programs have recognized that drug testing is appropriate in other contexts. See e.g., *Lovvorn v. City of Chattanooga*, 1988 U.S.App. Lexis 6952 at 23 (6th Cir. May 23, 1988) (Martin, J.) ("When determining, then whether a mandatory drug search is 'reasonable,' we believe that, as the costs to society of an impaired employee increase, the requisite level of suspicion that a drug problem exists decreases."); *Policemen's Benevolent Ass'n. Local 318 v. Township of Washington*, 672 F.supp. 779, 792 (D.N.J. 1987), rev'd, 1988 U.S.App. Lexis 8443 (3rd Cir. June 21, 1988) ("[T]he need to prevent a major airline disaster presents a far more compelling rationale than those presented [by the municipality in support of testing its police officer.]"); *American Federation of Government Employees v. Meese*, No. C-88-1419-SAW (N.D. Cal. June 16, 1988) (issuing a preliminary injunction against a Bureau of Prison plan to test randomly all agency employees but nonetheless noting that "[t]here are cases in which compulsory drug testing may be justified in the interest of public safety or security." Memorandum opinion at 2).

The Coast Guard also is aware of the recent Ninth Circuit decision that held that the Federal Railroad Administration's mandatory blood and urine testing after certain accidents, incidents, or rule violations is unconstitutional because the rules do not require a showing of "particularized suspicion" of drug or alcohol impairment prior to testing. *Railway Labor Executives' Association v. Burnley*, 839 F.2d 575 (9th Cir.), cert. granted, 108 S.Ct. 2033 (1988). The Ninth Circuit based its views, in part, on the proposition that " * * * the vast bulk of [railroad] safety regulation is directed at owners and managers of railroads, not employees." *Id.* at 585. However, contrary to the circumstances in the railroad industry, the Coast Guard has a long history of regulating licensed and documented maritime personnel.

The Supreme Court has granted a government petition for a writ of certiorari in *Railway Labor Executives' Association v. Burnley*, and has ordered that this case be argued next term "in tandem" with *National Treasury Employees Union v. Von Raab*, 816 F.2d 170 (5th Cir. 1987), cert. granted, 108 S.Ct. 1072 (1988) (upholding drug testing of applicants for critical safety or security sensitive positions in the U.S. Customs Service). Decisions in these cases may not be forthcoming until the spring of 1989. However, in the absence of Supreme Court guidance, the Coast Guard is convinced that the need for

drug testing by urinalysis in the maritime industry to determine fitness of maritime personnel for duty in sensitive safety-related positions, and, thereby, to ensure public safety, clearly outweighs the privacy interest of individuals in this class.

While not totally free from doubt, it is the opinion of the Department of Transportation that the Coast Guard's anti-drug program, and similar drug testing regimens proposed by other administrations within the Department, will be determined to be constitutional. The critical need for properly administered drug testing to ensure that employees in the transportation industry do not have drugs or drug metabolites in their systems while performing sensitive safety- or security-related functions outweighs the reduced privacy interest of these employees.

Lack of Evidence of a Drug Problem in the Maritime Industry

Various segments of the maritime industry have asserted that there has been no demonstrated need to mandate industry-wide drug testing of maritime employees.

Response: The Coast Guard clearly stated in the preamble of the notice of proposed rulemaking that it did not have data which specifically identified the use of drugs or alcohol as a major causal effect in commercial vessel losses or casualty damage. However, many commenters submitted data to indicate that company-sponsored drug testing programs have resulted in significant documented reductions in drug usage among their employees. For example, a major maritime association testified that the lost-time incidence among its member companies has decreased by some 50 percent, and that much of this decline can be attributed to their drug interdiction programs. Other companies have reported similar successes. This information supports the Coast Guard contention that the marine industry is not immune to the drug problem that exists in society in general. It further illustrates that drug testing programs do decrease the incidence of drug usage by maritime personnel.

Accuracy of Drug Test Results

Many commenters base their opposition to drug testing on the perceived inaccuracy of analysis and test results. The commenters raised the issues of false-positive test results, passive inhalation of illicit drugs, misidentification of licit drugs, and ingestion of food substances such as poppy seeds which may result in a positive drug test result.

Response: Each of these issues surfaced with the first series of drug testing programs introduced in the military and the private sector. Since that time, laboratories have been increasingly sophisticated in their analytical methods. Many laboratories have compiled extensive records demonstrating scientific accuracy and protection of individual specimens. Today false-positive test results occur primarily during analysis of a specimen provided during an initial screening test. However, the initial screening test is used only to yield a preliminary indication of the possible presence of drugs. In order to ensure the integrity and accuracy of any test result, the Coast Guard has determined that each positive initial screening test result must be confirmed using Gas Chromatography/Mass Spectrometry (GC/MS). The GC/MS confirmation test is an extremely accurate test and is virtually error-free when properly conducted. This final rule specifies explicit procedures which must be followed to ensure accurate drug test results.

The final rule requires that employers establish and utilize drug testing programs which comply with the requirements of 49 CFR Part 40. These regulations are patterned after the "Mandatory Guidelines for Federal Workplace Drug Testing Programs," published by the Department of Health and Human Services (DHHS) on April 11, 1988. These regulations provide a system of checks and balances during collection and analysis of specimens to ensure the integrity and accuracy of the tests using appropriate scientific methods and rigid chain-of-custody procedures. An employer may only use a laboratory that complies with the regulations and has been certified by the DHHS to process and analyze specimens required by the Coast Guard rule.

Finally, the Coast Guard believes that the Medical Review Officer (MRO) review process that has been provided in 49 CFR Part 40 will preclude misidentification of food substances or licit drugs that might produce a false-positive test result. The procedures provide an individual with an opportunity to report any legal or prescription drugs that he or she may be taking at the time of collection of the specimen. The MRO's broad authority to interpret each confirmed positive test result, to interview and evaluate an employee, and to verify that a confirmed positive test result is accurate should preclude misidentification of licit drugs taken in accordance with a valid

prescription or food substances. In summary, the Coast Guard believes that the two-step analysis process, coupled with the requirements for independent review by an MRO, provides a process by which an individual is protected from erroneous false-positive drug test results.

Periodic Testing in Conjunction With License Application or Renewal

While many commenters voiced support for the concept that applicants for original and renewed licenses, certificates of registry, and merchant mariner's documents should be subjected to drug testing, there was almost universal agreement that the costs and responsibility for administering such testing should be borne by the Coast Guard. Further, commenters generally feel that periodic testing has no deterrent value because an employee may temporarily abstain from drug use prior to such a test.

Response: The Coast Guard agrees with the commenters that predetermined periodic testing can be circumvented by a person's abstinence from drug use. However, periodic testing does enable the Coast Guard to identify those persons who are so heavily-dependent on drugs that they are unable to abstain from drug use for even a short period of time prior to a periodic test.

The suggestion that the cost for such testing be borne by the Coast Guard has not been adopted in the final rule. Costs for such testing should appropriately be borne by the person desiring a license, certificate of registry or merchant mariner's document, as are the costs for required physical examinations. There is no reason to impose these costs on the taxpayer, which would be the effect if the Coast Guard were to pay for the testing. Periodic testing will be required in conjunction with required physical examinations after implementation of the rule. However, the periodic testing requirement may be met by satisfactory evidence that an individual has passed a recent drug test or has been participating in a random drug testing program for the previous year.

Pre-employment Testing

Many commenters felt that pre-employment testing was a needless cost to incur since the job applicants would have been tested to obtain their license, certificate of registry or merchant mariner's document and would be immediately subject to the company's random testing program once he or she was hired. They also noted the transient nature of employment in the maritime industry, with mariners frequently signing on a vessel for a single trip, or

being employed on a succession of vessels.

Response: The Coast Guard believes that pre-employment testing is a necessary component of an effective anti-drug program. The Coast Guard acknowledges that needless, redundant testing could result if all job applicants were required to undergo pre-employment drug testing. Accordingly, the final rule has been modified to permit employers to hire, without a pre-employment drug test, an individual who can provide satisfactory evidence that he or she has passed a previous pre-employment or periodic drug test within six months of applying for their position or if that individual can establish that, over the previous twelve months he or she has been subject to a random testing program meeting the requirements of these regulations.

Random Testing

Numerous comments were provided concerning the issue of random testing. Some addressed the constitutionality of the tests. Many companies were particularly concerned with the proposed method of selecting employees to be tested. For the widely-scattered and often remotely located maritime workforce, employers felt that random selection of a unit or vessel and unannounced testing of the entire employee complement would provide a satisfactory deterrent effect and would be the most cost-effective method of implementing a random testing program.

Most commenters believe that the proposed 125 percent random sampling rate was excessive and would impose a significant economic burden, particularly on small businesses. The commenters proposed a range of random sampling rates starting at 10 percent annually. The majority of the commenters suggest that a 50 percent random sampling rate for the maritime industry is appropriate. These commenters believe that the 50 percent sampling rate accomplishes a deterrence level consistent with the intent of the proposal.

Response: While noting the constitutional issues surrounding the issue of random testing, the Coast Guard believes that random testing is a fundamental component of an effective drug testing program. Random testing has proven to be an effective deterrent to drug use and will provide safety benefits to the maritime community by reducing or eliminating drug use by maritime personnel. Random testing programs initiated by the military, including the Coast Guard, and private

industry show declining drug use, evidenced by a decrease in the number of individuals who test positive for drugs over the course of the drug testing program.

The Coast Guard agrees with the commenters who propose a 50 percent random sampling rate and, therefore, has revised the random sampling provision of the rule consistent with the majority of the comments received in response to the NPRM. The 50 percent sampling rate will provide a sufficient deterrent to drug use without imposing an undue economic or administrative burden on employers and employees subject to the requirements of the regulation. The frequency of testing and the development of a random selection method for testing has been left to the employer. The requirement remains, however, that the method chosen ensures that all employees have a substantially equal chance of being selected for testing and that no employee shall know in advance when such testing will occur. A properly designed unit testing program could meet these requirements.

For some employers, particularly those with a large number of employees subject to drug testing, it may be a substantial burden to move from no drug testing to a 50 percent random testing rate. If required to have tested 50 percent of all covered employees by the end of the first year, employers might have to test at rates far above 50 percent toward the end of the year to make up for lower rates at the beginning. Employers should be permitted to start out at a lower testing rate and work up to 50 percent as experience is gained and the testing procedure becomes administratively routine. We do not want to create a situation which might lead to mistakes by requiring initial testing at too high a rate.

The final rule, therefore, provides an implementation procedure that would allow employers to phase in random drug testing during the first 12 months in which tests are conducted. Employers would not be required to reach an annualized rate of 50 percent until the last test collection. The tests would have to be spaced reasonably through the year to permit the employer to phase into the 50 percent rate, and the total number of tests conducted would have to equal at least 25 percent of the covered population.

Suppose, for example, that an employer has 1000 sensitive safety- and security-related employees. At a 50 percent annual rate, 500 tests would have to be conducted during a year. Under the phase-in, however, the employer could conduct only a few drug

tests at the beginning of the program and then gradually increase the number of tests until, by the end of the first year, the annualized rate of 50 percent was achieved. Thus, if the employer's drug testing plan contemplated administering random tests on 12 occasions during the year, the employer would need to administer at least 42 tests (500 divided by 12) on the last occasion, but could administer fewer tests until then. Overall, the employer would have to conduct at least 250 random tests the first year. In subsequent years, the 50 percent rate would be maintained.

Post-Casualty Testing

Numerous commenters felt that post-casualty testing was a law-enforcement function and was appropriately the responsibility of the Coast Guard. Employers generally objected to the proposal that post-casualty testing be conducted by crewmembers when medical personnel were not available.

Response: The Coast Guard appreciates this opinion. However, in many instances the Coast Guard would be unaware that a serious marine incident had occurred until receipt from a vessel master or owner of Form CG-2692, Report of Vessel Casualty. Since time is of the essence in post-casualty testing, the responsibility for ensuring that it is accomplished whenever practicable has been left with the employer.

DHHS Guidelines

Many companies expressed concern over the required use of DHHS Guidelines, especially with respect to random testing programs which they presently have in effect. They stated that such requirements would force them to drastically alter testing programs which have proven effective.

Response: In the notice of proposed rulemaking for this rule, the Coast Guard proposed that all drug testing take place in accordance with the Mandatory Guidelines for Federal Drug Testing Programs of the Department of Health and Human Services (53 FR 11970; April 11, 1988). These guidelines describe the collection and testing procedures applicable to all drug testing in the Federal government, and they include safeguards for accuracy and privacy of testing.

The Department of Transportation has determined that certain modifications of the DHHS Guidelines are appropriate in the context of this and other DOT operating administration drug-free regulations. The result is the DOT "Procedures for Transportation Workplace Drug Testing Programs," which will be codified at 49 CFR Part 40.

These DOT Procedures are intended to preserve, to the greatest extent practicable, the important safeguards provided by the HHS Guidelines.

Some of the modifications to the DHHS Guidelines are editorial in nature (for example, references to responsibilities of "agencies" are changed to reference "employers"). Other modifications are intended to take into account differences in the situations of Federal agencies and DOT regulated industries. For example, in testing at remote sites, DOT regulated industries may find it necessary to conduct some kinds of testing in medical facilities, through use of mobile units, or in ordinary toilet facilities, rather than the more permanent collection sites contemplated by the DHHS Guidelines. It may not be practicable for the regulated parties to maintain on-site permanent log books. Consequently, the DOT Procedures permit alternative collection and recordkeeping procedures in these circumstances.

During the comment period on this drug-free workplace rule and those proposed by other operating administrations, comments were received concerning the DHHS Guidelines. These comments will be incorporated in the docket for the Office of the Secretary (OST) interim final rule creating 49 CFR Part 40. The OST will respond to those comments, as well as comments received during the comment period for Part 40, in its notice following the end of that comment period.

Applicability

Many comments were received that stated the scope of applicability of the proposed rule was too broad. They feel many positions in the marine transportation industry are not directly related to vessel navigation or safety, this being especially true in smaller vessel operations such as excursion boats, and on fish processing vessels. Requiring testing of caterers, bartenders, and musicians on small passenger vessels, or people involved in factory-type functions aboard fish processing vessels would prove excessively costly to the operators and such testing would not enhance the safety of navigation or vessel operation.

Response: The Coast Guard agrees with this view. The regulations in the final rule have been changed to eliminate pre-employment, for cause, and random testing requirements for employees whose duties do not directly affect a vessel's safe navigation or operation. In addition to the persons discussed above, the Coast Guard has determined that scientific personnel on

oceanographic research vessels can be exempted.

Employee Assistance Programs

Employee assistance programs received wide support with the exception of requiring rehabilitation as part of the program. There was strong opposition from employers to any mandated rehabilitation program. Employers feel it is essential for them to retain the right to terminate a person's employment, if they desire, should that person test positive for drugs. Union comments generally favor some requirement for rehabilitation of testing is mandated.

Response: The Coast Guard agrees that rehabilitation of an employee is not directly related to the safety of the vessel. The Coast Guard's concern is solely that persons who are impaired, or are likely to be impaired, are not carrying out safety-related duties. Employee rehabilitation should be a decision of the employer or agreed upon between labor and management during the collective bargaining process. The requirement for mandatory reinstatement of an employee who successfully completes rehabilitation has been deleted from the final rule. However, a person may not return to a safety-related position after testing positive for drugs without the MRO's recommendation. The person must agree to unannounced testing for a period of 60 months. In addition, the provisions of 46 CFR Part 5 concerning suspension or revocation of a license, certificate of registry, or merchant mariners document, and their restoration, apply.

Comments that the Proposed Rules are Politically-Motivated

Over 80 commenters addressed the "short" comment period allowed for evaluating the proposed regulations. Extensions of the comment period for 30 to 180 days were requested. Many commenters suggested that the proposed rules be reissued as an ANPRM, while others requested that an SNPRM be issued before publication of a final rule. The general perception of many in the industry was that the Coast Guard was rushing to final rule in this instance because of the up-coming elections in November.

Response: Because this issue was raised so frequently by the commenters, the Coast Guard chose to address these comments although they do not address the substance of the rule. The war against drugs is one of this Administration's top priorities. Also, Congress has enacted, and is considering, a substantial amount of legislation addressing the use,

distribution, importation, and interdiction of drugs in the United States. Moreover, a significant number of public opinion polls indicate that the American public is deeply concerned about the effect of drug use by individuals in critical safety occupations, including the maritime industry. Development of this rule is motivated by the current political climate only to the extent that these attitudes coincide with the Coast Guard's statutory duties and authority. The Coast Guard is implementing these comprehensive anti-drug regulations because they are consistent with our statutory authority and responsibility to promulgate minimum standards to ensure and promote maritime safety.

Medical Review Officers

Numerous comments were received which indicated opposition to the requirement that employers hire a Medical Review Officer (MRO) to evaluate the results determined to be positive by a testing laboratory. Employers felt that the laboratories would best be able to ascertain the validity of positive test results and the requirement for an MRO represented an unnecessary expense.

Response: After consideration of the comments on the issue of the MROs, the Coast Guard has determined that the requirements to utilize an MRO are appropriate. The Coast Guard believes that the review and evaluation functions of an MRO, as set forth in 49 CFR Part 40, provide critical and necessary safeguards for an employee who is subject to drug testing under the comprehensive anti-drug program. The Coast Guard believes that the MRO will prove to be a beneficial asset to both employees and employers who are subject to the provisions of the final rule.

Neither this rule nor 49 CFR Part 40 requires that each employer have its own individual MRO. The Coast Guard anticipates that small entities will become associated with large companies, or will participate in a consortium of small companies, in order to comply with the MRO requirements, and that the services of an MRO will not result in unreasonable costs to small entities.

Costs of Implementation

Many commenters stated that the Coast Guard has seriously underestimated the cost of implementing these regulations.

Response: The Coast Guard agrees that the certain cost estimates in the NPRM were lower than can be expected (e.g., initial screen and confirmatory

testing costs). These have been increased in the development of the final regulatory impact analysis. However, because of changes included in the final rule (e.g., elimination of rehabilitation requirements and reducing the random testing rate to 50 percent), the estimated overall cost of implementing these regulations has dropped from \$62.30 million to a maximum of \$9.22 million during the third year of implementation to a constantly recurring annual cost of \$7.20 million after the fifth year.

Exemption of Seasonal or Temporary Employees

Numerous requests were received from small passenger vessel operators and others to exclude seasonal or temporary employees. They expressed sincere concerns that requiring prospective employees to undergo pre-employment drug testing and to then be subjected to a random testing program would result in many individuals, notably high school or college students, seeking employment elsewhere. This, in turn, would greatly increase the difficulty of obtaining sufficient help to run a seasonal operation.

Response: As stated previously in this preamble, the Coast Guard has modified the scope of these regulations to exclude persons who are not involved as "crewmembers" aboard a vessel. Small passenger vessel operators will not be required to test employees serving as waiters, waitresses, cooks, bartenders, entertainers, etc., provided their duties do not directly affect the safety of the vessel's navigation or operations. Similarly, many seasonal employees on fish processing vessels are exempted. These changes should alleviate the problems associated with temporary employees. The Coast Guard appreciates the concerns expressed by parties employing high school or college age workers on a seasonal basis. However, many of these persons are solely or primarily responsible for the safe operation of the vessel as for example, a yacht club tender, camp boating instructor, or licensed operator of a sport fishing boat carrying six or fewer passengers. Safety concerns are not lessened because these persons are employed on a seasonal or temporary basis. In fact, there is considerable opinion, and some evidence, that the incidence of drug use is higher among the high school and college age group. The final rule does not exempt seasonal or temporary "crewmembers" from the testing requirements.

Alternate Testing Technologies

Testing of Hair: A number of comments addressed the issue of using testing technologies different from those proposed by the Coast Guard. Three comments suggested that Radio Immunoassay of Hair be permitted as an alternative to urinalysis.

Response: Because the suggestion of drug testing using analysis of hair specimens raises an issue within the expertise of DHHS, the Coast Guard does not intend to include testing of hair at this time. If DHHS finds this drug testing method satisfactory in the future, and if the DOT procedures in 49 CFR Part 40 are revised to include this testing method, or any other proven testing technology, the Coast Guard will adopt them in their rules also.

Breath Testing Devices: Many commenters objected to the requirement in the proposed rules that all inspected vessels certificated for unrestricted ocean routes, and all inspected vessels certificated for restricted overseas routes, have on board at all times an evidential breath testing device (EBT) approved by the National Highway Transportation Safety Administration. They objected primarily to the high initial costs of obtaining this equipment and having to train crewmembers to properly calibrate and operate these devices and to perform post-casualty breath testing on fellow crewmembers.

Response: After reviewing the comments on this issue, the Coast Guard has revised the proposed rule to allow carriage of any breath testing device capable of accurately detecting the presence of alcohol in a crewmember's system. Some of these devices have been shown to be very accurate, easy to use, and inexpensive.

Because of the wide variety of breath testing devices available under the revised rule, the Coast Guard will require only that such devices be used in accordance with procedures specified by the manufacturer. This change will provide employers with sufficient flexibility to choose any accurate breath testing device compatible with their operational circumstances. The use of alcohol is not automatically disqualifying. The weight to be given test results in determining whether the standards of 33 CFR Part 95 have been violated is up to the Administrative Law Judge who can consider the type of device and the conditions under which the test was administered.

The Coast Guard appreciates the concerns raised about testing fellow crewmembers, and allows blood or breath samples to be collected by medical personnel or other qualified

nonvessel personnel whenever practicable. However, if a vessel is in a location where such personnel are not available to conduct such tests, breath testing would be required to be done by vessel personnel. Blood testing can only be conducted by qualified medical personnel. The alternative, to forego readily available evidence concerning whether alcohol was involved in a casualty, would not be in compliance with the intent of 46 U.S.C. 6101.

Conflict with Foreign, State or Local Laws, or with Existing Agreements

Numerous comments indicated that drug testing of individuals was contrary to existing foreign or state laws prohibiting such testing. Other comments stated that the current programs are the result of collective bargaining agreements with affected unions and that the requirements of the proposed rules will send them back to the bargaining table.

Response: The Coast Guard recognizes that some state or local laws and some foreign laws may prohibit or limit the testing required under the final rule. Because of the predominant role assigned the Coast Guard concerning the safe operation of U.S. vessels in commercial service, it is the Coast Guard view that these rules preempt state laws. The complexity and variable circumstances encountered in the interaction of U.S. and foreign law concerning U.S. flag vessels operating within the jurisdiction of a foreign country requires each such situation to be separately analyzed.

We are aware of concerns expressed by foreign entities and foreign governments concerning the potential of our rule to have effect outside United States territory. There are several kinds of situations in which this concern appears to arise.

The first such situation involves a foreign citizen employed by a U.S. company. To begin with, we believe it is fundamental that a foreign citizen employed in the United States by an American company is fully subject to U.S. law, including the requirements for drug testing. With respect to employees of an American company located in a foreign country, it is not our intention to require an employer to violate local law. The requirement to ensure that employees located in a foreign country are subject to drug testing will not become effective until January 1, 1990. This additional compliance period is intended to minimize disruption for employers and employees while the U.S. government meets with foreign governments to discuss implementation of the requirements of the rule.

The second situation that has generated interest in this context concerns foreign entities that are contractors to U.S. companies. The Coast Guard position is that a marine employer who uses contract personnel to perform the duties of a crewmember has "engaged" those personnel. Therefore, the final rule subjects employees of the contractor to the same drug-testing requirements as direct employees of the marine employer. This requirement is necessary to ensure that U.S. companies do not circumvent the rule by contracting out for services. Some foreign entities and their governments, however, have suggested that this gives the rule extraterritorial effect, since a foreign contractor, like a U.S. contractor, would have to comply with our rule.

However, our rule does not require any foreign contractor to conduct drug testing of its employees. The rule imposes requirements only on the operator, i.e., marine employer. It is the responsibility of the marine employer to ensure that crewmembers are drug-free, as enforced by the drug-testing program we are today establishing. In that respect, the drug-testing requirements are not fundamentally different from other testing and training requirements. While it is true that foreign contractors will have to ensure that their employees who service U.S. companies meet our requirements, the same is also true for U.S. contractors.

Nevertheless, we appreciate the seriousness of the concerns expressed on this point. Therefore, the final rule provides that U.S. companies can continue to use foreign contractor employees, whether or not they have instituted drug-testing programs, through December 31, 1989. This short delay in the application of our rule to foreign contractors will provide an opportunity for additional discussion between governments.

The third situation involves a foreign citizen, employed by a foreign company, on a U.S. vessel operating in waters subject to the jurisdiction of the United States. Under agreement between the United States and Canada, Canadian pilots are required on American vessels under certain circumstances in both American and Canadian waters. These pilots, moreover, may, at least in some instances, be employees of the Canadian government. Representatives of the Canadian government have expressed the view that requiring testing of these pilots, even if they are in the United States at the time of the test, might violate the Canadian Human Rights Act. While there is as yet no

definitive understanding about the extent and effect of Canadian law on random drug testing by Canadians operating in the United States, further consultation with the Canadian government seems advisable. Under the circumstances, we have determined to postpone implementation of the final rule, except for post-casualty testing, insofar as it would affect foreign pilots and foreign vessels, until January 1, 1990. This will allow for consultation between governments about implementation of the requirements of the rule.

There are also issues about random tests for employees of U.S. companies where the vessels may not return to the U.S. during the year. The company is required to conduct the tests in international waters, where feasible, or on board the ship within the territorial waters of a foreign country where such testing does not violate the laws of the foreign country. Where foreign law prohibits the testing of an employee regardless of his location, implementation of the final rule, insofar as it would affect such individuals, is postponed until January 1, 1990, to allow consultations between governments.

We have determined not to make the rule applicable in any situation where compliance would violate the domestic laws or policies of another country. In addition, because of the potential confusion that may exist involving application of this rule in situations where compliance could violate foreign laws or policies, we have determined not to make the rule applicable, until January 1, 1990, in any situation where a foreign government contends that compliance with our rule raises questions of compatibility with its domestic laws or policies. During the next year, the Department of Transportation and other U.S. government officials will be working closely with representatives of foreign governments with the goal of reaching permanent resolution to any conflict between our rule and foreign laws and policies. The U.S. and Canadian Governments have already established a bilateral working group in an attempt to achieve this objective. We believe that considerable progress has already been made, and further meetings will be held in the near future. While we believe that this can be a model for addressing the concerns of other countries, it is not intended to be the exclusive means. The Commandant may delay the effective date further under this section, if such delay is necessary to permit consultation with any foreign

governments to be successfully completed.

It is the agency's intention to issue a notice no later than December 1, 1989, that would make any necessary amendments to the rule as a result of discussions with foreign governments. Shortly after their issuance, any such notices will be published in the *Federal Register*. While we recognize that this may create some anomalous conditions in competitive situations, it is the intention of the U.S. government to make every effort to resolve potential conflicts with foreign governments in a manner that accommodates their concerns while ensuring the necessary level of safety by those we regulate.

Section-by-Section Analysis

This final rule reflects substantial changes to those regulations set forth in the notice of proposed rulemaking. These changes have been made as a result of the comments received, issues raised during the public hearings and further review within the Coast Guard.

Amendments to Part 4

The final rule amends the existing marine casualty and investigation regulations by adding chemical testing requirements to be followed when commercial vessels are involved in serious marine incidents. To accomplish this, it has also been necessary to define additional terms utilized in these new regulations.

Section 4.03-2 defines a serious marine incident. Serious marine incidents differ from marine casualties and accidents. Some occurrences considered reportable marine casualties would not be considered serious marine incidents (e.g., suffering vessel damages of \$50,000); other occurrences considered serious marine incidents would not be considered reportable marine casualties (e.g., discharging a reportable quantity of a hazardous substance into the navigable waters of the United States).

Section 4.03-4 defines an individual directly involved in a serious marine incident. This rule requires that these individuals be chemically tested for drug or alcohol use. For an individual to be directly involved in a serious marine incident, that individual's order, action or failure to act must have been a significant causative factor in the events leading to or causing a serious marine incident. This would be indicative of human error. Chemical testing would be required to determine whether or not such an error could be a result of drug or alcohol impairment. It is not intended by these regulations that the master of a vessel, who, by virtue of position, is

responsible for the entire vessel, be tested after each serious marine incident in which the vessel may be involved. It is also not the intent of these regulations to necessarily test personnel after each material failure which may lead to a serious marine incident (e.g., the helmsman who happens to be on duty at the time of a steering gear failure).

Section 4.03-5 defines a medical facility.

Section 4.03-6 defines qualified medical personnel.

Section 4.03-7 defines a chemical test. Although these final rules recognize only certain chemical tests of urine, blood and breath to determine evidence of dangerous drug or alcohol use, the definition is written in broad enough terms to allow for the acceptance of other types of tests which may be added in subsequent rulemakings.

Paragraph (e) of § 4.05-1 has been revised to require the reporting of a marine casualty to the Coast Guard when an injury results which requires professional medical treatment beyond first aid and, in cases involving crewmembers, renders an individual unfit to perform routine vessel duties. This varies from the previous requirement which required reporting of injuries which incapacitated a person for a period in excess of 72 hours. This eliminates the need to report such cases as sprained ankles whereby an individual could be incapacitated for over three days and still not require professional medical attention.

A new Subpart 4.06 is added to address mandatory chemical testing following serious marine incidents involving vessels in commercial service. These regulations extend those contained in 33 CFR Part 95, which require determinations as to whether alcohol or drugs are involved in marine casualties and allow for the chemical testing of individuals involved in marine casualties or suspected of being intoxicated. The regulations in this part require chemical testing of individuals directly involved in serious marine incidents.

Section 4.06-1 outlines the responsibilities of the marine employer following the occurrence of a serious marine incident. A marine employer is first required to make a timely, good faith determination as to whether a marine casualty, discharge of oil, or discharge of a hazardous substance is, or is likely to become, a serious marine incident. If the employer determines that the criteria for a serious marine incident has been, or likely will be, met, the marine employer shall then determine who, if anyone, aboard the vessel was

directly involved in the incident. The marine employer shall then take all practicable steps to assure that all persons directly involved in the serious marine incident are chemically tested for evidence of dangerous drug or alcohol use. A law enforcement officer may determine that individuals other than those designated by the marine employer should also be designated as being directly involved in the serious marine incident. In such cases, the marine employer must take all practicable steps to test those individuals also.

This section is intended to allow the marine employer to balance the chemical testing requirements of this part against the immediate circumstances surrounding a serious marine incident. The need to control a shipboard fire may far outweigh the necessity to promptly take a breath sample to test for alcohol use. It may be physically impossible to transport a crewmember directly involved in a serious marine incident abroad a fishing vessel in the Gulf of Alaska to a medical facility where a blood sample can be taken and shipped for testing. The Coast Guard expects that timely chemical tests will be conducted on every person directly involved in a serious marine incident. It trusts the marine employer to make good faith determinations as to when such testing is required, who is required to be tested, and when it is practicable to do so.

The regulations also require the marine employer to indoctrinate all individuals engaged or employed aboard a vessel of these requirements. Personnel assigned functions to implement these regulations shall be trained to carry out those duties as necessary.

Section 4.06-5 outlines the responsibilities of persons directly involved in serious marine incidents. An individual can be determined to be directly involved in a serious marine incident by a marine employer or a law enforcement officer. When an individual is directed to undergo chemical testing for evidence of drug or alcohol use by the marine employer or the law enforcement officer, the individual is required to comply. However, no individual can be forcibly compelled to comply with these testing requirements. In cases where an individual refuses to submit to chemical testing required by this part, an entry will be made in the official log book, if one is required to be maintained, and on Form CG-2692B (Report of Required Chemical Drug and Alcohol Testing Following a Serious Marine Incident). Such a refusal is

considered to be a violation of regulation and will subject individuals holding a license, certificate of registry, or merchant marine's document to suspension and revocation proceedings under 46 CFR Part 5. Individuals, whether or not they hold a license, certificate of registry, or merchant mariner's document, who refuse to submit to testing when directed to do so by their employer or a law enforcement officer will be subject to removal from any duties which directly affect the safety of vessel's navigation or operations. There may be instances where personnel would be unable to submit to such testing in order to perform duties in the aftermath of a serious marine incident which would be necessary for the preservation of life or property or the protection of the environment. In such cases, the testing would have to be delayed or not conducted, as determined necessary by the marine employer.

Section 4.06-10 specifies what types of specimens must be taken to meet the chemical testing requirements of this subpart. Paragraph (a) requires urine specimens to be provided for testing for evidence of dangerous drug use. Urine specimens must be collected and tested in accordance with the requirements of § 4.06-20 and 46 CFR Part 16, "Chemical Testing." Paragraph (b) allows either blood or breath specimens, or both, to be utilized to test for evidence of alcohol use. Because alcohol dissipates quickly from a person's system, it is necessary that the specimens be taken as soon as is practicable following the occurrence of a serious marine incident.

Section 4.06-20 establishes requirements for specimen collection. It is extremely important that specimens be obtained as soon as practicable following the occurrence of a serious marine incident, that they are not altered or tampered with, and that they can be positively tracked from the time the specimens are provided until the time they are tested. To ensure this, designated personnel must supervise the collection process and make certain that the proper procedures are followed. Ideally, specimen collection would be overseen by qualified collection personnel or by a firm offering a specimen collection service, either in a designated shoreside facility or aboard the vessel. Because of the nature of the maritime industry, however, it may be necessary for specimen collections to be carried out in remote locations which would necessitate that trained shipboard personnel collect specimens. This latter option would only be permitted for urine and breath specimen

collections: blood specimens are only permitted to be taken by qualified medical personnel.

Paragraph (a) of this section specifies that a vessel certificated for unrestricted ocean routes and a vessel certificated for restricted overseas routes carry on board a breath testing device capable of determining the presence of alcohol in a person's system. The selection of this device is left to the discretion of the marine employer. However, the device must be used in accordance with the procedures specified by its manufacturer. These devices are not required to be carried on other vessels since their routes will, in all likelihood, place them near a medical facility where blood specimens can be taken, near a law enforcement facility where breath testing can be conducted, or in a location where the marine employer or the designated representative can bring testing equipment to the vessel.

Paragraph (b) requires that marine employers have urine specimen collection and shipping kits readily available for use in the collection and shipping of urine specimens following serious marine incidents. These kits need not be maintained aboard vessels if they can be obtained within 24 hours of the occurrence of a serious marine incident. The kits must contain all the items necessary, including written step-by-step procedures to be followed, to ensure that specimens are properly collected and shipped, regardless of the location at which the collection is accomplished. Specimen collection and mailing kit requirements are contained in § 16.330.

Section 4.06-30 requires that body fluid specimens be collected from the remains of crewmembers who die as a result of marine casualties. The marine employer is responsible for notifying the appropriate local authority of this requirement. The marine employer shall make a specimen collection and shipping kit available to the local authority and assist in assuring that the specimen is properly handled and shipped. Recognizing that there may be instances where the local authority or the custodian of the remains may refuse to allow such specimens to be taken, the regulations permit the marine employer to explain why the required specimens were not obtained in such cases.

Section 4.06-40 places the burden of ensuring that blood and urine specimens are properly collected, documented, and shipped upon the marine employer. Paragraph (a) specifies shipping requirements specific to blood specimens, and paragraph (b) specifies

requirements for shipment of urine specimens.

Section 4.06-50 requires testing laboratories to provide prompt analyses of specimens sent to them for testing. The testing laboratories are required to send test reports to the Medical Review Officer designated by the marine employer. The main function of the Medical Review Officer is to ensure that any positive test result is not attributable to a prescribed medication or some other acceptable reason.

Paragraph (c) cautions that a positive test result, by itself, shall not constitute a finding that the use of drugs or alcohol was the probable cause of a serious marine incident. Such a fact may, however, be considered as evidence in the investigation of a serious marine incident and may lead to the conclusion that the use of drugs or alcohol was its probable cause.

Section 4.06-60 details the requirements for submittal of chemical testing information to the Coast Guard. This is accomplished through the use of Form CG-2692B (Report of Required Chemical Drug and Alcohol Testing Following a Serious Marine Incident). Following the occurrence of a serious marine incident, the marine employer is required to submit this form to the Coast Guard. In cases in which a Form CG-2692 (Report of Marine Accident, Injury or Death) is required to be submitted, the Form CG-2692B shall be appended to it. In cases involving discharges of oil or hazardous substances, where a Form CG-2692 may not be required, the Form CG-2692B shall be submitted to the Coast Guard Officer in Charge, Marine Inspection having jurisdiction over the location where the discharge occurred or nearest the port of the vessel's first arrival following the discharge. The Form CG-2692B requires the marine employer to indicate all individuals directly involved in a serious marine incident. These individuals are to provide specimens for chemical testing as required by this subpart. In instances where individuals refuse to provide required specimens, or where for some reason specimens cannot be obtained, this information shall also be included on the form. The marine employer shall submit a copy of the positive or negative test results for each person designated as a person directly involved in the serious marine incident to the same Officer in Charge, Marine Inspection to whom the Form CG-2692B was submitted.

Amendments to Part 5

Table 5.569 is revised in the final rule to include a listing for "Violation of Regulation: Refusal to provide

specimens for required chemical test."

The suggested range of appropriate order to be used for this violation will be a 12 to 24 month outright suspension of an individual's license, certificate of registry, or merchant mariner's document.

Amendments to Subchapter B

The final rule amends Subchapter B, Merchant Marine Officers and Seamen, by adding a new Part 16, Chemical Testing. Part 16 is divided into four subparts: Subpart A, General; Subpart B, Required Chemical Testing; Subpart C, Standards for Chemical Testing for Dangerous Drugs; and Subpart D, Employee Assistance Programs.

Subpart A of this part contains requirements of a general nature which apply to the chemical testing of commercial vessel personnel.

Section 16.101 informs the reader of the purpose of the regulations contained in this part, i.e., to provide minimum standards, procedures and means to be used to test for the use of dangerous drugs in order to minimize the use of intoxicants by merchant marine personnel and to promote a drug free and safe work environment.

Section 16.101 provides that an employer may test the sample obtained under this rule only for the drugs required or specifically authorized to be tested under the rule. That is, an employer must test the sample for the five major drugs listed in the regulation. Only if, in the context of reasonable cause testing, the Coast Guard authorizes testing for additional Drug X under 49 CFR Part 40 (an approval which would be granted only after consultation with the Department of Health and Human Services, and only on the basis of a DHHS-established testing protocol and positive threshold) may the employer also test the sample for that drug.

Absent such an approval, if the employer wants to test, in addition, for Drug Y, the employer must obtain a second sample from the employee. The obtaining of this second sample is not under the authority of these regulations. The employer must base its request for the second sample on whatever other legal authority is available, since the employer cannot rely on the Coast Guard regulation as the basis for the request.

Section 16.105 defines several terms utilized in Part 16.

"Chemical test" is defined in broad enough terms to describe virtually any type of chemical test. Although these final rules authorize only certain chemical tests of urine, blood and breath to determine evidence of

dangerous drug or alcohol use, the definition is written to allow for the acceptance of other types of tests as they are proven to be satisfactory.

"Commitment of employment" is defined to mean the proof of employment required by 46 CFR 12.25-5.

"Crewmember", as used in this part, is an important term as it defines vessel personnel to whom the regulations of this part apply. The intent of these regulations is to chemically test all individuals engaged or employed aboard a vessel who perform duties which directly affect the safety of the vessel or its operations. This definition states that anyone aboard a vessel who is acting under the authority of a license, certificate of registry, or merchant mariner's document issued under this subchapter, whether or not a member of the vessel's crew, is subject to the requirements of this part. The wording is used to include individuals such as federal pilots who operate aboard a vessel, but are technically not a member of the vessel's crew. While not members of the vessel's crew, they are aboard serving a function, albeit temporary, which can directly affect the safety of the vessel. It is therefore necessary for them to be subject to these chemical testing requirements. The second part of this definition states that anyone engaged or employed to perform duties aboard a United States vessel which is required by law or regulation to be operated by an individual holding a license, certificate of registry, or merchant mariner's document issued under this subchapter which directly affects the safety of the vessel or its operations is similarly subject to the requirements of this part. Thus, state pilots, certain industrial personnel, and undocumented crewmembers would all be subject to the requirements of this part. Certain of these regulations do not apply to individuals employed aboard a small passenger vessel such as waiters, waitresses, bartenders, and musicians who have no duties directly affecting the safety of the vessel. Scientific personnel aboard oceanographic research vessels and individuals primarily employed in the preparation of fish or fish products on fish processing vessels are also excluded from certain testing requirements.

"Dangerous drug" is defined.

"Dangerous drug level" is defined.

"Employer" is defined to include both marine employers and sponsoring organizations, as described below. Many of the regulations in this part refer to employers, vice marine employers. In such cases, marine employers may

utilize sponsoring organizations to fulfill specified regulatory responsibilities.

"Fails a chemical test for dangerous drugs" is defined.

"Intoxicant" is defined to include any form of alcohol, dangerous drug, or combination thereof.

"Marine employer" is broadly defined to mean a vessel's owner, managing operator, charter, agent, master, or person in charge. Many of the regulations in this part pertain specifically to the marine employer. Who specifically executes the regulatory requirement will often depend on the circumstances of a given situation. Where doubt exists as to who will carry out a particular regulatory requirement, written company guidance should be provided.

"Medical Review Officer" is an individual designated by the employer to carry out the duties specified in 46 CFR 16.370. This individual may be employed directly by the employer, or may be provided for as part of a contracted drug testing program.

"Serious marine incident" is defined as in 46 CFR 4.03-2.

"Sponsoring organization" is broadly defined to include companies, consortiums, corporations, associations, unions, or other organizations with which marine employers or their employees are associated. Many of the regulations in this part refer to employers, vice marine employers. In such cases, sponsoring organizations can be used to fulfill the specified regulatory responsibilities.

"Vessel owned in the United States" is defined.

Subpart B of this part delineates the type of required chemical testing.

Section 16.201 emphasizes that chemical testing of personnel must be conducted. Any user who fails a chemical test for dangerous drugs is considered to be a user of dangerous drugs. The employer or prospective employer of an individual who fails to pass a required chemical test must deny that individual employment in, or remove him or her as soon as practicable from duties which directly affect the safety of the vessel's navigation or operations. If an individual holds a license, certificate of registry, or merchant mariner's document and fails to pass a required chemical test, the employer or prospective employer must report the test results to the nearest Officer in Charge, Marine Inspection. The individual will then be subject to suspension and revocation proceedings against his or her license, certificate of registry, or merchant mariner's document under 46 CFR Part 5.

Paragraph (e) of this section permits individuals who have failed a required chemical test to be rehired, provided requirements outlined elsewhere in the regulations have been fulfilled.

Section 16.205 establishes a graduated implementation scale for employers to come into compliance with the requirements of this part. A graduated scale is provided to allow smaller employers time to form associations or other similar sponsoring organizations, if they so choose, to oversee certain testing aspects required by these regulations and enable them to obtain reduced group testing rates at certified testing laboratories.

Marine employers who employ more than 50 employees subject to the requirements of this part are given six months after the effective date of this rule to implement a pre-employment testing program and one year to implement the remainder of the drug testing program.

Marine employers who employ from 11 to 50 employees subject to the requirements of this part are given one year after the effective date of this rule to implement the pre-employment, periodic, post-accident, reasonable cause, and after return to duty testing programs. They must establish random testing programs within two years after the effective date of this rule.

Marine employers who employ 10 or fewer employees subject to the requirements of this part are given two years after the effective date of this rule to implement a complete anti-drug program which fully complies with these regulations.

Paragraph (d) allows random testing programs to be gradually brought into effect over an extended time period of one year. As discussed earlier in this preamble, it may be a substantial burden for employers to move immediately from no drug testing to a 50-percent random testing rate. This paragraph specifies the graduated steps which will be permitted in the implementation of random testing programs.

Paragraph (f) is written to clarify that foreign pilots aboard U.S. vessels operating in waters not subject to the jurisdiction of the United States do not have to meet the testing requirements of this part.

Section 16.207 addresses conflicts with foreign laws. As discussed previously in this preamble, some foreign laws may prohibit testing of their citizens. This section delays implementation of the testing requirements of this part with respect to foreign citizens aboard U.S. vessels in order that agreements can be pursued

with foreign governments to clarify this point.

Section 16.210 requires that no one be engaged, employed or otherwise given a commitment of employment as a crewmember aboard a vessel unless that individual passes a chemical test for dangerous drugs. The burden rests upon the marine employer to ensure that this requirement is met. The pre-employment test may be waived if the individual can prove that he or she has passed a pre-employment or periodic chemical test within the previous six months or if the individual can prove that he or she has been subject to an accepted random testing program for not less than twelve months, has not failed a chemical test for dangerous drugs, and has not refused to participate in required chemical tests. The wording of this section relieves the employer of the burden of pre-employment testing by allowing the hiring of individuals through sponsoring organizations, e.g., unions, which conduct pre-employment and random tests in accordance with these regulations of their members prior to their being assigned a shipboard billet.

Section 16.220 specifies that a chemical test for dangerous drugs must be conducted whenever a physical examination is required by regulations contained elsewhere in this subchapter. If a physical examination is required for a license or merchant mariner's document, the applicant must provide the results of the chemical test to the Coast Guard Regional Examination Center (REC). When the regulations require a license holder to undergo physical examinations on a periodic basis, the results of each required chemical test must be provided to the REC by the individual at the time of license renewal.

If an individual can prove that he or she has passed a pre-employment chemical test within the previous six months or if the individual can prove that he or she has been subject to an accepted random testing program for not less than twelve months, has not failed a chemical test for dangerous drugs, and has not refused to participate in required chemical tests, a periodic chemical test need not be conducted.

Section 16.230 requires marine employers to provide for the chemical testing of crewmembers on a random basis. As has been discussed previously, marine employers may form or otherwise use sponsoring organizations to conduct their random chemical testing programs.

Employers must test crewmembers on a random basis at an annual rate of not

less than 50 percent. Every member of a given population must have a substantially equal chance of selection to be tested on a scientifically valid basis. The basis of selection is left to the employer. Employers may choose to test individuals; employers may choose to test entire units. The important consideration is that the testing frequency and process used in such that an individual employee's chances of selection remain constant throughout his or her employment. Employees may not receive a prewarning of when they are to be randomly tested.

It is important to note that the requirements of this section apply to individuals such as independent tankermen, federal pilots, state pilots, and certain industrial personnel. While not members of the vessel's crew, they are aboard serving a function, albeit temporary, which can directly affect the safety of the vessel or its operations. It is therefore necessary for them to be subject to these chemical testing requirements. Because such individuals commonly work for or through "third parties", e.g., pilot's associations or drilling companies, and are not properly employees of the marine employer, it is incumbent upon the marine employer to ensure that these individuals are either tested under programs established by their employer or association, or are tested under the marine employer's established program.

Paragraph (d) forbids anyone from serving as master, operator, or person in charge on a vessel in a position for which a license or merchant mariner's document is required unless all crewmembers are subject to the random testing requirements of this section. Doing so could result in suspension and revocation proceedings being initiated against the individual. This change was made because it is unreasonable to expect that all holders of licenses or merchant mariner's documents aboard a vessel be cognizant of who is and who is not in compliance with the testing procedures of this section. The master, operator, or person in charge, however, should be.

Section 16.240 requires that all individuals directly involved in a serious marine incident be chemically tested for the presence of dangerous drugs and alcohol in accordance with the requirements of 46 CFR 4.06.

Section 16.250 requires an employer to chemically test crewmembers for dangerous drug use when there is reasonable cause to suspect such usage. The decision to test in such circumstances should be based on the observation and concurrence of two persons in supervisory positions,

wherever practicable. Whenever such testing is conducted, it shall be logged in the vessel's official log book, if one is required. If an individual refuses to submit or cooperate in the administration of a timely chemical test when directed to do so, this fact shall also be entered in the vessel's official log book. In the case of licensed or documented personnel, this will subject the individual to suspension and revocation proceeding under 46 CFR Part 5.

Section 16.260 requires employers to maintain records of chemical tests performed. These records must be sufficient to provide evidence of the results of chemical tests of crewmembers to satisfy §§ 16.210(b) and 16.220(b). Additionally, the records must be sufficiently detailed so as to permit collection and analysis of the effectiveness of the testing programs. Negative report records must be retained for one year. Positive report records must be maintained for five years. These records must be made available to Coast Guard officials upon request.

Subpart C establishes the standards to be met when chemically testing for dangerous drugs.

Section 16.301 requires that drug testing programs subject to this part be conducted in a manner consistent with 49 CFR Part 40, Procedures for Transportation Workplace Drug Testing Programs. These regulations are based upon "Mandatory Guidelines for Federal Workplace Drug Testing Programs," developed by the Department of Health and Human Services (DHHS Guidelines). These were published in the Federal Register on April 11, 1988. This section cautions readers that the regulations in this subpart are summaries of the requirements contained in 49 CFR Part 40. In establishing specific procedures to carry out the requirements of this part, those regulations should be consulted.

Section 16.310 provides the employer with general guidance in the establishment of specimen collection procedures. It stresses principal issues which must be considered during program development (general collection site requirements, security of the collection site, access to the collection site by authorized personnel only, privacy of individuals providing specimens, and maintaining the integrity of specimens after they are given). Specific requirements for these aspects of a testing program are found in 49 CFR Part 40, and these regulations should be consulted to ensure program adequacy.

Section 16.320 requires that a chain of custody be established for each

specimen provided for chemical testing. It is extremely important that each specimen can always be accounted for, from the time it is provided through its authorized disposition. A properly established chain of custody ensures that the chances of a specimen being altered, contaminated, switched, or lost are minimized and that test results provided are, in actuality, those of the indicated specimen.

Section 16.330 establishes specimen handling and shipping procedures. The regulations require the employer to obtain a specimen collection and shipping kit to be used to collect specimens and return them to the certified drug testing laboratory. Items required to be provided in the specimen collection and shipping kit are specified. The list is not all-inclusive, and additional items may be included as the employer considers necessary. It is imagined that the employer will work closely with the chosen drug testing laboratory in developing this kit. One important feature of the kit is the set of step-by-step instructions which describe the proper procedures to be followed during specimen collection, handling, and shipping. Because situations are envisioned where specimen collection may be supervised by personnel not overly familiar with these procedures, the specimen collection instructions must be written in a manner which is easily understandable and will result in the specimens being properly provided, stored, handled, and shipped to the testing laboratory.

Section 16.340 requires that laboratories used to conduct the chemical tests required by this part be DHHS certified. The burden is placed upon the employer to ensure that this requirement is met.

Section 16.350 requires that each specimen be analyzed in a manner consistent with 49 CFR 40.24. DHHS certified laboratories will meet this requirement. It also specifies the dangerous drugs for which each specimen must be tested and defines when a specimen is considered to have tested positive. Specimens which indicate the presence of a dangerous drug in excess of the levels established in 49 CFR 40.24 shall be reported to the Medical Review Officer as positive.

Section 16.360 describes the information which must be included on each specimen analysis report. Only specimens tested as positive on the confirmatory test are to be listed as positive on the specimen analysis report. Samples which are negative on the screening test and specimens which are negative on the confirmatory test

shall be reported as negative on the specimen analysis report. All specimen analysis reports shall be sent to the Medical Review Officer designated by the employer, rather than to the employer.

Section 16.370 requires employers to designate or appoint a Medical Review Officer (MRO). The primary function of the MRO is to review and interpret each confirmed positive test in order to determine if there is an alternative medical explanation for a positive test result. The MRO may be employed directly by the employer, or the provision of MRO services may be contracted as part of the drug testing program. The MRO verifies positive test results through interviews with the crewmember who tested positive, reviews of the crewmember's medical history and biomedical factors, and verification of the laboratory report and assessment. The MRO may, if he or she considers it necessary, request the original specimen be reanalyzed to determine the accuracy of the reported test result.

The MRO provides the final report to the employer or the employer's designated agent. The MRO may determine there is a legitimate medical explanation for a confirmed positive test result that is consistent with legal drug use. In such cases the MRO shall report a test result as negative. The MRO may conclude, based on reviews of laboratory inspection reports, quality assurance and quality control data, and other drug test results, that a particular drug test result is insufficient for further action. In such cases the MRO shall also report a test result as negative. If the MRO determines that there is no legitimate medical explanation for a confirmed positive test result that is consistent with legal drug use, the MRO shall report the positive test result to the employer for further proceedings in accordance with the employer's anti-drug program.

The MRO also determines when an individual who has failed a chemical drug test for dangerous drugs may return to work. The decision is made after the MRO determines that the individual is drug-free and the risk of subsequent use of dangerous drugs by that person is sufficiently low to justify his or her return to work.

Section 16.380 mandates that employers shall not release individual test results or other personal information from anti-drug program records except: to the Coast Guard where required by these regulations, to specifically identified persons designated by the individual tested, or personally to the individual tested.

Subpart D specifies the requirements of employee assistance programs.

Section 16.401 requires employers to provide an Employee Assistance Program (EAP) for all crewmembers. The employer may establish the EAP as part of its internal personnel service program or the employer may contract with an entity that will provide EAP to a crewmember. The EAP must contain an education program and a training program for all personnel. At least 60 minutes of EAP training must be provided for each supervisor.

E.O. 12291 and DOT Regulatory Policies and Procedures

These regulations are considered to be non-major under Executive Order 12291. However, they are considered to be significant under the DOT regulatory policies and procedures (44 FR 11304; February 26, 1979) because they initiate a substantial regulatory program.

The Coast Guard has prepared and placed in the rulemaking docket a final regulatory evaluation addressing the economic impact of these rules. It may be inspected or copied at the Marine Safety Council, Room 3600, U.S. Coast Guard Headquarters, 2100 Second Street, SW., Washington, DC 20593-0001, from 8:00 a.m. to 3:00 p.m.

Regulatory Evaluation

The Coast Guard has developed a final regulatory impact analysis and placed it in the docket. As previously stated, the estimated overall cost of implementing these regulations will be a maximum of \$9.22 million during the third year of implementation to a constantly recurring annual cost of \$7.20 million after the fifth year. Although revisions to the vessel casualty reporting program have recently been effected, existing data does not readily identify drug-related casualties. Therefore, the Coast Guard has not estimated the total cost benefits of this rulemaking. However, the following must be kept in mind.

In 1984 there were approximately 2300 commercial vessel casualties (excluding fishing vessels), resulting in \$237 million in damages and 68 deaths. Of these, 1133 of the accidents were directly attributable to personnel-related causes, i.e. carelessness, misjudgment, etc., resulting in \$77 million in damages and 29 deaths. (It should be noted that these statistics do not include personnel deaths or injuries which were not associated with vessel accidents.) According to a 1987 NIDA report on Strategic Planning for Workplace Drug Abuse Programs, abusers of drugs and alcohol have 3.6 times as many accidents in comparison to other

workers. There is no reason to believe a similar correlation does not exist in the maritime industry. On that basis, it would be reasonable to assume that detecting 7.5 percent drug users in the employee population would have the potential for preventing up to 27 percent ($3.6 \times 7.5\%$) of the accidents attributable to personnel-related causes. If 27 percent of the \$77 million in damages and 29 deaths attributable to personnel-related causes is prevented some \$20.8 million in damages and eight deaths could be prevented. (Additional savings would also be achieved as a result of reduced compensation claims, lower medical costs, and less time lost due to sick leave.)

The Coast Guard believes that if drug screening can prevent even a low percentage of accidents through drug testing and rehabilitation, the program will more than pay for itself. Using the minimum accepted value of a human life of one million dollars, the saving of but a few lives annually, along with reduced property damage, will more than match the cost of the program. This goal is believed achievable, given the success of other drug testing programs.

Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 requires review of proposed rules to assess their impact on small business. In consideration of the cost information discussion under the regulatory analysis, the Coast Guard concludes that this final rule could have a significant economic impact on a substantial number of small entities. The Coast Guard has provided viable alternatives for small employers to adopt which would reduce the cost of compliance while achieving the levels of protection sought by these rules. Although unit costs for small entities for certain services required under these regulations may be somewhat higher, small operators have the latitude to utilize cooperative services, or form associations, which will result in a reduction of unit costs. A regulatory flexibility analysis discussing this issue in more detail has been placed in the docket.

Paperwork Reduction Act

This rulemaking contains information collection requirements in the following sections: Part 16, subparts B and C, plus section 46 CFR 4.06. These collection requirements are being submitted to the Office of Management and Budget for approval under the Paperwork Reduction Act (44 U.S.C. 3501 et. seq.). Under § 4.06-60, the employer is required to submit a Form CG-2692B

(Report of Required Chemical Drug and Alcohol Testing Following a Serious Marine Incident) to the Coast Guard whenever personnel are directed to provide specimens for mandatory chemical testing after the occurrence of a serious marine incident. Employers are also required to maintain records of the results of chemical testing for dangerous drugs under § 16.260.

Federalism Implications

This regulation has been analyzed in accordance with the principles and criteria contained in Executive Order 12612, and it has been determined that the proposed rulemaking does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment. The rules affect the safety of vessels in interstate and foreign commerce and are directly related to the qualifications of personnel licensed by the U.S. Coast Guard and their working conditions on vessels. These are express statutory responsibilities of the U.S. Coast Guard and there are no similar State responsibilities or programs in these areas.

Environmental Assessment

The Coast Guard has considered the environmental impact of these regulations and concluded that, under section 2.B.2.1. of Commandant Instruction M16475.1B, they will have no significant environmental impact and are categorically excluded from further environmental documentation.

List of Subjects

46 CFR Part 4

Administrative practice and procedures, Investigations, Accidents, Marine safety, Reporting and recordkeeping requirements, Alcohol and alcoholic beverages, Drugs.

46 CFR Part 5

Administrative practice and procedures, Investigations, Administrative law judge, Investigating officer, Seamen, License, Certificate, Document, Administrative hearings, Navigation (Water), Suspension and revocation, Marine safety, Alcohol and alcoholic beverages, Drugs.

46 CFR Part 16

Seamen, Marine safety, Navigation (Water), Alcohol and alcoholic beverages, Drugs.

Final Rule

For the reasons set out in the preamble, Title 46, Chapter I, of the

Code of Federal Regulations, is amended as follows:

PART 4—[AMENDED]

1. The table of contents of Part 4 is amended by adding the following:

* * * * *

Subpart 4.06—Mandatory Chemical Testing Following Serious Marine Incidents Involving Vessels in Commercial Service

4.06-1 Responsibilities of the marine employer.

4.06-5 Responsibilities of individuals directly involved in serious marine incidents.

4.06-10 Required specimens.

4.06-20 Specimen collection requirements.

4.06-30 Specimen collection in incidents involving fatalities.

4.06-40 Specimen handling and shipping.

4.06-50 Specimen analysis and follow-up procedures.

4.06-60 Submission of reports and test results.

* * * * *

2. The authority citation for Part 4 is revised to read as follows:

Authority: 33 U.S.C. 1231, 43 U.S.C. 1333; 46 U.S.C. 2103, 2306, 6101, 6301, 6305, 50 U.S.C. 198; 49 CFR 1.46, except Subpart 4.40 for which the authority is: 49 U.S.C. 1903(a)(1)(E); 49 CFR 1.46.

3. Subpart 4.03 is amended by adding new §§ 4.03-2, 4.03-4, 4.03-5, 4.03-6, and 4.03-7 to read as follows:

Subpart 4.03—Definitions

* * * * *

§ 4.03-2 Serious marine incident.

The term "serious marine incident" includes the following events involving a vessel in commercial service:

(a) Any marine casualty or accident as defined in § 4.03-1 which is required by § 4.05-1 to be reported to the Coast Guard and which results in any of the following:

(1) One or more deaths;

(2) An injury to a crewmember, passenger, or other person which requires professional medical treatment beyond first aid, and, in the case of a person employed on board a vessel in commercial service, which renders the individual unfit to perform routine vessel duties;

(3) Damage to property, as defined in § 4.05-1(f) of this part, in excess of \$100,000;

(4) Actual or constructive total loss of any vessel subject to inspection under 46 U.S.C. 3301; or

(5) Actual or constructive total loss of any self-propelled vessel, not subject to inspection under 46 U.S.C. 3301, of 100 gross tons or more.

(b) A discharge of oil of 10,000 gallons or more into the navigable waters of the United States, as defined in 33 U.S.C. 1321, whether or not resulting from a marine casualty.

(c) A discharge of a reportable quantity of a hazardous substance into the navigable waters of the United States, or a release of a reportable quantity of a hazardous substance into the environment of the United States, whether or not resulting from a marine casualty.

§ 4.03-4 Individual directly involved in a serious marine incident.

The term "individual directly involved in a serious marine incident" is an individual whose order, action or failure to act is determined to be, or cannot be ruled out as, a causative factor in the events leading to or causing a serious marine incident.

§ 4.03-5 Medical facility.

The term "medical facility" means an American hospital, clinic, physician's office, or laboratory, where blood and urine specimens can be collected according to recognized professional standards.

§ 4.03-6 Qualified medical personnel.

The term "qualified medical personnel" means a physician, physician's assistant, nurse, emergency medical technician, or other person authorized under State or Federal law or regulation to collect blood and urine specimens.

§ 4.03-7 Chemical test.

The term "chemical test" means a scientifically recognized test which analyzes an individual's breath, blood, urine, saliva, bodily fluids, or tissues for evidence of dangerous drug or alcohol use.

4. Section 4.05-1(e) is revised to read as follows:

§ 4.05-1 Notice of marine casualty.

* * * * *

(e) Injury which requires professional medical treatment beyond first aid and, in the case of a person engaged or employed on board a vessel in commercial service, which renders the individual unfit to perform routine vessel duties.

* * * * *

5. A new Subpart 4.06 is added to read as follows:

Subpart 4.06—Mandatory Chemical Testing Following Serious Marine Incidents Involving Vessels in Commercial Service

§ 4.06-1 Responsibilities of the marine employer.

(a) At the time of occurrence of a marine casualty, a discharge of oil into the navigable waters of the United States, a discharge of a hazardous substance into the navigable waters of the United States, or a release of a hazardous substance into the environment of the United States, the marine employer shall make a timely, good faith determination as to whether the occurrence currently is, or is likely to become, a serious marine incident.

(b) When a marine employer determines that a casualty or incident is, or is likely to become, a serious marine incident, the marine employer shall take all practicable steps to have each individual engaged or employed on board the vessel who is directly involved in the incident chemically tested for evidence of drug and alcohol use.

(c) The determination of which individuals are directly involved in a serious marine incident is to be made by the marine employer. A law enforcement officer may determine that additional individuals are directly involved in the serious marine incident. In such cases, the marine employer shall take all practicable steps to have these individuals tested in accordance with paragraph (b) of this section.

(d) The requirements of this subpart shall not prevent vessel personnel who are required to be tested from performing duties in the aftermath of a serious marine incident when their performance is necessary for the preservation of life or property or the protection of the environment.

(e) The marine employer shall ensure that all individuals engaged or employed on board a vessel are fully indoctrinated in the requirements of this subpart, and that appropriate vessel personnel are trained as necessary in the practical applications of these requirements.

(f) Each marine employer shall implement the testing requirements of this subpart in accordance with the implementation schedule provided in 46 CFR 16.205 and 16.207.

§ 4.06-5 Responsibilities of individuals directly involved in serious marine incidents.

(a) Any individual engaged or employed on board a vessel who is determined to be directly involved in a serious marine incident shall provide blood, breath or urine specimens for

chemical tests required by § 4.06-10 when directed to do so by the marine employer or a law enforcement officer.

(b) If the individual refuses to provide blood, breath or urine specimens, this refusal shall be noted on Form CG-2692B and in the vessel's official log book, if one is required.

(c) No individual may be forcibly compelled to provide specimens for chemical tests required by this part; however, refusal is considered a violation of regulation and could subject the individual to suspension and revocation proceedings under Part 5 of this chapter and removal from any duties which directly affect the safety of the vessel's navigation or operations.

§ 4.06-10 Required specimens.

Each individual required to submit to chemical testing shall, as soon as practicable, provide the following specimens for chemical testing:

(a) Urine specimens, collected in accordance with § 4.06-20 and Part 16 of this Chapter.

(b) Blood or breath specimens, or both, collected in accordance with § 4.06-20.

§ 4.06-20 Specimen collection requirements.

(a) All inspected vessels certificated for unrestricted ocean routes, and all inspected vessels certificated for restricted overseas routes, are required to have on board at all times a breath testing device capable of determining the presence of alcohol in a person's system. The breath testing device shall be used in accordance with procedures specified by the manufacturer.

(b) The marine employer shall ensure that urine specimen collection and shipping kits meeting the requirements of § 16.330 of this part are readily available for use following serious marine incidents. The specimen collection and shipping kits need not be maintained aboard each vessel if they can otherwise be readily obtained within 24 hours from the time of the occurrence of the serious marine incident.

(c) The marine employer shall ensure that specimens required by § 4.06-10 are collected as soon as practicable following the occurrence of a serious marine incident.

(d) When obtaining blood, breath, and urine specimens, the marine employer shall ensure that the collection process is supervised by either qualified collection personnel, the marine employer, a law enforcement officer, or the marine employer's representative.

(e) Chemical tests of an individual's breath for the presence of alcohol using

a breath testing device may be conducted by any individual trained to conduct such tests. Blood specimens shall be taken only by qualified medical personnel.

§ 4.06-30 Specimen collection in incidents involving fatalities.

(a) When an individual engaged or employed on board a vessel dies as a result of a serious marine incident, blood and urine specimens must be obtained from the remains of the individual for chemical testing, if practicable to do so. The marine employer shall notify the appropriate local authority, such as the coroner or medical examiner, as soon as possible, of the fatality and of the requirements of this subpart. The marine employer shall provide the specimen collection and shipping kit and request that the local authority assist in obtaining the necessary specimens. When the custodian of the remains is a person other than the local authority, the marine employer shall request the custodian to cooperate in obtaining the specimens required under this part.

(b) If the local authority or custodian of the remains declines to cooperate in obtaining the necessary specimens, the marine employer shall provide an explanation of the circumstances on Form CG-2692B (Report of Required Chemical Drug and Alcohol Testing Following a Serious Marine Incident).

§ 4.06-40 Specimen handling and shipping.

(a) The marine employer shall ensure that blood specimens collected in accordance with §§ 4.06-20 and 4.06-30 are promptly shipped to a testing laboratory qualified to conduct tests on such specimens. A proper chain of custody must be maintained for each specimen from the time of collection through the authorized disposition of the specimen. Blood specimens must be shipped to the laboratory in a cooled condition by any means adequate to ensure delivery within twenty-four (24) hours of receipt by the carrier.

(b) The marine employer shall ensure that the urine specimen collection procedures of § 16.310 of this part and the chain of custody requirements of § 16.320 are complied with. The marine employer shall ensure that urine specimens required by §§ 4.06-20 and 4.06-30 are promptly shipped to a laboratory complying with the requirements of 49 CFR Part 40. Urine specimens must be shipped by an expeditious means, but need not be shipped in a cooled condition for overnight delivery.

§ 4.06-50 Specimen analysis and follow-up procedures.

(a) Each laboratory will provide prompt analysis of specimens collected under this subpart, consistent with the need to develop all relevant information and to produce a complete analysis report.

(b) Reports shall be sent to the Medical Review Officer meeting the requirements of 40 CFR 40.27, as designated by the marine employer submitting the specimen for testing. Whenever a urinalysis report indicates the presence of a dangerous drug or drug metabolite, the Medical Review Officer shall review the report as required by 49 CFR 40.27 and submit his or her findings to the marine employer. Blood test reports indicating the presence of alcohol shall be similarly reviewed to determine if there is a legitimate medical explanation.

(c) Analysis results which indicate the presence of alcohol, dangerous drugs, or drug metabolites shall not be construed by themselves as constituting a finding that use of drugs or alcohol was the probable cause of a serious marine incident.

§ 4.06-60 Submission of reports and test results.

(a) Whenever an individual engaged or employed on a vessel is identified as being directly involved in a serious marine incident, the marine employer shall complete Form CG-2692B (Report of Required Chemical Drug and Alcohol Testing Following a Serious Marine Incident).

(b) When the serious marine incident requires the submission of Form CG-2692 (Report of Marine Casualty, Injury or Death) to the Coast Guard in accordance with § 4.05-10, the report required by paragraph (a) of this section shall be appended to Form CG-2692.

(c) In incidents involving discharges of oil or hazardous substances as described in § 4.03-2 (b) and (c) of this part, when Form CG-2692 is not required to be submitted, the report required by paragraph (a) of this section shall be submitted to the Coast Guard Officer in Charge, Marine Inspection, having jurisdiction over the location where the discharge occurred or nearest the port of first arrival following the discharge.

(d) Upon receipt of the report of chemical test results, the marine employer shall submit a copy of the test results for each person listed on the CG-2692B to the Coast Guard Officer in Charge, Marine Inspection to whom the CG-2692B was submitted.

PART 5—[AMENDED]

6. The authority citation for Part 5 continues to read as follows:

Authority: 46 U.S.C. 7101, 7301, and 7701; 50 U.S.C. 198; 49 CFR 1.46(b).

§ 5.569 [Amended]

7. In § 5.569 add to Table 5.569 the following new offense after Incompetence:

Type of offense	Range of order (in months)
Violation of Regulation: Refusal to provide specimens for required chemical test..	12-24.

8. A new Part 16 is added to Subchapter B to read as follows:

PART 16—CHEMICAL TESTING**Subpart A—General**

Sec.

16.101 Purpose of regulations.

16.105 Definitions of terms used in this part.

Subpart B—Required Chemical Testing

16.201 Application.

16.205 Implementation of chemical testing programs.

16.207 Conflict with foreign laws.

16.210 Pre-employment testing requirements.

16.220 Periodic testing requirements.

16.230 Random testing requirements.

16.240 Serious marine incident testing requirements.

16.250 Reasonable cause testing requirements.

16.260 Records.

Subpart C—Standards for Chemical Testing for Dangerous Drugs.

16.301 Procedures for Transportation Workplace Drug Testing Programs.

16.310 General.

16.320 Chain of custody.

16.330 Specimen handling and shipping.

16.340 Test laboratory requirements.

16.350 Specimen analyses.

16.360 Specimen analysis reports.

16.370 Medical Review Officer.

16.380 Release of information.

Subpart D—Employee Assistance Programs.

16.401 Employee Assistance Program (EAP).

Authority: 46 U.S.C. 2103, 3306, 7101, 7301, and 7701; 49 CFR 1.46.

Subpart A—General**§ 16.101 Purpose of regulations.**

(a) The regulations in this part provide a means to minimize the use of intoxicants by merchant marine

personnel and to promote a drug free and safe work environment.

(b) These regulations prescribe the minimum standards, procedures, and means to be used to test for the use of dangerous drugs.

(c) As part of a reasonable cause drug testing program established pursuant to this part, employers may test for drugs in addition to those specified in this part only with approval granted by the Coast Guard under 49 CFR Part 40 and for substances for which the Department of Health and Human Services has established an approved testing protocol and positive threshold.

§ 16.105 Definitions of terms used in this part.

"Chemical test" means a scientifically recognized test which analyzes an individual's breath, blood, urine, saliva, bodily fluids, or tissues for evidence of dangerous drug or alcohol use.

"Commitment of employment" means the proof of employment required by 46 CFR 12.25-5.

"Crewmember" means an individual who is:

(a) On board a vessel acting under the authority of a license, certificate of registry, or merchant mariner's document issued under this subchapter, whether or not the individual is a member of the vessel's crew; or

(b) Engaged or employed on board a vessel owned in the United States that is required by law or regulation to engage, employ, or be operated by an individual holding a license, certificate of registry, or merchant mariner's document issued under this subchapter, except the following:

(1) Individuals primarily employed in the preparation of fish or fish products or in a support position not related to navigation on a fish processing vessel;

(2) Scientific personnel on an oceanographic research vessel; and

(3) Individuals not required under Part 15 of this subchapter who have no duties which directly affect the safety of the vessel's navigation or operations.

"Dangerous drug" means a narcotic drug, controlled substance, and marijuana (as defined in section 102 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 802)).

"Dangerous drug level" means the amount of traces of dangerous drugs or drug metabolites in an individual's breath, blood, urine, saliva, or body fluids or tissues.

"Drug test" means a chemical test of an individual's urine for evidence of dangerous drug use.

"Employer" means a marine employer or sponsoring organization.

"Fails a chemical test for dangerous drugs" means the test result is reported as positive for the presence of dangerous drugs or drug metabolites in an individual's system after a Medical Review Officer's review in accordance with 49 CFR 40.27.

"Intoxicant" means any form of alcohol, dangerous drug, or combination thereof.

"Marine employer" means the owner, managing operator, charterer, agent, master, or person in charge of a vessel, other than recreational vessel.

"Medical Review Officer" means an individual designated by the employer to carry out the duties specified in § 16.370 of this part.

"Serious marine incident" means an event defined in 46 CFR 4.03-2.

"Sponsoring organization" is any company, consortium, corporation, association, union, or other organization with which individuals serving in the marine industry, or their employers, are associated.

"Vessel owned in the United States" means any vessel documented or numbered under the laws of the United States; and any vessel owned by a citizen of the United States that is not documented or numbered by any nation.

Subpart B—Required Chemical Testing

§ 16.201 Application.

(a) Chemical testing of personnel must be conducted as required by this subpart.

(b) If an individual fails a chemical test for dangerous drugs under this part, the individual will be presumed to be a user of dangerous drugs.

(c) If an individual holding a license, certificate of registry, or merchant mariner's document fails a chemical test for dangerous drugs, the individual's employer or prospective employer shall report the test results in writing to the nearest Coast Guard Officer in Charge, Marine Inspection (OCMI). The individual shall be denied employment as a crewmember or removed from duties which directly affect the safety of the vessel's navigation or operations as soon as practicable and shall be subject to suspension and revocation proceedings against his or her license, certificate of registry, or merchant mariner's document under 46 CFR Part 5.

(d) If an individual who does not hold a license, certificate of registry, or merchant mariner's document fails a chemical test for dangerous drugs, the individual shall be denied employment as a crewmember or removed from duties which directly affect the safety of

the vessel's navigation or operations as soon as practicable.

(e) An individual who has failed a required chemical test for dangerous drugs may not be reemployed aboard a vessel until the requirements of § 16.370(d) of this part and 46 CFR Part 5, if applicable, have been satisfied.

§ 16.205 Implementation of chemical testing programs.

(a) Each employer who employs more than 50 employees required to be tested under this part shall implement the pre-employment testing program required in § 16.210 not later than June 21, 1989. All other employer testing programs required by this part shall be implemented not later than December 21, 1989.

(b) Each employer who employs from 11 to 50 employees required to be tested under this part shall implement the pre-employment, serious marine incident, and reasonable cause testing programs required by this part not later than December 21, 1989. The random testing programs required by § 16.230 of this part shall be implemented not later than December 21, 1990.

(c) Each employer who employs 10 or fewer employees required to be tested under this part shall implement the employer testing programs required by this part not later than December 21, 1990.

(d) During the first 12 months following the institution of random drug testing pursuant to this section, an employer shall meet the following conditions:

(1) The random drug testing is spread reasonably through the 12-month period;

(2) The last test collection during the year is conducted at an annualized rate of 50 percent; and

(3) The total number of tests conducted during the 12 months is equal to at least 25 percent of the covered population.

(e) The periodic testing requirements of § 16.220 apply to physical examinations performed after December 21, 1990.

(f) When a vessel owned in the United States is operating in waters that are not subject to the jurisdiction of the United States, the testing requirements of §§ 16.210 and 16.230 do not apply to a citizen of a foreign country engaged or employed as pilot in accordance with the laws or customs of that foreign country.

(g) Upon written request of an employer, Commandant (G-MMI) will review the employer's chemical testing program to determine compliance with the provisions of this part.

§ 16.207 Conflict with foreign laws.

(a) This part shall not apply to any person for whom compliance with this part would violate the domestic laws or policies of another country.

(b) This part is not effective until January 1, 1990, with respect to any person for whom a foreign government contends that application of this part raises questions of compatibility with that country's domestic laws or policies. On or before December 1, 1989, the Commandant shall issue any necessary amendment resolving the applicability of this part to such person on and after January 1, 1990.

§ 16.210 Pre-employment testing requirements.

(a) No marine employer shall engage, employ, or otherwise give a commitment of employment to, any individual to serve as a crewmember unless the individual passes a chemical test for dangerous drugs for that employer.

(b) The individual is not required to undergo the pre-employment test required by paragraph (a) of this section if the individual provides satisfactory evidence that he or she has:

(1) Passed a pre-employment test for the marine employer or another employer, or a periodic chemical test for dangerous drugs, within the previous six months; or

(2) Been subject to a random testing program meeting the criteria of § 16.230 of this part during the previous twelve months, has not failed a chemical test for dangerous drugs, and has not refused to participate in required chemical tests.

§ 16.220 Periodic testing requirements.

(a) Whenever a physical examination is required for an individual by this subchapter, a chemical test for dangerous drugs must be included as a part of the physical examination. If a physical examination is required for a license or merchant mariner's document application, the applicant shall provide the results of the chemical test administered as part of the physical examination to the Coast Guard Regional Examination Center (REC). For those individuals required by this subchapter to receive physical examinations on a periodic basis, the individual shall provide the result of each required chemical test to the REC at the time the individual applies for a renewal of his or her license. Only the results of those chemical tests taken since the individual's most recent license renewal need be submitted.

(b) The individual is not required to undergo the periodic chemical test required by paragraph (a) of this section

if the individual provides satisfactory evidence that he or she has:

- (1) Passed a pre-employment or a periodic chemical test for dangerous drugs within the previous six months; or
- (2) Been subject to a random testing program meeting the criteria of § 16.230 of this part during the previous twelve months, has not failed a chemical test for dangerous drugs, and has not refused to participate in required chemical tests.

§ 16.230 Random testing requirements.

(a) Marine employers shall provide for the selection of crewmembers for chemical testing for dangerous drugs on a random basis. Random selection of individual crewmembers means that every member of a given population has a substantially equal chance of selection on a scientifically valid basis. The testing frequency and selection process shall be such that an employee's chance of selection continues to exist throughout his or her employment. Random selection may be accomplished by periodically selecting one or more vessels and testing all crewmembers aboard, provided each vessel subject to the marine employer's test program remains equally subject to selection.

(b) Marine employers may form or otherwise use sponsoring organizations, or may use contractors, to conduct the random chemical testing programs required by this part.

(c) Each marine employer shall ensure that crewmembers are tested on a random basis at an annual rate of not less than 50 percent.

(d) An individual may not be engaged or employed, including self employment, on a vessel in a position as master, operator, or person in charge for which a license or merchant mariner's document is required by law or regulation unless all crewmembers are subject to the random testing requirements of this section.

§ 16.240 Serious marine incident testing requirements.

The marine employer shall ensure that all persons directly involved in a serious marine incident are chemically tested for evidence of dangerous drugs and alcohol in accordance with the requirements of 46 CFR 4.06.

§ 16.250 Reasonable cause testing requirements.

(a) The marine employer shall require any crewmember engaged or employed on board a vessel owned in the United States that is required by law or regulation to engage, employ or be operated by an individual holding a license, certificate of registry, or merchant mariner's document issued

under this subchapter, who is reasonably suspected of using a dangerous drug to be chemically tested for dangerous drugs.

(b) The marine employer's decision to test must be based on a reasonable and articulable belief that the individual has used a dangerous drug based on direct observation of specific, contemporaneous physical, behavioral, or performance indicators of probable use. Where practicable, this belief should be based on the observation of the individual by two persons in supervisory positions.

(c) When the marine employer requires testing of an individual under the provisions of this section, the individual must be informed of that fact and directed to provide a urine specimen as soon as practicable. This fact shall be entered in the vessel's official log book, if one is required.

(d) If an individual refuses to provide a urine specimen when directed to do so by the employer under the provisions of this section, this fact shall be entered in the vessel's official log book, if one is required.

§ 16.260 Records.

(a) Employers shall maintain records of chemical tests which the Medical Review Officer reports as "positive" for a period of at least 5 years and shall make these records available to Coast Guard officials upon request. Records of tests reported as "negative" shall be retained for one year.

(b) The records shall be sufficient to:

- (1) Satisfy the requirements of §§ 16.210(b) and 16.220(b) of this part.
- (2) Identify the total number of individuals chemically tested annually for dangerous drugs in each of the categories of testing required by this part including the annual number of individuals failing chemical tests and the number and types of drugs for which individuals tested positive.

Subpart C—Standards for Chemical Testing for Dangerous Drugs

§ 16.301 Procedures for Transportation Workplace Drug Testing Programs.

Drug testing programs subject to this part shall be conducted in accordance with 49 CFR Part 40, Procedures for Transportation Workplace Drug Testing Programs. This subpart summarizes requirements for drug testing programs contained in those regulations. Those regulations should be consulted to determine the specific procedures which must be established and utilized. Drug testing programs required by this part shall use only drug testing laboratories

certified by the Department of Health and Human Services (DHHS).

§ 16.310 General.

(a) *Collection site.* The employer shall ensure that the collection site is adequate to provide for the collection, security, temporary storage, and shipping of specimens to a certified drug testing laboratory.

(b) *Security.* Procedures shall provide for the collection site to be secure. Collection sites dedicated solely for specimen collection must be secure at all times. Collection sites which are not dedicated solely for specimen collection must be secured during specimen collection.

(c) *Access to authorized personnel only.* No unauthorized personnel shall be permitted in any part of a collection site when specimens are collected nor shall unauthorized personnel be allowed access to stored specimens.

(d) *Privacy.* Procedures for collecting urine specimens shall allow for individual privacy unless there is reason to believe that a particular individual may alter or substitute the specimen to be provided.

(e) *Integrity of specimens.* Collection site personnel shall take precautions to ensure that each specimen is not adulterated or diluted during the collection process.

§ 16.320 Chain of custody.

(a) A chain of custody for each specimen to be chemically tested shall be established and maintained from the time of specimen collection through the testing of the specimen.

(b) If a specimen is not immediately prepared for shipment, it shall be safeguarded during temporary storage.

(c) Every effort shall be made to minimize the number of persons handling specimens.

§ 16.330 Specimen handling and shipping.

(a) The employer shall obtain a specimen collection and shipping kit to be used to collect specimens and ship them to the certified drug testing laboratory.

(b) The specimen collection and shipping kit, as required by 49 CFR Part 40, shall contain:

(1) Plastic urine specimen bottles in a sufficient quantity to accommodate the people to be tested;

(2) Means for sealing and identifying specimen bottles;

(3) Chain of custody forms;

(4) A set of step-by-step instructions which describe the proper procedures to be followed during specimen collection, handling, and shipping; and

(5) Shipping materials.

(c) The marine employer shall ensure that specimens are promptly shipped to a certified testing laboratory meeting the requirements of § 16.340. Chain of custody documents must accompany each specimen from the time of specimen collection through shipment to and testing by the laboratory.

(d) Specimens shall be shipped by an expeditious means.

§ 16.340 Test laboratory requirements.

(a) The employer shall ensure that all chemical testing for dangerous drugs required by this part is conducted by a DHHS certified laboratory.

(b) The laboratory shall meet the requirements of 49 CFR Part 40.

§ 16.350 Specimen analysis.

(a) Each specimen shall be analyzed in accordance with 49 CFR 40.24, which requires testing for:

- (1) Marijuana;
- (2) Cocaine;
- (3) Opiates;
- (4) Phencyclidine (PCP); and
- (5) Amphetamines.

(b) A specimen which indicates the presence of a dangerous drug at a level equal to or exceeding the levels established in 49 CFR 40.24 is reported to the Medical Review Officer as positive.

§ 16.360 Specimen analysis reports.

(a) The laboratory shall report all test results as required by 49 CFR 40.24(g). Reports are made within an average of five days after receipt of a specimen by the laboratory.

(b) The laboratory reports as negative all specimens which are negative on the initial test or negative on the confirmatory test. Only specimens confirmed positive are reported positive to the Medical Review Officer for a specific drug or drug metabolite.

§ 16.370 Medical review officer.

(a) The employer shall designate or appoint a Medical Review Officer (MRO) meeting the qualifications of 49 CFR 40.27. If the employer does not have a qualified individual or staff to serve as MRO, the employer may contract for the provision of MRO services as part of its drug testing program.

(b) The MRO shall review and interpret each confirmed positive test result in accordance with 49 CFR 40.27.

(c) If the MRO verifies a laboratory confirmed positive report, the MRO shall report the positive test result to the employer or the employers's designated agent.

(d) Before an individual who has failed a required chemical test for dangerous drugs may return to work aboard a vessel, the MRO shall determine that the individual is drug-free and the risk of subsequent use of dangerous drugs by that person is sufficiently low to justify his or her return to work. In addition, the individual shall agree to be subject to increased, unannounced testing for a period as determined by the MRO of up to 60 months.

§ 16.380 Release of information.

(a) Except as provided for in this part and in § 4.06-60 of this chapter, an employer shall not release individual test results or other personal information for anti-drug program records.

(b) Individual results from drug tests required by this part may be released if the individual tested signs a specific authorization for the release of the results to an identified person.

(c) Nothing in this section shall prevent an individual tested under this part from obtaining the results of that test.

Subpart D—Employee Assistance Programs**§ 16.401 Employee Assistance Program (EAP).**

The employer shall provide an Employee Assistance Program (EAP) for all crewmembers. The employer may establish the EAP as a part of its internal personnel services or the employer may contract with an entity that will provide EAP services to a crewmember. Each EAP must include education and training on drug use for crewmembers and the employer's supervisory personnel as provided below:

(a) *EAP education program:* Each EAP education program must include at least the following elements: display and distribution of informational material; display and distribution of a community service hot-line telephone number for crewmember assistance, and display and distribution of the employer's policy regarding drug and alcohol use in the workplace.

(b) *EAP training program:* An EAP training program must be conducted for the employer's crewmembers and supervisory personnel. The training program must include at least the following elements: the effects and consequences of drug and alcohol use on personal health, safety, and work environment; the manifestations and behavioral cues that may indicate drug and alcohol use and abuse; and documentation of training given to crewmembers and the employer's supervisory personnel. Supervisory personnel must receive at least 60 minutes of training.

November 14, 1988.

Clyde T. Lusk, Jr.,
Vice Admiral, U.S. Coast Guard Acting Commandant.

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Register

**Monday
November 21, 1988**

Part V

Department of Transportation

**Research and Special Programs
Administration**

49 CFR Part 199

**Control of Drug Use in Natural Gas,
Liquefied Natural Gas, and Hazardous
Liquid Pipeline Operations; Final Rule**

DEPARTMENT OF TRANSPORTATION

Research and Special Programs Administration

49 CFR Part 199

[RSPA Docket No. PS-102]
RIN 2137-AB54

Control of Drug Use in Natural Gas, Liquefied Natural Gas, and Hazardous Liquid Pipeline Operations

AGENCY: Research and Special Programs Administration (RSPA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: This final rule sets forth regulations to require operators of pipeline facilities, other than master meter systems, used for the transportation of natural gas or hazardous liquids and operators of liquefied natural gas (LNG) facilities to have an anti-drug program for employees who perform certain sensitive safety-related functions covered by the pipeline safety regulations. Testing under these rules will be conducted prior to employment, after an accident, randomly, and on the basis of reasonable cause. In addition, these regulations require that an operator provide an Employee Assistance Program (EAP) for conducting education and training regarding the effects and consequences of drug use. The rules are intended to ensure a drug-free, and hence safer, pipeline operations environment.

DATES: *Effective Date:* This rule will be effective December 21, 1988.

Operators with more than 50 employees subject to drug testing do not have to begin the drug testing required by this final rule until December 21, 1989, and operators with 50 or fewer such employees do not have to begin to conduct the program until April 23, 1990.

FOR FURTHER INFORMATION CONTACT: Cesar De Leon, Assistant Director for Regulation, Office of Pipeline Safety, Research and Special Programs Administration, Department of Transportation, 400 Seventh Street SW., Washington, DC 20590, (202) 366-1640.

SUPPLEMENTARY INFORMATION:

Background

On July 8, 1988, RSPA published a Notice of Proposed Rulemaking (NPRM) (53 FR 25892) entitled "Control of Drug Use in Natural Gas, Liquefied Natural Gas and Hazardous Liquid Pipeline Operations." This NPRM proposed to require operators of pipeline facilities (including LNG facilities but excluding

master meter systems) used for the transportation of natural gas or hazardous liquids to have an anti-drug program for employees who perform sensitive safety- and security-related functions. The NPRM invited comments from the public on these proposed rules and 73 written comments were received by the end of the comment period on September 6, 1988. These comments are in the public docket and have been reviewed in the development of the final rule.

The RSPA held public hearings on these proposed regulations on August 17, 1988, in Irving, Texas, and on September 6, 1988, in Washington, DC. Twenty-six persons testified at these hearings and the testimony was recorded by a court reporter. The transcripts of the hearings and any statements or other material submitted at the hearings are in the public docket and have been reviewed in the development of the final rule.

The NPRM proposed that this regulation would be included in Part 192, 193, or 195, as appropriate. In response to a few commenters who suggested that drug testing regulations should not be included with those commodity-specific regulations, the RSPA has adopted a new Part 199 specifically for these regulations.

Drug Testing Program Guidelines. In the NPRM for this rule, RSPA proposed that all drug testing take place in accordance with the "Mandatory Guidelines for Federal Drug Testing Programs" of the Department of Health and Human Services (DHHS) (53 FR 11970; April 11, 1988). These guidelines describe the collection and testing procedures applicable to all drug testing in the federal government, and they include safeguards for the accuracy and privacy of testing.

The DOT has determined that certain modifications of the DHHS Guidelines are appropriate in the context of this and other DOT operating administration drug-free workplace regulations. The result is the DOT *Procedures for Transportation Workplace Drug Testing Programs*. These "DOT Procedures" are intended to preserve, to the greatest extent practicable, the important safeguards provided by the DHHS Guidelines.

The Office of the Secretary of the Department of Transportation is publishing elsewhere in today's *Federal Register* an Interim Final Rule and request for comments entitled, *Procedures for Transportation Workplace Drug Testing Programs*. These Procedures, which will be codified in 49 CFR Part 40, are based on Department of Health and Human

Services Guidelines for Drug Testing, with appropriate modifications to allow them to apply to private industry and state and local governments. The new 49 CFR Part 40 provides detailed information for implementation of the drug testing requirements of this rule, setting forth requirements for such things as specimen collection procedures, laboratory procedures, and quality assurance.

Some of the modifications to the DHHS Guidelines are editorial in nature (for example, references to responsibilities of "agencies" are changed to references to "employers"). Other modifications are intended to take into account differences in the situations of federal agencies and DOT regulated industries. For example, in testing at remote sites, DOT regulated industries may find it necessary to conduct some kinds of testing in medical facilities or through use of mobile units, rather than the more permanent collection sites contemplated by the DHHS Guidelines. It may not be practicable for regulated parties to maintain on-site permanent log books. Consequently, the DOT Procedures permit alternative collection and recordkeeping procedures in these circumstances.

During the comment period on the NPRM and anti-drug rules proposed by other operating administrations, comments were received concerning the DHHS Guidelines. These comments will be incorporated in the docket for the OST interim final rule creating 49 CFR Part 40. The OST will respond to those comments, as well as comments received during the comment period for Part 40, in its notice following the end of the comment period on the interim rule.

Discussion of Comments

The RSPA received 73 timely comments in response to the NPRM, including five comments from labor unions, five from state and federal government agencies, eight from pipeline industry associations, a few comments from individuals and others, and the remainder from pipeline operators. The majority of the commenters were opposed to one or more aspects of the proposed rule, while some commenters generally supported the proposed rule. The RSPA considered all timely-filed comments submitted in response to the NPRM as well as the testimony of the 26 individuals who presented statements at the two public hearings. Discussion of the comments received on major issues and RSPA's response follows.

Specific Issues

Constitutionality of Mandatory Drug Testing. Many commenters, raising issues related to the Fourth Amendment and right of privacy, question the constitutionality of drug testing programs for pipeline personnel. The majority of commenters who raised the constitutional issues questioned the wisdom of proceeding with a drug rule while cases involving constitutionality of drug testing are pending in the Supreme Court. The commenters specifically noted that, in *Railway Labor Executives' Association v. Burnley*, the Ninth Circuit has ruled that a mandatory drug testing program of railroad employees violated the Fourth Amendment because the program required testing of entire operation crews involved in accidents without requiring the existence of a reasonable and particularized suspicion of drug use or drug-related impairment on the part of those to be tested. The Fifth Circuit took a contrary view in *National Treasury Employees Union v. Von Raab* by holding that drug testing of Customs Service employees seeking transfer to certain sensitive positions is permissible. Both cases are now pending before the United States Supreme Court. Commenters also point to the recent case of *Mark B. Harmon v. Edwin Meese III*, (No. 88-1766 GHR, U.S. District Court for the District of Columbia, decided July 29, 1988). In that case, the United States District Court for the District of Columbia granted the plaintiffs, Department of Justice employees, a preliminary injunction to enjoin the Department from implementing mandatory random drug testing on grounds that the program constituted an unreasonable search and seizure. The Court subsequently made the injunction permanent.

RSPA Response. The RSPA recognizes that there are legitimate and significant constitutional concerns surrounding drug testing in general and random drug testing as a specific component of drug testing. The RSPA acknowledges the current wide-scale litigation and apparent disparate judicial opinions on drug testing programs. Although the state of the case law is still evolving in rapid fashion and the Supreme Court has not resolved many of the relevant and complex issues, the RSPA is confident that testing of employees under this rule will withstand judicial scrutiny on constitutional grounds.

Of particular concern to the commenters was the relevance of the Fourth Amendment to drug testing. The principles of the Fourth Amendment to the U.S. Constitution are paramount in

scrutinizing the fundamental legality of many drug testing programs. The Fourth Amendment applies to "searches" conducted or mandated by the government (i.e., "state action") and protects individuals against "unreasonable searches and seizures." Action by a private party does not constitute state or federal action unless there exists a close nexus between the state and the action in question. See *Jackson v. Metropolitan Edison*, 419 U.S. 345 (1974); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972).

Because drug testing programs required under the final rule are imposed by the government, two collateral issues arise concerning whether the proposed urine tests under these programs constitute a search or a seizure and, if so, is the search or seizure unreasonable within the meaning of the Fourth Amendment. Although most courts to address the issue to date have ruled that toxicological testing of employees for the purpose of determining fitness for duty is a search within the meaning of the Fourth Amendment, the issue is not entirely settled. See *Wyman v. James*, 400 U.S. 309, 317-338 (1971) (government welfare caseworker's "home visit" as a precondition for assistance payments is not a Fourth Amendment search). See also, *Lovvorn v. City of Chattanooga*, 846 F.2d 1539, 1553-54 (6th Cir. 1988) (Guy, J., dissenting) *vacated and rehearing en banc granted* (6th Cir. Aug. 3, 1988); *National Treasury Employees Union v. von Raab*, 808 F.2d 1057, 1060, 1062 (5th Cir. 1987) (Higginbotham, J., concurring). Cf. *Mack v. United States, F.B.I.*, 814 F.2d 120, 125 n.2 (2nd Cir. 1987).

Also assuming, *arguendo*, that urine tests of personnel for prohibited substances are "searches" within the meaning of the Fourth Amendment, it is clear that while searches ordinarily must be conducted pursuant to a warrant issued on probable cause grounds, such a requirement is not always necessary. *Almeida-Sanchez v. United States*, 413 U.S. 266, 277 (1973) (Powell, J., concurring). Where, for example, "the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search," the Supreme Court has routinely held that a warrant is not required by the Fourth Amendment (citing *Camara v. Municipal Court*, 387 U.S. 523, 533 (1967). See e.g., *Griffin v. Wisconsin*, 107 S.Ct. 3164, 3167 (1987) (plurality opinion); *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985). The Supreme Court has likewise found that the probable cause standard is inappropriate where it

would defeat the purpose that the search is designed to achieve. See e.g., *New Jersey v. T.L.O.*, 469 U.S. at 340-342; *United States v. Martinez-Fuerte*, 428 U.S. 543, 560-561 (1976) (footnotes omitted) (while "some quantum of individualized suspicion is usually a prerequisite to constitutional search or seizure[,] the Fourth Amendment imposes no irreducible requirement of such suspicion").

Rather, "[t]he fundamental command of the Fourth Amendment is that searches and seizures be reasonable * * *." *New Jersey v. T.L.O.*, 469 U.S. at 340. In determining the reasonableness of a search, the Supreme Court has repeatedly stressed the importance of the facts particular to the search while acknowledging that the test of reasonableness "is not capable of precise definition or mechanical application." *Bell v. Wolfish*, 441 U.S. 520, 559 (1979). In analyzing a drug testing program, "what is reasonable depends on the context within which a search takes place." *New Jersey v. T.L.O.*, 469 U.S. at 337.

In scrutinizing whether a particular search comports with the Fourth Amendment, courts have adopted a balancing test. In general, to support a claim that a search of an individual or the individual's property is reasonable, the government must demonstrate that, on balance, the public's legitimate interest in conducting the search outweighs the individual's legitimate expectation or privacy. See e.g., *United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985); *United States v. Villamonte-Marquez*, 462 U.S. 579, 588 (1983); *Delaware v. Prouse*, 440 U.S. 648, 654 (1979). Thus, the courts must "consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." *Bell v. Wolfish*, 441 U.S. at 559.

Viewed in this light, the clear public interest in assuring that certain sensitive safety-related pipeline personnel perform their duties free of prohibited substances provides justification for testing and its limited intrusion on privacy expectations of covered employees. The drug problem in society in general and probability of drug use in the pipeline industry were discussed in the preamble of the NPRM. The impairing effects of drugs and the substantial risks to public safety posed by sensitive safety-related pipeline personnel who use drugs underlies the compelling governmental interest in the promulgation of this rule.

It is important to note that the drug testing requirements of the final rule are limited in scope and involve a minimal intrusion on privacy. As the Supreme Court has indicated, where searches are undertaken in situations where individualized suspicion is lacking, other safeguards must be relied upon to ensure that the discretion of the party conducting the search is properly defined and the scope of the search is limited. See *Delaware v. Prouse*, 440 U.S. at 654-655 (footnote omitted); *New York v. Burger*, 107 S.Ct. 2636 (1987). The drug testing requirements of the final rule place significant constraints on an operator's discretion in conducting drug testing. For example, the requirement for random drug testing calls for selection of an employee to be tested in a scientifically-acceptable manner, such as by use of a computer-based random number generator. Requirements for testing based on reasonable cause or post-accident testing also are severely circumscribed in order to limit an employer's discretion in administering these tests to employees.

The actual testing procedures that each employer is required to implement under this final rule are narrowly tailored to respect an employee's reasonable expectations of privacy. The DOT Procedures governing collection of urine samples are carefully designed to preserve privacy while protecting the integrity of the sample. The final rule contains a number of important employee safeguards, including privacy during collection under most types of tests, stringent laboratory safeguards, and provisions for challenging the test results. Other employee drug testing programs incorporating the collection and testing procedures of the DHHS Guidelines have been upheld against constitutional challenge. See *American Federation of Government Employees v. Dole*, 670 F.Supp. 445 (D.D.C. 1987), appeal filed, No. 87-5417 (D.C.Cir. Dec. 11, 1987) (upholding the constitutionality of the Department of Transportation program for random drug testing of safety-sensitive agency employees); *National Association of Air Traffic Specialists v. Dole*, 2 Ind.Emp.Rts. Cases (BNA) 68 (D.Alaska 1987) (denying a motion for a preliminary injunction against the FAA's use of urinalysis drug testing as part of an annual physical examination of the agency's air traffic specialists).

Equally significant is the fact that urine drug testing of sensitive safety-related employees is to be conducted in the "context" of the employment relationship. As the Supreme Court has noted, "[t]he operational realities of the

workplace * * * may make some employees' expectation of privacy unreasonable." *O'Connor v. Ortega*, 107 S.Ct. 1492 (1987) (emphasis in original). This is particularly important in circumstances where the employee works in an industry in which an employee's activities are subject to extensive regulation. Thus, persons who work in such "closely regulated" industries have a "reduced expectation of privacy" [*New York v. Burger*, 107 S.Ct. 2636 (1987)] and, "in effect consent[] to the restrictions placed upon them" [*Almeida-Sanchez v. United States*, 413 U.S. at 271]. For these reasons, two federal courts of appeals have upheld urinalysis testing, in the absence of particularized suspicion, in industries where pervasive regulation has reduced an employee's expectation of privacy. See *Rushton v. Nebraska Public Power Dist.*, 844 F.2d 562, 566 (8th Cir. 1988) (nuclear plant operators); *Shoemaker v. Handel*, 795 F.2d 1136, 1142 (3rd Cir.), cert. denied, 479 U.S. 986 (1986) (jockeys); *Policemen's Benevolent Ass'n, Local 318 v. Township of Washington*, 850 F.2d 133 (3rd Cir. 1988) (police officers).

The RSPA recognizes that a number of federal and state courts have rejected government-mandated drug testing programs on Fourth Amendment grounds. However, even courts striking drug testing programs have recognized that drug testing is appropriate in other contexts. See e.g., *Lovvorn v. City of Chattanooga*, 846 F.2d 1539, 1553-54 (6th Cir. 1988) (Martin, J.), vacated and rehearing en banc granted (6th Cir., August 3, 1988) ("When determining, then whether a mandatory drug search is 'reasonable,' we believe that, as the costs to society of an impaired employee increase, the requisite level of suspicion that a drug problem exists decreases."); *Policemen's Benevolent Ass'n, Local 318 v. Township of Washington*, 672 F.Supp. 779, 792 (D.N.J. 1987), rev'd 850 F.2d 133 (3rd Cir., 1988) ([T]he need to prevent a major airline disaster presents a far more compelling rationale than those presented [by the municipality in support of testing its police officers.]; *American Federation of Government Employees v. Meese*, No. C-88-1419-SAW (N.D.Cal. June 17, 1988) (issuing a preliminary injunction against a Bureau of Prison plan to test randomly all agency employees but nonetheless noting that "[t]here are cases in which compulsory drug testing may be justified in the interest of public safety or security." Memorandum opinion at 2).

The RSPA also is aware of the recent Ninth Circuit decision that held that the Federal Railroad Administration's

mandatory blood and urine tests after certain accidents, incidents, or rule violations are unconstitutional because the rules do not require a showing of "particularized suspicion" of drug or alcohol impairment prior to testing. *Railway Labor Executives' Association v. Burnley*, 839 F.2d 575 (9th Cir. 1988), cert. granted, 108 S.Ct. 2033 (1988). The Supreme Court has granted a government petition for writ of *certiorari* in this case and has ordered that the case be argued this term "in tandem" with *National Treasury Employees Union v. von Raab*, 816 F.2d 170 (5th Cir. 1987), cert. granted, 108 S.Ct. 1072 (1988) (upholding drug testing of applicants for critical safety or security sensitive positions in the U.S. Customs Service). Decisions in these cases may not be forthcoming until the Spring of 1989. Numerous commenters urge that RSPA should delay a decision on a final drug rule until these cases are resolved. The RSPA disagrees.

Although currently not resolved, the RSPA believes that RSPA's anti-drug program and similar drug testing regimens proposed by other administrations within the Department will be ruled constitutional. The critical public safety need for properly administered drug testing to ensure that employees in the transportation industry are free from drugs while performing certain sensitive safety-related functions outweighs the practical considerations which would delay rulemaking so that it could be tailored to any guidance that may be offered by the Supreme Court when the pending cases are ultimately decided. Such a decision would unnecessarily delay the adoption of this important safety rule well beyond that needed to allow reasonable time for implementation. Furthermore, partly in response to the comments that urge delay pending the Supreme Court decisions, RSPA has adjusted the implementation dates provided in this rule. This delayed implementation of the rule will ensure that it can be implemented as soon as practical and will allow time to amend the rule in the unlikely event the Supreme Court provides guidance that makes that necessary or appropriate.

Need for Pipeline Anti-Drug Program. Many commenters who oppose drug testing in general, and random testing in particular, and even commenters who support the comprehensive drug testing proposals, expressed the belief that there is not sufficient evidence of a drug problem in the pipeline industry to warrant mandated drug testing requirements. Many commenters indicated that the proposed rule did not

discuss or recognize the exemplary safety record in the pipeline industry. They also said that neither the pipeline industry nor the RSPA could show any pipeline accident that could be attributable to an employee that had been impaired due to the use of drugs. Many commenters further note that most pipeline accidents are caused by third party excavators over which the pipeline operators have little control.

The American Gas Association (AGA) also pointed out that pipelines are unique forms of transportation which do not carry people, unlike other forms of transportation regulated by DOT. Therefore, there are no passengers that depend upon the physical condition of the pipeline for their safety. Pipeline employees usually work in groups or teams, which make it less likely for an impaired worker to endanger the public. The AGA further argued that pipelines also have built-in safety features that would preclude a drug-impaired employee from causing an accident.

Comments from the Ohio Gas Association state that the presence of drugs in a person is an inadequate gauge of a person's present impairment and a person's performance on complex tasks does not necessarily suffer when under the influence of drugs. That Association cites one study that examined how well 12 daily users of an opiate could perform complex tasks. The results showed that the regular drug users performed as well as a nonuser control group.

The American Petroleum Institute (API) said it believed that any regulatory requirement, regardless of its worthwhile intentions, must demonstrate both a need and a solution that bears a positive relationship between costs and benefits. The API further asserts that a thorough assessment resulting in a demonstrated and compelling need must precede any broad and costly regulatory remedy for such a problem and they recommend that DOT undertake such a study.

The Service Employees International Union (SEIU) representing 10,000 members employed in the gas industry, primarily in gas distribution, is opposed to random and universal drug testing stating that the presence of drugs in a person's system does not indicate impairment on the job. The SEIU says that often tests detect the use of drugs in the past or during off-duty hours, and they object to the control of a worker's actions beyond the time the employee is at work.

On these bases, the commenters assert that the RSPA cannot justify the comprehensive proposals contained in the NPRM. Many of these commenters

maintain that the industry should police itself in the area of drug use and abuse.

RSPA Response. RSPA does recognize the excellent safety record of the hazardous liquid and natural gas pipeline industry. However, as stated in the NPRM, RSPA also has in the record evidence of a serious drug problem in our society generally. In fact, one in five Americans used drugs in the last year and one in ten in the last month. RSPA also believes that this societal problem may extend into the pipeline workplace. While many commenters do not believe there is a problem in their industry, no commenter presented any statistically reliable data to prove there is not a drug problem similar to the societal problems. In fact, the reason that neither RSPA nor the commenters have such data is because very little testing has been done.

On the other hand, the large majority of commenters, even those opposing the rule, agree that a drug-impaired employee should not be performing a safety-related function on a pipeline. In fact, the majority of pipeline companies commenting on the rule stated that they had implemented anti-drug programs which generally included pre-employment, post-accident, and reasonable cause testing. The RSPA believes that the safety positions on a pipeline should not be performed by those impaired by drugs and that this rulemaking action to deter drug use is warranted and will promote safety.

The RSPA does not adopt safety regulations only after an "accident" occurs. A safety regulatory agency must anticipate potential problems and act in a rational, reasonable, and practicable way to prevent "accidents" from occurring.

Although pipelines do not transport passengers, this is not a critical determinant in deciding whether an anti-drug abuse rule is needed. Many, if not most, of the transportation employees who are or are proposed to be covered in other of the Department's anti-drug abuse programs are involved in freight rather than passenger transportation. Drug-using transportation employees can endanger not just passengers but other members of the public as well. Pipelines criss-cross the nation with transmission pipeline systems and there are extensive natural gas distribution systems located in the heart of most populated areas. Release of the hazardous commodities transported by these pipelines can endanger both pipeline employees and any member of the public who may happen to live, work, attend school near, or simply pass by the pipeline. Risk is even greater for people living near LNG

storage facilities where the sudden release of a large volume of LNG can engulf surrounding areas with a flammable vapor cloud and create the potential for conflagration.

The RSPA also rejects claims that the degree of supervision afforded pipeline employees, the fact that they work in groups, and the existence of numerous built-in safety features on pipelines, renders an anti-drug abuse program unnecessary. In this regard, pipelines are not unlike many other transportation industries. For example, train operators are heavily supervised and work in teams, operating trains which are frequently equipped with safety devices that check the performance of the train operator. Yet in the January 4, 1987, Chase, Maryland, train accident, a Conrail movement passed an absolute restrictive signal and went through a switch into the path of a high-speed Amtrak train. Sixteen persons were killed and 174 were injured. The engineer and conductor of the Conrail train later admitted smoking marijuana in the cab just prior to the collision. The built-in safety devices had been tampered with.

As further example, the nuclear industry is much more extensively supervised with substantial built-in safety devices. Anti-drug programs have been recognized as appropriate under these conditions because of the grave risk to public safety. *Rushon v. Nebraska Public Power Dist.*, cited above. No amount of supervision or peer observation in the pipeline industry will assure that a drug abusing employee does not report for duty with drug use undetected and no built-in safety device is truly fail-safe.

Many reports, some referenced in the NPRM, clearly illustrate that the use of drugs impair employees' performance in the workplace. The effects of drugs have been documented in numerous studies and the RSPA is not persuaded by the few studies, mentioned by some commenters, that drugs do not affect the performance of employees and the safety of the workplace.

Accuracy of Drug Test Results. A few commenters base their opposition to drug testing on the perceived inaccuracy of analysis and test results. The commenters include the issues of false-positive test results, passive inhalation of illicit drugs, and misidentification of licit drugs resulting in a positive drug test result.

The Steelworkers' comments included the testimony of Mr. Lawrence Miike of the Office of Technology Assessment that he gave on April 9, 1987, before the Senate Committee on the Judiciary. That

testimony details the pitfalls and costs of extensive drug testing procedures and methodology where the population tested is small.

RSPA Response: The RSPA is aware of these expressed concerns because each of these issues surfaced in the early 1980's with the first series of drug testing programs introduced in the military and the private sector. In the early years of drug testing and analysis, laboratory security and analytical procedures had not reached today's level of sophistication. False-positive test results occur primarily during analysis of a specimen during an initial screening test, although contemporary screening tests, such as immunoassay tests, have become extremely accurate and approach 99 percent accuracy levels. Despite its accuracy, the initial screening test remains a less expensive test used only to yield a preliminary indication of the possible presence of drugs or drug metabolites. In order to ensure the integrity and accuracy of any final test result, each positive initial screening test result must be confirmed using the gas chromatography/mass spectrometry (GC/MS) test as approved by DHHS. The GC/MS confirmation test is an extremely accurate and sophisticated test and is virtually error-free when used in compliance with the DOT Procedures.

Operators must comply with the DOT Procedures when conducting a testing program pursuant to these rules. The DOT Procedures provide a system of checks and balances during collection and analysis of specimens to ensure the integrity and accuracy of the tests using appropriate scientific methods and rigid chain-of-custody procedures. An operator may only use a laboratory that has been certified by DHHS to process and analyze specimens. Since the mid-1980's, laboratories have become increasingly sophisticated in their analytical methods and chain-of-custody procedures. Many laboratories have compiled extensive records demonstrating scientific accuracy and protection of individual specimens.

For example, since 1980, one major drug testing laboratory has analyzed over 500,000 urine samples, conducting discrete testing for nine different drugs which resulted in nearly five million distinct analyses of these specimens. The company also has analyzed approximately 750,000 urine samples for the presence of two different drugs, resulting in nearly 1.5 million analyses of these specimens, pursuant to its contract with the military. None of the over six million analyses performed for DOT, the military, and other private and

public entities has resulted in a false-positive test result.

The RSPA does not believe that the issue of "passive inhalation" of marijuana smoke will prove to be a significant issue leading to false-positive test results. First, the threshold levels at which a drug test would yield a positive result for the presence of marijuana or marijuana metabolites are set at a level sufficiently high to preclude the possibility that such result was based on passive inhalation of marijuana smoke. Second, studies conducted to simulate the conditions that result in passive inhalation have been conducted in artificially-devised and extremely confining areas that were poorly ventilated. Also, in order to obtain a positive test result, testing was conducted immediately after this prolonged and intensive exposure to the marijuana smoke. It is unlikely that the identical circumstances would be encountered or accurately reproduced outside a laboratory.

Finally, the RSPA believes that the safeguards that will be provided in the DOT Procedures and by the medical review officer (MRO) review process will preclude misidentification of food substances or licit drugs that might produce a false-positive test result. The DOT Procedures provide an individual with an opportunity to report any legal or prescription drugs that he or she may be taking at the time of collection of the specimen. The MRO's broad authority to interpret each confirmed positive test result, to evaluate and interview an employee, based on the MRO's knowledge of drug abuse disorders, and to verify that a confirmed positive test result is accurate should preclude misidentification of licit drugs taken in accordance with a valid prescription or food substances. In summary, the RSPA believes that the two-step testing process, coupled with the DOT Procedures and the MRO procedures, provides a process by which an individual is protected from erroneous false-positive drug test results.

Employees Who Must be Tested. Many commenters requested that RSPA broadly identify employees to be tested. They argued that RSPA should not attempt to define each sensitive safety- and security-related function by job category. Some commenters stated that operators should include in their Operations and Maintenance (O&M) Plans a list of job classifications they consider to be sensitive safety- and security-related positions.

A smaller number of commenters were concerned that the term "sensitive safety- and security-related functions"

would be subject to varying interpretation by different operators. Those commenters thought that operator decisions on the types and degree of sensitive safety- and security-related functions represented by an individual's job responsibility would be arbitrary and would subject an operator to significant potential liability from employee suits. A few commenters pointed out that more specificity was needed to preclude a court challenge based on state statutes that limit random testing to very specifically identified positions or functions. A few commenters thought all employees of pipeline operators should be tested.

Practically all commenters objected strongly to including employees of contractors in the drug testing program. Some of the commenters based their objections to testing contractor employees on the transient nature of many unskilled contractor employees. Most commenters pointed out that it would be extremely difficult to assure that contractor employees had been drug tested. Transok, Inc., states that because several months pass between jobs conducted by contractors, operators would need to test these contractor employees every time that they were called in for a job.

RSPA Response. Those "sensitive safety- and security-related functions" that were proposed for testing in the NPRM have been more narrowly identified in the definition of "employee" in the final rule. An "employee" has been defined to mean a person who performs duties for an operator in the following three functional areas regulated by Part 192, 193, or 195—operation, maintenance, or emergency-response. This narrower definition of "employee" applies only to persons performing functions directly related to the pipeline safety regulations. This does not include clerical, truck driving, accounting, or any other functions not subject to Part 192, 193, or 195. These regulations do not apply to employees who perform design or construction functions regulated by Part 192, 193, or 195. The RSPA believes that the design function is subject to many varying levels of review and the employees performing those functions need not be tested. The RSPA also believes that it is not necessary to apply these regulations to employees that perform construction functions. Because the pipeline is pressure tested for strength or leakage upon completion of construction, the RSPA believes that the pressure test will ensure detection of any construction defects that may have

been caused by drug impaired employees.

Security-related functions are not covered by the final rule because functions performed by security personnel do not directly impact on the safe operation of the pipeline systems. Instead, security personnel provide secondary security protection from outside parties (primary protection being provided by fences, alarms, lighting, etc.). Given the indirect nature of this potential impact on safety, we have decided not to include such personnel within the anti-drug abuse program at this time. We do, however, encourage operators to voluntarily include such personnel in their programs.

The "employee" definition includes contractors and contractor workers. Although these persons may not be under the direct control of operators, their job performance is no less critical than the performance of employees who are employed directly for operators. Pipeline operators who choose to use contractors to perform their safety-related work have always been held responsible for compliance with safety regulations just as if the operator's own employees were performing the work. A decision to use a contractor rather than one's own employees should not result in a level of safety lower than intended.

However, two aspects of the final rule should assist operators in compliance when they use contractors: First, operators may require contractors to implement their own drug programs instead of including contractor employees in the operator's own program. So long as the operator is diligent about monitoring the contractor's compliance with such a requirement, the "knowingly" requirement should protect an operator from unfair liability. Second, limiting the employees covered by the drug rule to those who perform regulated operation, maintenance, or emergency-response functions, including welding, radiography and corrosion control on existing pipelines, should minimize the effects of the rule on operators who employ or contract for unskilled transient labor.

Pre-employment Testing. Most of the commenters who addressed pre-employment testing agreed with its use and many stated that they were already conducting pre-employment testing. However, some interpreted the proposal to be broader than intended and thus to apply to all job applicants. It was recommended that pre-employment testing be limited to otherwise successful applicants. A few commenters said that pre-employment

drug testing was easily administered because such testing could be conducted as part of the medical examination that is required by most operators for new employees.

RSPA Response. The RSPA believes that pre-employment testing is a necessary component of an effective anti-drug program. Pursuant to the rule, a pre-employment drug test is required only when an applicant has been selected for employment to perform certain regulated functions. In order to clarify the applicability of this requirement, the RSPA has revised the proposed rule. Therefore, the pre-employment testing provision does not require an operator to test each applicant for a position. The rule simply states that an employer may not hire or use anyone to perform certain functions until he or she has passed a drug test. Therefore, the employer need only test a prospective employee who the operator intends to hire and use for a position subject to drug testing. The proposal that operators would be required to notify applicants that pre-employment drug testing would be conducted has been dropped from the final rule because such a notice is not necessary to accomplish the intent of the operator's drug program. The RSPA believes that such notice should be left to the operator's discretion.

The RSPA believes that the frequency of pre-employment testing is mitigated by the continuity of an employee's involvement in a drug testing program under these new regulations in Part 199. So long as an employee is currently subject to an operator's RSPA-required anti-drug program, another operator may use that employee to perform certain functions. If an individual is not currently subject to an operator's or contractor's RSPA-required anti-drug program, whether by termination of a previous contract or previous employment, an operator would be required to conduct a pre-employment drug test before using that individual in a position subject to drug testing.

Under the amendment, it would be permissible for an operator to allow a contractor or contractor's employee to continue in the operator's anti-drug program after termination of a contract. Similarly, a contractor may choose to run its own anti-drug program in conformity with Part 199 requirements to maintain continuity. Particularly in the case of an operator who engages employees pursuant to a series of short-term contracts, both the operator and the employee benefit if the employee is continuously subject to a Part 199 anti-drug program. The operator could "rehire" the employee at any time but

would not be required to give the employee another pre-employment drug test. In addition, the employee could provide functions for another operator on a temporary basis but would not be required to participate in the other operator's anti-drug program or to submit to another pre-employment drug test.

Random Testing. A majority of commenters strongly oppose random testing for a variety of reasons. Among these reasons are the lack of evidence of drug use or abuse in the pipeline industry, invasion of individual privacy, violation of constitutionally-protected rights, and the high costs of conducting such testing. Many commenters said that such a testing program would be disruptive of the normal business activities of pipeline operators and would have a detrimental effect upon worker morale. This would result in unnecessary administrative and financial burdens.

The RSPA received many comments regarding the proposed random testing rates. However, of those commenters endorsing random testing, most suggested that a random testing rate of 10 percent to 20 percent is sufficient to deter drug use in the pipeline industry.

Some commenters argued that if the RSPA proceeds in the promulgation of a final rule, the random testing of employees should be delayed until the Supreme Court issues a decision on this issue. Some commenters also indicated that requirements to randomly test employees for the presence of drugs violated state statutes (Ohio and Vermont were among the states mentioned).

The United Steelworkers of America (Steelworkers) oppose government imposition of mandatory drug testing. The Steelworkers stated that while the public supports mandatory drug tests, as cited by the NPRM, that does not mean the public supports random tests.

RSPA Response. The comments opposing random testing on the basis of the constitutionality of and need for the rule have been discussed previously. The costs are discussed below in the Economic Analysis section. The RSPA believes that unannounced testing based on random selection is a fundamental component of an effective drug testing program. Unannounced random testing has proven to be an effective deterrent to drug use and will provide safety benefits to the pipeline industry by reducing or eliminating drug use by pipeline personnel. Unannounced random testing programs initiated by the military, including the Coast Guard, and private industry show declining drug

use, evidenced by a decrease in the number of individuals who test positive for drugs, over the course of the drug testing program.

The NPRM proposed a testing rate of up to 125 percent. No commenters provided any data to support a particular level of testing. The RSPA believes that a 50 percent testing rate is sufficient and necessary to establish a valid confidence level as well as to provide an adequate deterrent to drug use by employees. At the same time, this rate should avoid the imposition of an undue economic or administrative burden on employers and employees subject to the requirements of the regulation. In addition, the 50 percent random testing rate will produce a sufficient data base for the RSPA to analyze the scope of any drug problem in the pipeline industry generally or within any particular sector of the pipeline industry. Analysis of the random drug testing data will allow the RSPA to determine if the random testing program should be revised, including a revision of the random testing rate.

The 50 percent random testing rate is consistent with the random testing program currently applicable to sensitive safety-related employees of DOT. The DOT random testing program began in September 1987 and the random testing rate has gradually increased and will reach a level of 50 percent by the end of this year.

According to the provisions of the final rule, all operators are required to randomly select a sufficient number of employees to enable the operator to conduct unannounced testing of 50 percent of employees, who perform the applicable sensitive safety-related duties for the operator, during a calendar year. In order to test 50 percent of the employees who perform such functions, an operator may be required to select in excess of 50 percent of the employees who perform these functions for unannounced testing. Selection of a greater number of employees enables the operator to reach a 50 percent testing level despite absences due to vacations and medical leave or an inability to reach a collection site due to travel or duty requirements.

For some operators, particularly those with a large number of employees subject to drug testing, it may be a substantial burden to move from no drug testing directly to a 50 percent random testing rate. If required to have tested 50 percent of all covered employees by the end of the first year, operators might have to test at rates far above a 50 percent rate toward the end of the year, to make up for lower rates at the beginning. Operators should be

permitted to start out at a lower testing rate and work up to 50 percent as experience is gained and the testing procedure becomes administratively more routine. The RSPA does not want to create a situation which might lead to mistakes by requiring initial testing at too high a rate.

The final rule, therefore, provides an implementation procedure that allows operators to phase in random drug testing during the first 12 months in which tests are conducted. Operators would not be required to reach an annualized rate of 50 percent until the last test collection. The tests would have to be spaced reasonably through the 12-month period to permit the operator to phase in to the 50 percent rate, and the total number of tests conducted would have to be equal to at least 25 percent of the covered population.

Suppose, for example, that an employer has 1,000 sensitive safety-related employees. At a 50 percent annual rate, 500 tests would have to be conducted during each 12-month period. During the phase-in period, however, the operator could conduct only a few drug tests at the beginning of the program and then gradually increase the number of tests until, by the end of the first 12 months, the annualized rate of 50 percent was achieved. Thus, during the phase-in if the operator's anti-drug plan calls for administering random tests on 12 occasions, the operator would need to administer at least 42 tests (500 divided by 12) on the last testing occasion, but could administer fewer tests on earlier occasions. Overall, the operator would have to conduct at least 250 random tests during the phase-in period. In subsequent 12-month periods, the 50 percent rate would be maintained.

Post-accident Testing. Many industry commenters stated that their drug programs provided for conducting post-accident testing and were generally supportive of this part of the proposed regulation. However, industry commenters suggested that such testing should be limited to accidents that reasonably could have resulted from performance by an employee who was drug impaired. The commenters argued that the proposed rule to test employees whose performance is directly related to an accident was overly broad.

The National Transportation Safety Board (NTSB) recommended that a time limit of 4 hours be set for the collection of test specimens because a longer delay seriously limits the ability of tests to detect the parent drug or its psychoactive components in the blood. The NTSB further commented that toxicological samples collected even

after 4 hours may provide useful information and therefore samples should be collected even if the 4-hour period has expired. The NTSB also recommended that collection of blood specimens be required in all post-accident testing.

Some commenters objected to post-accident testing as a separate category and suggested that an accident should be one factor in deciding to conduct a "for cause" test.

RSPA Response. The RSPA agrees with the commenters who recommended limiting post-accident testing and has limited such testing to employees whose performance either contributed to an accident or cannot be completely discounted as a contributing factor to the accident. An exception is also provided when an employee's performance (e.g., maintenance) may have contributed to an accident, but whose performance occurred so far in advance of the accident that drug testing would not be useful in detecting drug use at the time of performance. This limitation in the final rule will ensure that testing is conducted only when the employee's performance may be causally linked to the accident and should allay the concerns of some commenters that a great number of employees would be subject to post-accident testing.

The final rule requires that post-accident testing be conducted as soon as possible but no later than 32 hours after an accident. This will ensure that such testing is not delayed and that the testing be conducted with dispatch. The RSPA strongly encourages employers to promptly determine if an employee is subject to post-accident testing, particularly in cases where there is little or no uncertainty that an employee's performance was a contributing factor in the accident. The RSPA intends to vigorously enforce the regulation where there is unreasonable delay in determining whether an employee should be tested under this provision or where there is unreasonable delay in testing after the determination to test is made.

The NTSB's suggestion that the RSPA require an employer to conduct post-accident testing within 4 hours after an accident is based on the time-sensitive nature of toxicological testing of blood samples. On the other hand, urinalysis testing does not involve the extreme time-critical considerations associated with collection and testing of blood samples. The RSPA believes that post-accident urinalysis testing is sufficient at this time to demonstrate an individual's drug use, evidenced by the

presence of a drug or a drug metabolite in the individual's system. Also, the RSPA proposed only urine testing in the NPRM, specifically excluding blood testing as an option, for all drug tests that would be conducted under the anti-drug program. Further, as noted in the NPRM, the blood test method of checking for the presence of drugs is considered to be a more invasive procedure. Therefore, the RSPA considers NTSB's suggestion to be beyond the scope of the notice and the RSPA has not adopted NTSB's suggestion to require post-accident testing by collecting a blood sample.

Reasonable Cause Testing. The commenters generally supported the concept of testing of an employee based on reasonable cause. However, they recommended that testing be based on reasonable suspicion of drug use, rather than on reasonable cause because the reasonable cause standard is a more restrictive standard. The commenters stated that adopting a "reasonable suspicion standard" rather than a "reasonable cause standard" would reduce the weight of evidence needed to support and invoke that standard and thus increase the frequency of such tests.

Many commenters also thought that the proposal that at least two of the employee's supervisors substantiate and concur in the determination that reasonable cause exists to test an employee is too restrictive. While having two supervisors concur that an employee's behavior warrants drug testing might be desirable in light of the subjectivity of reasonable cause testing, the commenters thought it would not be practical in all circumstances. The particular location of the job site or the time of day might make it impractical for two supervisors to concur, since many job sites may only have one supervisor and the next level of management may be many miles away. The commenters wanted operators to be given flexibility in determining whether reasonable cause exists. The NTSB questions the requirement for two supervisors to concur in the determination that "reasonable cause" exists and recommended that RSPA modify this requirement to require that one supervisor can call for reasonable cause testing, but with appropriate supervisory oversight to discourage abuse.

RSPA Response. The RSPA has not revised the regulation to be based on reasonable suspicion, because there does not appear to be a clear distinction between reasonable cause and reasonable suspicion. Also, reasonable cause is the basis for testing adopted by

other DOT agencies in their anti-drug rules. The RSPA is not persuaded that only one supervisor should determine reasonable cause because the seriousness of such a subjective determination should require the concurrence of two persons. The rule requires that at least two of the employee's supervisors, one of whom is trained in detection of possible symptoms of drug use, shall substantiate and concur in the decision to test an employee who is believed to be using a prohibited drug. The decision to test must be based on a reasonable and articulable belief that the employee is using a prohibited drug on the basis of specific, contemporaneous physical, behavioral, or performance indicators of probable drug use. The rule does not require that two supervisors observe the behavior of a suspected employee. The rule merely requires the concurrence of two supervisors. The RSPA believes that such concurrence between two supervisors can be accomplished by phone, by discussions a few hours later, or by having another supervisor travel to the job site, if only one supervisor is available at that particular job site.

An exception has been made for small operators having 50 or fewer employees subject to the drug testing program because sometimes these operators do not have two supervisors for every employee. For these operators, the substantiation of one supervisor is sufficient to require that an employee be tested for drugs, provided that supervisor has received training as required.

The RSPA has written the description of circumstances that might trigger testing under this provision in performance-type language. In addition to the broad criteria listed in the rule, evidence of repeated errors on the job, regulatory or company rule violations, or unsatisfactory time and attendance patterns, if coupled with a specific, contemporaneous event that indicates probable drug use, could provide additional, cumulative evidence to support a decision to test an employee based on reasonable cause.

Retesting. The final rule requires that confirmed-positive samples be retained for at least 365 days. The rule also creates a right to have the original sample retested if the employee makes a written request within 60 days of receipt of a final test result from the MRO. The employee may designate retesting by the original laboratory or another DHHS certified laboratory. The operator may require the employee to pay the cost of re-analysis in advance, subject to reimbursement if the retest is negative.

Employee Assistance Programs

Rehabilitation. The RSPA sought comment in the NPRM regarding four different EAP rehabilitation options. These options specified the circumstances under which an employee would be given the opportunity to seek rehabilitation. Option 1 would allow all employees to seek an opportunity for rehabilitation regardless of how the employee's drug use was detected. Option 2 would allow employees, except those employees whose drug use was detected as a result of post-accident testing or testing based on reasonable cause, to seek an opportunity for rehabilitation. Option 3 would only allow employees who volunteer to seek rehabilitation and would exclude all employees whose drug use was detected by any other means. Option 4 would permit each operator to determine its policy concerning whether rehabilitation would be offered.

Most commenters indicated that rehabilitation of employees should be left to the operator's determination because federal regulations should not interfere in the management-labor relationship. Most commenters also said that drug rehabilitation was part of union collective bargaining agreements and those issues should not be subject to federal regulations. Some commenters pointed out the significant problems faced by small operators if a position would have to be held open while the employee was rehabilitated. Most labor unions supported Option 1. Most pipeline operators supported Option 4. The NTSB supported Option 3 because the Board believed that employers should be required to remove from service all those employees in safety-sensitive positions when testing confirms drug use.

RSPA Response. RSPA agrees that rehabilitation is a labor-management decision and is not directly relevant to the safe operation and maintenance of the pipeline. Further, there are significant problems in applying rehabilitation regulations to all segments of the pipeline industry. Therefore, an EAP rehabilitation program is not mandated by these regulations. Nonetheless, the RSPA hopes that pipeline operators will provide rehabilitative assistance to the employee, especially those employees with long and significant service, by providing those employees an opportunity to be rehabilitated. With respect to NTSB's comment, the final rule prohibits an operator from using an employee in certain sensitive safety-related functions when drug use has

been confirmed, unless that individual has successfully completed a rehabilitation program.

Education and Training. Most commenters supported the EAP education and training program. Some commenters, however, thought that the type and length of EAP training should be left to the discretion of the operator.

RSPA Response. The education and training proposal in the NPRM has been adopted in the final rule. In response to a few commenters, some minor editorial changes were made to these requirements to distinguish the difference in these two facets of the drug program. The final rule permits an operator to develop and provide education and training as part of an internal program or to contract for these services. Operators may determine the extent of employee training. The 60 minutes of training proposed in the NPRM as a minimum for both employees and supervisors has been limited in the final rule to 60 minutes for supervisory personnel who will determine whether an employee must be drug tested based on reasonable cause. The RSPA believes that operators will not have difficulty in developing education and training programs for employees and supervisory personnel because of the many EAP's that are already being conducted by pipeline operators throughout the country.

Post-rehabilitation Testing. Some commenters stated that the RSPA should not specify the number of post-rehabilitation tests that should be conducted. The commenters recommended that post-rehabilitation testing should be left to the discretion of rehabilitation and medical personnel after taking into consideration the particular circumstances of each case.

RSPA Response. The RSPA has included a provision regarding unannounced testing after an employee's return to duty. This section requires an operator to subject an employee who has returned to duty following rehabilitation to a reasonable program of follow-up drug testing for not more than 60 months after the employee's return to duty. The RSPA believes that this program is required as a minimum to ensure that rehabilitation has been successful.

Confidentiality. Most commenters stated that drug test results should remain a confidential matter between the employer and the employee, as should any rehabilitation information. Several commenters stated that even employers should not have access to test results that would identify employees, but that such information should be available only to medical and

EAP personnel. Commenters were concerned that disclosure to anyone other than the employer, without the consent of the individual, could expose the employer to liability, including defamation and slander suits. Several commenters noted that disclosure would violate state privacy laws and compromise legitimate privacy interests of individuals. Most commenters objected to providing test results to prospective or future employers, and several suggested that test results should be destroyed if an applicant was not hired. Commenters differed on whether RSPA or state pipeline safety agencies should have access to records kept on testing and rehabilitation. Most commenters opposed access to records but stated that they would not object to release of general information in the form of statistics. These commenters stated that statistical information, such as the number of persons tested and the number testing positive for certain drugs, could be released to RSPA or state pipeline safety agencies.

RSPA Response. The RSPA has decided that the legitimate individual privacy rights of an individual warrant strict limitations on the availability of drug testing results and rehabilitation information. With one exception, the final rule provides that, other than in statistical form, an individual's drug test results and information about an individual's rehabilitation program may be released only with the written consent of the individual. The exception is that individual information must be released upon request by RSPA or an appropriate state pipeline safety agency as part of an accident investigation.

Preemption of State and Local Laws. Many commenters stated that state and local laws, especially those prohibiting or limiting an employer's ability to conduct random drug testing of its employees, could conflict with this rule. Several of these commenters recommended that RSPA include a regulatory provision that explicitly preempts state or local law on drug testing in the work place.

RSPA Response. The RSPA agrees with the commenters that conflicting state and local laws would interfere with an effective anti-drug program. Inconsistent state or local laws applicable to the subject matter of this final rule would frustrate the safety purposes of the rule and severely hamper implementation and administration of an anti-drug program. RSPA intends that issuance of the final rule, which mandates the conduct of an anti-drug abuse program that includes random testing, preempt, under the Supremacy Clause of the U.S.

Constitution, any state or local law, rule, regulation, order, or standard that covers testing of pipeline employees for the presence of drugs or drug metabolites. This preemption exists to the extent that the state or local law interferes with implementation of the federal law. The rule does not preempt any state law that imposes sanctions for the violation of a provision of a state criminal code related to reckless conduct leading to actual loss of life, injury, or damage to property, whether such provisions apply specifically to pipeline employees or generally to the public. Consistent with RSPA policy that recognizes that a declaration of preemption is a judicial prerogative, no express provision has been included in the rule.

Collective Bargaining. A major issue raised by many commenters concerns the effect of collective bargaining on the ability of operators to implement Federally-imposed regulations fully and in a timely manner.

Those commenters point out that operators who are parties to collective bargaining agreements are required under the National Labor Relations Act to bargain in good faith with labor unions on issues involving wages, hours, and other conditions of employment. Drug testing for industry employees and job applicants is a mandatory subject of bargaining under section 8(b) of the National Labor Relations Act. In *NLRB General Counsel Memorandum GC 87-5*, the General Counsel of the National Labor Relations Board stated that the implementation of a drug testing program would constitute a substantial change in working conditions. Thus, the commenters state that compulsory urinalysis testing is a condition of employment with regard to which employers who are parties to collective bargaining agreements must bargain in good faith.

Operators who are parties to collective bargaining agreements may have a more difficult time in adopting anti-drug programs that satisfy Part 199 criteria than in adopting broad guidelines that allow more flexibility. The commenters urged DOT to address the collective bargaining issue in its final rule in terms of granting operators sufficient time to adopt a drug plan and in allowing operators flexibility in the design and implementation of their drug programs. Commenters stated that employers will be required to bargain on the effects of drug testing, such as which positions would be covered, which drugs would be tested for, chain-of-custody procedures, who will pay, the random selection method to be used, and

whether union representatives should be involved in "for cause" decisions.

Several commenters suggested that RSPA provide additional time to develop and implement drug programs. Suggestions included 120 days after expiration of existing agreements, 12 to 15 months after issuance of the rule, and 12 months to develop and 18 months to implement a drug testing program. Commenters also mentioned grievance and arbitration issues which could delay implementation.

RSPA Response. Based on the comments, the final rule establishes an extended period to prepare for implementation of the anti-drug program. Operators with more than 50 employees subject to drug testing will have 1 year after the general effective date of this final rule to set up testing programs and EAP services. Drug testing does not have to begin until 1 year after the effective date of the rule. Operators with 50 or fewer employees subject to testing will have 16 months beyond the effective date to implement the anti-drug program. These periods should provide sufficient time to revise or adopt collective bargaining agreements.

Economic Analysis. Many commenters disagreed with the economic analysis of costs and benefits conducted in the Draft Regulatory Evaluation.

First, they state that the costs to conduct the anti-drug testing of employees were underestimated. The AGA thought that the cost of the initial urinalysis test and confirmatory test would average \$200 per employee. The AGA further indicated that the per employee costs of random testing should include the urinalysis sampling, confirmation tests, transporting workers to test sites, lost productivity of workers being tested, testing contractor employees, operating a test lab facility, maintaining a rehabilitation program, and complying with DOT recordkeeping requirements. They estimated that 240,000 employees were in sensitive safety- and security-related positions and would be subject to testing, instead of the 116,500 employees thought to be subject to testing by the RSPA. The AGA stated that they thought it would cost \$60 million dollars per year for random testing alone at the proposed 125 percent sampling rate. The AGA and several other commenters further pointed out that the \$33 million in estimated benefits erroneously assumed that all accidents in which human error was involved would have been prevented by drug testing.

RSPA Response. A Final Regulatory Evaluation has been prepared to reflect the changes in the final rule. The cost

estimates of conducting testing have been revised to be \$25 per initial test, \$35 per confirmation test, and \$35 for administrative costs. These costs have been verified by DOT based on its own testing program. The DOT program indicates that the \$35 administrative costs include specimen collection, recordkeeping, and chain-of-custody procedures. The cost of the program has been significantly reduced by limiting the random testing rate to 50 percent, by deleting the significant costs associated with rehabilitation of employees, by limiting the types of sensitive safety-related employees that must be drug tested, and by eliminating security-related positions. The discounted costs over a 10-year period of these regulations are estimated to be \$29.1 million.

The benefits of the program have been revised in the Final Regulatory Evaluation to limit the impact to employees that may have been under the influence of drugs in accidents that were due to human error or other causes. In addition, the evaluation notes the important benefits that would accrue by preventing even one major accident. The estimated discounted benefits of the program over a 10-year period are \$41.6 million.

Additional Issues

More Stringent Anti-Drug Programs. Some commenters said that their companies' drug testing programs went beyond the proposed federal rules and suggested changes to the proposed rules to allow more stringent requirements.

The final rule sets forth minimum requirements that must be included in an operator's anti-drug plan. However, the rule generally does not set forth detailed program administration requirements in most areas of the program. As a result, a significant degree of flexibility is retained for an employer's administration of its anti-drug program.

Section 199.11 of this regulation provides that an employer may test the sample obtained under this rule only for the drugs required or specifically authorized to be tested under this rule. That is, an employer must test the sample for the five major drugs listed in each DOT drug regulation. Only if, in the context of reasonable cause testing, the RSPA authorizes testing for additional Drug X under 49 CFR Part 40 (an approval which would be granted only after consultation with the Department of Health and Human Services, and only on the basis of an HHS-established testing protocol and positive threshold) may the employer also test the sample for that drug.

Absent such an approval, if the employer wants to test, in addition, for Drug Y, the employer must obtain a second sample from the employee. The obtaining of this second sample is not under the authority of the DOT regulation. The employer must base its request for the second sample on whatever other legal authority is available, since the employer cannot rely on the DOT regulation as the basis for the request.

Alcohol. Many commenters suggested that the RSPA include alcohol as a tested substance in any required testing program. These commenters pointed out that alcohol is probably the substance most abused by the public. The comments indicated that some operators already include alcohol in their anti-drug program.

The RSPA expressly excluded the issue of alcohol testing from this rulemaking for a variety of reasons stated in the NPRM; therefore, these comments are beyond the scope of the rulemaking. Alcohol testing was not proposed because the two preferred methods of testing an individual for the presence of alcohol are by breath analysis and by drawing blood. If tests were run for alcohol and for drugs, two different types of tests (blood alcohol concentration and urinalysis) would have to be conducted. This would greatly complicate the process as well as increase costs. Also, the blood test method generally is considered to be a more invasive procedure. Finally, it is easier to identify someone who abuses alcohol and reports for work impaired than someone who uses drugs.

Excluding alcohol testing from this rulemaking should not be construed to mean that the RSPA is ignoring the possibility that alcohol may be a substance of widespread abuse in the pipeline industry. The RSPA may consider rulemaking action against alcohol abuse in the future. Additionally, an operator is not prohibited from testing its employees for alcohol if the operator has the independent legal authority to do so.

Prohibited Drugs. The NTSB believes that the list of prohibited drugs is too narrow. The NTSB indicates that it has investigated a number of accidents in other modes of transportation caused by individuals impaired by drugs in Schedules III to V of the Controlled Substances Act.

In the final rule the definition of "prohibited drug" has been limited to the five substances for which drug testing is required: marijuana, cocaine, opiates, amphetamines, and phencyclidine (PCP), except that if an

operator wishes to test for other substances during reasonable cause or post-accident testing, it may do so provided it has obtained approval from RSPA, as specified in 49 CFR Part 40. In addition, the rule does not prohibit an operator from testing for other drugs if the operator has the independent legal authority to do so.

Medical Review Officer (MRO). The RSPA has clarified and expanded the role of the MRO which is established in the DHHS guidelines. For example, the MRO also is the final arbiter regarding disputes on anti-drug testing programs and schedules for unannounced testing. The MRO is also responsible to determine a schedule of unannounced testing, and when applicable, in consultation with the rehabilitation committee, for an employee who has returned to duty after rehabilitation.

State Agency Inspectors. Most commenters that commented on the subject thought that state pipeline safety agency inspectors should also be subject to a drug testing program. The RSPA plans to establish standard qualifications for state pipeline safety inspectors. The comments on the need for a drug testing program for state inspectors will be considered in any future rulemaking regarding those standards.

Small Operators. Most commenters thought that small operators should also be subject to these drug testing programs. The American Public Gas Association (APGA) recommended that master meter systems should not be excluded from participation in this program. A few commenters, such as the Iowa Association of Municipal Utilities, thought that operators having 25 or fewer employees should not be included in this rule.

The RSPA believes that the problem of drug abuse is so universal that small operators should be subject to these rules to ensure that all the nation's pipeline transportation system is protected from the hazards of drug impaired pipeline employees. Furthermore, because small operators are typically distribution companies supplying gas to the public in populated areas, the public exposure is greater. Therefore, small operators are subject to these rules, except that a change has been made to the reasonable cause testing for operators with fewer than 50 employees subject to this part. In that case, only one supervisor is necessary to determine that there is reasonable cause for an employee to be drug tested. In addition, small operators are given additional time to begin their testing programs.

The RSPA has not changed the final rule with regard to master meter systems. Those systems are still excluded from the requirements of these regulations because they do not usually perform the functions traditionally considered as operating or maintaining a pipeline. The gas distribution company is responsible for the operational characteristics of the pipeline system. Under the pipeline safety rules, the master meter operator is responsible for maintenance of the pipelines on his property. He normally contracts this out to a local maintenance or plumbing company. If there is a leak, he does not shut off the system or lower the pressure. Instead, the resident of a unit usually calls the gas distribution company, which in turn checks to see if there is a problem and then takes appropriate action. Therefore, the types of incidents that would arise, such as leaks or explosions, would not be prevented by the drug testing of master meter operators.

Action that May be Taken by an Operator. Some commenters objected to the proposal that an operator may not discipline or terminate an employee for drug-related causes if the employee successfully completes rehabilitation. They argued that the proposed rule interjected the federal government into decisions and regulations between management and labor—an untenable situation to both the supervisors and supervised employees.

The RSPA agrees and has deleted this proposal from the final rule.

Suggested Alternative Plan. Transok, Inc., suggests that instead of mandating drug testing, the RSPA should impose a fine on employers of \$500 for the first drug or alcohol related accident and \$5,000 for subsequent accidents occurring within 5 years of the initial accident. This, according to Transok, Inc., would ensure a drug-free transportation system by penalizing employers who do not adequately supervise employees.

The RSPA believes that this approach would not ensure the prevention of drug use by pipeline industry employees. First, without a drug testing program, the RSPA would not be able to identify the accidents caused by drug-impaired employees. Secondly, such an approach would not be preventative since the accidents would already have occurred.

Conflict with Foreign Laws. We have determined not to make the final rule applicable in any situation where compliance would violate the domestic laws or policies of another country. In addition, because of the potential confusion that may exist involving

application of this rule in situations where compliance could violate foreign laws or policies, we have determined not to make the rule applicable, until January 1, 1990, in any situation where a foreign government contends that compliance with our rule raises questions of compatibility with its domestic laws or policies. During the next year, the Department and other U.S. government officials will be working closely with representatives of foreign governments with the goal of reaching a permanent resolution to any conflict between our rule and foreign laws and policies. The U.S. and Canadian Governments have already established a bilateral working group in an attempt to achieve this objective. We believe that considerable progress has already been made, and further meetings will be held in the near future. While we believe that this can be a model for addressing the concerns of other countries, it is not intended to be the exclusive means. The Administrator may delay the effective date further under this section, if such delay is necessary to permit consultation with any foreign governments to be successfully completed.

It is the agency's intention to issue a notice no later than December 1, 1989, that would make any necessary amendments to the rule as a result of discussions with foreign governments. Shortly after their issuance, any such notices will be published in the Federal Register. While we recognize that any decision not to apply our rule to foreign citizens has the potential to create some anomalous conditions in competitive situations, it is the intention of the U.S. government to make every effort to resolve potential conflicts with foreign governments in a manner that accommodates their concerns while ensuring the necessary level of safety by those we regulate.

Advisory Committee Review

Section 4(b) of the NGPSA, as amended (49 App. U.S.C. 1673(b)), requires that each proposed gas pipeline safety standard be submitted to the Technical Pipeline Safety Standards Committee (TPSSC) for its consideration. Similarly, under section 204(b) of the HLPSSA (49 App. U.S.C. 2003(b)), proposed hazardous liquid pipeline safety standards must be submitted to the Technical Hazardous Liquid Pipeline Safety Standards Committee (THLPSSC). These Committees discussed the proposed rule at a joint meeting held on September 14, 1988, in Washington, DC. The official report of each Committee and the

transcript of the meeting is in the docket.

The following sets forth the recommendations of each of the advisory committees regarding the feasibility, reasonableness, and practicability on the proposed rule and disposition of these recommendations by RSPA.

TPSSC. The TPSSC voted nine to four that the proposed rule is feasible, reasonable, and practicable with the following recommended changes:

- Section VI. Adopt Option 4, which leaves rehabilitation to an operator's discretion.

RSPA Response. RSPA agrees and the requirement for a mandatory rehabilitation program has been deleted in this final rule.

- Section VI.C. Eliminate random testing.

RSPA Response. As noted previously, the RSPA believes that random testing is a critical component of an anti-drug program and that a 50 percent drug testing rate is necessary to establish a valid confidence level as well as to provide a sufficient deterrent to drug use by employees. The RSPA believes that the 50 percent rate will not impose an undue economic or administrative burden on operators and employees.

- Section VII. Eliminate this section regarding restrictions on employee discipline.

RSPA Response. RSPA concurs, and this section has been eliminated since rehabilitation is discretionary in the final rule.

- Section VIII.A. Change time for preparing anti-drug plan from 120 days to 1 year.

RSPA Response. The RSPA agrees more time is needed and has adjusted the compliance date of the final rule.

- Section I. Eliminate applicability to contractor employees in definition of "employee."

RSPA Response. As noted previously, the RSPA believes that contractor employees should be included in the group of employees that must undergo drug testing. Although these persons may not be under the direct control of operators, their job performance is no less critical than the performance of employees who work directly for operators. The RSPA has limited the employees covered by the drug rule to those who perform regulated operation, maintenance, or emergency-response functions, which should minimize the effects of the rule on operators who contract for unskilled transient laborers.

- Section IV.C. Use more performance language in training.

RSPA Response. The RSPA believes that the requirements proposed for

training generally were already in performance language. However, the proposal to require at least 60 minutes of training annually has been deleted as too specific. The final rule requires that operators provide 1 hour of training for supervisory personnel who will determine whether an employee must be drug tested based on reasonable cause. The training should include the effects and consequences of drug use and the manifestations and behavioral cues that may indicate drug use and abuse. The RSPA believes the rule provides sufficient flexibility and performance language to permit the tailoring of a training program to fit the operations of each particular operator. If an operator wishes to provide training in excess of the minimum requirements of this rule, the operator has the option to do so.

- Section IX. Limit access to records to circumstances following accidents.

RSPA Response. The RSPA has limited access to the drug testing records of a particular employee to when RSPA or a state pipeline safety agency are conducting an accident investigation.

THLPSSC. The THLPSSC voted 11 to 0 not to support the NPRM on drug testing because the need for such a rule has not been demonstrated. However, that advisory committee recommended that if the RSPA issues a final rule, the RSPA should consider the following recommendations:

- Section IV.C. Eliminate random testing.

RSPA Response. As noted previously, the RSPA believes that random testing is a critical component of an anti-drug program, and that a 50 percent drug testing rate is necessary to establish a valid confidence level as well as to provide a sufficient deterrent to drug use by employees. The RSPA believes that the 50 percent testing rate will not impose an undue economic or administrative burden on operators and employees.

- Section IV.D. Eliminate reasonable cause of testing.

RSPA Response. The RSPA has not eliminated this section. The RSPA believes that testing for "reasonable cause" is a necessary element and one of the cornerstones of the testing program. If an employee is believed to be taking prohibited drugs or under the influence of a prohibited drug while on duty, it is incumbent on the operator to determine if that employee is using prohibited drugs. More over, the comments indicate that most large operators are already conducting drug testing when their employees are believed to be using prohibited drugs.

- Section VI. Adopt Option 4, which leaves rehabilitation to an operator's discretion.

RSPA Response. The requirement for a rehabilitation program has been deleted in the final rule.

- Eliminate the applicability of the proposed rule to contractor employees.

RSPA Response. This has not been done for the reasons stated previously.

- Section I. "DHHS Guidelines" should be a minimum requirement.

RSPA Response. The DOT has modified the DHHS Guidelines and adopted them as the DOT Procedures. As in all pipeline safety regulations, the operator may exceed the requirements as set forth in the federal regulations.

- Section IX. The RSPA should be given access to statistical information only.

RSPA Response. As mentioned before, the RSPA has limited access to the drug testing records of a particular employee to when RSPA or a state pipeline safety agency are conducting an accident investigation.

- Section 195.401(d)(3). Eliminate the absolute prohibition against an employee having any amount of a prohibited drug in his system.

RSPA Response. The RSPA has eliminated this requirement to be consistent with the "DOT Procedures" covering the amount of drug in an employee's physiological system that constitutes failure of an initial or confirmatory drug test.

- Section VII. Eliminate the restrictions on employee discipline. However, don't eliminate the employee discipline restrictions if random testing and testing based on reasonable cause are included in final rule.

RSPA Response. The proposed employee discipline restrictions are not in the final rule. The RSPA does not believe that any restriction on employee discipline is needed because the final rule does not mandate rehabilitation. Absent mandatory rehabilitation, any restriction on disciplinary action would unnecessarily interject RSPA into the management-employee relationship.

- Section VIII. Change time for preparing anti-drug plan from 120 days to 1 year.

RSPA Response. The RSPA agrees more time is needed and has adjusted the compliance date of the final rule.

Regulatory Flexibility Determination

These final rules apply to all entities subject to RSPA's jurisdiction under Part 192, 193, or 195, other than operators of master meter systems. Operators of master meter systems constitute the bulk of small businesses or other small

entities that operate gas pipeline systems. There are few, if any, small entities that operate hazardous liquid pipelines subject to Part 195 or LNG facilities that are subject to Part 193. The final rule provides additional time for small operators to prepare their anti-drug plans and begin drug testing. In addition, the rule provides small operators flexibility in testing for reasonable cause by allowing one supervisor trained in detection to substantiate the decision to test. Therefore, I certify that pursuant to section 605 of the Regulatory Flexibility Act, this final rule will not have a "significant economic impact on a substantial number of small entities."

Paperwork Reduction Act

The final rule requires that the operator develop a written program and maintain records on drug testing and training. In accordance with the Paperwork Reduction Act of 1980 (Pub. L. 96-511), these information collection requirements have been submitted to the Office of Management and Budget for approval. Information need not be collected under this rule until OMB clearance is received and the OMB clearance number is published in the Federal Register.

Federalism Implications

The RSPA has reviewed the final rule in light of the Federalism considerations set forth in Executive Order 12612. Although the final rule will have to be adopted by states participating in the federal-state relationships prescribed in the Natural Gas Pipeline Safety Act of 1968 and the Hazardous Liquid Pipeline Safety Act of 1979, the impact of such adoption based upon currently available information would not be substantial. In addition, RSPA does not expect that such adoption would have a substantial direct effect on the relationship between the federal government and the states or on the distribution of power and responsibilities among the various levels of government. This expectation takes into account the preemption of inconsistent state or local laws governing drug testing as discussed supra. Accordingly, preparation of a Federalism Assessment under Executive Order 12612 is not warranted.

Significance

This final rule has been reviewed under Executive Order 12291 and determined not to be a major rule because it would not have an impact on the economy in excess of \$100 million annually, would not result in a major change in costs or prices for consumers, individual industries, government, or

any geographic region, and would not significantly affect competition. However, it is significant under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979) because it concerns a matter on which there is substantial public interest and because it involves important Departmental policy. The Draft Regulatory Evaluation has been revised to reflect the changes in the final rule. The total discounted cost of these regulations over a 10-year period is now estimated to be \$29.1 million. The discounted benefits of the program have been revised and are now estimated to be \$41.6 million over a 10-year period. A copy of the Final Regulatory Evaluation has been placed in the docket.

List of Subjects in 49 CFR Part 199

Pipeline safety, Drug testing.
In view of the foregoing, RSPA amends Title 49 of the Code of Federal Regulations by adding a new Part 199 as follows:

PART 199—DRUG TESTING

- Sec.
199.1 Scope and compliance.
199.3 Definitions.
199.5 DOT procedures.
199.7 Anti-drug plan.
199.9 Use of persons who fail or refuse a drug test.
199.11 Drug tests required.
199.13 Drug testing laboratory.
199.15 Review of drug testing results.
199.17 Retention of sample and retesting.
199.19 Employee assistance program.
199.21 Contractor employees.
199.23 Recordkeeping.
Authority: 49 App. U.S.C. 1872, 1674a, 1681, 1804, 1808, 2002, and 2040; 49 CFR 1.53

§ 199.1 Scope and compliance.

(a) This part requires operators of pipeline facilities subject to Part 192, 193, or 195 of this chapter to test employees for the presence of prohibited drugs and provide an employee assistance program. However, this part does not apply to operators of "master meter systems" defined in § 191.3 of this chapter.

(b) Operators with more than 50 employees subject to drug testing under this part need not comply with this part until December 21, 1989. Operators with 50 or fewer employees subject to drug testing under this part need not comply with this part until April 23, 1990.

(c) This part shall not apply to any person for whom compliance with this part would violate the domestic laws or policies of another country.

(d) This part is not effective until January 1, 1990, with respect to any person for whom a foreign government contends that application of this part

raises questions of compatibility with that country's domestic laws or policies. On or before December 1, 1989, the Administrator shall issue any necessary amendment resolving the applicability of this part to such person on and after January 1, 1990.

§ 199.3 Definitions.

As used in this part—

"Accident" means an incident reportable under Part 191 of this chapter involving gas pipeline facilities or LNG facilities, or an accident reportable under Part 195 of this chapter involving hazardous liquid pipeline facilities.

"Administrator" means the Administrator of the Research and Special Programs Administration (RSPA), or any person who has been delegated authority in the matter concerned.

"DOT Procedures" means the "Procedures for Transportation Workplace Drug Testing Programs" published by the Office of the Secretary of Transportation in Part 40 of this title.

"Employee" means a person who performs on a pipeline or LNG facility an operating, maintenance, or emergency-response function regulated by Part 192, 193, or 195 of this chapter. This does not include clerical, truck driving, accounting, or other functions not subject to Part 192, 193, or 195. The person may be employed by the operator, be a contractor engaged by the operator, or be employed by such a contractor.

"Fail a drug test" means that the confirmation test result shows positive evidence of the presence under DOT Procedures of a prohibited drug in an employee's system.

"Operator" means a person who owns or operates pipeline facilities subject to Part 192, 193, or 195 of this chapter.

"Pass a drug test" means that initial testing or confirmation testing under DOT Procedures does not show evidence of the presence of a prohibited drug in a person's system.

"Prohibited drug" means any of the following substances specified in Schedule I or Schedule II of the Controlled Substances Act, 21 U.S.C. 801.812 (1981 & 1987 Cum.P.P.): marijuana, cocaine, opiates, amphetamines, and phencyclidine (PCP). In addition, for the purposes of reasonable cause testing, "prohibited drug" includes any substance in Schedule I or II if an operator has obtained prior approval from RSPA, pursuant to the "DOT Procedures" in 49 CFR Part 40, to test for such substance, and if the Department of Health and Human Services has established an

approved testing protocol and positive threshold for such substance.

"Rehabilitation committee" means the individuals who develop and determine an employee's rehabilitation plan and a schedule for the employee's return to work. The committee consists of the operator or the operator's designated representative, the medical review officer, and the individual in charge of the employee's rehabilitation.

"State agency" means an agency of any of the several states, the District of Columbia, or Puerto Rico that participates under section 5 of the Natural Gas Pipeline Safety Act of 1968 (49 App. U.S.C. 1674) or section 205 of the Hazardous Liquid Pipeline Safety Act of 1979 (49 App. U.S.C. 2009).

§ 199.5 DOT procedures.

The anti-drug program required by this part must be conducted according to the requirements of this part and the DOT Procedures. In the event of conflict, the provisions of this part prevail. Terms and concepts used in this part have the same meaning as in the DOT Procedures.

§ 199.7 Anti-drug plan.

(a) Each operator shall maintain and follow a written anti-drug plan that conforms to the requirements of this part and the DOT Procedures. The plan must contain—

(1) Methods and procedures for compliance with all the requirements of this part, including the employee assistance program;

(2) The name and address of each laboratory that analyzes the specimens collected for drug testing; and

(3) The name and address of the operator's medical review officer.

§ 199.9 Use of persons who fail or refuse a drug test.

(a) An operator may not knowingly use as an employee any person who—

(1) Fails a drug test required by this part and the medical review officer makes a determination under § 199.15(d)(2); or

(2) Refuses to take a drug test required by this part.

(b) Paragraph (a)(1) of this section does not apply to a person who has—

(1) Successfully completed a rehabilitation program and passed a drug test under DOT Procedures;

(2) Been recommended by the medical review officer for return to duty as a result of the rehabilitation program; and

(3) Not failed a drug test required by this part after the successful completion of a rehabilitation program.

§ 199.11 Drug tests required.

Each operator shall conduct the following drug tests for the presence of a prohibited drug:

(a) *Pre-employment testing.* No operator may hire or contract for the use of any person as an employee unless that person passes a drug test or is covered by an anti-drug program that conforms to the requirements of this part.

(b) *Post-accident testing.* As soon as possible but no later than 32 hours after an accident, an operator shall drug test each employee whose performance either contributed to the accident or cannot be completely discounted as a contributing factor to the accident. An operator may decide not to test under this paragraph but such a decision must be based on the best information available immediately after the accident that the employee's performance could not have contributed to the accident or that, because of the time between that performance and the accident, a drug test is useless to determine whether the performance was affected by drug use.

(c) *Random testing.* Each operator shall drug test at least 50 percent of its employees every 12 months. Each operator shall select employees for testing by using a random number table or a computer-based random number generator that is matched with an employee's social security number, payroll identification number, or other appropriate identification number. However, during the first 12 months following the institution of random drug testing under this part, each operator shall meet the following conditions:

(1) The random drug testing is spread reasonably through the 12-month period;

(2) The last test collection during the year is conducted at an annualized rate of 50 percent; and

(3) The total number of tests conducted during the 12 months is equal to at least 25 percent of the covered population.

(d) *Testing based on reasonable cause.* Each operator shall drug test each employee when there is reasonable cause to believe the employee is using a prohibited drug. The decision to test must be based on a reasonable and articulable belief that the employee is using a prohibited drug on the basis of specific, contemporaneous physical, behavioral, or performance indicators of probable drug use. At least two of the employee's supervisors, one of whom is trained in detection of the possible symptoms of drug use, shall substantiate and concur in the decision to test an employee. However, in the case of operators with 50 or fewer employees subject to testing under this part, only

one supervisor of the employee trained in detecting possible drug use symptoms shall substantiate the decision to test.

(e) *Testing after rehabilitation.* A person who returns to duty as an employee after rehabilitation shall be subject to a reasonable program of follow-up drug testing without prior notice for not more than 60 months after his return to duty.

§ 199.13 Drug testing laboratory.

(a) Each operator shall use for the drug testing required by this part only drug testing laboratories certified by the Department of Health and Human Services under the DOT Procedures.

(b) The drug testing laboratory must permit—

(1) Inspections by the operator before the laboratory is awarded a testing contract; and

(2) Unannounced inspections, including examination of records, at any time, by the operator, the Administrator, and if the operator is subject to state agency jurisdiction, a representative of that state agency.

§ 199.15 Review of drug testing results.

(a) *MRO appointment.* Each operator shall designate or appoint a medical review officer (MRO). If an operator does not have a qualified individual on staff to serve as MRO, the operator may contract for the provision of MRO services as part of its anti-drug program.

(b) *MRO qualifications.* The MRO must be a licensed physician with knowledge of drug abuse disorders.

(c) *MRO duties.* The MRO shall perform the following functions for the operator:

(1) Review the results of drug testing before they are reported to the operator.

(2) Review and interpret each confirmed positive test result as follows to determine if there is an alternative medical explanation for the confirmed positive test result:

(i) Conduct a medical interview with the individual tested.

(ii) Review the individual's medical history and any relevant biomedical factors.

(iii) Review all medical records made available by the individual tested to determine if a confirmed positive test resulted from legally prescribed medication.

(iv) If necessary, require that the original specimen be reanalyzed to determine the accuracy of the reported test result.

(v) Verify that the laboratory report and assessment are correct.

(3) Determine whether and when an employee involved in a rehabilitation program may be returned to duty.

(4) Determine a schedule of unannounced testing, in consultation with the rehabilitation committee, for an employee who has returned to duty after rehabilitation.

(5) Ensure that an employee has been drug tested in accordance with the DOT Procedures before the employee returns to duty after rehabilitation.

(d) *MRO determinations.* The following rules govern MRO determinations:

(1) If the MRO determines, after appropriate review, that there is a legitimate medical explanation for the confirmed positive test result other than the unauthorized use of a prohibited drug, the MRO is not required to take further action.

(2) If the MRO determines, after appropriate review, that there is no legitimate medical explanation for the confirmed positive test result other than the unauthorized use of a prohibited drug, the MRO shall refer the individual tested to an employee assistance program, or to a personnel or administrative officer for further proceedings in accordance with the operator's anti-drug program.

(3) Based on a review of laboratory inspection reports, quality assurance and quality control data, and other drug test results, the MRO may conclude that a particular drug test result is scientifically insufficient for further action. Under these circumstances, the MRO should conclude that the test is negative for the presence of a prohibited drug or drug metabolite in an individual's system.

§ 199.17 Retention of samples and retesting.

(a) Samples that yield positive results on confirmation must be retained by the laboratory in properly secured, long-term, frozen storage for at least 365 days as required by the DOT Procedures. Within this 365-day period, the employee or his representative, the operator, the Administrator, or, if the operator is subject to the jurisdiction of a state agency, the state agency may request that the laboratory retain the sample for an additional period. If, within the 365-day period, the laboratory has not received a proper written request to retain the sample for a further reasonable period specified in the request, the sample may be

discarded following the end of the 365-period.

(b) If the medical review officer (MRO) determines there is no legitimate medical explanation for a confirmed positive test result other than the unauthorized use of a prohibited drug, the original sample must be retested if the employee makes a written request for retesting within 60 days of receipt of the final test result from the MRO. The employee may specify retesting by the Department of Health and Human Services. The operator may require the employee to pay in advance the cost of shipment (if any) and reanalysis of the sample, but the employee must be reimbursed for such expense if the retest is negative.

(c) If the employee specifies retesting by a second laboratory, the original laboratory must follow approved chain-of-custody procedures in transferring a portion of the sample.

(d) Since some analytes may deteriorate during storage, detected levels of the drug below the detection limits established in the DOT Procedures, but equal to or greater than the established sensitivity of the assay, must, as technically appropriate, be reported and considered corroborative of the original positive results.

§ 199.19 Employee assistance program.

(a) Each operator shall provide an employee assistance program (EAP) for its employees and supervisory personnel who will determine whether an employee must be drug tested based on reasonable cause. The operator may establish the EAP as a part of its internal personnel services or the operator may contract with an entity that provides EAP services. Each EAP must include education and training on drug use. At the discretion of the operator, the EPA may include an opportunity for employee rehabilitation.

(b) Education under each EAP must include at least the following elements: display and distribution of informational material; display and distribution of a community service hot-line telephone number for employee assistance; and display and distribution of the employer's policy regarding the use of prohibited drugs.

(c) Training under each EAP for supervisory personnel who will determine whether an employee must be drug tested based on reasonable cause must include one 60-minute period of

training on the specific, contemporaneous physical, behavioral, and performance indicators of probable drug use.

§ 199.21 Contractor employees.

With respect to those employees who are contractors or employed by a contractor, an operator may provide by contract that the drug testing, education, and training required by this part be carried out by the contractor provided:

(a) The operator remains responsible for ensuring that the requirements of this part are complied with; and

(b) The contractor allows access to property and records by the operator, the Administrator, and if the operator is subject to the jurisdiction of a state agency, a representative of the state agency for the purpose of monitoring the operator's compliance with the requirements of this part.

§ 199.23 Recordkeeping.

(a) Each operator shall keep the following records for the periods specified and permit access to the records as provided by paragraph (b) of this section:

(1) Records that demonstrate the collection process conforms to this part must be kept for at least 3 years.

(2) Records of employee drug test results that show employees failed a drug test, and the type of test failed (e.g., post-accident), and records that demonstrate rehabilitation, if any, must be kept for at least 5 years, and include the following information:

(i) The functions performed by employees who failed a drug test.

(ii) The prohibited drugs which were used by employees who failed a drug test.

(iii) The disposition of employees who failed a drug test (e.g., termination, rehabilitation, leave without pay).

(iv) The age of each employee who failed a drug test.

(3) Records of employee drug test results that show employees passed a drug test must be kept for at least 1 year.

(4) A record of the number of employees tested, by type of test (e.g., post-accident), must be kept for at least 5 years.

(5) Records confirming that supervisors and employees have been trained as required by this part must be kept for at least 3 years.

(b) Information regarding an individual's drug testing results or rehabilitation may be released only upon the written consent of the individual, except that such information must be released regardless of consent to the Administrator or the representative of a state agency upon request as part of an accident investigation. Statistical data related to drug testing and rehabilitation that is not name-specific and training records must be made available to the Administrator or the representative of a state agency upon request.

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