

(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. *Rushton 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.

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

M. Cynthia Douglass,

Administrator, Research and Special Programs Administration.

[FR Doc. 88-26610 Filed 11-15-88; 3:51 pm]

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Registered Federal Reporter

**Monday
November 21, 1988**

Part VI

Department of Transportation

Federal Railroad Administration

49 CFR Parts 217 and 219

**Random Drug Testing; Amendments to
Alcohol/Drug Regulations; Final Rule**

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

49 CFR Parts 217 and 219

[FRA Docket No. RSOR-6, Notice No. 20]

Random Drug Testing; Amendments to Alcohol/Drug Regulations

AGENCY: Federal Railroad Administration (FRA), DOT.

ACTION: Final rule.

SUMMARY: FRA issues a final rule prohibiting use of controlled substances without medical authorization by certain safety-sensitive railroad employees, requiring random drug testing of those employees, and amending existing regulations regarding control of alcohol and drug use in railroad operations to provide further safeguards with respect to body fluid tests for controlled substances. These measures are intended to facilitate the control of drug use in railroad operations and thereby prevent accidents, injuries, and property damage.

DATES: This final rule will be effective December 21, 1988. Pursuant to 49 CFR Part 211, FRA Rules of Practice, any petition for reconsideration must be submitted not later than 10 days prior to the effective date of the rule, or December 12, 1988. Railroad random testing programs must be submitted not later than June 19, 1989. The new Procedures for Transportation Workplace Drug Testing Programs must be implemented by the railroads by July 19, 1989, and on that date a prohibition on non-medical drug use will also become effective. Random testing programs must be implemented not later than November 20, 1989.

ADDRESSES: Any petition for reconsideration shall be submitted to the Docket Clerk (RCC-30), Office of Chief Counsel, Federal Railroad Administration, Room 8201, 400 Seventh Street, SW., Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Walter Rockey, Executive Assistant to the Associate Administrator for Safety (RRS-3), FRA, Washington, DC 20590 (Telephone: (202) 366-0897) or Grady Cothen, Special Counsel (Telephone: (202) 366-9416).

SUPPLEMENTARY INFORMATION:

Introduction

The Rulemaking

On May 10, 1988, FRA published in the Federal Register a notice of proposed rulemaking (NPRM) to (1) prohibit the use of controlled substances by safety-sensitive railroad employees

at any time, except with medical authorization, and (2) require that railroads implement random drug urine testing programs approved by the FRA (53 FR 16640). That notice also proposed to make certain incidental and conforming amendments to existing regulations regarding post-accident, reasonable cause, and pre-employment drug testing (49 CFR Part 219, Subparts C, D, and F).

On May 24, 1988, FRA published in the Federal Register an announcement of public hearings on the NPRM (54 FR 18589). Hearings were held in Chicago, Illinois, on June 14, 1988, in Atlanta, Georgia, on June 15, 1988, in Los Angeles, California, on June 23, 1988, and in Washington, DC, on June 28 and 29, 1988. The docket remained open for public comments through August 8, 1988. In keeping with FRA's announced policy to consider late-filed comments to the extent practicable, FRA has considered all comments submitted through August 22, 1988.

On July 28, 1988, FRA published in the Federal Register an Interim Rule and Interim Statements of Policy (53 FR 28594) implementing Pub. L. 100-342, the Rail Safety Improvement Act of 1988. This document amended the responsibility for compliance section of the present regulations (49 CFR 219.9) by making applicable to individuals the civil penalty sanctions of section 209 of the Federal Railroad Safety Act of 1970, as amended.

Industry and Regulatory Background

FRA has previously described at great length the historic efforts of the railroad industry to deal with safety hazards caused by alcohol and drugs and the very severe consequences to public and employee safety when those efforts have not been successful. (See documents pertinent to promulgation of the existing regulations at 48 FR 30723, July 5, 1983 (ANPRM); 49 FR 24252, June 12, 1984 (NPRM); 50 FR 31508, August 2, 1985 (Final Rule)).

The existing regulations regarding control of alcohol and drug use in railroad operations became effective beginning on February 10, 1986. Those regulations (49 CFR Part 219), which apply to employees performing functions subject to the Hours of Service Act (45 U.S.C. 61 et seq.)—

- Prohibit any employee from going or remaining on duty while using, possessing or being under the influence of alcohol or a controlled substance;
- Mandate post-accident toxicological testing following certain significant train accidents and employee fatalities;

- Require improved reporting of alcohol/drug involvement in accident/incidents (49 CFR 225.17(d));
- Provide for pre-employment drug screens;

- Authorize testing for reasonable cause (i.e., on reasonable suspicion, after an accident or injury involving human failure, or following an enumerated safety rule violation); and
- Require railroads to implement policies designed to identify employees troubled by substance abuse problems through voluntary referrals and co-worker reporting.

Over three years after issuance, elements of the rule remain under challenge in litigation now pending before the United States Supreme Court (*Burnley v. Railway Labor Executives' Association*, No. 87-1555).

This regulatory program builds on an extensive history on the part of the rail unions, the railroads and FRA in development of employee assistance programs and encouragement of education and awareness activities. Rail unions have included sobriety and mutual assistance in their organizational objectives since their formation in the last century. The railroads have, since their inception, enforced Rule G, the standard operating rule forbidding employees to go or remain on duty while using, possessing or being under the influence of alcohol. In recent years, mind-altering drugs have been added to this prohibition. Beginning in the 1950's, and on a broad front during the 1970's, the railroads developed and put in place some of the best employee assistance programs in all of American industry, serving extremely large client loads, and often including family members of employees. Employee assistance services have been made available to employees discharged for alcohol and drug-related violations, and voluntary referrals on a confidential basis have been actively encouraged.

Concurrent with the development and implementation of the existing regulatory program, FRA has actively promoted the design and implementation of peer prevention programs led by employees and supported by rail management. These efforts, known within the industry as Operation Red Block or Operation Stop (hereafter collectively "Operation Red Block"), provide a means for rank-and-file workers to protect their own safety while assisting fellow employees with substance abuse problems through education, awareness campaigns, intervention and, if necessary, confrontation of workers who come to

work impaired. In exchange for this active employee involvement, railroad managements on a number of properties have agreed to withhold discipline in first-offense cases under the companies' substance abuse policy or Rule G (the standard operating rule prohibiting alcohol and drug use, possession and impairment), even when the offense is detected through incident-driven alcohol/drug testing and/or observations of railroad supervisors. In the next month, FRA will release a case study detailing the functioning of Operation Red Block on two railroads.

In addition to regulatory and voluntary activities, the railroad companies themselves have taken a variety of initiatives to address substance abuse among their employees. For instance, of the seven large rail systems that provide roughly 85 percent of rail transportation services in the United States (Burlington Northern, Conrail, CSX Rail Transportation, Norfolk Southern, Santa Fe, Southern Pacific and Union Pacific) (hereinafter "major rail systems") five have implemented drug screens in connection with physical examinations as a part of their medical qualifications programs. These examinations are typically conducted on a periodic basis and when employees return to service or transfer from one type of job position to another. Most of these programs have been challenged in litigation under the Railway Labor Act, even though it is the uniform practice of the railroads to use the results of drug screens for medical qualifications purposes and to return the employee to service upon presentation of a negative specimen (and completion of any substance abuse treatment that the employee, or the medical officer, deem necessary). See *Railway Labor Executives Association Consolidated Rail Corporation*, 845 F.2d 1187 (3rd Cir. 1988) (barring medical testing), cert. granted — U.S. —; *Railway Labor Executives Association v. Norfolk and Western Ry.*, 833 F.2d 700 (7th Cir. 1987) (medical testing creates only minor dispute subject to arbitration); *Brotherhood of Maintenance of Way Employees, Lodge 16 v. Burlington Northern Railroad Company*, 802 F.2d 1016 (8th Cir. 1986) (post-furlough testing held minor dispute).

All of the major rail systems have in place some form of training program for supervisors in drug abuse detection, and some of the programs provide for inclusion of employees and their representatives. Union organizations have also included substance abuse prevention information in their meetings and widely disseminated publications,

and thousands of prevention committee members have received training through their railroads.

During the past three years, several thousand managers, supervisors and employee representatives have participated in conferences sponsored (or jointly sponsored) by FRA to provide information concerning FRA's regulatory program or to promote Operation Red Block. The most recent of these meetings, a working conference to share the field experience of the Operation Red Block prevention teams and expose nonparticipants to program concepts, was held in Fort Worth, Texas, in May of this year. At this conference the Federal Railroad Administrator once again strongly urged nonparticipating railroads and unions to join together in supporting Operation Red Block, and some additional Operation Red Block agreements have been signed since that time.

In short, the railroad industry approaches the 1990's having attempted every major strategy conceivable to control alcohol and drug use, with the exception of random testing. Despite these efforts and the progress they have brought, however, the public and railroad employees remain at risk.

Drug Abuse Prevalence

Tools of Measurement

Drug abuse prevalence is a changing reality that responds to many variables, including temporary or permanent effects of countermeasures implemented by employers or the government. The prevalence of drug abuse in any population is also difficult to measure directly due to a variety of reasons, including the following:

- Survey techniques using self and peer reporting are not necessarily well suited to determination of conduct that involves illegal acts. (FRA attempted to obtain reliable survey data on drug abuse in one railroad region, following the general model used for the 1978 alcohol survey conducted under the Railroad Employee Assistance Project. This effort was not successful, since drug users would not report their own use and co-workers often said there was a problem in the workplace while denying having seen incidents of drug use (which they would have been responsible for reporting had they been witnesses).)

- Supervisor/management estimates of drug abuse undertaken prior to institution of testing programs consistently understate prevalence rates as measured by other, more objective means.

- Testing programs relying on body fluids reflect only immediate past use (within the period necessary to reduce the concentration of drug or metabolite below the cut-off for the test) and thus understate the percent of population who may use drugs within a longer time period, such as a week, month or a year.

- For-cause testing programs generally produce positive rates higher than random or periodic testing, since drug abusers are overrepresented in events giving rise to the tests by virtue of their more frequent contribution to their occurrence.

- Reasonable suspicion testing, which is often aggregated with for-cause testing for reporting purposes, obviously produces high rates of detection because the individuals are selected based on signs and symptoms consistent with drug use.

- Scheduled testing with advance notice (e.g., periodic physical) produces positive rates much lower than actual incidence in the population, since all nondependent users and even some dependent users can abstain for the period necessary to avoid detection. Such testing of employed populations also results in apparent precipitous declines in prevalence as measured through the testing process. These declines may be partially illusory, since they may reflect increased effort by drug abusers to avoid detection by abstaining prior to the tests.

- Testing programs may not be directly comparable for a variety of reasons, including scope of substances tested, cut-offs on screening and confirmation, rigor with which collection is supervised, laboratory diligence in identifying diluted and adulterated samples, and varying rates of refusal. Prevalence may also vary as the population changes through turnover (entry and exit) and passage of time (as some persons put aside habits learned in their youths and others develop habits, e.g., as a result of life crises or exposure to addicting substances in the course of medical treatment).

Individual Railroad Data and Industry Estimates

In the course of this rulemaking and program administration FRA has gathered a variety of statistical indicators from the railroads that verify the presence of a substance abuse problem in the industry and permit inferences to be drawn with respect to its size and significance.

A major western rail system employing 27,000 employees reports having performed over 23,000 urinalysis tests for alcohol and drugs of abuse

since 1985, some 5,000 of which were for cause, with the remainder conducted in the medical program. In 1985, medical testing yielded a positive rate of 13.7 percent, but this indicator had dropped to 2.3 percent during the first four months of 1988. For-cause testing (including of FRA post-accident) yielded 24.1 percent positives in 1985, but had declined to 8.3 percent in 1988. This railroad's statistics for non-Hours of Service employees showed similar or slightly higher rates of detection for those groups despite broad corporate policies reaching all crafts.

Another major western railroad has pursued what it characterizes as a very aggressive for-cause testing program since August of 1984. From an initial positive rate in excess of 20 percent, the railroad reported an incidence rate of about 2 percent in early 1988. Transportation department employees on this railroad tested positive at a 5.6 percent rate in 1987. Maintenance-of-way and maintenance-of-equipment personnel tested positive at a similar or slightly lower rate. However, applicants for maintenance-of-way employment tested positive at a 38.6 percent rate as late as 1986 (the last year for which data was provided).

A major eastern rail system experiences positive rates during periodic physical examinations of under 1 percent. The railroad's reasonable cause positive rate was 4 percent in 1987, but dropped to 2 percent in the first 5 months of 1988. Return-from-furlough testing, which tends to focus on younger employees, yielded an 8.4 percent positive rate in 1987 but only 3.2 percent in 1988 (6 months).

Another major western rail system that performs most of its testing in the medical context, but also requires reasonable cause testing, experienced an overall 2.8 percent positive rate in 1987, falling to 1.6 percent in the first 5 months of 1988. This railroad's reasonable cause statistics reported under 49 CFR Part 217 showed a considerably higher positive rate for drugs in for-cause testing (15 percent), but with very few tests conducted (27), some of which may have been reasonable suspicion tests.

The major rail system on which Operation Red Block had its genesis reports the following alcohol/drug positive rates for mandatory post-accident and FRA reasonable cause testing: 8.3 percent in 1986, 10.6 percent in 1987, and 9.7 percent in 1988.

A northeastern commuter authority reports an overall positive rate of 11.4 percent for alcohol and drugs in for-cause, mandatory post-accident, and return-to-work testing since 1985.

A large midwest regional railroad has been administering mandatory post-accident and reasonable cause tests to its employees since 1986. In the first six months of that year, the railroad experienced a 13 percent positive rate (combined for both types of testing), declining to 5.3 percent in the most recent six-month period.

Railroads view alcohol and drug use as a unitary problem and so generally did not break down the two categories in presenting information in this rulemaking, so certain of the data presented above included both alcohol and drugs (where urine testing programs included alcohol). FRA has noted in the past, and through review of for-cause data submitted under 49 CFR Part 217, that the ratio of drug to alcohol positives in urine testing programs is typically about four or five to one.

As reflected by testimony in this proceeding, national and system union leaders generally estimate that use of drugs or alcohol affecting performance is a problem for approximately ten percent, or just under ten percent, of railroad employees.

National Railroad Prevalence Data

FRA administers two systems that collect prevalence data for the railroad industry. The first is a system of annual reporting regarding reasonable cause tests and Rule G dispositions (49 CFR 217.13(d)). In 1986, 5.8 percent of 2,953 reasonable cause urine tests were positive for alcohol or other drugs, with the rate for drugs other than alcohol running at 4.4 percent. In 1987, 6.8 percent of 5,439 reasonable cause urine tests were positive for alcohol or drugs, and the rate for drugs other than alcohol was 5.5 percent. In both years, marijuana and illegal stimulants (cocaine, amphetamines) dominated the "other drug" category, but central nervous system depressants (barbiturates, benzodiazepines) and narcotics (morphine and codeine) were well represented.

FRA also centrally administers a program for analysis of blood and urine specimens collected at independent medical facilities following significant railroad accidents. The categories of events are defined in such a way that roughly two-thirds of the testing events will be caused by human factors. (The remainder are selected solely based on severity and the public need to investigate causation and may, after investigation, be determined to have been caused exclusively by track, equipment or other factors.) Although the purposes of this program focus on investigation of individual accidents and targeting of resources for remediation,

data are also aggregated to reflect incidence rates among the population tested. Pertinent information from this program is displayed below:

	2/10/86- 12/31/86	1987 (12 mos.)	1/1/88- 6/30/88
Qualifying events.....	170	179	85
Employees sampled.....	738	770	336
Positive for alcohol (percent).....	.9	.4	1.2
Positive for controlled substance (unauthorized use) (percent).....	3.7	5.1	6.5

Of particular concern is the fact that 14.9 percent of commuter railroad employees tested after qualifying accidents in the past two and one-half years were positive for unauthorized use of controlled substances.

Significance

FRA remains concerned that aggregate reasonable cause and post-accident statistics remain at relatively high levels, notwithstanding material changes in certain indicators on individual railroads. The aggregate reasonable cause statistics likely reflect the commencement in 1987 of reasonable cause programs on many railroads that previously had not adopted aggressive testing strategies. As noted above, railroads that maintain testing programs at reasonable levels of effort do show significant declines in positive rates, even for short-notice testing. FRA would therefore expect the long-term trend to show declines in positive rates on a national basis.

However, the rate of positive test results in postaccident testing, an appreciable portion of which involve recent or very heavy use (based on review of blood and urine levels), continues to be alarming. Although the detection of drug use among employees involved in an accident does not invariably mean that accident was caused by drugs, it does indicate the presence of a risk factor. And the nation's railroads continue to experience accidents for which strong indications point to alcohol or drug use as a casual or contributing factor.

Accident History

When FRA published the current regulations, we stated as follows:

If we have not yet experienced a serious passenger train accident for which alcohol or drug involvement has been documented, it

must nevertheless be remembered that the potential exists.

(50 FR 31508, 31525; August 2, 1985). Despite all efforts to prevent this type of event from occurring, 16 persons were killed and 174 were injured when a Conrail movement passed an absolute restrictive signal and went through a switch into the path of a high-speed Amtrak train at Chase, Maryland, on January 4, 1987. The engineer and conductor of the Conrail engines later admitted smoking marijuana in the cab just prior to the collision. Aggregation of all costs from this accident, including property damage and settlement of wrongful death and personal injury claims, may approach \$100 million. With every hope that history will not repeat itself, we note again today that for so long as a significant number of railroad employees continue their misuse of alcohol and drugs the railroads, railroad employees and the public remain exposed to an unacceptable risk. This risk includes danger to passenger operations, the possibility of release of toxic or volatile hazardous materials, and the ever-present exposure of crewmembers from collisions and high-speed derailments.

The experience of 1987, which began so tragically with the Chase, Maryland, accident, is illustrative of the human and material consequences that drug and alcohol abuse can cause. According to a Safety Study by the National Transportation Safety Board entitled "Alcohol/Drug Use and its Impact on Railroad Safety" (NTSB/SS-88/04; June 1, 1988) (hereafter NTSB Alcohol/Drug Study), the Board found alcohol or drug involvement was a probable cause of eight rail transportation accidents in 1987, including one rail transit accident. The Board said that alcohol/drug involvement was listed as a contributing factor in the case of two additional accidents, one of them a transit accident. The 1987 railroad accidents listed in the NTSB study included, in addition to the Chase, Maryland, accident—

- New York, New York, April 10: Employee fatality during switching movement; deceased tested positive for marijuana metabolite and conductor directing movement tested positive for cocaine metabolite.

- Pittsburgh, Pennsylvania, April 11: Sideswipe/derailment of freight train overspeed on curve; 22,000 residents evacuated due to hazardous material release; engineer at fault tested positive for non-authorized use of butalbital, a barbiturate widely available in prescription medications.

- New York, New York, April 27: Rear end collision of commuter trains due to motorman failing to observe signal; 17 injured; motorman tested positive for marijuana.

- North Platte, Nebraska, September 19: Hostler left locomotives unattended without brakes, causing them to run into standing train; damage \$271,000; hostler positive for marijuana.

- Kemmerer, Wyoming, November 8: Head-on collision of freight trains resulting in fatality, 8 injuries and \$900,000 in damage; front brakeman of train not operated in accordance with signal indications positive for cocaine. Including the above-listed, FRA has identified 13 accidents during 1987 involving alcohol or drug positives where employees may have been impaired and contributed to the cause or severity of those accidents.

FRA continues to detect at least one positive for alcohol or drugs in an average of one out of five accidents for which testing is conducted. For 1988, several accidents still under investigation or review illustrate the potential impacts of impaired employees:

- Chester, Pennsylvania, January 29: High-speed passenger train routed onto track occupied by maintenance-of-way equipment, 19 injured; \$3,380,000 in property damage; block operator fled post after accident, but his urine specimen collected three and one-half days later tested positive for marijuana metabolite, and traces of the cocaine metabolite and amphetamines.

- Dixon, Illinois, March 21: Freight trains collided head-on; 3 injuries; \$195,000 in damage; dispatcher positive for alcohol (.15 percent) and one brakeman on each train tested positive for marijuana.

- Mount Vernon, New York, April 6: Rear-end collision of empty commuter trains; 1 fatality; damage \$1 million; engineer of striking train positive for marijuana metabolite (trace); dispatcher positive for opiates; block operator and assistant block operator positive for butalbital; leverman positive for marijuana.

- Fairlawn, New Jersey, May 21: Head-on collision of freight trains; 1 fatality; damage \$39,000; dispatcher positive for marijuana.

- Long Beach, California, June 9: Switching collision of freight trains; 4 injuries; \$51,000 damage; conductor of crew under investigation was positive for marijuana.

Overall, in the period January 1, 1987, through August 15, 1988, there have been 54 qualifying accidents in which one or more employees tested positive for

unauthorized use of controlled substances. Thirty-two people died in those accidents, 357 were injured, and more than \$33 million in railroad property was destroyed.

In summary, FRA remains concerned that all of the necessary and quite useful measures implemented to date have not been sufficient to bring an end to the threat to rail safety posed by misuse of alcohol and drugs.

The Proposed Rule

The NPRM proposed to prohibit use by safety-sensitive railroad employees of a controlled substance at any time, except with medical authorization, and to require implementation of random drug testing programs for those employees. The preamble and proposed rule text set out a number of issues to be resolved with respect to the design and implementation of these provisions and options for disposition of employees testing positive. The NPRM also proposed to amend the penalty schedule to Part 219 and make amendments to Part 217 to collect adequate data on the random testing program.

Discussion of Comments and Conclusions

General Overview of the Major Issues

In response to the NPRM, the FRA received comments from seventy-six persons, including written submissions and oral testimony at five public hearings. June hearings were held in Chicago, Atlanta, Los Angeles and Washington and all written comments received by August 22, 1988 were considered. Comments were received from thirty-six railroads, two organizations representing railroads, ten employee organizations, thirteen individuals, nine persons or organizations with some expertise in analysis of urine for drugs of abuse, and six public interest organizations.

All commenters supported the goal of a drug-free railroad operating environment. In general terms, the use of random testing as a means of achieving this goal received broad support from rail operators and members of the drug and alcohol testing industry. Labor organizations, however, opposed the imposition of mandatory random drug testing.

Evidence of a problem. Railroads noted that present testing programs reveal current drug use by employees (see discussion of data culled from railroad drug testing experience to date, above). All Class I carriers expressed concern at the level of drug usage being detected, stating that such usage has a

detrimental effect on the safety of operations. A number of commenters, including Safe Travel America, pointed to the Chase, Maryland accident as evidence of the grave consequences of drug use.

Support for random testing. Rail carriers were joined in their support of random testing by a number of public interest groups, individuals, and members of the drug testing industry. These commenters are alarmed by the evidence of drug use among railroad employees and they believe that a random drug testing program is necessary to confront the problem. They believe that random testing is the most effective deterrent to drug use available. During oral testimony it was frequently stated that the interests of public safety justify the slight intrusion upon employee privacy.

Random testing as a deterrent. FRA heard from several railroads and experts who believe that random testing is justified because it provides a deterrent to on-duty and off-duty drug use. Commenters were nearly unanimous in their appraisal of the deterrent effect of random testing. Peter Bensinger of Bensinger, DuPont and Associates stated that, based upon his own considerable experience in the field, he believes that random testing is the most effective deterrent yet devised. Only the RLEA doubted the power of random testing's deterrent effect, stating that employee fear of discipline for a rule violation presents a deterrent of at least equal weight.

Opposition to random testing. Random testing was opposed by labor groups, CSX Transportation, eight individuals, and the Epilepsy Foundation of America. These commenters believe that random testing is an unacceptably intrusive and unnecessary method of curbing drug use by railroad employees. Random testing was opposed on constitutional grounds, and a number of alternatives were suggested. Many feared that railroads would use this new form of testing to harass union locals and employees. Others object to what they perceive to be an underlying bias—that an employee is guilty of misconduct until he can prove his innocence. The Railway Labor Executives Association (RLEA) contended that random testing would encourage drug users to switch to more dangerous drugs for which testing is not conducted.

The National Transportation Safety Board (NTSB) believed that other measures should be implemented before it is decided that random testing should be implemented. (See discussion below.)

Alternative Strategies. Labor, CSX Transportation, and the NTSB also believe that the implementation of testing is unnecessary and may undermine other efforts at controlling drug use. Several alternatives were suggested:

1. FRA should encourage carriers to establish Operation Red Block programs. These programs are supported because they instill trust between management and employees while being more effective in removing impaired employees from service. CSX Transportation submitted information which was said to indicate that their own Red Block program has helped to improve their safety record and to drastically reduce instances of Rule G violations.

2. FRA should only mandate that carriers develop their own testing programs through collective bargaining with unions. This was opposed by testing proponents because it would delay the imposition of testing and possibly require employers to administer numerous different programs for the various crafts. Safe Travel America disfavored this approach because it would prevent public input into the process. Some commenters also believed that a uniform nationwide program is superior to a piecemeal approach.

3. FRA should encourage training of supervisors in the detection of troubled employees.

4. FRA should do more to promote safety equipment such as automatic train control devices.

5. FRA should regulate carrier practices which create an environment conducive to drug and alcohol abuse. Among the factors thought to encourage abuse are long hours, long layovers and overnight stays away from home terminals.

Labor unions and the NTSB stated that these efforts coupled with existing programs (post-accident testing, reasonable cause testing, pre-employment testing, medical testing, Rule G and employee assistance programs (EAP's)) should provide the necessary remedy for employee drug use. (NTSB's comments are more fully discussed below.)

CSX proposed that FRA support these programs and help establish acceptable levels of positive test results for the various non-selective testing methods. CSX suggested that random testing be mandated only for those carriers or regions that fail to meet the established target rate.

Constitutional Issues Regarding Random Drug Testing

Comments: The FRA received few detailed comments on the constitutionality of the proposed rule. A number of railroads, individuals and public interest groups indicated that they believe the FRA proposal to be constitutional because the public right to safety overrides an employee's less significant claim to privacy. Labor groups, CSX Transportation, and the Epilepsy Foundation of America, however, either questioned or affirmatively challenged the constitutionality of the rule.

A commenter also submitted the views of Senator Daniel Inouye (prepared for a legislative committee report), who viewed random testing of transportation employees as constitutionally defective by virtue of its impact on all employees, including the majority who do not misuse drugs. See Senate Rept. 100-43 at 39-42 (additional views on S. 1041).

Conclusions: Commenters in this rulemaking have not contended that a drug-free policy such as contained in section 219.102 of the proposed rule infringes protected constitutional interests, and we believe it is clear that it would not. See *New York Transit Authority v. Beazer*, 440 U.S. 568 (1979).

FRA is keenly aware of the constitutional issues posed by random drug testing. Those issues, and logically antecedent issues, are being litigated in a variety of forums already, and will likely be substantially resolved by the Supreme Court in pending litigation and cases already in the courts of appeals before the instant rule could wind its way through the judicial process. The Federal Aviation Administration addresses the constitutional issues in its preamble elsewhere in today's *Federal Register*. A very similar analysis applies to the issues in the instant rule applicable to railroad employees.

FRA has endeavored to craft the final rule in a manner ensuring that random testing programs meet objective criteria that protect against any exercise of discretion by the railroad in selecting a particular employee for testing. Urine collections will occur in private, except where carefully delineated conditions provide reason to believe that the employee may alter or substitute the specimen. The final rule carefully protects medical information necessarily developed incident to the testing process (i.e., provided by the employee at the time of sample collection or revealed through testing for controlled substances that have therapeutic uses).

Confidentiality protections for test results involving even illicit drug use will limit the perceived intrusiveness of the program from the point of view of the abuser, and non-abusers will obviously have nothing to fear. The final rule also affirms due process rights through careful control of the testing process itself, including review of test results by an expert fact-finder (the medical review officer), opportunity for the employee to make further explanations prior to any action on a laboratory report, access to underlying records and right to have the sample analyzed by another certified laboratory. Existing procedural rights with respect to employment remain unabridged (e.g., investigation, grievance and adjustment under the collective bargaining agreement and section 3 of the Railway Labor Act, 45 U.S.C. 153).

FRA has, in short, adopted the full range of protections useful to ensure fairness and confidentiality and to check abuse of discretion. The sanctions against individuals now available under amendments made by the Rail Safety Improvement Act of 1988 will further strengthen FRA's ability to enforce these important protections. Further, FRA is making the enhanced testing safeguards applicable to our existing rule.

Extent of the Drug Problem in Rail Transportation

Comments: Comments regarding the prevalence of the drug problem in rail transportation are discussed above. Virtually all commenters agreed that drug use remains at unacceptable levels and that it poses a safety risk that must be addressed. Commenters differed in the means deemed appropriate to address the problem.

Conclusions: Like the commenters, FRA remains concerned that misuse of controlled substances by railroad employees engaged in safety-sensitive duties is a significant problem that threatens the safety of railroad employees and the public for so long as it continues.

Accuracy of Drug Test Results

Comments: The FRA received comments from labor groups and individuals questioning the accuracy of drug testing. Experts testified, however, that use of GC/MS by the Coast Guard and U.S. Navy has turned up no false positives after thousands of proficiency tests. PharmChem, Inc. related that their own experience has shown that with proper confirmation techniques, drug testing is essentially errorless if chain of custody is properly maintained.

Conclusions: The accuracy of properly administered urine testing for drugs of abuse is not a matter of speculation. The scientific tools are available to make positive identification of specific compounds in human body fluids. See, e.g., *Urine Testing for Drugs of Abuse*, Research Monograph Series No. 73 (National Institute on Drug Abuse 1986); *GC/MS Assays for Abused Drugs in Body Fluids*, Research Monograph Series No. 32 (National Institute on Drug Abuse 1980). Commercial testing laboratories have extensive experience in the use of relevant technologies. The College of American Pathologists has for many years administered an open proficiency testing program for clinical laboratories performing drug testing. The United States armed services have conclusively demonstrated the value of blind proficiency testing as a means of ensuring reliable identification of positive specimens and documentation that no false positive tests are being reported, and two major railroads are already utilizing this technique. Finally, the Department of Health and Human Services is now administering a laboratory certification program that will identify a number of major laboratories capable of providing first-rate forensic control and documentation of testing, as well as first-rate analytical toxicology. Certification of additional laboratories is expected in the next few weeks, as the carefully-planned process of initial proficiency testing and laboratory inspection is completed.

As adapted for private sector application, the HHS Guidelines provide a workable and forensically sound approach to determination of the presence of drugs and their metabolites in urine. Care must be taken, of course, to prevent, detect and correct any error in application of the safeguards provided by the Guidelines and sound laboratory practice. FRA believes such errors, if any, will be extremely rare and readily susceptible to correction.

Coverage of Employees

Comments: Four railroads and one substance abuse expert testified in support of the current provision mandating testing only for employees covered by the Hours of Service Act. But a majority of commenters favored extending the degree of coverage to some extent. Labor, several railroads, and the NTSB all favored testing of first line supervisors. Testing of these individuals was supported because they make frequent safety critical decisions and because the testing of managers promotes employee faith in the fairness of the program.

There was also broad support, especially among carriers, for extending testing to maintenance of way employees. It was stated that these employees operate machinery over tracks while normal operations are in progress. They therefore pose as much of a threat to safety as employees who are covered by the Hours of Service Act.

To a lesser extent, extension of coverage to the following groups was supported: car inspectors, shop mechanics, railroad officers who carry firearms, and clerks who prepare paperwork for the transportation of hazardous materials.

Conclusions: FRA is persuaded that regulations for the control of alcohol and drug use should, from the point of view of ideal or optimum safety objectives, extend to all employees engaged in functions bearing directly on the safety of rail operations. Railroad policies generally reflect this point of view, as well. Given this objective, a Federal rule would extend to those actually involved in moving freight and passengers, those responsible for inspection or maintenance of rail track and structures, employees who work on a rolling stock or inspect it for compliance with Federal standards, those who prepare shipping papers for hazardous materials, on-board service personnel on passenger trains, and a variety of other employees who are few in number but whose responsibilities can affect safety.

Nevertheless, to date FRA has limited the coverage of its regulations to employees directly involved in moving passengers and freight and maintaining signal systems that govern train operations, i.e., employees covered by the Hours of Service Act. FRA has maintained this distinction for a variety of reasons, including the frequency with which these employees perform safety-sensitive tasks, the devastation that they can produce by act or omission, and the demonstrable impacts that occur when any single employee is impaired by alcohol or drugs. Congressional attention to these functions through the Hours of Service Act has also established a strong precedent for focusing the alcohol/drug control program on persons performing these functions. Further, FRA has sought to focus its enforcement efforts on areas of most immediate need.

There is a growing body of opinion within the railroad industry, as expressed in the comments submitted in response to the NPRM, the additional employees, salaried and wage-earning, should be included within the coverage of measures such as the drug-free rule and random drug testing. FRA agrees

that broader coverage may be warranted, based on known safety exposure and prevalence of drug use among other railroad employees. However, FRA is not willing to effectively delegate the task of defining the classes of employees covered by use of a vague definitional formula; nor can FRA overlook the issues of degree that are particularly critical when one is considering a random testing proposal. Further, FRA is cognizant of the burdens imposed on employees and railroads by any random testing program and seeks to limit those burdens to the extent possible consistent with safety.

FRA believes that the appropriate approach to this issue is to put in place the remaining elements necessary to comprise a comprehensive alcohol/drug regulatory program for employees performing functions subject to the Hours of Service Act. Both this rulemaking and successful completion of pending litigation will be necessary to achieve this objective. The issue of broader coverage can then be considered at an appropriate later date with respect to all or a portion of the elements of the comprehensive basic program.

Drug-Free Rule

Comments: The great majority of commenters support FRA efforts to prohibit off-duty as well as on-duty use. These commenters offered several compelling reasons for proscribing off-duty use. Most significantly, a number of experts and railroads pointed to the recent scientific studies which indicate that off-duty use has a lingering effect and can cause impairment even while the user is not subject to noticeable acute effects. It is argued that this compromise of fitness is not permissible in an employee who performs safety critical functions.

Commenters offered several other reasons for a drug-free rule. Any employee found to have drugs in his system is more likely to use drugs on-duty. Two commenters also noted that drug use is infectious—a casual off-duty user may be reluctant to turn in a fellow employee who is impaired on the job. An employee who uses drugs off-duty may be distracted while on the job by concerns over how he will obtain and pay for his next supply. One carrier expressed its view that a person willing to break laws (as evidence by illicit drug use) should not be entrusted with the responsibilities of a safety sensitive position. A few commenters contended that testing for off-duty use is necessary because present testing techniques can only determine the presence of drugs, and not whether the subject is impaired.

Only a few commenters objected to use of testing technologies that necessarily discover off-duty use. The RLEA based its objection on the contention that present studies are inconclusive as to the lingering effects of drug use. The RLEA argued that an intrusion upon employee privacy should not be based upon an unproven premise. Dr. John P. Morgan and Dr. Arthur J. McBay also question the reliability of studies tending to indicate that drug use can have lingering effects. Dr. McBay takes the position, in effect, that the safety risk associated with marijuana use is not documented, particularly after the acute effects of the drug are no longer apparent to the user, and that FRA overestimated drug abuse prevalence in rail transportation. (Dr. McBay further took a skeptical approach to virtually every additional major tenet of the rulemaking, even going so far as to question whether marijuana use is a public health program. (Cf., e.g., Institute of Medicine, *Marijuana and Health* (National Academy Press 1982).)

Conclusions: The fundamental premise of this rulemaking is that public and employee safety can be adequately protected only if employees engaged in safety-sensitive functions are free from the effects of drugs used without proper medical supervision. As described in the NPRM, the effects of drugs may include after-effects, chronic effects and withdrawal effects, as well as acute drug intoxication. The great weight of the comments in response to the NPRM supported FRA's judgment that it is not reasonable to allow the public to remain at risk from the consequences of drug abuse by attempting to address the problem only when overt manifestations present themselves in an unambiguous manner in the workplace.

Certain of the labor organizations continue to refer to the employee's right to do what he pleases "on his own time." However, employee representatives expressed differing viewpoints on this issue during the rulemaking. Employees, like transportation companies and government regulators, are gradually coming to the realization that society pays a substantial price for unauthorized use of controlled substances and that it is not possible to conveniently separate drug abuse off duty from fitness on duty. This realization is dramatically evidenced by the CSX Rail agreements for reasonable cause (post-accident or casualty) and return-to-service drug urine testing. The agreements implicitly recognize that any employee bringing residues of drug use to a fitness-for-duty examination is a

matter of legitimate safety concern, whether or not on-duty use or impairment can be demonstrated. The consequences of detection in this context is removal from service until successful completion of rehabilitation, and it is a consequence fully endorsed by the labor organizations in a collectively bargained agreement. A similar recognition is embodied in the recent agreement between the Brotherhood of Railroad Signalmen and the Southeastern Pennsylvania Transportation Authority.

In the final analysis FRA's judgment that safety-sensitive employees should be free of drugs and their lingering effects is not one based on a handful of scientific studies or opinions of individual experts. Scientific studies can be cited for virtually any proposition, and there are as many opinions on issues of this breadth as there are experts. FRA's judgment is informed by the collective experience of the railroad industry, drug abuse clinicians, and those who have participated in this and prior rulemakings on control of alcohol and drug use. It is not possible to detail the full extent of that experience in any reasonable number of pages, but the following considerations are illustrative:

1. FRA has noted the prominence of cocaine abusers in serious accidents where evidence of heavy use was present, but recency of use was in question. FRA has also noted the clinical data associated with cocaine use that indicates a variety of adverse after-effects which could negatively impact employee fitness.

2. Misuse of controlled substances may be of concern even where prompted by the most innocent of motivations, such as self-medication for an illness. The Pittsburgh, Pennsylvania, accident of April 11, 1987, was caused by the inattention of a locomotive engineer who failed to control the speed of his train. The NTSB determined that the engineer's use of a medication containing butalbital contributed to probable cause. The engineer had obtained the medication from a family member and used it for flu symptoms with the last dose having been taken a full 24 hours prior to the accident. The engineer likely did not realize that the plasma half-life of the drug is in excess of 24 hours, permitting successive doses to build up in the body, so that a therapeutic level of the drug remained in his blood at the time of the accident with potentially sedating effects. The accident resulted in release of hazardous materials and evacuation of 22,000 residents of nearby neighborhoods and 122 minor injuries;

and any accident of this kind has the potential for much more serious harm to the public.

3. PCP and other hallucinogens may cause personality disorders and delayed effects long after they cease to be detectable in body fluids.

4. Like those addicted to alcohol, persons addicted to certain central nervous system depressants and narcotics may suffer severe withdrawal effects including seizures if they fail to use the drug at a maintenance level.

5. Railroad medical officers and employee assistance directors participating in this rulemaking are uniform in their judgments that unauthorized use of controlled substances is a fitness concern for the employer for a variety of reasons, including the fact that the employee using drugs may be unable to judge the full extent or duration of drug effects. FRA judges these representations to be consistent with the notable commitment of these professionals to rehabilitation of those willing to accept help.

Common sense, clinical experience and the experience of the FRA and its regulated industry offer persuasive reasons for implementing a drug-free policy, as does endorsement of this rulemaking by the National Institute on Drug Abuse.

FRA has noted that this conclusion is also supported in sworn declarations of a number of experts that have been introduced in evidence in pending litigation regarding other drug testing programs. For instance, George W. Woody, M.D., Chief of the Substance Abuse Treatment Unit at the Philadelphia Veterans Administration Medical Center and Professor of Clinical Psychiatry at the University of Pennsylvania described the mental disorders produced by prolonged use of stimulants and hallucinogens, and depression caused by sedative users, both of which were observed "long after the acute effects of the drug had ended." Dr. Woody noted that a drug use pattern that appears casual and controlled may change in complexion with great rapidity:

[A]lthough a person might initially use a substance of abuse in off-duty hours and demonstrate little or no impairment on the job, the mere fact that the person uses the drug carries a significant danger that this controlled, sporadic pattern will change to an uncontrolled, abusive pattern in which he or she is unable to check their impulses to use the drug. The result is more frequent use and a greater likelihood of becoming impaired while at work.

Declaration of George D. Woody, M.D., April 9, 1987, at 4. Dr. Marian Fischman of Johns Hopkins University School of

Medicine indicated that residual "next day" effects from marijuana use appear to be supported by recent studies and may be of particular concern if the subject does not expect such effects. Dr. Fischman also noted the deleterious residual effects of chronic use of stimulants. Both Drs. Woody and Fischman defend the study of pilot performance cited in the NPRM (Yesavage et al., 1985) as soundly designed and suggestive of residual effects from marijuana. These declarations and others of a similar nature were entered in the docket of this rulemaking.

It should not require repeating that there can be no surveillance of employees during their off-duty time. The final rule neither authorizes nor requires any such surveillance. A railroad employee's off-duty time is certainly his or her own. But this rule does accomplish two objectives: First, the employee may not engage in non-authorized use of controlled substances. This merely requires that prescription medication be used as prescribed, that physicians be informed of the safety-sensitive nature of the employee's duties before prescribing the manner in which the drug may be used (sec. 219.103), and that employees not use substances that it would be unlawful to possess in any event. With respect to conduct during off-duty periods, voluntary compliance is the means of enforcement. Second, the rule provides notice that an employee who appears on the job with unauthorized controlled substances or their metabolites in the employee's system is subject to detection. This prospect, enforced through urine testing, will provide incentives for changed behavior.

Random Testing: Detection and Deterrence

Comments. Commenters generally agreed that detection of drug abuse problems by employed persons seeking to hide their habits is ordinarily not possible until very advanced stages of dependency, and even then indicators do not point unambiguously to drug abuse, as opposed to other medical or psychological problems. As Dr. J. Michael Walsh of NIDA stated:

Very often the signs and symptoms of impairment for abused drugs are subtle to both the user and to those around him, especially in the early stages of abuse, making it almost impossible for friends or co-workers to detect the problem * * *. By the time it is readily detectable it is far too late normally.

Dr. Walsh noted supervisors may wish to ignore the indications that they do receive, because of the great difficulty of

dealing with the problem in most employment contexts.

A physician/consultant who has served as the Federal Air Surgeon put it this way:

For illegal drugs there are significant impairments beyond the period of the "high." These may last for hours and even days. The impairments are insidious, subtle and unpredictable, making it almost impossible for friends or co-workers to detect the problem.

A large regional railroad stated that in its experience only about one of four drug positives detected has been through reasonable suspicion testing, since it is very difficult for supervisors to pick up indicators.

Conclusions. FRA found portions of its existing rule provisions on the premise that drug use—even current drug use accompanied by acute effects—is not reliably detectable in a clear majority of cases, even by supervisors who have received a reasonable amount of pertinent training. Experience under FRA's post-accident testing rule and elements of the reasonable cause testing program that do not rely upon individualized reasonable suspicion was verified and underscored the correctness of this judgment. Several thousand railroad supervisors have been trained in recognizing the signs and symptoms of drug abuse, and thousands of railroad employees continue to use drugs. Even the drug abuser who may show symptoms will be inclined to deny to himself that that is the case, thus undercutting the deterrent effect of a reasonable suspicion testing policy. Quite apart from the difficulty of detecting drug abuse through observations, it is clear that supervisory observation could not be an exclusive tool of detection in the railroad industry because of the long periods during which supervisors are not present. Even where pre-departure supervisory observation is possible, employees can simply bring drugs into the workplace and use those drugs when they have departed their initial terminal (as happened in the Chase, Maryland, accident).

Clearly, some drug use is detectable. Gross intoxication might be noticeable by virtually any supervisor (though the supervisor would need to know what action to take); supervisors trained in signs and symptoms will be capable of making reasonable suspicion determinations in additional cases; and advanced dependency is often discernible through supervisory alertness or careful personnel practices. However, it is a sad fact that the

concerted efforts of railroad companies and others to employ these important tools have shown their limitations. This conclusion is amply supported by testimony in this proceeding and in the proceeding for review of the current alcohol/drug rule (52 FR 2118; January 20, 1987).

FRA has also noted the consistency of this judgment with expert testimony by witnesses in district court litigation regarding similar testing programs. For instance Robert L. DuPont, M.D., explained, in a detailed review of diagnostic criteria for marijuana and cocaine use, why those criteria are either not subject to observation by a supervisor or are non-specific (i.e., occur as symptoms of allergies or illnesses) and thus easily explained away by the drug user:

[W]hat is primarily affected are the higher brain functions of judgment, decision making, reaction time, and other abilities needed to perform work safely. Motivation—the process of making a commitment to achieving a goal—is often profoundly affected by [the type of intoxication caused by] marijuana or stimulants such as cocaine. The problem is often particularly severe with a heavy or frequent user.

Declaration of Robert L. DuPont, Jr., June 10, 1987, at 2. Dr. Sidney Cohen of the University of California at Los Angeles also affirmed that traditional diagnostic criteria are not readily susceptible to reliable application by supervisors. (These declarations were entered in the docket of this rulemaking.)

The difficulty involved in detecting drug use is vividly illustrated by the experience of the U.S. Navy. Prior to incidents that resulted in disclosure of a major drug problem, Naval officers judged drug abuse to be a problem capable of being controlled through careful monitoring of performance. But drug testing instituted in 1981 showed a positive rate of 48 percent for enlisted personnel under the age of 25. Random testing brought the positive rate for Navy personnel down to the low single-digit range. See, e.g., Robert E. Willette, Ph.D., in *Urine Testing for Drugs of Abuse*, Research Monograph No. 73, at 6 (National Institute on Drug Abuse, 1986).

Employee representatives contend that other workers know who uses drugs, and after four years of concerted effort prevention teams are doing important work to address those who are known to use on the job. However, as the Union Pacific Railroad, whose employees pioneered Operation Red Block, has noted, voluntary action alone is not enough. It is not enough for at least two reasons, and it is not possible to say with mathematical certainty which of these factors preponderates:

First, Operation Red Block has not yet been extended to all railroads, nor have all union leaders of all crafts accepted the program on any railroad. Indeed, on a national basis coverage remains spotty, with only about half of railroad employees touched in any way by the program. "Holdouts" include both railroads and rail unions. This is a program founded on mutual trust and a keen perception of self-interest, as well as a healthy concern for the fellow employee. Clearly, these are conditions that cannot be mandated by any statute or regulation.

Second, even where Operation Red Block is in place it cannot succeed by itself. Where tolerance of substance abuse does not exist, some users will stop, but others will take special care to conceal their use, thereby denying co-workers the leverage necessary to bring about a change in behavior or get the abuser into treatment. In some cases, co-workers may even be unaware of the problem until they witness an unsafe act in the workplace. Further, some drug users simply will not respond in a positive way to expressions of concern from co-workers.

FRA continues to detect unauthorized use of drugs in mandatory post-accident tests on railroads that have active Operation Red Block programs, as well as those that do not. The major western rail system on which Operation Red Block got its start stressed in its testimony in this proceeding its dissatisfaction with a continuing reasonable cause positive rate of over 9 percent. The major eastern rail system that signed the first system-wide testing agreements with its organizations in August of 1987 has 2 post-accident alcohol/drug positives in the 12 months prior to the agreements and 4 positives (all for illicit drugs) in the subsequent 12 months.

It should be no surprise that Operation Red Block cannot be a complete answer to the problem, since different people respond to different stimuli. Some will respond to the carrot, some to the stick, some to peer concern and others only to a strong deterrent. This point is best illustrated by one Operation Red Block railroad's call for random testing and institution by another of a testing agreement.

Random Testing and Voluntary Programs

Comments. CSX and employee representatives also expressed the belief that the imposition of mandatory random testing would undermine trust and cooperation between railway labor and management. This trust is held to be critical to the success of EAP's and

Operation Red Block. Thus, it was feared that random testing would undermine the success of these programs. Labor also feared that unless these preventive programs are mandated, carriers will tend to rely on random testing to weed out drug use instead of investing in prevention-oriented programs. Employee representatives postulated a wide range of negative impacts on voluntary programs from institution of random testing.

Other commenters, however, contend that random testing would more likely increase the importance of EAP's and Red Block. First, the fear of detection would drive many users to seek assistance. Second, with the stakes raised, there is no reason to believe that the commitment to these programs from counselors, unions or employees would decrease. Finally, the resulting increase in rehabilitation would give these programs an even more important role in combatting drug use. Two carriers indicated that voluntary admissions to EAP's on their lines increased after testing programs were implemented. Further, all operators who addressed the question stated that the implementation of random testing would not diminish their commitment to or financial support of preventive programs.

Conclusions. There is no doubt that implementation of regulatory options subtly influences a variety of initiatives in the private sector. FRA withheld regulatory action on the issue of alcohol and drugs for over a decade in order to promote and provide the opportunity for the development of non-regulatory solutions. During this period, employee assistance programs became firmly established and contributed to the well-being of thousands of railroad employees, the REAP Report showed that, with respect to alcohol abuse, at least, much remained to be done (Mannello & Seaman, University Research Corp., 1979). FRA began its search for a sound regulatory design in 1983, and in the same year the first bypass agreement was signed (protecting Rule G violators who are reported by co-workers). Operation Red Block was implemented on portions of two railroads in 1984, the same year FRA proposed the most comprehensive testing program for employees of a regulated industry that had ever been suggested as of that time. FRA implemented its final rule in early 1986 despite a major law suit by the rail unions, and by 1987 employees of CSX had signed an agreement approving testing very similar to that contained in the FRA rule. This history illustrates

that the "threat" of regulation can stimulate interest in voluntary action, but it does not establish that regulatory action stifles voluntary action. Indeed, the railroad industry today is involved in more aggressive private sector programs to address alcohol and drug use than at any previous time in its history.

One can speculate that even more might have been done had regulation been withheld, but FRA doubts that would have been the case. Alcohol and drug testing programs in aid of Federal prohibitions have brought to light the extent of this problem. They have reminded employees that they are the principal victims of job-related substance abuse. They have focused public attention and encouraged responsive measures by management and labor alike.

Similarly, one can speculate that requiring random testing may slow the future spread of Operation Red Block and similar initiatives by dampening the interest of the institutional players (e.g., railroads and employee organizations). It can be argued that resources will be diverted, even though the railroads uniformly testified that this would not occur. It can be argued that employee organizations will lose interest, even though they steadfastly denied that such would be the case. FRA finds none of this broad speculation useful for decisional purposes, because it is founded neither in history nor clear logic. Discussion among the parties at the hearings in this proceeding discounted such effects.

Employee spokesmen also raised the question as to whether co-workers involved in peer prevention activities (and others who might have been induced to participate in the future) may no longer view their role as necessary or appropriate. Some prevention committee members, for instance, may take the point of view that "someone else" is now responsible. Others may view random testing as so personally objectionable as to drive a wedge between them and any effort to address the substance abuse problem. FRA understands that these arguments are offered in good faith and cannot discount the possibility that some of the predicted effects may come to pass with respect to certain employees. Statutory jurisdiction over railroad safety confers no crystal balls through which the future may be foreseen, particularly when the motivations of complex human beings are in question. However, FRA views the risk of harm to voluntary programs as a minimal risk that must be taken.

This judgment is reached with the following points in mind:

- Prior predictions of harm from regulatory action have proven unfounded.
- Random testing may actually strengthen voluntary efforts by heightening the risk of detection and thus the susceptibility of the drug user to persuasion by concerned co-worker (while also heightening the concern of the co-worker who wants to reach his fellow employee before that employee is detected through random testing).

- Where Operation Red Block is not in place because of employee disinterest and management decides to sanction positive results with severe discipline, random testing will provide renewed incentives for employees to bargain for Red Block agreements and, in the interim, to utilize the co-worker report provision of the existing rule.

- Operation Red Block and other voluntary efforts will always be important to safeguard continued abstinence among those who have been detected through various means and have been provided an opportunity for treatment and return-to-service. Concerned co-workers who have once affirmed their role in prevention will not shrink from the responsibility to assist the recovering employee.

In short, FRA is persuaded that the existing strong regulatory program has strengthened voluntary action and that there is nothing qualitative different about random drug testing that should necessarily result in a different outcome. Much depends, of course, on the approach taken by opinion leaders among railroad employees. To a certain extent, they have the power to make their worst predictions come true; at the same time, they recognize it is not in the interest of those they serve for this to occur. FRA believes that employee representatives will continue to recognize the value of voluntary action and will communicate that need down through the ranks.

Random Testing: Structure of Testing Programs

Comments: Comments uniformly supported the exclusion of subjective factors from the random selection process. However, the railroads requested two types of flexibility. First, they wished to utilize a multi-stage selection process in which geographic units would first be selected on a random basis for any testing period (e.g., day, week or month). Then employees would be selected randomly within the geographic units. Second, certain of the railroads urged FRA to permit carriers to test different portions of the workforce

at different selection rates, so long as the actual selection within each category is purely random. Geographic variations in drug use prevalence were cited in favor of this distinction, and there was some interest expressed in targeting a higher level of effort by craft, as well. These alternatives are further described below.

The Association of American Railroads (AAR) proposed that the FRA allow railroads flexibility in setting up random testing programs. As proposed in the NPRM, carriers would submit their proposals to the FRA for approval. FRA would then review the plan to be certain that the carrier program does not provide the railroad with an opportunity to discriminate or to harass employees or union locals. The AAR further believed that all testing programs should guarantee that each covered employee have a known and non-zero chance of selection on any given day, but that each employee need not have the exact same chance of selection.

As noted above, support for the multi-stage selection process was particularly strong. A carrier would divide its pool of employees into geographic clusters. On a given day of testing a number of these geographic clusters would be randomly selected. Then, employees within each selected cluster would be selected for testing at random. The carrier would then only have to conduct testing at few locations, rather than having to track down employees all across an extensive operating system. NIDA agreed that this method is cost efficient, pointing to the unit sweeps conducted by the military services as an example. (The Department of Transportation uses a similar method to administer its own random drug testing program.)

Some carriers also requested permission to use experience-rating techniques to target segments of the workforce where drug use is more prevalent. These segments would then be tested at a higher level than others. Targeting on the basis of location, age and craft was suggested. Two commuter lines and organized labor oppose group targeting, however. Labor expressed concern that geographic targeting could be used to harass an active union local. Employee representatives stated that the mere threat of increased testing could also have a chilling effect on local union activities. Proponents of targeting, however, stated that there would be no chance of harassment because all testing plans would have to be approved by the FRA, and all targeting should be based upon objective statistics which indicate that a particular segment is more prone to drug use.

One commenter stated that regardless of whether a multi-stage or experience rating system is employed, the FRA should do the selection for the carrier in order to assure fairness.

Additional flexibility was requested by the Norfolk Southern, which offered testimony regarding the permissible period of time during which an employer may test the employee following selection. Norfolk Southern recommends that a carrier be permitted to administer the test at its convenience up to six months after the employee has been selected for random testing.

Most carriers also indicated an unwillingness to call employees to report for solely for testing (even if rested and available), in part out of fear that drug users among those selected would evade testing by marking off sick or by other means. Many railroads suggested that they be permitted to test an employee upon reporting for duty, while on duty, and at the end of a run before marking off duty. While one labor organization is not opposed to testing employees who are merely subject to call, three carrier representatives opposed the use of the extra board for the purpose of calling an employee in to submit to a drug test. They objected to the burdens of having to tract the employee down and then pay the employee for the time spent administering the test.

Few comments were received regarding whether to limit the chance that an employee will be tested more than once in a testing cycle. The AAR and a major freight railroad stated that an employee should remain in the pool, subject to testing at the same rate as every other employee. One other railroad believed that the probability of reselection should remain greater than zero, but less than that of unselected employees. Such a scheme would help to ensure that a greater number of employees is tested during each cycle, while the threat of testing remains palpable as regarding each individual.

The RLEA urged the FRA to recognize that time taken to provide a sample is not off-duty time. FRA also received comments from four carriers recommending that time lost in order to give a drug test should be considered neither time on-duty nor time-off duty for purposes of the Hours of Service Act. A number of commenters urged FRA to permit on-property collection of samples (*i.e.*, collection at railroad terminals and other railroad facilities). On-property collection would limit the amount of time an employee would be out of service for testing, and could help carriers avoid violations of the Hours of Service Act. Railroads stated that large

amounts of time can be consumed not only in transporting an employee to the remote facility but in waiting for services after arriving at the facility. Limiting the loss of an employee's services would also lower the cost of the program to the carrier. Additionally, it was argued that the chain of custody may be more secure if testing is done at a carrier facility—*i.e.*, there is a greater chance of mislabeling at a busy emergency room or medical facility where a number of technicians and clerks may handle the sample. In response to expressed concerns that on-site collection could afford managers an opportunity to harass employees, it was pointed out that all on-site procedures and facilities would have to meet the requirements of the HHS guidelines.

Conclusions: It is critical that the railroads have ample flexibility to implement random testing programs on a basis that will be cost effective to the railroad and will not cause undue inconvenience to employees. Programs should be structured to a maximum extent so that testing can be accomplished within normal duty hours, within legislated Hours of Service Act restrictions, and without delaying the transportation of passengers and freight that is the railroad's business purpose.

Flexibility in time. The railroads must first have flexibility to test at any time during the normal work day, including any period of allowed overtime. In this regard, it will be noted that the normal work day for through freight service may be any 12-hour portion of any 24-hour period. Time spent in deadheading to and from work assignments may further constrain availability. Similarly, yard service and dispatching "tricks" may be broken into three 8- or 9-hour periods that run around the clock. It will be important for railroads to randomly test employees working at all hours of the day and night. Computer railroads will have different requirements, as they endeavor to ensure crew availability for rush hour periods in the morning and afternoon.

The rule allows railroads to develop and submit plans providing for testing at any time an employee is lawfully on duty. Two restrictions apply. First, an employee may not be assigned for testing without first reporting for duty. Only on-duty employees may receive notice that testing is required. This restriction is consistent with concerns raised by employees that their off-duty periods could be disturbed and by concerns of the railroads that attempting to "call" employees for testing would risk loss of control as employees using drugs marked off sick or evaded testing through other strategies. Obviously, the

final rule does not affect the determination of when employees are subject to the requirement that they report for duty. That matter is controlled by the collective bargaining agreements and the Railway Labor Act.

The second restriction on time availability is the Hours of Service Act. FRA does not enjoy the authority to repeal or modify requirements of that Act. FRA noted the request of several railroads that time spent in testing and incident to transportation be considered "limbo time" (neither on-duty nor off-duty). Legislation passed by the House of Representatives would have made possible such treatment, but FRA is not presently at liberty to take this action administratively. As a consequence, the railroads should plan their random testing programs on the assumption that time devoted to random testing (like other forms of testing) is time on duty commingled with covered service for purposes of the statutory maximums. This would not preclude the railroad's asserting a section 5(d) Hours of Service Act defense where testing was not completed within prescribed duty limits. However, to succeed with such a defense the railroad would have to prove that the delay was due to an unforeseeable combination of events, and that it used due diligence to minimize the excess service. Given the preplanned nature of random testing, such a showing is far less likely to be made in that context than in the post-accident or reasonable cause context.

Flexibility in space. Reasonable flexibility in determining the site of collection will be crucial to the success of the program. If employees' personal schedules and train operations are not to be routinely disrupted, railroads will have to have the ability to collect samples at sites nearby to major terminals, crew change points, and other work sites. For this reason, FRA is authorizing collection at any suitable site, including a location on railroad property. Railroads are also free to utilize independent medical facilities and mobile units. For the time being, the requirement that reasonable cause collections be conducted at independent medical facilities will continue. FRA will review this issue along with a number of others in a future rulemaking.

For random testing, collection personnel may include any individual who is qualified by virtue of training or professional/technical experience. Non-medical collectors would be required to have received training in compliance with the Procedures for Transportation Workplace Drug Testing Programs (further described below), and the

training program shall be included in the random testing program submitted for approval. FRA will make available a model training program setting forth the elements required to be included. Medical professionals and technicians will be deemed qualified to perform collections if, at a minimum, they are provided appropriate instructions for collection and certify in each case that they have conducted the collection as required in the instructions.

FRA is keenly aware that collection on the property by employees or contractors of the railroad may raise issues of neutrality and perceived integrity in the minds of some railroad employees. However, properly conducted collection will, by itself, provide reassurance. The testing procedures provide that specimen bottles will be filled, identified and secured with a tamper-proof seal in the presence of the employee. The employee then affirms the identity of the specimen by initialing the label/seal. In reporting any test result, the laboratory must certify that the seal was intact upon receipt. Recognizing the sensitivity involved in collection of the sample, FRA has also provided that the collector may not be a person in the chain of command above the employee or a co-worker. Railroads are encouraged to take additional actions to provide reassurance to employees that the testing process is being conducted in a fair and impartial manner, and, of course, to include these steps in their proposed programs submitted to FRA for approval. Moreover, the DOT Procedures for testing (more fully described below prohibit observed collection except under very limited circumstances, and railroad supervision would not be permitted to participate in such observation.

Random Testing Programs: Level of Effort

Comments: FRA received varying recommendations concerning the optimum level of testing. Commenters generally appeared to agree that no consistent incidence of unauthorized drug use was acceptable at any statistical level, but there was wide variance of opinion with respect to the rate of testing that would be appropriate given current drug prevalence information. Several commenters acknowledged that there is no evidence from civilian experience indicating what percentage of a population should annually be tested under a random testing program.

However, it was also noted that the testing rates of certain of the military services (125 percent to 240 percent)

would not be appropriate for the railroad employee population, which is older and more stable (lower turnover) and has a lower drug use incidence rate than that experienced by the military services when their programs began. Some suggested that the FRA only establish minimum and maximum permissible levels, allowing the carrier to choose a level meeting its own needs and philosophy.

The AAR and a number of railroads stated that an adequate deterrent would be posed if fifteen percent of the workforce is subjected to short notice testing during the course of a year. Within that fifteen percent at least five percent would have to be based on random selection. Other railroads generally recommended testing levels between ten and thirty-one percent. The only union to address the subject suggested a target rate of twelve and one-half percent.

A significant portion of commenters suggested somewhat higher levels, however. A major commuter authority considered fifty percent to be optimum, while the NTSB, Safe Travel America, a commuter authority and a major freight railroad believed that a level as high as 125 percent may be needed to effect a credible deterrent (though not all would mandate this level as minimum).

Another commenter suggested that a rate under 100 percent would create a perception of "the finite possibility of detection" and thus should be sufficient to deter, but indicated that it would be wise to vary the rate on an annual basis to determine the yield of various rates. While strongly supporting random testing, the AAR stated:

Setting an unrealistically high level of effort as a mandatory minimum, with no scientific investigation of the relationship between the sampling fraction and the deterrent effect, would impose a burden the railroads would be forced to live with for a considerable length of time. Once requirements such as this are written into federal regulations it is extremely difficult and time consuming to change them.

Finally, a major freight railroad states:

[W]e wish to emphasize * * * that the deterrence value of any random testing program, even one requiring a high level of effort, e.g., testing 100 percent of employees annually, would decline dramatically if employees who test positive for illegal drugs or alcohol were assured freedom from discipline as little as one time only.

Conclusions: Random drug testing will have two complementary objectives; detection and deterrence. Reliable detection is critical not only to removing the addicted substance abuser from the workplace but also to establishing an atmosphere of deterrence. However, random testing will work in concert with

other means of detection and deterrence and thus should be viewed as one element in an overall program of countermeasures.

Commenters agreed that current drug testing programs that involve short-notice testing, such as post-accident testing and reasonable cause testing, do produce an important deterrent effect and have obviously led to the identification of many employees with drug abuse problems. Medically-based testing programs also provide a means of detection, although the advance notice customarily associated with this form of testing makes its direct deterrent value minimal (since drug users, knowing they will be tested at a scheduled appointment, may be able to abstain for the short period necessary to avoid detection).

The overall target level of deterrent effect that would be most cost effective and reasonable from the point of view of burdens on employees and transportation is not possible to determine at the outset of a random testing program. However, the record of this rulemaking has provided FRA with a sense of confidence that a moderate but substantial level of testing at the outset should address the drug deterrence need on most railroads while avoiding unnecessary burdens. As a consequence, the final rule will require that the railroads actually collect and analyze specimens from a number of randomly selected employees sufficient to equal in number 50 percent of the relevant employee population. The rule provides flexibility to allow for gradual start-up of the program.

In a supplemental notice, FRA will propose procedures to allow eventual adjustment of the testing level, by railroad, as a uniform experience base is established and differing needs are documented. That notice will also propose to allow the railroads to credit other short-notice testing (reasonable cause and post-accident) to the required level of effort for random testing. FRA believes that the railroad industry will remain unique with respect to the significant number of for-cause tests conducted. FRA is further concerned that failure to allow for this credit would discourage railroads from continuing aggressive reasonable cause testing programs, which inquire into fitness following unsafe practices. However, these are issues developed during the current rulemaking that deserve prompt but separate consideration to complete the program design.

Drugs Tested

Comments: The HHS Guidelines require Federal agencies to test for marijuana and cocaine and authorize random testing for opiates, amphetamines, and PCP. Agencies may test for other Schedule I and II drugs in post-accident, unsafe practice and reasonable suspicion situations, if HHS has approved the analytical methods. On the face of the Guidelines, it appears that HHS will also accept agency applications to add additional Schedule I/II drugs to the five specified for random testing. The NPRM proposed to require random testing for the five HHS drugs and to authorize testing for additional substances under certain circumstances.

Comments were received requesting that the FRA allow carriers to test for drugs other than the five specified by the HHS guidelines. It was argued that there are many drugs not covered by the guidelines whose use will have a detrimental effect on the safety of rail operations. Only one drug testing expert testified that extending the list of tested drugs is not necessary at this time, the present five being by far the most prevalent. There was strong support among other experts and a number of carriers for the addition of barbiturates and benzodiazepines, in particular. It was stated that the use of these drugs is sufficiently prevalent to cause concern, and that a shift toward use of these drugs can be anticipated if they are not tested for.

An employee assistance manager of a regional railroad stated:

[Barbiturates and benzodiazepines] have addictive properties and are widely available from a variety of sources. They affect reaction times and attention spans detrimentally, and pose as real a threat as other substances when used in an operating environment.

Several railroad medical officers participating in the proceeding were also strongly supportive of testing for central nervous system depressants. The NTSB supported testing for these drugs and lower-scheduled narcotics, as well.

An official of the National Institute on Drug Abuse testified that post-accident testing should continue for the broadest range of drugs feasible, regardless of any limitations that might be placed on more routine testing.

The Epilepsy Foundation opposed testing for barbiturates, since it could disclose to employers therapeutic drug use among epileptics whose seizure disorders are fully controlled, potentially leading to job discrimination.

Conclusions: The current alcohol/drug rule authorizes reasonable cause testing

for any controlled substance, regardless of schedule or treatment for criminal law purposes. In the prior rulemaking, the American Medical Association and other commenters had agreed that the controlled substance list adequately defines those compounds of greatest concern with respect to the fitness of employees responsible for safe movement of transportation vehicles. Railroads are presently required to conduct pre-employment testing for drugs other than those mandated for random testing by this final rule.

FRA believes that the random testing rule, and testing procedures applicable to pre-employment and reasonable cause testing, must be sufficiently flexible to address known substance abuse problems and to address changing substance abuse patterns. FRA is already aware that abuse of barbiturates is a small but significant problem on the railroads. There is every reason to believe that misuse of benzodiazepines (sedative-hypnotics) may also be a problem (see, e.g., *Data from the Drug Abuse Warning Network, Series G, Number 21 at 70* (National Institute on Drug Abuse, Statistical Series, July-December 1987)), though drug testing technology is struggling to keep up with detection requirements for low-dosage tranquilizers that have recently come to dominate the market. Drugs that impair vigilance are a particular problem on a railroad, since employees are required to maintain alertness at all hours of the day and night under circumstances sometimes involving minimal external stimuli.

Random testing itself has the potential to alter the mix of substance abuse to some extent, as some abusers elect to use compounds other than those included in random testing. New drugs will be introduced into licit and illicit markets that may become new drugs of choice for some railroad employees. It is crucial that the testing system be sufficiently flexible to permit detection of additional drugs without the additional delays involved in rulemaking.

Although experience under the current rule has not revealed any analytical deficiencies among the laboratories currently providing services to the railroads, FRA nevertheless agrees that more highly structured and intensive quality control measures can provide an important measure of reassurance to employees while also verifying that true positives are reliably identified and confirmed. The HHS laboratory certification program provides a logical framework for this effort. However, HHS approval of testing for other drugs will not be available to private sector

employers (who are simply not within the scope of the Guidelines).

With respect to testing for barbiturates, FRA is not persuaded that railroad employers would discriminate against persons with epileptic conditions based on barbiturate use detected in testing authorized under this final rule. The Epilepsy Foundation cited no instances of job discrimination by rail employers, who already test for barbiturates in their medical programs and reasonable cause testing programs, as well as under FRA's mandate for pre-employment drug screens. Railroad medical review officers would, of course, maintain in confidentiality any information concerning documented prescription use of these drugs.

Therefore, FRA will propose in a supplemental notice a revised procedure under which railroads may request approval for testing of other controlled substances, with appropriate safeguards to ensure the quality of laboratory analysis.

HHS Guidelines and Testing Safeguards

Comments: Commenters expressed widespread approval of the HHS Guidelines as an adequate means of assuring integrity in the administration of random testing programs. Labor organizations tended to accept the Guidelines in their entirety, while a few railroads proposed some minor changes.

The Equal Employment Advisory Council (EEAC) recommends that the FRA allow carriers the option of testing under the HHS Guidelines or under a plan of their own which is at least as effective in protecting employees from inaccurate results.

Four commenters believe that the HHS Guideline threshold level of 100 nanograms per milliliter (ng/ml) for marijuana should be lowered. They stated that 100 ng/ml is far higher than the level one might reasonably expect to find in a passive smoker. It was argued that maintaining a high level would only serve to lower the detection rate for casual users of marijuana. Levels in the 10 to 50 ng/ml range were recommended. PharmChem, Inc., however, stated that the 100 ng/ml threshold is adequate to protect passive smokers while assuring that very few actual users escape detection.

Dr. Arthur J. McBay suggested that the FRA go a step beyond the Guidelines and require specimen splitting. Dr. McBay suggested that one portion be sent forward to the laboratory for testing and the other be retained in frozen storage. In the case of a contested positive, the retained portion could be divided, with one part being made

available to the employer and the other to the employee for retesting. This procedure was said to address "chain of custody, mislabelling, specimen switching, contamination, carryover, instrumental, technician and reporting errors." Amtrak indicated that it uses a similar system for its corporate testing program.

All commenters agreed that GC/MS methods are highly accurate. One commenter, however, stated that GC/MS should not be mandated because it is expensive, and that the GC/MS requirement should be changed if a more accurate form of testing becomes available. Dr. Arthur J. McBay stated that the rule should specify that full mass spectra analysis is required.

The Syva Co., fearing that the HHS may be slow in certifying laboratories, suggested that FRA recognize state certification of labs.

Two carriers and three members of the drug testing industry urged FRA to allow screening of urine samples at the testing location. All samples which initially tested positive would then be sent to a competent lab for confirmation. This procedure would allow operators to immediately remove from service those employees who have tested positive in the initial screen. Those whose positive results are not confirmed would be reinstated with back pay. Lab costs would be lowered since only samples with an initial positive would be sent to testing laboratories. Additionally, it was argued, most employees would be spared the fear and uncertainty which was said to accompany the wait for lab results. Proponents of on-site screening acknowledged that the initial screen is not as accurate as a GC/MS confirmation. However, they contended that false positives would actually inflict harm only in a minute number of cases, since not more than 5 percent of those testing positive (a minority in itself) would have the outcome reversed on confirmation.

All commenters addressing the subject believed that there are sufficient qualified testing facilities nationwide to handle the increase in testing which would result from implementation of the FRA rule. NIDA indicated that its certification program is reviewing 100 laboratories, one of which could handle all Federal employee specimens, with more than ample capacity in remaining laboratories to competently analyze additional samples from transportation operators.

Conclusions: The HHS Guidelines offer state-of-the-art procedures for collection of specimens, chain-of-custody, laboratory analysis and review and handling of test results. The

Guidelines draw on extensive experience in the perfection and validation of military drug testing programs and were adopted for the Federal workplace program after notice and opportunity for comment. FRA agrees that the Guidelines should set the standard for urine drug testing in transportation. However, based on comments received and experience under the current rule, it is clear that the Guidelines require modest modification to fit the demands of a geographically dispersed transportation industry and non-Federal workplaces.

Proposals to loosen the Guidelines' requirements. Various parties found the Guidelines excessively burdensome or inflexible in some respect affecting their interests. FRA has carefully considered each of these suggestions and responds to the more substantive ones in the discussion which follows.

FRA respectfully disagrees with those commenters who would modify the Guidelines to permit on-site screening of urine samples. FRA recognizes the obvious advantages provided by this method, which have been intelligently advanced by several commenters, including two major railroads that use this technique in their present company plans. However, FRA agrees with the rationale expressed in the preamble to the Guidelines for requiring "same-site" screening and confirmation (53 FR 11970, 11972; April 11, 1988); and FRA disfavors on-site screening for the following additional reasons:

1. There is no effective way to quality-control, on-site screening to ensure positives are being detected at the prescribed cut-off. "Blind" proficiency testing samples would be readily identified in such a setting.

2. "New" technologies advocated by vendors for on-site screening have inherent limitations. One such system, for instance, is cross-reactive for four different drugs to a 300 ng/ml cut-off. Apart from yielding some unconfirmed positives, the system would apparently be largely ineffective for PCP, for which the Guidelines set a 25 ng/ml detection limit, while detecting amphetamines below the uniform HHS level. Data submitted by this vendor was limited to two reviews of a single set of tests that covered only two drugs based on tests under laboratory conditions. Although this system may have many very valuable applications, FRA is not prepared to structure a national program around a proprietary product still undergoing refinement.

3. Based on experience with its post-accident testing program, which has utilized the two principal immunoassay systems as well as other screening

techniques, FRA believes that a small but not insignificant rate of false or unconfirmed positives will continue to occur in screening tests regardless of whether analysis is performed on site or at a laboratory. Although there is merit in providing immediate feedback to employees who screen negative, there is also a hazard that in a locally administered system the person with a presumptive positive will be singled out. Certainly any system that held the individual out of service would do so, and advocates of on-site screening contend that the ability to remove the presumed drug user from the workplace is a major advantage of this approach. With no disrespect intended to those railroads and others advocating on-site screening, FRA is not willing to incur the threat to the reputations and peace of mind of the great majority of employees who do not use drugs that such an approach would entail. Despite education efforts by FRA, the railroads and the labor organizations, the technical aspects of drug testing are still poorly understood by many railroad officers and employees. The risk that a presumptive positive could be viewed as a badge of dishonor is simply too great to entertain in a program mandated by Federal regulation. Random testing will produce the desired safety impacts if it deters use among non-dependent users, increases incentives for early referral among dependent users, and gradually, over a period of months or years, supplements other means of identifying those who persist in their abuse. Early removal of a single employee identified as presumptively positive is not, therefore, as critical to the accident prevention program as suggested by some of the commenters.

FRA also disagrees with a railroad that blind proficiency testing requirements of Guidelines should not be extended to the rail random testing program. Blind proficiency testing is one of the critical means of ensuring that laboratories are delivering high quality services. Blind proficiency testing is also critical to employee acceptance, as evidenced by the strong employee support for the CSX testing agreements, which embody this safeguard. FRA includes both open and blind proficiency testing in its quality control program for mandatory post-accident testing (which involves both blood and urine specimens) and believes that there is no impediment from the point of view of feasibility to including this element in the random testing program.

FRA disagrees with the suggestion that it would be sufficient for the railroads to utilize certified laboratories,

since those laboratories will be routinely proficiency tested by Federal agencies. Some HHS-certified labs may never seek or win contracts to test Federal employee specimens and thus may never be subject to blind testing. While others will have such contracts, this is no better indication of capability than actual performance. Given the large volumes of railroad employee samples this program will generate, it is important to know that true positives are being detected and to document that negatives are being so reported.

Blind proficiency testing will involve some cost and logistical preparation, but any large employer should be capable of obtaining and utilizing this service from an expert contractor. FRA is persuaded that smaller railroads may find it costly on a per unit and overhead basis to participate in blind proficiency testing. Thus, under the Procedures for Transportation Workplace Drug Testing Programs (further described elsewhere in today's *Federal Register*), the blind testing requirement is limited to employers submitting 1,000 or more samples per year for analysis. Smaller employers are not required to submit blind samples if they are utilizing a laboratory that is subject to blind testing by a Federal agency or another transportation employer.

Cut-offs. The HHS Guidelines provide uniform administrative detection limits or cut-offs for each of the 5 drug groups for which testing is authorized. FRA appreciates the concerns of those commenters who believe a 100 ng/ml screening cut-off for marijuana metabolites is excessively high. However, FRA believes that this cut-off will permit identification of the great majority of regular or recent marijuana users, since the available assays detect "total cannabinoids", rather than being specific to the target metabolite (normally the 9-carboxy acid of THC). Data from FRA post-accident testing suggests that most confirmed positives at a 20 ng/ml level for confirmation screen over 100 ng/ml (for total metabolites). (FRA's post-accident protocol currently detects at 20 ng/ml on both screening and confirmation in order to identify the casual user who may have used just prior to an accident and whose specimen is collected early in the process of metabolism and elimination.) Further, the high cut-off virtually eliminates any possibility of a positive result from (claimed) passive inhalation.

Confirmation method. FRA disagrees with one commenter who would allow methods of confirmation other than gas chromatography/mass spectrometry.

The commenter is correct in indicating that scientific advances may allow for better analytical methods of equal or greater specificity, but FRA believes that currently requiring the best available method on the face of the rule (rather than by implication, as with the current regulation) will provide reassurance to employees and avoid dispute and confusion. If better methods are validated and are available at reasonable cost, FRA can revise the rule to recognize the scientific or technological advance.

FRA likewise does not agree that full spectrum GC/MS analysis should be specified by the rule, since sophisticated single and multiple-ion protocols are available, most utilizing a deuterated internal standard, that are specific for the target compounds while offering good sensitivity and excellent quantitation at the cut-off. Expert inspection teams are reviewing each laboratory's GC/MS method to ensure specificity, accuracy and reliability for the 5 drug groups, and similar reviews would be required before additional drugs are added.

Laboratory certification. FRA does not agree with the comment that state licensure of laboratories should be recognized in the rule, nor is FRA prepared to accept accreditation by voluntary bodies absent HHS recognition. Laboratories conducting testing under FRA's existing rule typically hold one or more Federal or state licenses for various purposes. However, the HHS certification program is the first highly rigorous certification program specifically targeted at urine drug testing at the Federal level. The HHS Guidelines provide national standards for recognition and periodic review. By contrast, only a handful of states have aggressive licensure programs for drug testing laboratories. FRA believes that the uniform baseline provided by the HHS Guidelines is important to consistent and effective implementation of safeguards. Uniformity is particularly important given the interstate nature of the railroads' business and the variety of jurisdictions on which railroad employees work.

Split specimen. HHS considered a split sample requirement but rejected it for reasons FRA adopts. HHS stated, in part, as follows:

[S]uch a system could increase the risk of administrative error by doubling the labeling, initialing, storage, and accountability requirements.

53 FR 11971; April 11, 1988. The railroad context presents a stark example of the problems with this approach.

Employees' principal concern with respect to the testing process is often actions of the railroad company itself. In this regard, it would hardly add credibility to the system to have the railroad retain split samples in its possession.

Some of the other reasons often given for use of split samples often turn out not to bear scrutiny. Chain-of-custody and labeling problems, for instance, typically relate to handling prior to delivery to the laboratory. It is likely that any problem relating to a single sample would infect both (e.g., improper identification, broken chain-of-custody at site of collection). If there is an error at the laboratory, retention of the original (single) sample will allow for retesting.

Lab capacity. FRA believes that more than adequate certified laboratory capacity will exist to provide for quality analysis. Implementation of this program is, of course, contingent upon timely certifications being issued by HHS.

Adoption of Testing Procedures. In the NPRM for this rule, FRA proposed that all drug testing take place in accordance with the Mandatory Guidelines for Federal Workplace Drug Testing Programs of the Department of Health and Human Services (53 FR 11970; April 11, 1988). Those guidelines describe the collection and testing procedures applicable to all drug testing of Federal employees, and they include safeguards for the accuracy and privacy of testing. FRA also specifically solicited comment on adaptation of the Guidelines to meet the special circumstances of the regulated industry.

Based upon comments submitted in this docket and other information, the Department of Transportation has determined that certain modifications to the procedures of the Guidelines are appropriate in the context of this and other DOT operating administration drug testing regulations. Accordingly, the Department's Office of the Secretary is publishing elsewhere in today's *Federal Register* an Interim Final Rule with Request for Comments entitled "Procedures for Transportation Workplace Drug Testing Programs," that codifies the Department of Health and Human Services Guidelines for drug testing at 49 CFR Part 40. These DOT Procedures are intended to implement the important safeguards provided by the HHS Guidelines and set forth requirements for specimen collection, laboratory certification, and quality assurance.

As previously noted, during the comment period on the NPRM in this

proceeding, comments were received concerning the HHS Guidelines, as summarized above. 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 further 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.

Hair Analysis

Comments: Two companies supported an alternative to urinalysis. The commenters advocated analysis of hair by radio immunoassay (RIA). The hair is subjected to a proprietary extraction process and then analyzed in a manner similar to any other specimen, with presumptive positives confirmed by GC/MS. The commenters urge that this approach will produce an accurate test result without the inconvenience and intrusion of urine collection. A major advantage of this approach is the enlarged "window of detection". According to the commenters, since hair analysis can track drug use which occurred months in the past, there would be no need to test randomly.

Conclusions: Analysis of hair for drugs of abuse may offer promising possibilities for the future, and the commenters pointed out that many useful applications are already being made. However, as with any new proprietary technology being developed for commercial use, a number of issues of practicality remain to be settled. There seems to be little dispute that drugs, when eliminated through hair growth, can be detected for an extended period. However, issues such as detection limits, sampling methods, quality control of the extraction process, interpretation of opiate results, etc., should be thoroughly reviewed by the Department of Health and Human Services before large scale applications can be mandated or authorized. Further, it must be clear that an adequate laboratory capability exists to apply the technology.

Rehabilitation and Discipline

Comments: The FRA received numerous comments on what the consequences of a positive drug test should be. Two carriers, the labor organizations and certain other commenters believe that the regulation should require carriers to give an employee an opportunity for rehabilitation. It was suggested that drug use be treated like any other medical condition. It was pointed out that the employee could still be disciplined if drug use resulted in a

violation of a carrier operating rule. These commenters also indicated that if rehabilitation is required, it should be a one time opportunity—i.e., recidivists should not be extended a second opportunity at rehabilitation.

Opponents of mandatory rehabilitation included railroads, members of the drug testing industry, and public interest groups. Numerous commenters stated that the deterrent effect of random testing would be completely undermined if drug users are not disciplined after a positive result. Without the threat of discipline, there would be little incentive for an employee to discontinue use until detected. Safe Travel America stated its belief that a policy of mandatory rehabilitation would undermine Operation Red Block programs by discouraging early referrals. Short lines stated that they could not afford to rehabilitate an employee and could not find a temporary replacement to perform the employee's duties during a period of rehabilitation.

A number of railroads used the FRA to leave decisions regarding discipline and rehabilitation entirely up to the carrier. Some contended that each case is different, and therefore management should have the flexibility to act in a manner appropriate to each case.

Conclusions: In general, the policy of FRA under current regulations is to allow flexibility for handling under corporate policies and collective bargaining agreements when an employee's drug use is disclosed by body fluid testing or other means of detection available to management. FRA has extensively dealt with this issue in prior rulemaking proceedings.

With respect to the consequences of random testing, FRA believes that the public safety can best be advanced by continuing to provide the private sector parties with flexibility to fashion reasonable responses. Where labor and management are able to establish a relationship of trust, they will put in place Operation Red Block agreements allowing those whose drug use has been detected to return to service after treatment in probationary status (or withholding discipline entirely on a first offense) in exchange for active employee involvement in prevention, referral and (where no alternative exists) identification under the co-worker report rule. Where labor-management cooperation cannot be effected, the threat of disciplinary sanctions flowing from detection will provide a powerful deterrent to volitional use of drugs while creating a strong incentive for the dependent user

to step forward and ask for help before detection in a random test.

Mandating discipline or disqualification in every case would bar railroads from participating in Operation Red Block agreements, which aid safety to the extent that they encourage employee participation in substance abuse prevention and enforcement. Mandating the opportunity for rehabilitation in every case would greatly reduce the incentives for early self-referrals and co-worker referrals. On either extreme, Federal intervention would eliminate the mutuality of consideration inherent in the Operation Red Block concept.

The final rule does require that an employee determined to have used drugs without appropriate medical authorization be removed from covered service. The employee may not be returned to covered service. The employee may not be returned to covered service unless the employee has submitted a negative urine sample and has completed any appropriate program of rehabilitation. Nothing in the rule requires that an employee determined to have violated the drug use prohibition be retained in the employ of the railroad.

Post-Rehabilitation Testing and After-care Monitoring

Comments: The FRA received various recommendations concerning follow-up testing of employees who have completed rehabilitation after testing positive in a random test. Commenters generally agree that FRA should give carriers wide latitude in post-rehabilitation testing, permitting the carrier to vary the frequency and duration of such testing on a case by case basis. Recommendations on an adequate period of follow-up testing varied from one to three years. Comments were received indicating that three to four tests per year may be sufficient.

Conclusions: Continuing treatment and follow-up testing of employees returned to service are important measures from the point of view of the recovering substance abuser and the public safety. Although this rule does not require that persons testing positive be afforded the opportunity for rehabilitation, it is inevitable that many will be offered that opportunity, particularly many testing positive for the first time. The knowledge that a follow-up test may be required can assist the recovering employee and offer important assurance from the point of view of the public safety.

As a consequence, the final rule provides that, after returning to work, a recovering employee must continue in any program of aftercare required by the EAP counselor (as defined in the current rule to include medical or employee assistance professional personnel) and be subject to follow-up testing for not longer than 60 months after return to service. Professionals designated by the railroad are free to work out a reasonable program of follow-up testing based on the nature and severity of the use or dependency problem identified through clinical evaluation.

Confidentiality of Test Results

Comments: Commenters are in general agreement that the HHS Guidelines offer adequate protection to employees. The Epilepsy Foundation of America is satisfied that the HHS Guidelines prohibit MRO's from divulging to management the existence of an epileptic condition in an employee.

Carriers believe they must be free to divulge test results in at least two circumstances: pursuant to a bona fide government inquiry or discovery request, and when necessary to protect the railroad during legal proceedings. In addition to these instances, FRA received comment on the propriety of permitting operators to divulge an employee's testing history to a subsequent employer engaged in transportation. A handful of commenters stated that in the interests of safety a carrier should be permitted to inform a subsequent employer of an employee's past drug habits. Others believed that an employee should not be permanently encumbered by a single positive test result. Strong opposition to dissemination was expressed by the Epilepsy Foundation of America and the EEAC, while one carrier commented that at the very least the period during which the information can be divulged should be limited to no more than one year following completion of rehabilitation. Another commenter suggested that dissemination be permitted only if the employee failed to be rehabilitated.

Railroads and their representatives took the position that disclosure of test results in the context of a disciplinary proceeding would be the responsibility of the employee demanding the investigation or asserting the grievance (i.e., the employee would have waived confidentiality).

Conclusions: The purpose of random testing and other forms of testing authorized by the current rule is to detect and deter drug use in violation of stated prohibitions in order to ensure safety of the public and railroad

employees. Test results that reveal medical use of controlled substances are subject to the individual's personal privacy interest in medical information, as is drug use information provided by the employee in order to permit informed interpretation of the test result. However, revealing such use to the railroad's medical review officer, who is under a duty not to republish the information, is not a material intrusion on the employee's privacy interest, since railroad employees have historically been subject to medical qualifications standards of the railroads. FRA agrees that this information need go no further than the medical review officer, and the final rule so provides. (The final rule prescribes a similar restriction on medical use disclosed through post-accident testing, subject to the need of Federal agencies investigating serious railroad accidents to have all information relevant to accident/incident causation.)

Test results indicating non-medical use of controlled substances are not subject to any recognized privacy interest. In most cases, such results will indicate ingestion of drugs that it is illegal to possess. However, requiring that this information be handled confidentially will tend to reduce the perceived intrusiveness of the testing process, and no legitimate safety purpose would be served by excessively broad publication of this information.

As a consequence, the final rule and the DOT Procedures require confidential handling of test results and medical information provided by the employee to aid interpretation of the results. In the case of test results, dissemination is limited to those persons necessarily involved in administrative action related to the drug use indicated by the test. Disclosure of test results by the railroad is permitted only with the written consent of the employee. The rule does not bar FRA or NTSB use of post-accident test results for accident investigation purposes (and disclosure incident to that process), carrier disclosure of aggregate statistics where such disclosure would not identify an individual, or FRA access to test records for regulatory compliance purposes.

Subsequent employers may obtain information concerning past drug testing under the rule only if the employee or applicant consents to disclosure. Obviously, nothing in the rule prohibits railroads entertaining applications from persons with railroad experience from requiring such consents as a condition of the hiring action.

Alternative Strategies—The NTSB Alcohol/Drug Study

The National Transportation Safety Board (NTSB) weighed in with brief comments and the 159-page Safety Study noted above. The NTSB Alcohol/Drug Study surveyed the 1987 accident experience for railroads and rail transit, reviewed railroad activities to address alcohol/drug problems, and proposed a lengthy list of further initiatives.

This document is a useful compendium of recent accident/incident data reflecting the consequences of alcohol and drug use by railroad and rail transit employees. However, FRA disagrees in material respects with many of the Study's conclusions and recommendations.

While offering a variety of recommendations on program implementation, NTSB stated as follows:

Conceptually, the Safety Board views the FRA rule (with modifications that are addressed in this study) as the model approach for Federal regulation to reduce alcohol and/or drug use in the transportation industry.

The Board went on to make a long list of recommendations which FRA will carefully consider on their individual merits. They are reviewed here in the context of the current regulatory proposal, which was issued prior to the NTSB report, since they were characterized by the Board as alternatives to random testing.

Post-accident testing recommendations. The first group of NTSB recommendations relate to mandatory post-accident toxicological testing (49 CFR Part 219, Subpart C). This program involves collection of blood and urine samples from employees involved in serious railroad accidents. The multifaceted rationale for this program was described in the preamble to the current rule (50 FR 31508, 31541-31542; Aug. 2, 1985), but a major objective of the program is to provide data pertinent to accident/incident causation. FRA has strictly limited its scope, because the taking of blood samples is physically invasive and should be required only where there is a reasonably compelling public interest. Testing is currently required after any train accident involving a fatality, hazardous material evacuation or railroad property damage in excess of \$500,000. Testing is also required after employee fatalities and "impact" train accidents that involve personal injuries or at least \$50,000 in damage. With the experience gained through mandatory post-accident testing to date and the deployment of additional

countermeasures through regulatory and voluntary action, FRA looks forward to modest further reductions in the scope of this program. NTSB, by contrast, would dramatically expand mandatory post-accident testing by—

- Lowering the damage threshold for nonimpact accidents to \$150,000, using replacement cost as the basis for computation, and including loss of lading;
- Expanding the scope of those tested beyond employees covered by the Hours of Service Act;
- Requiring testing after impact accidents even if the dollar threshold for reportability (currently \$5,200) is not exceeded; and
- Requiring collection of post-accident specimens within 4 hours.

The NTSB estimated that adoption of these recommendations would lead to testing after 600 accidents annually (currently less than 200) and lead to blood/urine sampling of over 6,000 employees (currently about 800). In support of these changes the NTSB cited several derailments in 1987 for which testing was not done because of differences between railroad damage estimates at the accident scene and later computations either by the railroad or by the NTSB.

FRA believes that major expansion of the current postaccident testing program is not warranted. The program is already the most extensive program providing full toxicology for fatalities and survivors that is in place for any mode of transportation. In order to be effective and check the exercise of discretion by administering personnel, testing must be done under a relatively rigid mandate. The NTSB recommendation would result in testing after a large number of derailments, the vast majority of which are caused by track or equipment or an interaction between the two (in contrast to collision-type events for which human factors predominate). The current program design excludes testing in this setting except with respect to the most serious accidents. Indeed, of the 4 accidents cited by the Board as examples of the need for more inclusive standards for testing, none appears to have involved human factors.

Further, the Board's suggestion that a 4-hour outside limit be put on post-accident testing—a limit which the Board would allow to be exceeded where necessity required—amounts to tinkering with a requirement that already requires that collection be given first priority after immediate safety response and medical care for those injured. FRA does not disagree that

prompt collection is the objective, but sees little gain in a complicated formula that says, in effect, test as soon as possible, but not later than 4 hours, but after 4 hours if necessary.

FRA does not mean to imply that changes in the program may not be appropriate. FRA understands the view of the Board, for instance, that additional safety-sensitive employees could be included in post-accident testing. However, inclusion should be tightly justified, and suggestions that "all" "safety sensitive" personnel be tested continue to beg the question of whom and under what circumstances. This is an issue FRA intends to revisit in a subsequent rulemaking. Marginal changes in post-accident testing coverage, however, can hardly be expected to have direct and immediate impacts on overall deterrence of drug use.

Medical certification program. The Board devotes less than a page of discussion to its recommendation that FRA institute a medical certification program for railroad employees. The apparent purpose and justification for having the railroads issue medical certificates to thousands of employees would be to have a certificate to revoke should alcohol or drug use be detected. FRA cannot imagine a more indirect and costly means of accomplishing an objective that may be accomplished directly, particularly in light of FRA's recent acquisition of statutory authority to apply sanctions to individuals.

The Board recognizes that major railroads already have medical certification programs. It cites no systemic deficiencies in those programs, documents no pattern of rail accidents caused by medical conditions other than misuse of alcohol or drugs, and gives no consideration to the effect of enforcing such a program on effective use of FRA's limited budget and personnel. Without prejudice to further consideration of the concept, FRA finds nothing in this proposal that should delay implementation of random testing.

Medical testing. The Board also recommends that FRA require periodic medical examinations ("return-to-work, return-from-furlough, and others as appropriate") for all employees in safety-sensitive functions and that FRA require inclusion of alcohol and drug screening in those exams.

Here the Board echoes the sense of FRA's 1984 recommendation to the railroads (49 FR 24252, 24297; June 12, 1984) that drug tests be included with physical examinations. All major railroads have medical examination programs and there is considerable merit to inclusion of drug screens,

particularly in a return-to-work context. FRA reserves the issue of whether these screens should be required for a later date. Of the seven rail systems that dominate rail transportation in this country (Conrail, CSX, Norfolk Southern, Union Pacific, Burlington Northern, Southern Pacific, Santa Fe), five already conduct drug or drug/alcohol screens with their physical examinations, although one or more of these railroads may be barred from continuing its program as a result of union-brought litigation. The National Railroad Passenger Corporation (Amtrak) also conducts such testing. The uniform experience of the railroads that have implemented medical testing is that it is important and useful, but not by any means dispositive of the problem, since abusers are often able to abstain for the time necessary to avoid detection. In short, it is not an alternative to random testing or other forms of short-notice testing.

Monitor performance. The NTSB also recommends that FRA "require railroads to monitor relevant behavior and performance, such as work attendance, work habits, and motor vehicle driving records, of all employees in safety-sensitive positions and to recommend to counseling those employees whose [records] are consistent with possible substance abuse." FRA, of course, already requires programs of training and testing in operating rules compliance (49 CFR Part 217) which monitor the most critical facets of performance on the job. FRA recommended that the railroads implement measures to review personnel records in 1984 (49 FR 24297; June 12, 1984). The Board itself quoted in the Alcohol/Drug Study from the FRA Alcohol/Drug Field Manual unit addressed at identification of drug abuse patterns. Further, the Department of Transportation proposed legislation, which was signed into law during the comment period, to permit efficient access to the National Driver Register. There is no difference in objectives, therefore, between the Board and FRA.

However, FRA is concerned that the recommendation, in effect, asks that FRA mandate and enforce good personnel management. Although certain concrete steps can be required and compliance monitored (e.g., periodic checking of driving records), efficient and effective personnel management is much too broad and diverse a topic to cover in any set of regulatory requirements; and neither the Board nor FRA can point to a single approach that is validated as a definitive response to substance abuse in the workplace.

Railroads already have significant incentives to manage their personnel wisely, and it is not clear that a new layer of Federal regulations would advance the process. This is an issue appropriate for inclusion in system assessments of railroad performance. However, one should not proceed with the illusion that better management by itself can bring an end to substance abuse in the workplace, since, absent direct and effective countermeasures, it is likely to persist at unacceptable levels in the face of the best personnel practices currently available.

Training. The Board would require annual drug and alcohol detection training for all employees who are required to monitor fitness for duty of other railroad employees, including working supervisors such as conductors and yardmasters. The existing FRA rule already requires that supervisors empowered to order reasonable cause drug tests receive detection training, and the Board documents in its report the delivery of such training to broad categories of line supervision under the current FRA rule and railroad programs, as well as inclusion of education/awareness components in Operation Red Block and similar voluntary programs that FRA has sponsored and supported. It is very clear, however, that detection training is not a substitute for random testing. Testimony offered at the field hearings supported the conclusion that many drugs in vogue in the railroad workplace can impair the fitness of a crewmember without inducing symptoms recognizable to even an educated layman. The fact that testing is keyed to an imperfect ability to recognize symptoms is one of the fundamental limitations of reasonable suspicion testing. While the considerable detection training conducted in this industry since 1985 has moderated that limitation to some extent, it cannot diminish it to an acceptable degree.

Reasonable cause testing. The Board's proposals for reasonable cause testing are as follows:

- Require that railroads adopt mandatory reasonable cause testing programs for all employees in safety-sensitive positions;
- Expand the circumstances which will trigger reasonable cause testing to include any violation of any safety or operating rule which can compromise the safety of operations or the welfare of other employees;
- Add testing requirements related to "work attendance, work habits, and poor motor vehicle driving records."

- Require alcohol breath testing in addition to urine testing when any reasonable cause condition is met. FRA appreciates that these recommendations involve matters of serious relevance to the current rulemaking. However, FRA does not find them a suitable alternative to random drug testing for the following reasons:

Certain of the recommendations are more clearly sound in concept than in practical application. For instance, broadening the type of operating rule violations that would warrant testing would have to be done incrementally. It is not possible to allow discretion to the railroad officer in the field to determine when a particular event is sufficiently serious as a safety matter to require testing; nor, clearly, would violation of many operating rules warrant such action. For example, operating rules typically include such general provisions as prohibiting "reading of other than Company instructions while performing service." No doubt inattention caused by reading the morning paper could be a safety problem, but perusing it while stopped on a siding for a half hour waiting for another train to approach and pass might be less than a critical matter. The point is that allowing discretion in application of literally hundreds of pages of rules and instructions incorporated therein by reference would simply provide a license for exercise of unchecked discretion. FRA notes that since implementation of the current rule in February of 1986 no party including the Board has proposed any specific operating rules that should be added to the current enumerated list. Similarly, consideration of a long term decline in job performance is obviously relevant to safety, but it is critical to establish linkage between those indicators and drug use before ordering drug testing or other measures. This is a task well suited to medical or employee assistance personnel under existing referral policies of the railroads.

FRA notes that the formal NTSB recommendation for mandatory reasonable cause testing comes at a time when all but one of the major rail systems in the United States have in place reasonably aggressive or very aggressive for-cause urine testing programs, either under the FRA rule or their own corporate policies. It is doubtful that railroad managements need further encouragement to do what it is clearly in their interest to undertake.

Further, a mandate for reasonable cause testing would be largely

unenforceable, particularly where no documented accident or injury occurred. In the railroad environment, there are normally two parties to any observed situation of reasonable cause. One is the employee, the other is the railroad officer. If the railroad officer fails to test, the employee who gave reasonable cause certainly has no incentive to report himself. Experience suggests that fellow workers who might witness the incident are equally unlikely to report it. Random testing, by contrast, is fully enforceable.

The NTSB and random testing. The Board's comments for the docket of this rulemaking reflect its conclusions and recommendations in the Alcohol/Drug Study. The Board recommends—

- "Aggressive reasonable cause testing, triggered by a wide range of potentially safety-related errors or work behavior patterns;
 - "Post-accident/incident testing (with the definitions of "accident" and "incident" broadened as described in the enclosed Safety Study);
 - "Periodic (medical) testing;
 - "Effective supervision of employees, provided by supervisors and management better trained to detect and deal effectively with drug and alcohol use; [and]
 - "Competent drug/alcohol education and treatment for employees."
- The Board advocates implementation of these measures prior to consideration of random testing. Whether the Board supports or opposes random testing remains unclear.

FRA believes that some of the Board's recommendations duplicate existing measures already implemented on a voluntary basis, while others are impractical or unwise when cast as Federal regulatory mandates. FRA notes that the Alcohol/Drug Study deals with random testing in a very summary fashion, concluding without significant analysis that other recommended measures, taken together, would be more effective. FRA simply disagrees with this conclusion, and the testimony of those who chose to appear at the hearings failed to support it. This not the time to exhaust the resources of the rail industry or the oversight capacity of the FRA chipping away at the periphery of the problem. This is not the occasion, after over a decade of experimentation, to attempt methods that are unnecessarily intrusive, untried, or uncertain of administration. What is required is a clear and effective deterrent, utilizing means that will detect those incapable of changing their behaviors. Random testing will provide that deterrent and detection capability.

Small Railroad Issues

Comments: FRA received numerous comments on the issue of whether small railroads should be excluded from the requirements of the rule. The American Short Line Railroad Association (ASLRA) and a good number of its members stated that the unique nature of the small carrier warrants exclusion, while many of the Class I carriers stated that because some small carriers operate on the same tracks as larger roads they should be equally drug free.

The ASLRA proposed that carriers with fifteen or fewer covered employees be exempted. One carrier suggested that the cut-off point be carriers with 31,200 or fewer manhours by covered employees annually. Another suggested that the FRA exempt carriers based upon operating speed.

Many comments were received on the special nature of the small short line railroad:

1. Small railroads generally operate on special, dedicated trackage which is not part of the national trunk line system. They do not share this trackage with other carriers.

2. In nearly three years of FRA post-accident testing, there has not been a single drug or alcohol positive on a carrier in this classification.

3. Typically only one train operates on the line at any time, eliminating the possibility of a collision-type accident, the type of occurrence which correlates to many of the human performance decrements produced by drug impairment.

4. Managers often perform covered service, and therefore the regulation would create an anomaly whereby the manager would be administering testing on himself or herself.

5. Employees of small railroads are closely supervised and do not stay overnight at remote locations. Thus, two important root causes of drug use among rail employees are not present.

6. Small roads operate at low speed (typically no more than 25 mph) in rural locations and do not transport passengers. Hazardous materials traffic volumes are low.

7. The cost of a program to the small operator is disproportionately high. The economic burden of a sophisticated program could bankrupt unstable fledgling companies or force tradeoffs against safety investments that would be more effective in their unique circumstances.

However, commenters distinguished the cases in which a small road operates concurrently with a large carrier on shared track. All commenters agreed that the potential for a serious accident

exists in that situation and that carriers operating on shared trackage should be subject to the same testing requirements as all other carriers operating on the national trunk line system.

Comments were also received discussing how the FRA should tailor the requirement of random testing to meet the concerns of the small carrier. It was suggested by large and small carriers alike that the FRA establish a hardship exclusion, whereby the FRA could excuse a carrier from compliance pursuant to the determination that a testing program is not necessary, or would be overly burdensome. Three small carriers proposed that the FRA itself conduct testing of short lines. This would save the railroads from having to bear the cost of drafting and implementing a program of their own. One commenter suggested that if testing is required, the FRA should excuse the small road from reporting requirements in order to preserve anonymity.

Due to the economic burden which random testing may place on small roads, much comment was received on ways to help small operators defray the cost of testing. One approach is for small railroads to "piggyback" onto the program of a Class I carrier. The large operator would in effect administer the program on a compensated basis for the small carrier. Some small carriers gave qualified assent to such arrangements, while several Class I carriers expressed strong opposition. Larger railroads fear possible liability consequences. They are also reluctant to be strapped with responsibility for tracking down short line employees or administering their programs. Some small railroads also feared the loss of control over personnel that would result if larger railroads administered the selection process.

The FRA received comments on the feasibility of lowering costs through the use of multi-carrier agreements. Under this approach, short lines could join together and establish a single program which would do the testing for several railroads. The ASLRA stated, however, that past attempts at collective arrangements indicate that short lines are reluctant to relinquish control of their operations and that therefore programs of this sort would most likely enjoy very limited support.

Conclusions: As FRA has explained in previous rulemakings, very small railroads present a unique regulatory problem. They are fundamentally different from small entities in other modes for several reasons. Most of these entities operate over track that is devoted exclusively to their service. It is not part of the national trunk line system. Because they are involved in the

"retail" service of picking up or setting out cars at points of origin or destination, they move smaller trains, often with lower-horsepower locomotives. Operating speeds are generally in the 10 mile per hour range. Because most small railroads operate only a single train, collision-type accidents are impossible. Hazardous materials traffic is light, and operating speeds ordinarily do not produce the kinetic energy necessary to cause a major hazardous materials release. Small railroads do not provide scheduled passenger service, and their total employment constitutes less than 1 percent of the industry.

The special problems of small railroads with 15 or fewer Hours of Service employees, and the reduced safety exposure they represent, have compelled the Congress to allow exemptions to the traditional restrictions on Hours of Service applicable to all other railroads. Their problems are recognized in other ways in Federal safety standards, including exclusion from certain reporting requirements and exclusion of certain low-speed track (in common with other railroads) from the Track Safety Standards. When FRA issued the current alcohol/drug regulations in 1985, the very small railroads were also excluded from requirements for pre-employment drug testing, from the reasonable cause testing authorization, and from "bypass" requirements.

FRA did make very small railroads subject to requirements for post-accident toxicological testing, as well as the prohibitions of § 219.101 ("Federal Rule G"). However, since the institution of these requirements not a single small railroad has had an accident sufficiently severe to qualify under the mandatory post-accident testing requirements. Nor do we have any other information indicating public safety consequences from drug use on very small railroads.

FRA agrees that imposition of mandatory random testing on very small railroads is unnecessary and inappropriate. Although small railroads can certainly have accidents, they have few accidents that involve hazard to persons off their rights-of-way. As a consequence, the final rule exempts railroads with 15 or fewer employees from the random testing requirement. However, this exemption does not apply where the small railroad has trackage rights over another railroad or otherwise engages in joint operations with another railroad.

FRA believes that the criterion of 15 or fewer Hours of Service employees should, as a time-honored distinction

embodied in the Hours of Service Act, serve as the line of delineation between those railroads subject to the random testing requirement and those not subject. This threshold is clearly in the range of reasonableness as a distinction between very local and limited rail operations and somewhat more extensive operations involving greater potential hazards.

FRA recognizes that small railroads above the exemption limit will require assistance to develop and implement random testing programs. FRA believes that the combination of concerted action through the ASLRA, FRA assistance, contracts with larger railroads, consortia among smaller railroads, and other approaches yet to be devised will permit orderly implementation of random testing on these properties. Similarly, very small railroads that operate over other railroads should be able to make reasonable arrangements for testing services from the host railroad or from other sources. FRA has considered but decided against mandating the participation of larger railroads in these arrangements, believing that workable solutions can only be fashioned on a business basis without FRA involvement.

Alcohol

Comments: Safe Travel America and six railroads would extend the random testing mandate to include alcohol. Commenters favoring inclusion of alcohol noted that alcohol is the single most abused drug in our society and feared that testing for other drugs alone could cause abusers to use alcohol instead. United Transportation Union witnesses viewed alcohol as a problem six or seven times greater than abuse of other drugs.

The AAR and certain other commenters believed that alcohol is more easily detected than use of other drugs. It was noted that testing for job-related use of alcohol would require blood or breath sampling, with attendant logistical complications.

Conclusions: Random testing for alcohol is a proposal that is technically beyond the scope of the NPRM. FRA did not include random testing for alcohol in the NPRM because it appeared that existing countermeasures, including the reasonable cause testing program, have been effective in reducing the use of alcohol by employees. Since post-accident toxicological testing began in early 1986, the positive rate for alcohol has remained at or below one percent. In one 7-year period prior to the issuance of the current rule, significant alcohol presence was determined in about one of every six or seven

employees killed on the job in train incidents. In the two and one-half years since the effective date of the current rule, the only employee fatalities in train incidents for which alcohol has been detected are three non-Hours of Service employees (i.e., employees not subject to the current rule).

Further, FRA had noted that testing for alcohol presents separate issues that require independent analysis. It is not possible to test a single urine specimen and determine current blood alcohol concentration. Breath testing is the preferred method of detection and evaluation, but clearly would involve a separate logistical structure to administer in a random manner.

Accordingly, FRA has determined that the alcohol issue should continue to be addressed through existing programs, without prejudice to the possibility of further regulatory action at a later time.

Preemption

Comments: Comments were received indicating that some states have enacted laws which limit or regulate drug testing by private employers. In order to comply with these state requirements a railroad may have to vary the nature of its testing program from state to state. Two operators and the EEAC request that the FRA indicate in the final rule that state laws concerning drug testing are preempted by the federal mandate.

The RLEA commented that the final rule should also supersede any current or future random testing programs which are not implemented under the authority of the FRA rule.

Conclusions: Section 205 of the Federal Railroad Safety Act of 1970 provides, in effect, that state and local laws and regulations are preempted by any Safety Act regulation addressing the same subject matter. This statutory preemption is restated in the current regulation, which this final rule amends. Therefore, issuance of this random testing rule will preempt any state legislation regarding random drug testing for railroad employees, whether or not inconsistent with the final rule. FRA understands the scope of preemption to be as broad as necessary to ensure uniformity, both with respect to the occasions on which testing may be required and the technical safeguards for that testing.

Penalties

Comments: The FRA received a number of comments alleging abuses of present drug testing programs. Several union organizations, concerned that random testing may be misused by some members of railroad management, urged the FRA to provide harassed or

mistreated employees with specific remedies. The Brotherhood of Locomotive Engineers asked for a \$5,000 penalty for harassment, defined as a willful violation of the regulations. One railroad believed that railroads should be excused if, during the first year, the testing target was not met. Other comments were beyond the scope of the notice.

Conclusions: FRA has updated the penalty schedule to reflect the higher levels of penalties allowed under the Rail Safety Improvement Act of 1988. Additional revisions may be made in the context of the pending review of all penalty schedules (53 FR 28594; July 28, 1988).

International Commerce

It has been determined not to make the random testing requirement 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 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.

Section-by-Section Analysis of Final Rule

The final rule reflects substantial revisions as a result of comments received, issues raised during the exchanges at the public hearings, and further review within FRA. Each comment received has been considered by the FRA in preparing this final rule.

Amendments to Part 219

The final rule amends the existing alcohol/drug control rule (49 CFR Part 219) by adding a prohibition on non-medical use of controlled substances at any time, creating a new subpart requiring submission and implementation of random drug testing programs, adding a new subpart that sets forth rigorous conditions and safeguards for urine drug testing authorized or required under the part, and making conforming changes in the general subpart. As noted below, further amendments will be issued in this same proceeding to conform Subparts D and F to the new Subpart H and revise Subpart C to incorporate enhanced procedures similar to those contained in Subpart H.

Subpart A amendments

Section 219.3 is amended to exclude from the operation of Subpart G (random testing) any person for whom compliance would violate the domestic laws or policies of another country.

Section 219.9 is amended to place the responsibility for compliance with random testing and testing safeguards on the railroad. Paragraph (d) of § 219.9, added by a recent amendment (53 FR 28594, 28600; July 28, 1988), imposes responsibility for compliance on individuals with respect to any applicable provisions and makes individuals subject to penalty for willful violations.

Subpart B amendment. The final rule amends Subpart B by adding a new § 219.102, entitled "Prohibition on use of controlled substances." The rule expressly states the proposition that an employee who performs covered service may not use a controlled substance at any time, except as permitted by § 219.103. Section 219.103 allows use of a controlled substance under medical authorization where the medical practitioner has made a good faith

judgment, with notice of the employee's assigned duties and on the basis of available medical history, that use of the substance by the employee at the prescribed or authorized dosage level is consistent with the safe performance of the employee's duties.

The purpose of this prohibition is to promote the fitness of employees engaged in safety-sensitive functions and thereby to promote public and employee safety on the railroad. The prohibition is stated broadly to encourage responsible use of controlled substances and to put the employee on notice that detection of residues of controlled substances may have adverse consequences. Without proper medical guidance, employees may use controlled substances that have terminal half-lives of many hours or even days without being aware of the potential for adverse consequences on the job. Further, without such guidance, employees may cease to use drugs precipitously, resulting in withdrawal or hangover effects that can also degrade performance.

The rule neither authorizes nor requires surveillance by the railroad or any other person of off-duty conduct. Rather, the rule establishes a standard of conduct to guide the covered employee.

Subpart G. The final rule adds a new Subpart G to Part 219. The subpart requires establishment of random testing programs.

Section 219.601 deals with content and approval of random testing programs. Paragraph (a) requires each railroad to submit a random testing program for approval by the Administrator not later than June 19, 1989. Subsequent amendments would also be reviewed prior to implementation.

Paragraph (b) requires random testing programs to meet certain criteria. First, they must provide for statistically random selection of employees. In order to allow for rounding errors associated with multi-stage selection processes, the rule provides that each employee must have a "substantially equal" statistical chance of selection within a specified time frame. Any exercise of discretion in selection is specifically prohibited.

Second, programs must select for testing a sufficient number of employees so that the annualized rate of testing is equal to 50 percent of the relevant workforce. (Selection of a greater number of employees than are actually tested is a common feature of random testing programs, since at any given time some employees will be unavailable for testing due to use of annual or sick leave, training away from the normal

work site, etc. The railroad program should address precisely how these problems will be addressed.)

The final rule also makes allowance for gradual start-up of the program. For some employers, particularly those with a large number of employees subject to drug testing, it may be a substantial burden to move immediately to a 50 percent random testing rate. If required to have tested at a rate equal to 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 more routine. Clearly, it would not be wise 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 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 a railroad has 1,000 covered 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 was achieved. Thus, if the railroad's random testing program 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.

Third, the programs must meet certain criteria to ensure effectiveness. The program must be structured so that each employee perceives the possibility that he or she will be subject to testing. For example, the program must sample employees who regularly work late night and early morning shifts, not just

employees on day shifts. Pool crews and extra board employees should also be subject to selection and testing on a basis that creates an expectation that selection may occur under circumstances where the employee is available for testing. Notice of selection shall not be provided until the duty tour during which testing occurs and then only so far in advance of collection as is necessary. Testing procedures and safeguards must be consistent with the requirements of Part 219.

Fourth, random testing programs must provide that an employee shall be subject to testing only while on duty. Employees who are off duty may not be notified that testing is required. Although the rule does not bar calling employees to duty exclusively for the purpose of testing if they are available for service under the collective bargaining agreement, they may not be notified of the testing requirement until they have reported. Since it is in the mutual interest of employees and railroads to provide for testing in connection with regular duty tours, FRA believes that random testing programs will be so designed as to create the minimum impact on employees' lives and therefore minimum cost to the railroad.

Finally, programs must provide that employees selected on a random basis be so informed. FRA anticipates that this would be done through initial verbal notification and through a check-off on the urine custody and control form.

Paragraph (c) provides for approval or disapproval (and resubmission) of random testing programs.

Paragraph (d) requires implementation of approved programs not later than November 20, 1989. Prior to implementation, each covered employee must receive a notice announcing the forthcoming commencement of the program, the consequences of a determination that the employee has violated § 219.102 or any applicable railroad rule, and reminding the employee of the right to self-refer for counseling and treatment without adverse consequences. The notice is intended to encourage affected employees to cease using drugs prior to the implementation of random testing.

Section 219.603 requires participation in random testing and prescribes a 9-month disqualification from covered service for refusing to provide a sample. This period is similar to the period set forth for refusal of a post-accident test, and hearing procedures are likewise similar. The section clarifies that tampering by the donor is a refusal. The requirement that the employee be disqualified from covered service is one

that operates against the railroad (including a subsequent employer with notice of the refusal) and is issued under the Secretary's general regulatory authority conferred by section 202 of the Federal Railroad Safety Act. Following the end of the 9-month period, the disqualified employee could be returned to work only after presenting a negative sample and would be subject to follow-up testing. The employee would also have to complete any program of rehabilitation deemed necessary after professional evaluation.

Section 219.605 deals with consequences of a test result. Paragraph (a) recites that a test result is not considered positive until confirmed and reviewed by a medical review officer. Paragraph (b) provides for notification to the employee. Paragraph (c) requires the railroad to suspend from covered service an employee who is believed to be in violation of § 219.102 as a result of a positive test result. Paragraph (d) preserves any procedural rights available to the employee under a collective bargaining agreement or at common law. Most railroad employees are subject to specific procedural rights under the collective bargaining agreements with respect to lodging of a rule charge, investigation, grievance and arbitration. It is FRA's intent that this mechanism continue to be used to resolve issues of compliance by the employee with Federal and railroad alcohol/drug rules. For instance, should a railroad investigating officer or arbitrator determine, after hearing, that the employee had not been shown to be in noncompliance with § 219.102 or a railroad rule, the deciding officer could reinstate the employee with full back pay and benefits. This is the same system currently being used to determine employee responsibility under existing regulations.

Paragraph (e) provides that an employee who has been determined to have violated § 219.102 may not be returned to service unless the employee has presented a negative urine sample, been evaluated for chemical dependency or other treatable disorder, and completed any course of counseling or treatment determined to be necessary by an EAP counselor (a term defined in § 219.5). The determination referred to is the determination of the railroad (which is ordinarily subject to review and modification by an arbitrator or court of competent jurisdiction). This paragraph does not require that the employee be provided an opportunity for treatment, nor does it bar disciplinary sanctions. It merely establishes a safety "floor" for return of the recovering substance abuser to covered service. Upon return

to service, the employee is subject to the requirement of participation in aftercare, if required by the EAP counselor, and to a reasonable program of follow-up testing not more than 60 months in duration. These provisions will allow the exercise of sound professional judgment by substance abuse and medical professionals and do not provide license for pursuit of collateral agendas.

Section 219.607 provides for record retention. Detailed records for positive tests must be retained for at least 2 years in order to ensure their availability to FRA and arbitrators (as necessary). Records of negative tests must be retained for 1 year. Summary records of test results and employee rehabilitation must be retained for at least 5 years. These records must be maintained for a reasonable period, by employee, if adequate data is to be gathered with respect to the success of drug abuse treatment.

Section 219.609 excludes from the subpart a railroad that employs not more than 15 Hours of Service employees and that does not operate on the tracks of another operating railroad. The exclusion does apply to a small railroad that leases track from another railroad, so long as the small railroad is the exclusive operator. FRA recognizes that this section does not precisely parallel the application language of § 219.3(b). FRA will resolve this tension in a forthcoming rulemaking.

Subpart H. The final rule adds a new Subpart H, which provides enhanced testing standards for existing Subparts D and F, as well as the new random testing subparts. This subpart becomes fully effective on July 19, 1989. This will allow time for HHS to complete its certification of laboratories, for railroads to make additional arrangements for collection and enter into new contracts for laboratory services, and for other necessary steps to be implemented. Earlier compliance is, of course, consistent with current regulations.

Subpart H will function in tandem with the Procedures for Transportation Workplace Drug Testing Programs, 49 CFR Part 40, which is published elsewhere in today's Federal Register. This part will, in effect, codify the HHS Guidelines with adaptations for DOT-regulated parties. Through incorporation by reference, Subpart H makes the DOT Procedures mandatory on railroad employers with respect to reasonable cause testing, pre-employment drug testing, and random testing. In the case of any perceived conflict of interpretation between Part 219 and Part

40, Part 219 controls because of its more particular application.

Section 219.701(a) gives effect to the DOT Procedures and applies them and Subpart H to Subparts D, F and G. For emphasis, the provision notes that only HHS-certified laboratories may be employed for this testing.

Paragraph (b) requires that the railroads' contracts with certified laboratories provide for appropriate inspection rights. The purpose of inspection as specified here is continuing laboratory quality control.

Paragraph (c) requires that laboratory contracts also provide for the laboratory's compliance with this part, including the laboratory standards provisions of the HHS Guidelines.

It should be noted that the DOT Procedures contain special provisions relieving smaller employers of blind proficiency testing requirements where the employer uses a laboratory already subject to blind proficiency testing by a transportation employer or Federal agency. Railroads covered by the blind testing requirement employ the great majority of employees subject to Part 219 and will submit to certified laboratories large volumes of employee samples and blind proficiency testing samples. Requiring this of smaller railroads would have little marginal effect with respect to quality control of the laboratories but would involve considerable expense and administrative burden. Further, involving a proliferation of smaller businesses in a blind proficiency testing program at this juncture in the development of the art would create unacceptable risks that samples could be mishandled and lead to confusion over the meaning of proficiency testing results. Although laboratory capacity for drug urinalysis is more than adequate, the number of firms providing expert external quality control services is presently limited. It is more important that large volume programs challenge the laboratories properly than it is for a large number of small clients to submit a relative handful of blind samples.

Section 219.703 deals with collection of urine samples.

Paragraph (a) provides that collection shall be handled in accordance with 49 CFR Part 40, the adapted HHS Guidelines.

Paragraph (b) refers to the policy of the DOT Procedures, which recognizes two groups of qualified collectors. The first is licensed medical professionals and technicians. Medical personnel may conduct collections if they have received instructions for collection under Part 40 and if they conduct the collection and certify its completion as required in that

Part. Medical personnel are an essential resource for collection of urine samples following injury-producing events, where the employee has the option to provide a blood sample (as is the case under Subpart D), and in remote rural locations. Further, many railroads will wish to use independent medical facilities for collections (even when not required) in order to provide reassurance to employees that the process is fair and unbiased. Medical personnel are familiar with basic procedures for collection, identification and handling of body fluids used for diagnostic purposes. The adapted Guidelines set forth supplementary procedures that guard against intentional tampering by the donor while ensuring that the specimen is properly secured and handled in accordance with chain-of-custody procedures. Medical personnel must be provided written instructions ensuring that those procedures are followed.

Other personnel may also be trained to collect a urine specimen in accordance with the adapted Guidelines.

Paragraph (c) bars use of supervisors and co-workers as collectors. Collection should be accomplished in a detached and professional manner. Employees should not be subject to collection by persons with whom they work in the railroad operating environment. The term "co-worker" is defined for purposes of the paragraph to mean a person with whom the employee is assigned or could be assigned in a crew or other working unit to perform normal transportation duties on the railroad. FRA is aware that this limitation may make it difficult for smaller railroads to provide for collection on railroad property using their own personnel as collectors. However, FRA believes that smaller railroads will be able to use commercial collection services and local medical personnel to accomplish the collections.

Section 219.705 deals with the range of controlled substances for which testing is conducted. *Paragraph (a)* provides that samples shall be analyzed for controlled substances identified in paragraph (b). Under the DOT Procedures, testing is also authorized for specific gravity, creatinine (a natural waste present in all urine) concentration, and for suspected adulterants such as soap, vinegar or other agents that might be introduced in an attempt to defeat a screening test. These preparatory steps do not involve determination of any information that would be reported by a laboratory to any other person, unless the sample was deemed not suitable for analysis.

Paragraph (b) requires that each sample be analyzed for marijuana, cocaine, phencyclidine (PCP), opiates (morphine and codeine), and amphetamines (amphetamine and methamphetamine). Obviously, in the case of certain of these drugs it is the metabolite of the drug that is the target compound.

The five drug groups identified in this section generally represent the most widely abused controlled substances. Even in the case of PCP, for which the prevalence rate among employed populations is very low, there is an important public safety interest in identifying the few employees who may use the drug, since it is capable of producing lasting and extreme mental disorders, as well as irrational and uncontrolled conduct during its period of acute activity. Inexpensive screening tests are available for each of the drug groups.

Paragraph (c) provides that a railroad may test the sample obtained under this rule only for the drugs required or specifically authorized to be tested under this rule. (Part 40 further emphasizes that testing of the specimen other than that specifically authorized or required is prohibited.) That is, a railroad must test the sample for the five major drugs listed in each DOT regulation. Only if, in the context of reasonable cause testing, the FRA 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 railroad 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 any 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.

Section 219.707 provides for review of test results by the railroad's medical review officer (MRO) under provisions of 49 CFR Part 40. Under Part 40, test results are reported exclusively to the MRO, and only after performance of the confirmatory test.

Under *paragraph (a)* and Part 40, the MRO has the responsibility to review the laboratory report and consider alternate explanations for the presence

of the compound detected, such as medical use of the controlled substance.

Paragraph (b) requires the MRO to complete review of the test results in not more than 10 working days, unless additional time is required because the MRO is awaiting supplementary documentation from the employee.

Paragraph (c) requires prompt delivery of any positive report to the employee. In no case may a railroad take adverse action against the employee without providing the employee a copy of the test result.

Paragraph (d) provides that the MRO shall report all negative results, including analytical positives indicating medical use of controlled substances and tests for which laboratory data is deemed insufficient, over the MRO's signature. The intent of this provision is for there to be a single form of negative report that does not disclose the basis on which the result is considered negative. The paragraph bars dissemination of medical drug use information to non-medical personnel, whether the information is derived from a test result or information provided by the employee or the employee's physician. The medical review officer is not barred from using therapeutic drug use information in the context of an established medical qualifications program, since enforcement of such a bar would inappropriately inject FRA into a confidential relationship and create major problems of enforcement. Where such programs exist, as they have with respect to railroads of significant size for many decades, the employee waives normal privacy interests with respect to matters bearing on medical fitness for duty.

Section 219.709 addresses sample retention and retesting.

Paragraph (a) provides for retention of samples deemed positive on confirmation for a one-year period. Within this period the employee may request that the sample be retained for a further reasonable period.

Paragraph (b) creates a right to have the original sample retested if the employee makes the request within 60 days of receipt of a positive test result from the MRO. The employee may designate retesting by the original laboratory or another HHS certified laboratory. The railroad may require the employee to advance the cost of reanalysis, subject to reimbursement if the retest is negative.

Paragraph (c) provides that inter-laboratory transfers be handled in accordance with chain-of-custody procedures.

Paragraph (d) provides that retest results shall be reported down to the

level of sensitivity of the assay. Some drugs and metabolites deteriorate during handling and storage, therefore use of the same cut-offs employed for original testing is not appropriate.

Section 219.711 requires that test results be held in confidence. Paragraph (a) restricts handling of test results by laboratories. This paragraph must be effectuated through the railroad's contract with the laboratory (see § 219.701(c)).

Paragraph (b) provides that test results may be used within the railroad only for the purpose of compliance with Part 219. No further dissemination may be made within or external to the railroad, except with the written voluntary consent of the employee. The paragraph also requires that the railroad institute internal procedures sufficient to guard the information against unauthorized disclosure. Compliance with this part would include suspension of the employee, completion of any disciplinary proceeding required to determine compliance with § 219.102 or a similar company rule (including review of the determination by a professional arbitrator), and referral of the individual to an employee assistance program, if applicable.

FRA recognizes that it may be appropriate for future railroad employers of persons testing positive to be aware that the employee has been determined to have violated § 219.102, particularly where the employee requires rehabilitation prior to being returned to service or is subject to aftercare or follow-up testing. Railroads can achieve this objective by requesting the applicant to provide the necessary consent as a condition of employment. Such a consent is voluntary within the meaning of this part.

Paragraph (c) deals with handling of post-accident test results under Subpart C. Railroads are required to maintain those test results in the same manner as provided for other test results, except to the extent the results are made public in connection with an accident investigation. The section also recites FRA's present policy of treating test results indicating medical use of controlled substances as not subject to disclosure except where it is necessary to consider the information in relation to determination of probable cause.

The final rule also amends the *Schedule of Civil Penalties, Appendix A*, to provide penalties for violations of the random testing provisions (which incorporate by reference Subpart H). Other portions of the penalty schedule will be similarly amended prior to the effective date of Subpart H. Amounts set forth in the schedule amendments reflect

the increased penalty range recently enacted into law in the Rail Safety Improvement Act of 1988.

Amendment to Part 217

The final rule also amends § 217.13 (Annual Report) to require reporting of alcohol/drug tests and observations in a standard format and to require reporting of new data elements related to the random testing program. Experience under the existing provision has indicated that the railroads and the FRA share a common need to obtain comparative aggregate data regarding this subject matter.

Further Rulemaking

The final rule makes certain changes in the safeguards for urine drug testing conducted under Subparts D and F of the current rule (49 CFR Part 219), effective July 19, 1989. In summary, the provisions of the new Subpart H will displace a number of provisions designed to provide for accurate and well-administered urine drug testing with the state-of-the-art requirements now available under the HHS Guidelines, as adapted through the DOT Procedures. Where appropriate, existing text will be removed and cross-references to the new regulatory language will be inserted. Provisions for mandatory post-accident toxicological testing will also be updated to incorporate procedures and further safeguards equivalent to those set forth in the DOT Procedures, which are themselves based on HHS Guidelines issued in April of 1988 and not yet fully implemented through laboratory certifications. Certain other decisions made in this proceeding will also require conforming changes in previous regulatory language in order to ensure consistency and orderly implementation.

FRA is publishing this final rule as soon as possible in order to allow the railroads ample time to plan and implement random testing programs. However, FRA recognizes that a supplemental final rule will have to be issued to make the conforming changes, and certain additional issues will have to be handled through separate notice and comment.

The supplemental final rule will be issued in the very near future, well ahead of the implementation dates announced in this final rule.

A supplemental NPRM will also be issued addressing the issues of approval of testing for other controlled substances, adjustment of random testing level of effort in light of experience gained under the rule, and

crediting of other short-notice tests to the random testing 50% target level.

Additional notices of proposed rulemaking regarding minor substantive changes may also be issued in the near future. FRA remains committed to making a significant number of perfecting changes in the existing rule text and will do so with appropriate opportunity for further public participation.

Regulatory Analysis

E.O. 12291 and DOT Regulatory Policies and Procedures

These final regulations have been evaluated in accordance with existing regulatory policies and are considered to be non-major under Executive Order 12291. However, they are considered to be significant under the DOT policies and procedures (44 FR 11034; February 26, 1979) because they initiate a substantial regulatory program.

Consequently, FRA has prepared and placed in the rulemaking docket a regulatory evaluation addressing the economic impact of these rules. It may be inspected and copied in Room 8201, 400 Seventh Street, SW., Washington, DC 20590.

FRA's "base case" estimate yields program costs over the first ten years of approximately \$81 million and direct benefits from reduced train accidents of more than \$87 million (current values at 10 percent discount), resulting in a positive benefit to cost ratio of 1.08 to 1. The favorable ratio would be significantly higher if the rule avoided a major catastrophic accident, such as a hazardous materials accident involving loss of a number of lives and destruction of valuable property.

FRA believes that additional direct and indirect benefits will accrue as a result of the deterrence of drug abuse and treatment of those detected for the first time. (Railroad policies typically allow reinstatement of recovering drug abusers on a leniency basis if they have completed appropriate treatment.) These benefits will include reduced personal injuries on and off the job, improved productivity and reduced absenteeism, reduced medical and worker's compensation claims, theft reduction, and diversion of cash resources of employees from non-productive expenditures for purchase of drugs to productive, legitimate uses. Accordingly, the total benefits flowing from the rule should preponderate over costs by a significantly higher ratio than presented in the quantitative analysis.

Regulatory Flexibility Act

FRA certifies that this final rule will not have a significant economic impact on a substantial number of small entities. Although a significant number of small railroads are subject to these regulations, the economic impact of the rules will not be significant for several reasons. Although unit costs for small railroads for certain services required under the regulations may be somewhat higher, small railroads have the latitude to utilize cooperative buying services and, from testimony received during the rulemaking, will find at least some connecting Class I railroads willing to assist in areas such as laboratory contracts. Preparation of random testing programs will be facilitated by the small railroads' industry association. Gross testing costs will be generally proportional to the scale of the railroad, since costs vary by number of employees required to be tested.

FRA has taken two specific actions that will limit impacts on small entities. First, very small railroads employing 15 or fewer Hours of Service employees will be excluded from the requirement for random testing programs if they are not engaged in joint operations with other railroads. Second, smaller railroads are excluded from the requirement for blind proficiency testing if they utilize laboratories subject to blind challenge by other Government or transportation clients.

Comments received on this issue are summarized above.

Paperwork Reduction Act

The rules being adopted in this proceeding contain revised information collection requirements in the following sections: §§ 219.601, 219.603, 219.605, 219.607, 219.701 (incorporating 49 CFR Part 40), 219.705, 219.707, 219.709, 219.711. Revised information collection requirements are also contained in the amendments to § 217.13. FRA is submitting these information collection requirements to the Office of Management and Budget for approval under the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 et seq.). FRA anticipates that OMB will undertake prompt action on these requests for approval. When OMB has approved these revised requirements, FRA will publish a notice in the *Federal Register* announcing that action and revising § 219.21 accordingly. Compliance with the revised information collection requirements is not required until the approvals have been provided. Any comments on the revised information collection requirements should be provided to Mr. Gary Waxman,

Regulatory Policy Branch, Office of Management and Budget, New Executive Office Building, 726 Jackson Place, NW., Washington, DC 20503. Copies of any such comments should be provided to the docket of this rulemaking.

Environmental Impact

FRA has evaluated these regulations in accordance with its procedures for ensuring full consideration of the environmental impact of FRA actions as required by the National Environmental Policy Act (42 U.S.C. 4321 et seq.), other environmental statutes, Executive Orders, and DOT Order 5610.1c. These regulations meet the criteria that establish this as a non-major action for environmental purposes.

Federalism Implications

This final rule will not have a substantial effect on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. Thus, in accordance with Executive Order 12612, preparation of a Federalism assessment is not warranted. Under section 205 of the Federal Railroad Safety Act of 1970, 45 U.S.C. 434, this rule preempts any state or local law addressing the subject matter of the rule. The Safety Act provides for uniform regulation of railroads involved in interstate commerce.

List of Subjects

49 CFR Part 217

Railroad safety, Railroad operating rules, Reporting and recordkeeping activities.

49 CFR Part 219

Railroad safety, Control of alcohol and drug use, Reporting and recordkeeping requirements, Urine drug testing standards.

In consideration of the foregoing, Chapter II, Subtitle B, of Title 49, Code of Federal Regulations is amended as follows:

PART 219—[AMENDED]

1. The authority citation for Part 219 continues to read as follows:

Authority: 45 U.S.C. 431, 437, and 438, as amended; Pub. L. 100-342; and 49 CFR 1.49(m).

2. Part 219 is amended as follows:

a. The table of contents is amended to add new entries as follows:

Subpart B—Prohibitions

219.102 Prohibition on abuse of controlled substances

Subpart G—Random Drug Testing Program

Sec.

219.601 Railroad random testing programs
219.603 Participation in testing; refusals
219.605 Positive test results; procedures
219.607 Reports; FRA access to records; confidentiality
219.609 Exclusion from subpart

Subpart H—Procedures and Safeguards for Urine Drug Testing

219.701 Standards for urine drug testing
219.703 Collection
219.705 Drugs tested
219.707 Review by MRO
219.709 Retest
219.711 Confidentiality of test results

b. Section 219.3 is amended by adding a new paragraph (c) at the end thereof to read as follows:

§ 219.3 Application.

(c)(1) Subpart G of this part shall not apply to any person for whom compliance with that subpart would violate the domestic laws or policies of another country.

(2) Subpart G is not effective until January 1, 1990, with respect to any person for whom a foreign government contends that application of that subpart raises a question 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 Subpart G to such person on and after January 1, 1990.

(c) Section 219.9 is amended by revising paragraph (a)(1), redesignating paragraph (a)(5) as (a)(7) and republishing it, by adding new paragraphs (a)(5) and (a)(6), and by republishing the introductory text of paragraph (a) to read as follows:

§ 219.9 Responsibility for compliance.

(a) A railroad that—

(1) Having actual knowledge, requires or permits an employee to go or remain on duty in covered service while in violation of § 219.101 or § 219.102;

(5) Fails to adopt or publish, or willfully and with actual knowledge fails to implement, a program required by Subpart G of this part;

(6) Willfully and with actual knowledge, requires an employee (or applicant) to submit to testing under a program required by Subpart C, D, F or G without observance of the procedures

and safeguards contained in the subpart under which testing is conducted or, in the case of a test under Subpart D, F or G, without observance of the procedures and safeguards contained in Subpart H; or

(7) Fails to comply with any other requirement of this part; shall be deemed to have violated this part and shall be subject to a civil penalty as provided for in Appendix A and paragraph (d) of this section.

d. Section 219.102 is added to read as follows:

§ 219.102 Prohibition on abuse of controlled substances.

On and after July 19, 1989, no employee who performs covered service may use a controlled substance at any time, whether on duty or off duty, except as permitted by section 219.103 of this subpart.

e. Subpart G is added to read as follows:

Subpart G—Random Drug Testing Program**§ 219.601 Railroad random testing programs.**

(a) *Submission.* No later than June 19, 1989, or in the case of a railroad commencing operations thereafter not later than 30 days prior to such commencement, each railroad shall submit for FRA approval a random testing program meeting the requirements of this subpart. The program shall be submitted to the Associate Administrator for Safety, FRA, for review and approval by the Administrator. If, after approval, a railroad desires to amend the random testing program implemented under this subpart, the railroad shall file with FRA a notice of such amendment at least 30 days prior to the intended effective date of such action. A program responsive to the requirements of this section or any amendment to the program shall not be implemented prior to approval.

(b) *Form of programs.* Random testing programs submitted by or on behalf of each railroad under this subpart shall meet the following criteria, and the railroad and its managers, supervisors, officials and other employees and agents shall conform to such criteria in implementing the program:

(1) Selection of covered employees for testing shall be made by a method employing objective, neutral criteria which ensure that every covered employee has a substantially equal statistical chance of being selected within a specified time frame (except where approval has been granted under

paragraph (e) of this section). The method may not permit subjective factors to play a role in selection, i.e., no employee may be selected as the result of the exercise of discretion by the railroad. The selection method shall be capable of verification with respect to the randomness of the selection process, and any records necessary to document random selection shall be retained for not less than 24 months from the date upon which the particular samples were collected.

(2) The program shall select for testing a sufficient number of employees so that, during the first 12 months—

(i) The random testing program is spread reasonably through the 12-month period;

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

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

During each subsequent 12-month period the program shall select for testing a sufficient number of employees so that the number of tests conducted will equal at least 50 percent of the number of covered employees. Annualized percentage rates shall be determined by reference to the total number of covered employees employed by the railroad at the beginning of the particular twelve-month period or by an alternate method specified in the plan approved by the Administrator.

(3) Railroad random testing programs shall ensure to the maximum extent practicable that each employee shall perceive the possibility that a random test may be required on any day the employee reports for work.

(4) Notice of an employee's selection shall not be provided until the duty tour in which testing is to be conducted, and then only so far in advance as is reasonably necessary to ensure the employee's presence at the time and place set for testing.

(5) The program shall include testing procedures and safeguards, and procedures for action based on positive test results, consistent with this part.

(6) An employee shall be subject to testing only while on duty.

(7) Each time an employee is selected for random testing the employee will be informed that selection was made on a random basis. The program shall provide that the employee will be permitted to retain a copy of a writing to that effect (e.g., a urine custody and control form with this information set forth).

(c) *Approval.* The Administrator will notify the railroad in writing whether the program is approved as consistent with the criteria set forth in this part. If the Administrator determines that the program does not conform to those criteria, the Administrator will inform the railroad of any matters preventing approval of the program, with specific explanation as to necessary revisions. The railroad shall resubmit its program with the required revisions within 30 days of such notice. Failure to resubmit the program with the necessary revisions will be considered a failure to implement a program under this subpart.

(d) *Implementation.* (1) No later than 45 days prior to commencement of random testing, the railroad shall publish to each of its covered employees, individually, a written notice that they will be subject to random drug testing under this part. Such notice shall state the date for commencement of the program, shall state that the selection of employees for testing will be on a strictly random basis, shall describe the consequences of a determination that the employee has violated § 219.102 or any applicable railroad rule, and shall inform the employee of the employee's rights under Subpart E of this part. A copy of the notice shall be provided to each new covered employee on or before the employee's initial date of service. Since knowledge of Federal law is presumed, nothing in this paragraph creates a defense to a violation of § 219.102 of this part.

(2) Each railroad shall implement its approved random testing program not later than November 20, 1989 (or, in the case of a railroad commencing operations thereafter, on the expiration of 60 days from approval by the Administrator or November 20, 1989, whichever is later).

§ 219.603 Participation in testing; refusals.

(a) *Participation.* A railroad shall, under the conditions specified in this subpart and Subpart H, require a covered employee selected through the random testing program to cooperate in urine testing to determine compliance with section 219.102, and the employee shall provide the required sample and complete the required paperwork and certifications. Compliance by the employee shall be excused only in the case of a documented medical or family emergency.

(b) *Refusals.* (1) An employee who, upon being notified of the requirement to provide a sample under this subpart, refuses to provide a sample shall be withdrawn from covered service and shall be deemed disqualified for a period of nine (9) months. The

disqualification required by this paragraph shall apply with respect to employment in covered service by any railroad with notice of such refusal. The requirement of disqualification for nine (9) months does not limit any discretion on the part of the railroad to impose additional sanctions for the same or related conduct.

(2) Upon being withdrawn from service under this section, the employee shall be entitled to the same procedural protections as those set out in § 219.213(b) of this part with respect to refusal of post-accident testing. The purpose of the hearing shall be to determine whether the employee refused to provide a sample, having been notified of the requirement to do so, and whether the employee can establish a basis for being excused under the criteria stated by paragraph (a) of this section.

(3) Tampering with a sample in order to prevent a valid test (e.g., through substitution, dilution or adulteration) constitutes a refusal to provide a sample.

(c) Upon the expiration of the 9-month period described in this section, a railroad may permit the employee to return to covered service only under the same conditions specified in § 219.605(e) of this part.

§ 219.605 Positive test results; procedures.

(a) *Medical review.* The result of a test required under this subpart shall be deemed positive only after it has been properly confirmed as required in Subpart H of this part and reviewed by a Medical Review Officer (MRO) as provided in subpart H to determine if it is evidence of prohibited drug use under § 219.102. This section establishes procedures for administrative handling by the railroad in the event a sample provided under this subpart is reported as positive by the MRO.

(b) *Notification.* Except as provided in Subpart H of this part, within the period specified in § 219.707 of this part the railroad shall notify an employee of the results of any test that is

(1) positive, by providing a copy of a laboratory report meeting the requirements of subpart H or

(2) negative, by providing a written notice issued by the MRO.

(c) *Suspension.* If the railroad determines that there is reason to believe that an employee is in violation of § 219.102, as evidenced by a positive test result, the railroad shall immediately remove the employee from covered service. In each case, the employee shall be provided with the report of the test results and notice of

the basis for the removal not later than the time of removal.

(d) *Hearing procedures.* Nothing in this part shall be deemed to abridge any additional procedural rights or remedies not inconsistent with this part that are available to the employee under a collective bargaining agreement, the Railway Labor Act, or (with respect to employment at will) at common law with respect to the removal or other adverse action taken as a consequence of the positive test result.

(e) *Return to service.* An employee who has been determined to have used a controlled substance in violation of § 219.102 of this part as a consequence of a positive test result under this subpart shall not be returned to covered service unless the employee has—

(1) Presented a urine sample for testing under Subpart H of this part that tested negative for controlled substances assayed;

(2) Been evaluated by an EAP counselor to determine if the employee is affected by a psychological or physical dependence on one or more controlled substances or by another identifiable and treatable mental or physical disorder involving abuse of alcohol or drugs as a primary manifestation; and

(3) Successfully completed any course of counseling or treatment determined to be necessary by the EAP counselor prior to return to covered service.

An employee returned to service under the above-stated conditions shall continue in any program of counseling or treatment deemed necessary by the EAP counselor and shall be subject to a reasonable program of follow-up drug testing without prior notice for a period of not more than 60 months following return to service.

§ 219.607 Reports; FRA access to records; confidentiality.

Each railroad shall retain for at least 2 years all records of each test conducted under this subpart that is reported as positive by the Medical Review Officer, including urine custody and control forms, laboratory reports, and certification statements. Records of negative tests shall be retained for at least 1 year. Each railroad shall maintain for at least 5 years summary records of employee drug test results and rehabilitation for each covered employee. Records required to be kept shall be made available to FRA as provided by section 208 of the Federal Railroad Safety Act of 1970.

§ 219.609 Exclusion from subpart.

This subpart does not apply to a railroad that employs not more than 15 employees covered by the Hours of Service Act (45 U.S.C. 61-64b) and that does not operate on tracks of another railroad (or otherwise engage in joint operations with another railroad) except as necessary for purposes of interchange.

f. A new Subpart H is added to read as follows:

Subpart H—Procedures and Safeguards for Urine Drug Testing**§ 219.701 Standards for urine drug testing.**

(a) Effective upon the expiration of July 19, 1989, the conduct of urine drug testing under Subparts D, F, and G of this part shall be governed by this subpart and Part 40 of Subtitle A of this title. Laboratories employed for these purposes must be certified by the Department of Health and Human Services under that Department's Mandatory Guidelines for Federal Workplace Drug Testing Programs.

(b) Each railroad's contract with a laboratory conducting testing subject to this subpart shall provide that the FRA and the railroad shall have the right to unannounced inspection during normal business hours through qualified personnel or designated contractors. Such inspection rights shall, at minimum, include reasonable accompanied access to all records pertinent to testing under this part, quality control data incident thereto, samples submitted under this part, and equipment and personnel related to analysis of those samples.

(c) Each such contract shall also require that the laboratory comply with all applicable provisions of this part and 49 CFR Part 40, including requirements for employee access to specified laboratory records and any applicable conditions imposed upon approvals issued under this subpart or 49 CFR Part 40.

§ 219.703 Collection.

(a) Urine samples shall be collected and handled as required in 49 CFR Part 40 and this section.

(b) The following persons are qualified to perform urine collections under this subpart:

(1) A licensed medical professional or medical technologist or technician who is provided instructions for collection under 49 CFR Part 40 and who performs the collection and certifies completion as required therein; or

(2) A person who has successfully completed training as a collector as required in 49 CFR Part 40.

(c) A person with management or supervisory responsibility over the employee to be tested, or a co-worker of the employee to be tested, may not serve as a collector. For purposes of this paragraph, "co-worker" means a person with whom the person to be tested is assigned or could be assigned in a crew or other working unit to perform normal transportation duties on the railroad.

§ 219.705 Drugs tested.

(a) Urine samples collected under Subparts D, F, and G of this part shall be analyzed for the presence of controlled substances designated in paragraph (b) of this section and may be analyzed by procedures reasonably incident to analysis of the specimen for controlled substances (e.g., determination of pH or tests for specific gravity, creatinine concentration, or presence of adulterants).

(b) Each sample submitted shall be analyzed for marijuana, cocaine, phencyclidine (PCP), opiates (morphine and codeine), and amphetamines (amphetamine and methamphetamine).

(c) As part of the reasonable cause testing program established by Subpart D of this part, a railroad may test for additional controlled substances in addition to those specified in this section only with approval granted by FRA and for substances for which the Department of Health and Human Services has established an approved testing protocol and positive threshold.

§ 219.707 Review by MRO.

(a) Test results reported positive by the laboratory as provided in 49 CFR Part 40 shall not be deemed positive or disseminated to any person (other than to the employee tested in a medical interview, if conducted) until they are reviewed by a Medical Review Officer (MRO) of the railroad as required by 49 CFR Part 40 and this section.

(b) The MRO shall complete review of test results within not more than 10 regular working days of receipt of the laboratory report or they shall be declared negative, unless any portion of the delay shall result from the unwillingness or inability of the employee to appear for an interview or provide documentation of prescription or other authorized use of medications. If the employee is responsible for such delay, the 10-day period may be extended by a period equal to the period attributed to the employee's delay. This paragraph shall not be read to bar reporting of a positive result if the employee, without a reasonable basis, fails to respond to an opportunity to provide supplementary information.

(c) After the MRO has reviewed the pertinent information and the laboratory assessment is verified as indicating presence of controlled substances without medical authorization consistent with § 219.103 of this part (and the review required by paragraph (b) of this section is completed), the MRO will report the results to a designated railroad officer for action in keeping with the requirements of this part. The employee shall be provided a copy of the approved test results within 48 hours of delivery to the railroad officer, or immediately upon the railroad's taking any action adverse to the employee, whichever first occurs.

(d) Test results reported as negative by the laboratory shall also be communicated to the employee through the MRO. The MRO shall promptly transmit the negative finding to the employee. All negative test results, including results involving medical use or administration of controlled substances or insufficiency of laboratory data, shall be transmitted to the designated railroad officer over the MRO's signature. The MRO may not disclose medically approved drug use or administration information obtained under this part (whether ascertained through testing or reported by the employee or the employee's medical practitioner at the employee's request) to non-medical railroad personnel; however, nothing in this part bars use of such information by the railroad's medical officer in the context of an established medical qualifications program.

§ 219.709 Retest.

(a) Samples that yield positive results on confirmation shall be retained by the laboratory in properly secured, long-term, frozen storage for at least 365 days, as required by Part 40 of this title. Within this 365-day period, the employee or his representative, the railroad, or the FRA may request that the laboratory retain the sample for an additional period. If, with 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-day period.

(b) In the case of a test declared positive by the MRO, the original sample shall be retested if the employee makes a written request to the Medical Review Officer for retesting within 60 days of receipt of the final test result from the MRO. The employee may specify retesting by the original laboratory or by a second laboratory

that is certified by the Department of Health and Human Services as described in 49 CFR Part 40. The railroad may require the employee to advance the cost of shipment (if any) and reanalysis of the sample, but the employee shall be reimbursed for such expense if the retest is negative.

(c) If the employee specifies retesting by a second laboratory, the original laboratory shall 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 49 CFR Part 40, but equal to or greater than the established sensitivity of the assay, shall, as technically appropriate, be reported and considered corroborative of the original positive results.

§ 219.711 Confidentiality of test results.

(a) A laboratory reporting results of tests conducted under this subpart shall report those results only to the designated Medical Review Officer of

the railroad. The results shall not be disclosed by the laboratory to any person other than the employee to whom the sample was identified. This paragraph shall not be read to bar normal access to analytical data for laboratory accreditation or certification processes, but records shall be maintained by specimen identification number (or accession number) rather than employee name.

(b) No record of tests conducted subject to this subpart or information drawn therefrom shall be used or disseminated by the railroad or within the railroad for any purpose other than providing for compliance with this part (and railroad rules consistent herewith), unless with the voluntary written consent of the employee. Such written consent shall specify the person to whom the information may be provided. Each railroad shall adopt and implement procedures to guard this information against unauthorized disclosure both within and external to the railroad company.

(c)(1) Effective July 19, 1989, results of post-accident toxicological testing under Subpart C of this part are reported to the railroad's Medical Review Officer, and the railroad shall treat the test results as subject to paragraph (b) of this section, except where publicly disclosed by FRA or the National Transportation Safety Board.

(2) To the extent permitted by law, FRA treats Subpart C test results indicating use of prescription or physician-administered controlled substances (and employee declarations of medical use incident to such testing) as confidential and withholds public disclosure except where it is necessary to consider this information in an accident investigation in relation to determination of probable cause. However, FRA may provide any result of testing under Subpart C to the National Transportation Safety Board.

3. Appendix A to Part 219 is amended by adding the following entries at the end of the table:

APPENDIX A—SCHEDULE OF CIVIL PENALTIES¹

Section	Violation	Willful violation
Subpart G—Random Drug Testing		
219.601 Failure to implement and/or submit to FRA for approval a random drug testing program that satisfies the requirements of this Subpart and subpart H.....		10,000
Failure to facilitate conduct of required random drug testing by failing to take all practical steps to require employee participation or by otherwise failing to comply with Subpart G such that test cannot be conducted.....	2,000	5,000
Required employee to provide samples in reliance on Subpart G based on other than random selection.....	5,000	10,000
219.603 Required employee to submit to testing without observance of procedures and safeguards contained in Subparts G and H.....	5,000	7,500
219.605 Failure to provide notice of positive test result.....	2,000	2,500
Failure to comply with other Subpart G requirement.....	1,000	2,500

¹ A penalty may be assessed against an individual only for a willful violation. The Administrator reserves the right to assess a penalty of up to \$20,000 for any violation where circumstances warrant. See 49 CFR Part 209, Appendix A.

PART 217—[AMENDED]

1. The authority citation for Part 217 is revised to read as follows:

Authority: 45 U.S.C. 431, 437, and 438, as amended; Pub. L. 100-342; and 49 CFR 1.49(m).

2. Part 217 is amended by revising the introductory text of paragraph § 217.13(d) and by amending § 217.13 to add a new paragraph (d)(5) as follows:

§ 217.13 Annual Report.

(d) The number, type and result of each test and inspection related to enforcement of Part 219 of this subchapter and the railroad's rule on alcohol and drug use ("Rule G"). This information shall be reported on Form FRA 6180.77 and shall include the following:

(5) Number and results of random drug tests conducted under the authority of § 219.601 of this chapter. For positive tests indicate the number for each controlled substance by drug group, and the following information: number and type of disciplinary actions taken, number of employees referred for evaluation, number of employees evaluated as not requiring formal treatment, number of employees

evaluated as requiring outpatient treatment, number of employees evaluated as requiring inpatient treatment, number of employees failing to complete abatement or rehabilitation (as determined by clinical judgment or positive test on return-to-work urinalysis), number of employees who completed abatement or rehabilitation determined after investigation to have been involved in subsequent alcohol/drug disciplinary offenses, and number of follow-up tests and results by drug group (including refusals). Also indicate the number of refusals to cooperate in random testing and provide a summary of any negative test findings based upon scientific insufficiency (without personal identifying information).

Issued in Washington, DC on November 14, 1988.

John H. Riley,

Federal Railroad Administrator.

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