

voluntarily by the operator, who successfully complete and EAP Rehabilitation Program and wish to be retained in sensitive safety and security-related positions, must, at a minimum, have two unannounced drug tests in the twelve months following the completion of the EAP Rehabilitation Program. The specific time of the test is left to the discretion of the operator. However, the time period between the positive drug test event before entrance into an EAP Rehabilitation Program and the first post-EAP test should be sufficient to ensure that the post-EAP test is not identifying the drug use incident previously identified.

B. EAP education program. Each EAP education program must include, at minimum, the display and distribution of informational material on the nature and effects of drugs, and the operator's policy regarding drugs and drug use in the workplace.

C. EAP training program. Each EAP training program must be conducted annually for employees. 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 or alcohol use and abuse; and documentation of training given to employees. EAP training programs for employees must consist of at least 60 consecutive minutes for each employee each year.

VII. Action That May Be Taken by an Operator

An operator may not discipline or terminate an employee for drug-related

causes, who is not a temporary employee, if the employee successfully completes rehabilitation and receives a recommendation for return to duty by the rehabilitation program director. However, the employee must be temporarily moved from his or her position until rehabilitation is successfully completed, and the required recommendation is obtained from the rehabilitation program director. An operator is not required to offer rehabilitation to an employee who refuses to take a required drug test or to one who has been found to use a prohibited drug while on the job.

VIII. Operator's Drug Testing Plan

A. Each operator shall include a drug testing plan, which conforms to this Appendix and the HHS Guidelines, in its operating and maintenance plan by 120 days after the effective date of this rule. The drug testing plan must be implemented within 180 days after the incorporation of the plan in the operating and maintenance plan.

B. The plan must provide the name and address of the laboratory which has been selected by the operator for analysis of the specimens collected during the drug testing program.

C. With respect to those employees who are hired by a contractor to perform functions for the operator specified in section II of this appendix pursuant to a contract with the operator, the operator may provide by contract that the testing, training and rehabilitation required by its drug testing plan be carried out by the contractor provided that: (1) The operator remains responsible for ensuring that the terms of its

drug testing plan are complied with, (2) the operator remains responsible for ensuring that an employee who fails the testing does not perform any functions specified in section II until successful rehabilitation has taken place, and (3) the contractor shall allow access to property and records by the operator, by State Pipeline Safety Representatives, and by RSPA for the purpose of monitoring the operator's compliance with the requirements of this appendix.

IX. Recording Results of Drug Testing Program

Each operator shall maintain a record of the results of its drug testing program. Each operator shall permit duly authorized RSPA and State Pipeline Safety Personnel to have access to the record. The record shall include the following information categorized by method of testing:

1. The functions performed by the employees who tested positive for prohibited drug.
2. The prohibited drugs which were used by the employees.
3. The disposition of employees who failed the test (e.g., termination, rehabilitation, leave without pay).
4. The age of each employee who failed a drug test.
5. The number of employees tested.

[FR Doc. 88-15095 Filed 7-7-88; 8:45 am]

BILLING CODE 4910-60-M

Friday July 8, 1988

Friday
July 8, 1988

Part VIII

Department of Transportation

Urban Mass Transportation
Administration

49 CFR Part 653

Control of Drug Use in Mass
Transportation Operations; Notice of
Proposed Rulemaking

DEPARTMENT OF TRANSPORTATION

Urban Mass Transportation Administration

49 CFR Part 653

[UMTA Docket No. 88-F]

Control of Drug Use in Mass Transportation Operations

AGENCY: Urban Mass Transportation Administration (UMTA), DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: UMTA is requesting comment on a proposed rule which would require a recipient of Federal transit funding to certify that it has established a comprehensive anti-drug program. The impetus for this action is the safety concern associated with the use of drugs by mass transportation workers in sensitive safety positions. The overall goal of testing is to ensure a drug-free transportation environment which, in turn, would reduce accidents and casualties in mass transit operations. Among other things, a recipient's anti-drug program would be required to mandate chemical testing for the use of drugs by those in certain sensitive safety positions. In addition, the NPRM sets out four options concerning rehabilitation for certain employees. Finally, a recipient's program would be required to include an employee assistance program.

DATES: Written comments should be received by September 6, 1988. Public hearings will be held in the following cities: Washington, DC, New York, Chicago, and Los Angeles. The dates and locations of the hearings will be published in a notice in the Federal Register soon.

ADDRESS: Written comments should be addressed to: U.S. Department of Transportation, Urban Mass Transportation Administration, Office of the Chief Counsel, Docket No. 88-F, 400 7th Street SW., Room 9316, Washington, DC 20590. Comments will be available for review by the public at this address from 9:00 a.m. to 5:00 p.m., Monday through Friday. The dates and locations of the public hearings will be published soon in a Notice in the Federal Register.

FOR FURTHER INFORMATION CONTACT:

Franz K. Gimmler, Deputy Associate Administrator for Safety, or Judy Z. Meade, Drug and Alcohol Program Manager, Urban Mass Transportation Administration, Department of Transportation, 400 Seventh Street SW., Washington, DC 20590, (202) 366-2896.

SUPPLEMENTARY INFORMATION:**A. Background***Drug Abuse in American Society*

Drug abuse constitutes a major societal problem. Statistics have been compiled and reported by the National Institute of Drug Abuse (NIDA) and by media polls. The results indicate that the use of drugs is widespread. Compared with 1979 and 1982 levels, the 18-25 year old group was most likely to have stabilized or decreased their use of most drugs in 1985. In contrast, the 26 plus year old group was most likely to have increased their use of most drugs. For instance, preliminary data from the 1985 NIDA, "National Survey on Drug Abuse," indicate the following:

In the 18-25 age category:

- 60.5 percent reported using marijuana sometime during their life;
- 21.9 percent reported using marijuana within the past month;
- 25.2 percent reported using cocaine sometime during their life;
- 7.7 percent reported using cocaine within the past month.

In the age 26 and over category:

- 27 percent reported using marijuana sometime during their life;
- 9.5 percent reported using marijuana within the past month;
- 9.5 percent reported using cocaine sometime during their life;
- 2.1 percent reported using cocaine within the past month.

Because of statistics like the above, the public is concerned that an individual who uses drugs may jeopardize the personal safety of others. A recently issued special report from the Comptroller General of the United States titled "Controlling Drug Abuse: A Status Report" (1988 GAO Report) states that "Drug abuse in the United States has persisted at a very high level throughout the 1980's. Drug abuse is a serious national problem that adversely affects all parts of our society * * *."

There is widespread public belief that persons in safety-affecting occupations should not be abusers of drugs. POPULUS, Inc., and Decision/Making/Information conducted a national survey in 1986 on mandatory drug testing in the work place. The following are the results of that survey concerning the general public's views on drug testing of individuals in various occupations. Of those surveyed:

- 88% favored testing of airline pilots and air traffic controllers.
- 85% favored testing of police and other law enforcement agents.
- 81% favored testing of bus drivers.
- 75% favored testing of military personnel.

—75% favored testing employees of pharmaceutical companies.

The researchers concluded that the respondents believed "people who are responsible for the physical safety of others should be tested." Transportation workers affect public safety and the public supports testing these workers for the use of drugs. POPULUS, Inc., and Decision/Making/Information, "Mandatory Drug Testing: A Nation Divided * * * Or Is It?" Final Report, Greenwich, CT (July 1986).

Another 1986 survey examined the public's attitude toward drug testing of certain occupational groups. American Viewpoint, Inc., conducted a national telephone survey of 1,000 respondents. The results indicate, "by a margin of 76 percent to 22 percent, Americans agree that the drug crisis today is serious enough for mandatory drug testing." American Viewpoint, Inc., used a "forced choice" list that did not include the transportation modes when doing the survey. The persons surveyed placed the following occupations at the top of their list for mandatory drug testing:

- Police and firefighters (84%)
- Members of the armed forces (83%)
- Doctors and nurses (81%)

Eighty percent of the respondents indicated they would participate in voluntary testing if asked to do so by their employers. American Viewpoint, Inc., "U.S. National Survey," Alexandria, VA (August 1986).

Based on the above information, UMTA concludes that the public is concerned about drug abuse and supports drug testing of workers affecting public safety. Although drug abuse is more prevalent among the 25 and under age group, younger users are aging, and not stopping. The Department of Transportation in its regulatory role of protecting public safety, assumes that the problem of drug abuse among transportation workers does not differ significantly from that in the overall population.

Effects of Drug Use on Safety

This NPRM proposes to prohibit certain mass transportation workers in sensitive-safety positions from making non-approved uses of controlled substances, whether on duty or off duty. The premise of this proposal is very simple: Use of any controlled substance has the potential to degrade safety performance. In order to understand this premise, it is necessary to review what controlled substances are and what effects they have on individual persons.

Drugs are chemicals that affect the body (physiological or function-altering

effects) and often the mind (psychological or mind-altering effects). In broad summary, controlled substances are certain drugs identified by the government as having mind- or function-altering effects of a kind that create a potential for abuse and/or dependency. In comments before the Department of Transportation, the American Medical Association and other parties have agreed that, as a general matter, controlled substances constitute the primary drugs of interest (other than alcohol) with respect to transportation safety.

The Controlled Substances Act (26 U.S.C. 801 *et seq.*), among other things, establishes five schedules of controlled substances. Most controlled substances have at least some accepted medical applications, but those classified in Schedule I of the controlled substances list do not. Therapeutic use of certain controlled substances is frequently indicated both from a medical point of view and from the point of view of transportation safety, since proper use of drugs can control disorders that adversely affect performance while permitting the individual to continue productive employment. If therapeutic drugs are used at appropriate levels established by medical practitioners and care is taken to monitor undesired "side effects," safety will not be materially compromised. Indeed, in many cases, control of the underlying disorder will produce net safety benefits.

However, when individuals make non-medical use of controlled substances, they often use illegal drugs that have unacceptable mind-altering and function-altering characteristics. Similarly, when individuals self-administer legal drugs for non-medical purposes, or without proper medical supervision, adverse effects may result.

Drugs and Their Effects

Controlled substances are classified as—

- Narcotics, such as the opiate-based drugs;
 - Central nervous system (CNS) depressants, such as the barbiturates, tranquilizers, or methaqualone;
 - CNS stimulants, such as cocaine and amphetamines;
 - Hallucinogens, such as LSD and PCP; and
 - Cannabis (marijuana derivatives).
- All controlled substances have a potential for abuse, and many have a high potential for dependence. The effects of these drugs vary to some extent by dosage, subject, frequency of use, route of ingestion, and pattern of use. An individual drug user may be affected differently by the same dosage

on different occasions as a result of degree of fatigue, physical disorders, biorhythms, acquired tolerance, and other factors.

It is important to note that the effects of drugs on human performance are not limited to a perceived "high" or other immediate mind-altering sensation experienced by the user. Instead, drug effects are complex and, in many cases, long-lived. The potential effects of drugs include—

- *Acute effects*, immediate physiological or psychological changes including the often sought-after change of mental state;
- *After effects*, delayed or prolonged physiological or psychological changes from individual doses or series of doses;
- *Chronic effects*, physiological or psychological changes, including changes in cognitive functions and biochemistry resulting from prolonged use; and
- *Withdrawal effects*, physiological or psychological changes resulting from termination of use.

All of these potential effects are of concern with respect to transportation safety. Yet only the acute effects correlate to some extent with blood concentrations of the impairing substance. For most drugs the extent of that correlation is unknown.

Perceived Dangers of Drugs in Transportation

The potential detrimental effects of drugs on performance are not a matter of speculation. There is a broad consensus among transportation companies, employees and related professionals that the use of alcohol and the non-medical use of controlled substances are not consistent with safety. Increasingly, knowledgeable safety professionals in transportation are beginning to realize that "off-duty use" and "on-duty use" are not completely distinct categories warranting entirely separate consideration. Instead, such uses are facets of an overall picture—i.e., overall fitness for duty involving "sensitive-safety" functions. Although there are differences of opinion among transportation safety experts concerning appropriate countermeasures, the need for effective countermeasures is almost universally acknowledged.

Experimental/Clinical Data

Developing opinion in the transportation industries is informed by a growing body of information related to drug effects on safety. Numerous behavioral studies and extensive clinical experience have established the fact that controlled substances can

powerfully alter the capacity of human beings to respond to their environment.

The following discussion will explain how drugs can and do adversely affect safety. Since each human being is, from a scientific view, a unique and whole organism, any such discussion will suffer from incompleteness and an absence of total analytical integration. However, available literature does offer useful information that can be placed in appropriate context and can guide the formulation of public policy. Among other sources, this discussion draws heavily on a draft study prepared by the Transportation Systems Center of the Department of Transportation. A copy of that report (Sussman, Salvatore, Huntley and Hobbs, "Data Available on the Impact of Drug Use on Transportation Safety," April 17, 1978) will be placed in the docket of this rulemaking.

Drug effects can be analyzed in experimental studies from the point of view of their impact on particular human faculties. These faculties are, of course, merely aspects of human performance capabilities, and experimental studies often involve tasks that may call on more than one faculty. "Sensory function" refers to the ability of an individual to detect, feel, identify, discriminate between, and recognize objects and conditions. Visual acuity and perception are of greatest concern for transportation employees. "Motor performance" concerns that ability to make timely, accurate, and steady control movements. Both simple and complex reaction time, as well as tracking and steadiness, are skills of concern to transportation. "Vigilance" is a term used to describe the ability of an individual to detect and respond to extremely infrequent signals provided as a part of a low event or boring task. Maintaining attention and alertness is important for all transportation operators, particularly during night operations. "Cognitive functions" refers to the ability to classify, store, integrate and recall information. Judgment, memory, proclivity for risk-taking, and ability to manage multiple tasks are areas of particular concern for transportation.

The clear message from available evidence is that all controlled substances tend to affect adversely one or more of the faculties critical to safe conduct of transportation and transportation-related studies. In some cases, acute effects may be of greatest concern. With other drugs the primary hazards may relate to after effects and chronic effects. Some individuals may be unimpaired by some drugs at some dosages with respect to certain faculties

relevant to performance. Indeed, in certain discrete settings CNS stimulants may temporarily enhance the ability of an individual to sustain attention (as an acute effect). However, when the full range of effects is considered, no controlled substance can be eliminated as a source of significant concern.

Narcotics are among the drugs having the highest potential for abuse and dependence, and use of narcotics is therefore unlikely to be limited to off-duty hours. Narcotics dull the perception of external and internal stimuli and tend to induce a feeling of pleasant lethargy. These drugs can adversely affect motor performance, as well as vigilance. Although there is no extensive body of literature on the effects of narcotics on tasks common to transportation, standard therapeutic practice requires warning that narcotics should not be used by transportation or heavy-equipment operators except where side effects have been determined and then only under strict medical supervision.

CNS depressants include a variety of compounds that reduce sensitivity to stimuli, slow information processing, and impair the ability of the user to concentrate or focus attention.

Behavioral studies of the acute effects of CNS depressants have demonstrated decrements to monitor performance, including tracking skills, simple reaction time, and choice reaction time. Depressants may adversely affect sensory functions such as signal recognition and cognitive functions such as short-term memory and information processing.

Experimental evidence also shows that after effects of depressant use (hangovers) can impair performance. Further, most CNS depressants have a high-dependency potential, and severe withdrawal effects can result if use is discontinued suddenly. Since the timing of withdrawal symptoms is not always predictable, the cessation of use by a depressant-dependent person can result in loss of control over a transportation vehicle or task. Instances of severe withdrawal from alcohol, involving convulsions and loss of control, have been reported in the aviation context. Moreover, withdrawal from other CNS depressants present risks of equal gravity.

CNS stimulants such as cocaine and amphetamines tend to increase mental activity, responsiveness to external stimuli, and in some cases restore concentration to fatigued individuals. These apparently benign qualities make stimulants (particularly amphetamine) attractive "operational" drugs (taken in an effort to sustain or enhance performance), as well as so-called

"recreational drugs". The non-regulated stimulant caffeine is taken for similar purposes.

However, powerful stimulants do not avoid fatigue, but only postpone it and thereby compound its severity. Side effects may include restlessness, increased anxiety, and confusion. Transportation employees may rely upon the drug for periods which go beyond its period of effectiveness, resulting in the sudden onset of deep sleep. Sustained reliance on amphetamines may result in toxic effects such as paranoia and delirium, since increasing doses are needed to offset developing tolerance. While it is widely held that stimulants do not produce true physical dependence, it is also recognized that they can induce a strong psychological dependence.

Recent experience with cocaine has confirmed the dependency-producing character of that drug, its potent psychoactivity, its ability to induce seizures and cardiovascular events after a single dose, and its ability to produce psychosis after chronic use. See e.g., *Cocaine: Pharmacology, Effects, and Treatment of Abuse*, Research Monograph Series, No. 50 (National Institute on Drug Abuse 1984). Reports of drug experiences strongly suggest that cocaine use may promote risk-taking and cause the user to over estimate his degree of control. Cocaine is not an attractive "operational" drug because of its short duration, but use by an employee prior to reporting for work may result in depression or exacerbate fatigue, leaving the employee poorly equipped to undertake a full work day. Because dependency on cocaine may manifest itself abruptly after a long period of apparently successful "occasional" use, the cocaine abuser's private "recreation" may become a matter of public safety concern at any time without warning.

Although no experimental studies reflecting the effects of stimulants over an extended period of time have been reported, clinical experience suggests that these substances have a significant potential for producing behavioral changes inimical to safety, particularly when used in high concentrations or over a long period of time.

Hallucinogens are ingested for the specific purpose of inducing euphoria and a distortion of time and space. These drugs generally produce relaxation and shortened attention span. Hallucinogens have not been the subject of responsible scientific research involving human subjects because of their capacity to produce psychotic reactions. Use of hallucinogens is of particular concern, since they may

trigger mental disturbances that can last for extended periods or recur without warning.

Marijuana is sometimes classified as an hallucinogen but has properties that warrant its separate treatment. As the most popular illegal drug of abuse, marijuana was once viewed by many Americans as a mild and relatively harmless substance. However, as the potency of marijuana available increased and a larger segment of the population gained experience in its use, it became apparent that marijuana had emerged as a major public health and safety risk.

By 1980, it could be said that marijuana impairs learning ability and interferes with complex psychomotor performance, including driving. *Marijuana Research Findings: 1980*, Research Monograph Series No. 31 (National Institute on Drug Abuse). In addition, marijuana became more widely recognized as a threat to health. Institute of Medicine, National Academy of Sciences, *Marijuana and Health* (National Academy Press 1982).

According to the experimental studies, marijuana affects such sensory functions as visual acuity, signal detection, and balance or standing steadiness. Closed-course and city driving tests both indicated reduced driving precision, some of which the Institute on Medicine (*Id.* at 118) assessed as indicating impairment of judgment as well as car-handling skills.

Laboratory studies have also demonstrated reduced vigilance in signal-detection tasks. Studies evaluating cognitive functions indicated that marijuana may reduce risk taking, but also show that marijuana reduces performance in divided-attention situations.

Recent research has suggested the possibility of next-day after effects from marijuana that may reduce performance on complex, divided-attention tasks. Yesavage, Leirer, Denari and Hollister, "Carry-Over Effects of Marijuana Intoxication on Aircraft Pilot Performance: A Preliminary Report" (*Am. J. Psychiatry* 142:1325-1329 (1985)). Some experts also believe that the accumulation of marijuana metabolites in the body through chronic use may produce adverse effects that do not abate at any time while the marijuana habit is sustained. Since marijuana metabolites have been identified at low levels in the urine for as long as 77 days after cessation of heavy and chronic use, the possibility of significant chronic effects cannot be excluded. See Ellis, Mann, Judson, Schramm and Tashchian, "Excretion Patterns of Cannabinoid

Metabolites After Last Use in a Group of Chronic Users" (*Clin. Pharmacol. Ther.* 38:572-578 (1985)).

In summary, drugs in each of the classes of controlled substances have mind and function-altering effects on the human subject. Recent research involving several widely-used drugs vividly illustrates the correlation among clinical data, theoretical pharmacology, and performance on transportation-related tasks. Smiley, Moskowitz, and Ziedman, "Effects of Drugs on Driving", DHHS Publication No. (ADM) 85-1386 (National Institute on Drug Abuse and National Highway Traffic Safety Administration 1985). Smiley, *et al.*, examined the effects of secobarbital and diazepam (CNS depressants), marijuana and alcohol in a complex, blind study using a driving simulator. The study measured performance on a variety of driving tasks, including stop or swerve decisions, tracking, passing, and maintaining distance at two dosage levels for each drug. The results revealed differences in particular effects and performances on individual phases of the study. However, when the data were combined the authors concluded as follows:

Secobarbital, diazepam, marijuana, and alcohol were all found to impair performance of a variety of simulated driving tasks. Drug levels tested for secobarbital and diazepam were therapeutic doses. The marijuana doses were considered moderate to strong by the subject population use. The alcohol effects were reported for levels up to and slightly above the legal limit. *No clear-cut differences in the pattern of effects were found among the drugs tested.* All drugs impaired perceptual-motor skill (e.g., tracking, speed and headway control), perceptual tasks where response time and detection ability were measured, and decision-making tasks. *Id.* 19 (emphasis supplied).

This research suggests that the subtle differences in the way that certain drugs affect human functions may be less important than the overall disordering effect of those drugs on the user's ability to respond to the complex challenges posed by the transportation environment.

Finally, as noted above, many of the detrimental effects of drugs relate not so much to the toxic or acute action of the drug when it may be found in high concentrations in the blood stream, but rather to the chronic or cumulative action of the drug on the body and the mind. Much of this long-term impairment of the organism is poorly understood but what is known is a source of concern.

Epidemiological Studies

An approach to evaluating the effects of drugs on transportation safety would include a program to determine the

presence of drug use in an adequate sample of accidents and the collection of data on the incidence of drug use among all drivers. With this information, it would be possible to determine whether the user was overrepresented in the accident population. Over a period of years, analysis of this kind has permitted the Department of Transportation, through its National Highway Traffic Safety Administration, to determine the role of alcohol in highway accidents. Attempts to obtain post-accident toxicology results are only now beginning to provide data that may, in combination with careful field investigations, provide sufficient evidence to estimate accurately the involvement of drugs in transportation accidents.

A study of 440 fatally-injured, young California drivers detected alcohol in 70 percent of the drivers, marijuana in 37 percent, and cocaine in 11 percent. Each of 24 other drugs was detected in fewer than 5 percent of the fatally-injured group. The authors concluded that only alcohol could be clearly "associated with crash responsibility" within the limitations of the available data, and that the role of marijuana in automobile crashes warrants further investigation. Williams, Peat, Crouch, Wells, and Finkle, "Drugs in Fatally Injured Young Male Drivers," *Public Health Reports* 100:19-25 (1985).

Another study examined the presence of alcohol and drugs among 497 drivers injured in motor vehicle accidents and treated in a Rochester, New York hospital. Thirty-eight percent of the drivers had alcohol and/or another drug in their systems. Alcohol was found in 25 percent of the drivers, marijuana in 9.5 percent of the drivers, and tranquilizers in 7.5 percent of the drivers. These results were considered conservative, because the drivers were not required to provide blood samples and many refused. Terhune and Fell, "The Role of Alcohol, Marijuana, and Other Drugs in the Accidents of Injured Drivers," NHTSA Technical Report DOT-HS-806-181 (Revised—March 1982).

As the foregoing studies indicate, in a number of instances, people may have used both drugs and alcohol. The multiple drug phenomenon suggests the hazard of relying on countermeasures directed exclusively at alcohol and complicates the evaluation of drug involvement. This dilemma is particularly critical when it is considered that workers may use drugs other than alcohol on the job to avoid detection by their employer.

The Problem of Drugs in the Mass Transit Industry

Employees of the mass transit industry represent a broad and diverse cross section of American society. It is reasonable to assume that the problem of drug and alcohol abuse exists in this industry in similar proportion to that existing in society as a whole. Personnel who use drugs and alcohol can pose dangers to themselves and coworkers and can cause or exacerbate events that may take human life, destroy property, and seriously harm the environment. The Department of Transportation (DOT) and the Urban Mass Transportation Administration (UMTA) are committed to the goal of a drug-free transportation system in all modes of transportation.

UMTA does not contend that drug abuse among personnel engaged in mass transportation is present in any greater degree than in the general public or that accident statistics demonstrate drug abuse as a major factor in mass transit accidents. No data exist to prove the presence of a drug or alcohol abuse problem among mass transit personnel. UMTA is very interested in receiving any additional data on the use of controlled substances by sensitive safety personnel in mass transit. However, UMTA believes that the public expects, and is entitled to expect, that transportation systems will be operated safely. The potential for accidents caused by mass transit personnel whose skills may be impaired due to drug usage will be greatly decreased by the implementation of a drug-testing program. Implementation of a drug abuse prevention program, including education and awareness, testing and rehabilitation, is necessary to ensure that mass transportation operates in the safest manner possible.

B. The Statutory Basis for the Rule

The grant programs under both section 3 and section 9 of the Urban Mass Transportation Act of 1964, as amended (The UMT Act) require a recipient of Federal financial assistance to have the inherent capacity to carry out the purposes of the transit grants. Under the section 3 discretionary grants program, section 3(a)(2)(A)(i) provides that "No grant or loan shall be provided under this section unless the Secretary determines that the applicant has or will have—(i) the legal, financial, and technical capacity to carry out the proposed project; * * *."

Essentially the same requirement is contained in the formula grant program under section 9, although in the form of

a certification. Section 9(e)(3) provides that each recipient of section 9 funding " * * * should submit to the Secretary annually a certification that such recipient * * * has or will have the legal, financial, and technical capacity to carry out the proposed program of projects * * *". This provision also requires a certification by the recipient that it has "satisfactory continuing control" over the use of UMTA-assisted facilities and equipment.

The technical capacity to carry out a mass transit project necessarily must include an ability to provide essentially safe mass transportation services, and it is within the scope of this requirement for UMTA to require recipients of sections 3 and 9 funding to undertake measures that would enhance their ability to provide safe operations. "Satisfactory continuing control" also necessarily implies the ability to ensure that the safe operation of UMTA-assisted facilities and equipment is not endangered by drug use by sensitive-safety and security personnel.

Under the section 3 discretionary program, moreover, the Secretary is authorized to make grants " * * * on such terms and conditions as the Secretary may prescribe * * *," providing even broader authority under this program to require a recipient to institute a drug program before a grant will be awarded.

For the section 18 transportation program for non-urbanized areas, subsection 18(f) provides that "grants under this section shall be subject to such terms and conditions (which are appropriate to the special needs of public transportation in areas other than urbanized areas) as the Secretary may prescribe." The requirements proposed here would be among the terms and conditions imposed under the authority of this section.

Section 22 of the UMT Act provides the Secretary (and, by delegation, UMTA) with authority to investigate certain conditions which the Secretary believes creates a serious hazard of death or injury. If the Secretary determines that such conditions do create such a hazard, the Secretary shall require the recipient of UMTA funding to submit a plan for correcting or eliminating such condition. The Secretary is authorized to withhold funding under the UMT Act until the plan is implemented.

Finally, the Department is considering seeking legislation from Congress to clarify this existing authority.

C. Purpose of NPRM

It is the policy of UMTA that workers in sensitive-safety positions of

recipients of Federal transit funds be free of drugs. To detect and deter the use of drugs by such employees, this proposed rule would require recipients to establish a program that would include four types of testing for the use of controlled substances: (1) Pre-employment; (2) post-accident; (3) reasonable cause; (4) and random drug testing. The testing procedures would protect individual privacy, ensure accountability and integrity of specimens, require confirmation of all positive screening tests, mandate the use of laboratories operating within the guidelines to be established by the U.S. Department of Health and Human Services, provide confidentiality for test results and medical histories, and ensure nondiscriminatory testing methods and random drug testing.

Failure of a recipient to certify that it has established a drug program will render it ineligible to receive Federal financial assistance under section 3, 9, or 18 of the UMT Act.

D. The Proposed Rule

The overall goal of testing is to ensure a drug-free transportation environment which, in turn, would reduce accidents and casualties in mass transit operations. This proposed rule would require recipients of Federal transit funding to establish an effective, comprehensive anti-drug program within 180 days of the effective date of the rule.

Under a comprehensive anti-drug program under this proposed rule, an employee in a sensitive safety position may not use controlled substances on or off duty. (The terms controlled substances and drugs are synonymous in this proposal.) If controlled substance use is detected, an individual shall not perform in a sensitive safety position. An individual may not be hired or continue to work at a sensitive safety position if he or she has a confirmed positive drug test as a result of a pre-employment, post-accident, reasonable cause, or random test.

This NPRM proposes specific requirements for testing procedures and options for rehabilitation programs. As noted later, UMTA realizes that some of these requirements may be difficult to achieve as proposed. This may be especially true for small transit providers. UMTA is interested in comments on ways in which the objectives of this NPRM can be achieved through procedures or programs without the need for detailed regulatory requirements. For example, should UMTA permit programs developed by consortiums of transit authorities or employee organizations to be used to comply with the following

UMTA proposed program? We also seek comment on whether an industry-wide program, developed by industry and/or labor associations may be a viable and expedient mechanism to implement drug abatement programs. If so, UMTA requests detailed comments on how such program would be implemented.

Drug testing and sanctions for use will help discourage substance abuse and reduce absenteeism, accidents, health care costs, and other drug-related problems. It will act as a deterrent to those individuals who might be tempted to try drugs for the first time or who currently use drugs. Finally, drug testing will protect the safety of the employees of mass transit entities, through the early identification and, under some options, rehabilitation of workers with drug abuse problems.

This proposed rule would only affect employees in sensitive safety positions. UMTA specifically requests comment on whether security related positions should be subject to this proposed rule for the same reasons that sensitive safety positions are.

UMTA also requests comment on the practicality of recipients getting a comprehensive anti-drug program in place in the 180 day time period set out in the NPRM. UMTA recognizes that many recipients are State and local governments with their own policies and procedures as well as legislative and regulatory bodies. Specifically, UMTA requests comment on alternative time frames and reasons for them.

Pre-employment Testing

UMTA proposes to require recipients to ensure that employees in sensitive safety positions are chemically tested for evidence of the use of controlled substances. A urine specimen would be used for testing purposes. An applicant who tests positive for the use of a controlled substance or refused to be tested could not be hired to perform sensitive-safety functions.

A recipient would be responsible for ensuring that testing is carried out according to the requirements of the proposed rule, for receiving and maintaining documentation of the results for sensitive safety employees for 3 years, and for notifying applicants of the results and affording them an opportunity to explain the presence of a controlled substance. If the applicant is not hired, no record of the test results will be maintained by the recipient. UMTA specifically requests comment on the proposed requirements that the employer keep no records of an application for employment that has been withdrawn because of a failed

drug test and on the proposed requirement that the recipient not disclose the results of the test to any other person. We have made these proposals because we believe they are appropriate policies for the implementation of an effective and non-punitive anti-drug program. Comments are invited to the extent to which these proposals are necessary or justified.

Post-accident Testing

Post-accident testing is a necessary part of a drug program. UMTA proposes mandatory testing for sensitive-safety employees involved in fatal accidents. The limitation to fatal accidents is purely a practical matter, and this proposed regulation should not be interpreted to prohibit recipients from testing employees involved in other categories of accidents.

A recipient would be responsible for ensuring that testing is done in the prescribed manner after a fatal accident. A fatal accident is defined as one in which a fatality occurs within 24 hours of the accident. Testing would be done as soon as possible, but no later than 12 hours after the fatality. If testing is not done, the recipient would be required to furnish an explanation. In administering a drug test after an accident, UMTA proposes to authorize employers to test sensitive safety employees for any Schedule I or Schedule II drug, even though many of these substances would not be tested for in a pre-employment, random, or periodic test. This is the same practice as would be followed by DOT in testing its employees under the proposed Department of Health and Human Services (HHS) guidelines.

Post-accident testing would require the employee to go to a collection site and provide a urine sample within 12 hours of the fatality. A twelve-hour period was selected because UMTA believes this time frame will capture those individuals who used prohibited drugs prior to the accident. Furthermore, this time frame takes into consideration the myriad of factors (geographic isolation of the accident, late notification of the accident to the recipient, injury, etc.) which could legitimately delay collection of a sample. UMTA requests comments on whether post-accident testing should be limited only to fatal accidents. For example, should it be expanded to include accidents or incidents where hospitalization is required or include all accidents? Should positive post-accident tests be reported to UMTA and, if so, at what intervals?

Reasonable Cause Testing

UMTA proposes to require a recipient to conduct testing when it has reasonable cause that an on-duty sensitive-safety employee has used a controlled substance. Reasonable cause is based on a belief that an individual is using or is under the influence of controlled substances while on duty. Changes in character or behavior may be evidence of the use of controlled substances. These changes are often characterized by mood swings and changes in appearance, attitude, speech, and work habits. In light of the subjectivity of this criteria, two witnesses would be required to substantiate this determination. At least one witness would have to be a person in a supervisory capacity.

Are there practical problems to this approach? Should both of the observers have to be supervisors? What other criteria could be used that would protect a disfavored employee from potential harassment through drug testing? Should there be a limit to the number of times an employee can be subjected to reasonable cause testing in order to prevent unwarranted harassment? Should there be specified circumstances, such as rule violations, under which drug testing would be automatic? If so, what kind of rule violations would suggest a drug problem and should trigger reasonable cause testing? We note in this regard that the Federal Railroad Administration has specified, in its existing anti-drug rule, the types of incidents that could justify requiring an employee to undergo drug testing. Could a similar program work for recipients?

Commenters also should present any data on the effectiveness of existing programs which use reasonable cause or suspicion-type testing. At least one program that we are aware of provides for rehabilitation similar to that proposed under option 3 below, but which was worked out by labor and management. Sanctions, in terms of salary loss, are potentially quite severe for persons discovered to have drugs in their systems as a result of a test. Commenters should address the benefits, costs and deterrence value of such a program.

UMTA proposes to authorize employers to test sensitive-safety employees for any Schedule I or Schedule II drug when there is reasonable cause to believe a drug was used, even though many of the Schedule I and II substances would not be tested for in a pre-employment or random test. This is the same practice as would be followed by DOT in testing its

employees under the proposed HHS guidelines.

Random Testing

Random testing is expected to be the primary method of deterrence in the anti-drug program. Random testing avoids potential bias toward and selective harassment of an employee because every employee has an equal chance for selection at any time. Random selection is usually accomplished through scientifically accepted methods such as the use of a random number table or computer-based, random number generator. Both methods select individuals by matching these random numbers against an employee's social security number or payroll account number.

With random testing, abstinence is the only way to avoid the risk of detection of drug use. Random drug testing requires a specific implementation plan to deter drug use. The rule proposes to use a sampling rate of up to 125 percent of employees performing specific sensitive safety functions. The 125 percent sampling rate is based on the Coast Guard testing program. This does not mean that the rate would be set at 125 percent, but this figure serves as a benchmark on which comments about the most appropriate rate can be based. UMTA intends to select an appropriate rate based on effectiveness deterrence, and costs. Commenters are asked to suggest what the rate should be and provide the basis for their views.

A 125 percent rate for random testing would have certain advantages. This testing rate has been shown to be a viable deterrent in the Coast Guard program to future drug use and has been proven effective in reducing the present incidence of drug use. The Coast Guard's random testing program of its uniformed personnel resulted in reducing detected drug use by 75 percent in the five years since the program was implemented. This testing rate currently is the best evidence available to UMTA regarding a successful random testing program. UMTA is proposing 125 percent as a potential maximum testing rate. At the same time, UMTA recognizes that the higher the sampling rate, the higher the costs of the program. UMTA invites comments on how low a sampling percentage could be adopted while still maintaining a credible deterrent. In particular, UMTA is interested in information on documented, effective random testing programs and the sampling rates that were used as measured against the incidence of drug use on a year-to-year basis, and information that would

provide updated estimates of the relative costs and effectiveness associated with various sampling rates. UMTA also requests commenters to address whether the experience of uniformed personnel in the Coast Guard program is a valid indicator of how sensitive safety mass transit employees would respond to a similar program.

A sampling rate of 125 percent would mean that a population of 10,000 would provide 12,500 annual samples. Similarly, a sampling rate of 12.5 percent would provide 1,250 samples from the same population. Using true random selection, employees selected for each weekly or monthly increment would be returned to the pool of those eligible for testing and would be subject to reselection. The vulnerability for reselection deters drug abuse because an individual selected early in the testing cycle would still be equally subject to testing throughout the remainder of the year and would still risk detection if he or she used drugs after the first test. One feature of this plan is that some employees might not be selected at all during the first year and others could be selected more than once. Another issue in this area is the matter of "randomness" among small or isolated populations. What, for example, is the meaning of a random test to an employee population consisting of only one employee, or a few employees? This problem is particularly acute if the owner or manager of the business is also the sole person, or one of only a few persons, subject to testing. Similarly, although surprise is an essential feature of true random selection, how can this be achieved when the employee is located in a remote location and must be transported some distance to provide a sample? This could result in the loss of the element of surprise in many cases. UMTA seeks comments on how to deal with these problems.

Should the rule permit transit providers, especially the small ones, to use a third party to set up and maintain their drug testing program? They could choose to comply with the rule through the use of several options, including:

1. Form consortiums made of small providers that would develop a centrally administered random testing program.
2. Form consortiums, and hire a contractor to develop and implement a random testing program.
3. Contract separately with an outside company that would set-up and provide these services.
4. Have existing industry-related groups (e.g. trade associations) set-up drug programs in which small entities could participate.

5. Arrange to be included as a part of a larger grantee's drug testing program.

UMTA invites comments as to what methods might be used to facilitate the inclusion of small entities in the program and whether all small entities should be required to develop and implement a drug abatement program. Commenters who believe that the proposed rule should not cover small entities, either in whole or in part, should explain the basis for their views and describe how they would define small entity for this purpose.

UMTA is considering whether programs should provide for adjustment of the minimum sampling rate based upon the success of the program. Although a numerical target is needed as a benchmark for discussion, in actual practice there may come a point of sharply diminishing returns from any set level as the mix of countermeasures detects most chronic substance abuse and deters casual use. The testing program could be designed so that it could be phased up or down as appropriate and in response to the pattern of results obtained through the program. In combination with post-accident testing experiences, the results of random testing would provide the most useful gauge of the need. UMTA is considering whether there are circumstances under which the program should allow for the level of effort to be increased or scaled back based on a method of evaluation stated in the rule based on individual applications and specifically requests comments on this issue. As with other issues, UMTA reserves the right to make appropriate adjustments in the rule in response to public comments. Are there any other ways to reduce costs or improve the effectiveness of the proposed rule? For example, are there any ways to grant employers flexibility without compromising the objectives of the rule? What would be the likely cost savings, if any, in a more flexible approach.

UMTA also requests comments as to whether the rule should contain a provision allowing a company with a high level of safety with regard to drug use, demonstrated over a designated time period, more latitude in determining the application of its anti-drug program.

Applicability to Employees in Safety Sensitive Positions

The NPRM would require a recipient of UMTA funding under section 3, 9, or 18 of the UMT Act, or 23 U.S.C. 103(e)(4), to certify that it had established a drug program that, at a minimum, provided for four types of drug testing and an employee assistance program. The

NPRM would only require that the drug program apply to sensitive safety positions, including vehicle operators, controllers, and mechanics. UMTA seeks particular comment on this definition. Does it adequately cover all employees who have or could have an impact on the operational aspects of a recipient? Is it too broad? Should other specific jobs be included such as other maintenance personnel?

Employee Assistance Programs

UMTA has determined that properly managed Employee Assistance Programs (EAP's) benefit both management and employees and can be a positive factor in controlling drug use.

UMTA recognizes that individually established EAP's may be beyond the fiscal resources of some recipients. However, the recipient of Federal financial transit assistance has a responsibility to employees and the public to provide a drug-free environment to the maximum extent practical. As such, in certain circumstances, under the proposed rule, recipients would provide EAP services or make such services available through one of the following means: company-operated EAP; contractor or consortium arrangement; or arrangements with local community service organizations for voluntary referrals or employer-directed referrals. Other alternatives to the above must be approved by UMTA and would have to provide an equivalent level of EAP service to employees.

The proposed rule would require that an EAP provide education, training for employees and supervisory personnel, and, under three of four proposed options, an opportunity for rehabilitation.

An EAP may include the following components:

(a) Employee policy and procedures on drug use based on a grantee's unique needs, organizational structure, and goals and resources;

(b) Employee communications that include ongoing printed educational materials directed at both drivers and family members;

(c) Service delivery system which may include:

(1) Drug screening and confirmation testing and

(2) Treatment (rehabilitation) and/or referral to more appropriate or specialized professional facility (usually all testing is on a contract basis);

(d) Training of supervisors; and

(e) Evaluation of the effectiveness of the EAP.

UMTA has determined that properly managed EAPs benefit both the grantee

and employee. We propose to require that all grantees develop EAPs for their employees. Each EAP would be required to have an educational component which would minimally have display and distribution of informational material; display and distribution of the community-service hot-line telephone number for driver assistance (if one is available); and display and distribution of the grantee policy regarding drug use by drivers. Additionally, each EAP of a grantee would be required to provide annual training for employees and supervisory personnel. The training would minimally require the following elements: The effects and consequences of drug use on personal health, safety, and work environment; the manifestations and behavioral causes that may indicate drug use and abuse; and documentation of training given to employees and supervisory personnel. EAP training programs for employees and supervisory personnel would consist of at least 60 minutes for each driver and supervisor the first year. Is 60 minutes a sufficient time for this training? Finally, each EAP, under three of the four options presented, would provide an opportunity for rehabilitation. How should small grantees establish and manage EAPs?

Employers would be required to appoint or designate a Medical Review Officer (MRO). The MRO would perform several functions, including review of the results of the employer's drug testing program; interpretation of each confirmed positive test result; and evaluation of an individual in conjunction with an EAP rehabilitation program. UMTA also seeks comments on the MRO's appropriate role in determining when an individual might be returned to duty. The proposed rule (by reference to the HHS Guidelines) requires that an MRO be a licensed doctor of medicine or osteopathy. The MRO could be a currently employed company physician or could be a private physician who performs MRO service for the employer on a contractual basis. Comments are requested on the need for an MRO and if the MRO need be a licensed physician or could be another type of medical professional.

An employee must successfully complete a rehabilitation program before being returned to his or her previous duties. UMTA is not proposing to require employers to pay the cost of rehabilitation. At this time, the proposed rule does not impose any limits on the amount of time that an employee may use to complete a rehabilitation program. However, UMTA recognizes that requiring an employer to hold a

position open or adjust operations for an indefinite period, while an employee is enrolled in a rehabilitation, may result in inconvenience and hardship for some employers, especially smaller companies. Therefore, UMTA solicits comments on an equitable and appropriate amount of time for an employee to complete a rehabilitation program to be specified in the rule, and whether the amount of time should be different for smaller companies. UMTA is particularly interested in time frames that have been shown to be appropriate for other documented rehabilitation programs, taking into account how long it may take for an employee to be admitted to a rehabilitation program.

Commenters also should address whether employees involved in EAP programs could be employed in nonsensitive safety positions during the rehabilitation process. The proposed rule does not require the employer to offer these same opportunities to a repeat offender, to persons not currently employed by the employer who fail a pre-employment test, or persons who have been found to use drugs on the job.

UMTA is considering four different options concerning the circumstances under which employees would be given an opportunity to seek rehabilitation. Under the first option, an employee who comes forward voluntarily or tests positive for drugs for the first time would be eligible for rehabilitation rather than be discharged. Non-employees given a pre-employment drug test need not be given an opportunity for rehabilitation. Once rehabilitated, the employee would be reinstated into his or her prior position. The second option would provide rehabilitation rights to an employee who comes forward voluntarily or who is identified as a drug user during a random test; but would not require that the same opportunity be afforded to an employee identified as a drug user in a post-accident or reasonable cause test. Under this option, a rehabilitated employee would be reinstated into his or her prior position, but an employee who is not afforded the right to rehabilitation could be discharged. In the third option, only an employee who comes forward voluntarily could claim rehabilitation rights, and anyone testing positive for drugs (regardless of the circumstances, e.g., random, post-accident, reasonable cause) could be fired immediately. Under all three proposed options, recipients would be free to offer more rehabilitation options than proposed. The proposed options only establish minimum rehabilitation requirements for EAP's. Thus for example, a recipient

could voluntarily offer two chances at rehabilitation rather than one.

The fourth option would require the employer to determine, as part of its anti-drug program, what rehabilitation opportunities to provide. This is essentially a "local option" approach. The employer could choose any of the three other options as its approach or some variation of them. It could choose not to provide an opportunity for rehabilitation in any circumstance, in which case an employee who was identified as a drug user could be fired. In any case, however, the employee could not return to a sensitive safety position unless he or she met the conditions established in the option 4 version of § 653.52.

Each of these approaches has its own merits. For example, the broad rehabilitation program anticipated by the first alternative is likely to maximize both the costs and the benefits to society, by ensuring that more drug users will get the help they need. If users are simply fired, they will often lose access to, and perhaps incentive to use rehabilitation services, and they may continue to be drug users. However, it could be argued that employees who are found to be drug users through post-accident or reasonable cause tests are less deserving of an opportunity for rehabilitation, and the second alternative would therefore exclude them. The third alternative is likely to be the lowest in direct costs, because rehabilitation would be required only for employees who seek it voluntarily, but for the same reason, however, this alternative might produce less in societal benefits. Commenters should address whether, and to what extent the third alternative would encourage drug users to identify themselves before they are tested, in contrast to the first and second alternatives, which appear to provide less incentives for drug users to identify themselves before they are discovered through the testing process. The fourth option could permit employees to rid their work forces of drug users more quickly and at a lower cost (if rehabilitation opportunities were not provided). It would also permit greater flexibility at the local level. The benefits of rehabilitation might be lost, however. Commenters should address whether this alternative would be effective for the transit industry. How would this alternative affect the deterrence value of the proposal? What impact would it have on the costs and benefits? Would not requiring rehabilitation foster other approaches to combating drug usage?

UMTA specifically invites comment on which of these or other alternatives offer the greatest benefits at the lowest costs.

Under any of these options, if the individual was successfully rehabilitated, the program would require that he or she be offered the opportunity to return to his or her former position. The NPRM does not specify who makes the decision concerning whether the individual has been successfully rehabilitated, however. UMTA seeks comments on whether the final rule should so specify.

If the final rule does specify who makes this decision, who should the decision-maker be? Should it be the medical review officer, the head of the EAP, the head of the drug rehabilitation program in which the employee participated, an independent physician, or some combination of these persons? Are there other individuals that should be participated or required to make the decision?

UMTA also seeks comments on whether the rule should contain standards for making this determination. If so, what should they be? Should the employer, UMTA, or both have a procedure through which the employee can contest a determination that he or she had not been rehabilitated?

Post-rehabilitation Testing

Once an employee has undergone rehabilitation, there may be a need to conduct tests to ensure continued disassociation from drugs. At the time of the adoption of a final rule in this proceeding, we intend to provide procedures for the conduct of such tests. We invite public comment on what the final rule should contain.

For example, should there be a uniform testing period after rehabilitation, or should this be determined on a case-by-case basis? Who should make such a determination: the medical review officer (whose role is noted in the HHS Guidelines), the EAP counselor, or both together? Should the employee be involved? How could employee involvement be accomplished? If we adopt a uniform post-rehabilitation period, how long should it be? Is six months reasonable? Would longer periods constitute an unacceptable burden on employees and on the employer? Others might argue that a longer follow-up period, such as one year, is called for. Should the length of the follow-up period depend on the kind of drug that was detected? Should it depend on the severity of the individual's drug problem, as indicated by the kind of treatment that was found to be necessary? For example, should

someone undergoing inpatient rehabilitation be subject to post-rehabilitation testing for a longer time than someone who needs only abatement counseling?

During the post-rehabilitation period, should we prescribe the minimum and/or maximum number of tests to be administered? We would want to ensure that any necessary tests would be given frequently enough to ensure that the employee is free of drugs. At the same time, however, we do not want drug testing to become an instrument of harassment of the employee or an undue burden on the employer. Here again is the issue of whether the number of tests given should vary with the kind of drug used and the severity of the employee's problem.

One alternative, on which we also invite comments, is a specified post-rehabilitation testing period that would apply only if the employee, the EAP counselor, and perhaps the employer failed to agree on an individualized program. Such a fall-back system could provide, for example, for up to four additional tests over the 12 months following rehabilitation.

Temporary Employees

Although the rehabilitation for drug users is a cornerstone of this program, we believe that there may be some employees in the industry whose normal period of employment is too short to make it practical to require rehabilitation and reemployment. For example, even if a short-term hire seeks rehabilitation, the end of the scheduled employment term might come before the completion of a rehabilitation program. Therefore, we are considering not requiring employers to offer an opportunity for rehabilitation to temporary employees who are hired for a period of less than 90 days. That is, if such employees are found to be drug users, it would be permissible to dismiss these persons immediately.

However, we recognize that some employees hired on a "temporary" basis are actually regularly reemployed. Some of these employees are recurring seasonal hires, others are continually reemployed at the end of each specified term. These persons are regular members of the industry, and thus, should not be excluded from the opportunity for rehabilitation and reemployment. Under the proposal, an employee would not be considered temporary for the purposes of rehabilitation, if he or she is eligible for reemployment by the same employer within 90 days following the end of the employment term. We specifically request comments on (1) the merits of

excluding temporary employees from the opportunity for rehabilitation, and (2) the definition of temporary employees. Commenters also should address how the rules should be applied to striking employees or employees scheduled for layoffs. Definitions of these terms also should be addressed.

Reporting Requirements

Semi-annual and annual reports of the results under each program would be required under the proposed rule. The report would contain demographic data of drug abuse by occupational category, drugs detected, and geographic locations.

Those semi-annual and annual progress reports would be sent to UMTA. UMTA is proposing that the reports should provide the following summary information for each type of testing performed: Occupational group of tested employees, the specific drugs detected and the disposition of employees (e.g., termination, rehabilitation, resignation, and other categories as applicable, such as leave without pay). Confidentiality must be afforded to all information regarding drug abuse by employees. This data would be used by UMTA only to summarize trends and determine if additional actions or changes may be required to combat drug use and abuse in aviation. We invite comments on the frequency and content of reports to be filed.

Access to Employee Drug Use Information

The proposed rule would regulate access to information about an employee's drug testing history under the anti-drug program by future employers, including future employers in other transportation modes. UMTA specifically requests public comment on what procedures, if any, should be included in the rule to safeguard the privacy of persons tested under the anti-drug program. As noted above, we are considering a variety of options with respect to pre-employment drug tests, including mandatory destruction of the documents for employees not hired. The results of drug tests performed for other reasons, however, also raise important privacy questions. Therefore, we specifically invite comments about whether there are circumstances under which we should permit the disclosure of drug test data to persons other than the employer and the employee (such as future employers). If, in the final rule, we were to allow such disclosure, there would appear to be a number of options. First, the data could be released only at

the specific request of the future employer, at either the discretion of the employer conducting the test, or only at the request of the employee. Under another option, a subsequent employer could require that an applicant either disclose prior drug test results or give the employer permission to obtain prior drug test results as a condition of employment. A final option under consideration by UMTA is authorizing the release of test results to future employers only in specified circumstances. For example, confirmed positive test results would be released to subsequent employers where an employee had been discharged for a refusal to participate in a rehabilitation program or an employee had failed a drug test after completing rehabilitation. Interested persons also should comment on whether the proposed rules should treat the privacy issues related to pre-employment test differently from random or reasonable cause tests.

The potential release of data highlights the importance of an employee's right to contest the test results. A urine sample that had been subject to tampering could unjustly end an employee's career. An employee should have an opportunity to challenge the integrity of the testing process, for example, by contesting whether the positive test result arose from a tampering incident or other error in the testing process. UMTA, therefore, requests comments on what procedures should be adopted. Commenters also should address whether the types of procedures afforded an employee should vary depending upon the consequences of a positive test and whether the burden of proof on the validity of test results should be borne by the employee or the employer.

In addition to future employers, other individuals may want access to the results of drug tests conducted under the proposed rules. UMTA could prohibit access to test results by the general public, including the news media. Moreover, other government agencies may want the data for statistical, regulatory, or law enforcement purposes. UMTA requests comments on whether the rule can and should prohibit access to the results of the anti-drug program to individuals other than the employer and the employee.

A related issue involves whether UMTA should distinguish between general statistical data (the total number of positive tests at a company in a month or a year) and particularized data (name-specific data). Small operators who employ few individuals will have

difficulty concealing the identity of individuals tested under the proposed anti-drug program. Since small operators will have few individuals to test in any given time period, even seemingly neutral statistical data would result in identification of an individual employee who was dismissed as a result of a confirmed positive test result. This potential problem may be exacerbated if UMTA requires that only a small percentage of employees be tested each year.

HHS Guidelines

On April 11, 1988, the Department of Health and Human Services (HHS) published Mandatory Guidelines for Federal Workplace Drug Testing Programs. These include guidelines for drug testing procedures and standards for certifying drug testing laboratories (53 FR 11970). As drafted, the guidelines apply to drug testing programs conducted by Federal agencies themselves. This NPRM would direct regulated parties to conduct their drug-testing programs according to these guidelines as well.

The HHS guidelines include proposed solutions to concerns such as the integrity of the sample collection process, maintaining a proper chain of custody, and ensuring that laboratories that do drug testing are qualified to do so.

The HHS guidelines would establish what illegal drugs are to be tested for (e.g., marijuana, cocaine, amphetamines, PCP, and opiates) and the levels of drug metabolites in a sample that would result in a positive test being reported. The guidelines specify the types of tests that would be required for initial screening tests (an immunoassay test) and confirmatory tests (a gas chromatography/mass spectrometry test).

The guidelines also specify collection procedures. These include the use of toilet bluing agents, temperature monitoring, and other steps to ensure the integrity of the sample without requiring observation of the individual while he or she is providing the sample. The sample collection procedures also include filling out a chain-of-custody form to accompany the sample as it goes to the laboratory.

The guidelines for laboratory processing of samples cover both technical and procedural steps designed to ensure that a proper chain of custody is maintained and that the test is conducted accurately. Intralaboratory chain-of-custody forms would be used; only authorized personnel would have access to the sample. Records concerning the calibration of testing

instruments would be maintained. Laboratories would report test results to the employer in a timely manner, and statistics on the tests would be retained by the laboratory for 2 years.

In addition to setting forth qualifications for key laboratory personnel and quality control procedures for the laboratories, the guidelines include standards and procedures through which HHS certifies laboratories. Regulated parties would be required to use only those laboratories which HHS has certified pursuant to these standards.

E. Hearings and Request for Written Comment

UMTA intends to hold hearings on today's proposed rulemaking in Washington, DC, New York City, Chicago, and Los Angeles. The exact times and locations of these hearings are not yet available. Once the exact times and locations of these hearings are confirmed, UMTA will publish a notice in the *Federal Register*. Commenters wishing acknowledgment of their written comments should include a self-addressed, stamped postcard with their comments. The Docket Clerk will stamp the card with the date and time the comments are received and return the card to the commenter.

F. Regulatory Impacts

1. Executive Order 12291

This action has been reviewed under Executive Order 12291, and UMTA has determined this is not a major rule. If promulgated, this rule will not result in an annual effect on the economy of \$100 million or more.

2. Regulatory Evaluation

The proposed regulation would be a "significant" rule, as defined by the Department's Policies and Procedures on Improving Governmental Regulations, because it involves important departmental policy and will generate substantial public interest. UMTA has prepared a Regulatory Evaluation in support of this rulemaking. The Regulatory Evaluation is on file as part of the docket to this rulemaking.

Commenters should be aware that other operating administrations within the Department of Transportation also are proposing drug testing programs. Elsewhere in today's *Federal Register* are NPRMs issued by the Coast Guard & Research & Special Program Administration.

In addition, the Federal Aviation Administration published an NPRM in the *Federal Register* on March 14, 1988

(53 FR 8368); the Federal Railroad Administration's NPRM was published on May 10, 1988 (53 FR 16640); and the Federal Highway Administration (FHWA) published its NPRM on June 14, 1988 (53 FR 22268).

Each of these rulemakings addresses the costs and benefits of the proposal and are generally consistent with one another. In some instances, however, and generally as a result of differences in the industries affected, the assumptions differ from those discussed in this proposed rulemaking. Obviously, changes in assumptions could affect the costs and benefits, because of the nature of some industries, costs for similar elements also may vary or could vary enough to warrant sensitivity analyses. Other changes in assumptions, such as test costs or rehabilitation costs, also can have an effect on the analysis. Commenters may find it helpful to review the notices of proposed rulemakings or the economic analyses prepared by the other operating administrations. Comparisons may aid commenters in reviewing data on this proposal and in formulating comments. In reviewing the economic analysis and the basic assumptions made, commenters should address specific areas where they agree or disagree with the assumptions and the basis for the comment. Commenters are directed to the other rulemakings and their assumptions as a source of information in submitting comments. A copy of each of the documents has been placed in the docket.

3. Executive Order 12612—Federalism Assessment

UMTA has reviewed this proposed rule under Executive Order 12612, concerning Federalism. UMTA has determined that the proposal has sufficient Federalism implications to warrant the preparation of this Federalism assessment.

The Federalism impacts of this rulemaking result from its proposal for new, uniform UMTA requirements that federally-assisted mass transportation providers create and implement the drug programs described in this notice. Historically, transportation safety in the mass transit industry has not been the subject of specific UMTA regulatory requirements. Unlike other DOT organizations (e.g., FAA, FHWA, Coast Guard, FRA), UMTA has never directly licensed or regulated industry employees for safety. These matters have been handled locally by transit authorities.

Congress has shown increasing concern about UMTA's role in transit safety, for example in the enactment of

section 22 of the UMT Act. More importantly, however, the necessity of promoting safe transportation through the use of vigorous anti-drug programs designed to ensure a drug-free mass transit workplace is national in scope and overriding in importance. This safety imperative is the primary basis for UMTA's decision to propose a new Federal requirement which goes beyond the traditional relationship between UMTA, transit grantees, and their employees. The basis for imposing these requirements is the Federal financial assistance provided to the recipients by UMTA. It is also important that UMTA ensure the maximum effectiveness of its financial assistance; i.e., it must ensure that the funds are used in a safe, drug-free environment. From a national perspective, safety is important in its own right but also to ensure Federal funds are not wasted because of drug-related accidents or other misuses.

In considering the Federalism impacts of this proposal, UMTA has focused on several key provisions of Executive Order 12612.

- *Necessity for action.* As noted above, there is an overriding safety necessity to ensure a drug-free transportation workplace. Passengers on bus, rail, and other mass transportation systems must be ensured that vehicle operators and others whose actions are important to passenger safety do not use illegal drugs. In the absence of an UMTA requirement for drug programs, which will identify drug users, deter drug use, and may provide opportunities for rehabilitation, this assurance cannot be made.

- *Consultation with State and local governments.* Unlike other DOT organizations with respect to drug rules, UMTA's regulated parties are primarily State and local government agencies (e.g., State departments of transportation, local transit authorities). This is the peculiarity of the UMTA drug rule which creates a larger Federalism impact than that created by drug rules in other modes. Consequently, the views of affected State and local agencies are particularly crucial to UMTA's consideration of the issues raised in this NPRM. On any significant rulemaking affecting its grantees, UMTA receives numerous and thorough comments from State and local agencies. UMTA will take its normal extra steps, beyond Federal Register publication, to ensure that these State and local governments are made aware of this proposed rule. Between the written comments and the four public hearings UMTA is planning to hold, UMTA expects to learn, in detail, the concerns of State and local governments about this proposal. These

comments will be taken into account as UMTA makes decisions concerning the final rule on this subject.

- *National scope of the problem.* As noted elsewhere, the country has a nationwide, pervasive drug problem. There is no community in the country that is not affected, actually or potentially, by this problem. Mass transit users in every community need the same assurance that their safety will not be compromised by drug use by sensitive safety transit employees. They also need assurance that their tax dollar used in Federal assistance are not wasted because of drug-related accidents.

- *Need for uniform, national standards.* Only with uniform minimum national standards in this area can the safety concerns of passengers and the privacy and reliability concerns of employees be resolved in a way that addresses the national drug problem we face. State and local agencies are free to tailor the basic program requirements to meet their needs. Federal intrusion into local implementation decisions will be minimized through the use of self-certification by grantees of their compliance with UMTA requirements.

- *Authority.* The statutory authority for this proposal is discussed elsewhere in this preamble. As a statutory and constitutional matter, the authority of Federal agencies to impose reasonable and necessary conditions on the receipt of Federal financial assistance is well established.

- *Preemption.* The NPRM does not, as such, preempt State or local laws. However, there may be a few instances in which a State or local agency could face a conflict between compliance with the proposed regulation and State and local requirements. For example, the NPRM would require random testing. Some State or local laws may prohibit or limit random testing. In this situation, the UMTA rule would not preempt the application of the State or local law; if compliance with the State or local law prevented the grantee from complying with the UMTA rule, however, the grantee's UMTA funding could be jeopardized. It is our understanding that most grantees operate under statutes that permit them to take all necessary actions to comply with Federal grant conditions. Such laws, in most cases, could resolve the potential conflict outlined above. UMTA seeks comments on whether conflicts of this sort are likely to arise and, if so, what steps should be taken to avoid or resolve them.

Given these considerations, UMTA has determined that, while the proposed

rule will have Federalism impacts, the justifications for and proposed methods of dealing with the impacts are such that proposing the rule is consistent with the Administration's Federalism policy. UMTA seeks comments on any additional alternatives that would achieve the proposal's objectives while reducing Federalism impacts or that would mitigate these impacts.

4. Regulatory Flexibility Act

In accordance with 5 U.S.C. 605(b), as added by the Regulatory Flexibility Act, Pub. L. 96-354, UMTA certifies that this proposed rule, if promulgated, will not have a significant economic impact on a substantial number of small entities within the meaning of the Act.

5. Environmental Impacts

This proposed regulation would not adversely affect the environment.

6. Paperwork Reduction Act

The collection of information requirements contained in this proposed rule are subject to the Paperwork Reduction Act, Pub. L. 96-511, 44 U.S.C. Chapter 35. These requirements are being submitted to the Office of Management and Budget for review. Comments on the proposed certification requirement must be sent to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503, Attention: Desk Officer for Department of Transportation. UMTA requests that the commenter also transmit an information copy of any such comments to UMTA Docket No. 88-F.

List of Subjects in 49 CFR Part 653

Drug testing, Grant programs—transportation, Mass transportation.

G. NEW 49 CFR PART 653

Accordingly, for the reasons described in the preamble, 49 CFR Chapter VI would be amended by adding new Part 653 to read as follows:

PART 653—CONTROL OF DRUG USE IN FEDERALLY FUNDED MASS TRANSPORTATION OPERATIONS

Subpart A—General

Sec.

- 653.1 Purpose.
- 653.2 Scope.
- 653.3 Definitions.
- 653.4 Establishment of recipient anti-drug program.
- 653.5 Recipient's comprehensive anti-drug program.
- 653.6 Use of prescribed drugs.

Subpart B—Post Accident Toxicological Testing

- 653.10 Testing requirements.

- 653.11 Testing procedures.
- 653.12 Guidelines for drug testing.
- 653.13 Fatal accident drug test report.
- 653.14 Driver fatalities.

Subpart C—Reasonable Cause Testing

- 653.20 Testing requirements.
- 653.21 Testing procedures.

Subpart D—Pre-Employment Testing

- 653.30 Testing requirements.
- 653.31 Testing procedures.

Subpart E—Random Testing

- 653.40 Testing requirements.
- 653.41 Testing procedures.

Subpart F—Employee Assistance Programs and Rehabilitation

- 653.50 Employee assistance program.
- 653.51 Opportunity for rehabilitation.
- 653.52 Job security.
- 653.53 EAP education program.
- 653.54 EAP training program.

Authority: 49 U.S.C. 1601, 1602, 1607, and 1618, and 23 U.S.C. 103(e)(4).

Subpart A—General

§ 653.1 Purpose.

(a) This part requires a recipient of Federal transit funds to establish a program to detect and deter the use of controlled substances.

(b) This part does not restrict a recipient from adopting and enforcing additional or more stringent requirements consistent with this part.

§ 653.2 Scope.

(a) This part applies to a recipient of Federal financial assistance under sections 3, 9, or 18 of the Urban Mass Transportation Act of 1964, as amended, or 23 U.S.C. 103(e)(4).

(b) The program required by this part applies to employees of the recipient in sensitive-safety positions, including vehicle operators, controllers, and mechanics.

§ 653.3 Definitions.

As used in this part—

"Administrator" means the Administrator of the Urban Mass Transportation Administration or his or her designee.

"Fatal accident" means an accident involving a vehicle of the recipient which leads to the death of a human being within 24 hours after the accident.

"HHS Drug Testing Guidelines" means the Scientific and Technical Guidelines for Drug Testing Programs issued by the Alcohol, Drug Abuse, and Mental Health Administration of the U.S. Department of Health and Human Services. These guidelines are available for review at UMTA headquarters and each UMTA regional office.

"Prohibited drug" means a substance specified in Schedule I or Schedule II of

the Controlled Substances Act, 21 U.S.C. 801.812, unless the drug is being used as authorized by, and in accordance with a legal prescription or exemption under Federal, State, or local law.

"Random selection process" means that tests are unannounced; that every employee in a sensitive-safety position of a given recipient has an equal chance of selection; and the total number of random tests conducted annually shall equal or exceed a specified (up to 125) percent of the total number of sensitive safety employees of a recipient.

"Reasonable cause" means the recipient reasonably believes that the appearance and/or conduct of the employee on duty are indicative of being under the influence of or impaired by a controlled substance based upon specified observations. The questioned conduct must be witnessed and documented by at least two employees, one of whom is in a supervisory capacity.

"Recipient" means a direct recipient of Federal financial assistance under sections 3, 9 or 18 of the UMT Act, or 23 U.S.C. 103(e)(4).

"Sensitive safety position" means any position of a recipient that involves operation of passenger-carrying equipment, including any directly related support activities that control or affect the operation of such equipment.

"UMTA" means the Urban Mass Transportation Administration.

§ 653.4 Establishment of recipient anti-drug program.

(a) No later than 180 days after the effective date of this subpart, each recipient shall certify to UMTA that it has established and implemented a comprehensive anti-drug program meeting the requirements of this part.

(b) Failure to make the certification required under paragraph (a) shall render the recipient ineligible to receive Federal financial assistance under sections 3, 9 or 18 of the Urban Mass Transportation Assistance Act of 1964, as amended.

§ 653.5 Recipient's comprehensive anti-drug program.

(a) Each recipient's comprehensive anti-drug program shall provide that—

(1) No employee of the recipient shall perform sensitive safety functions if the employee uses any controlled substances, except as provided in § 653.6 of this subpart;

(2) No employee shall perform sensitive safety functions if the employee tests positive for the presence of controlled substances, except as provided in § 653.6 of this subpart;

(3) All employees are subject to post-accident, reasonable cause and random testing for drugs under Subparts B, C, and E of this part;

(4) All prospective employees are subject to pre-employment testing for drugs under Subpart D of this part;

(5) Certain employees who use controlled substances are eligible to participate in an employee assistance program under Subpart F of this part; and

(6) An employee who refuses to be tested as prescribed under this part shall not perform sensitive safety functions until the individual tests negative for the use of controlled substances.

§ 653.6 Use of prescribed drugs.

(a) A comprehensive anti-drug program shall provide that any employee of a recipient who tests positive for the use of a controlled substance shall have available as an affirmative defense, to be proven by the employee through clear and convincing evidence, that his or her use of the controlled substance (except for methadone) was as prescribed by a licensed medical practitioner who has considered the employee's medical history and has determined such use to be consistent with the employee's assigned duties and that the level was at the prescribed dosage.

(b) This section does not restrict a recipient from requiring an employee to notify the recipient of therapeutic drug use.

Subpart B—Post-Accident Toxicological Testing

§ 653.10 Testing requirements.

(a) A recipient's drug program shall ensure that post-accident toxicological tests are conducted on an employee in a sensitive-safety position who is involved in a fatal accident.

(b) Such an employee shall submit to controlled substance testing following a fatal accident.

§ 653.11 Testing procedures.

(a) A recipient's drug program shall require an employee of the recipient in a sensitive-safety position to be tested for controlled substance use if the employee is involved in a fatal accident. The sample should be collected as soon as possible, but no later than 12 hours after the fatality.

(b)(1) Such an employee of the recipient shall report or be transported to a collection site and give a urine sample as soon as possible, but not later than 12 hours following a fatality. If a hazard to occupants of the vehicle

would be increased by compliance with this subpart, the employee of the recipient may move the vehicle to the nearest safe place to reduce or eliminate the hazard.

(2) If the employee is incapacitated or unconscious, the recipient shall request the treating medical facility to obtain a body fluid sample as determined appropriate by a medical practitioner.

(c) A recipient shall ensure that a legible copy of instructions for collection, labeling, packaging, and mailing of body fluid samples shall be maintained on each recipient vehicle. The instructions for collection, labeling, and packaging shall conform with the HHS guidelines. Mailing instructions shall include the name, mailing address, and telephone number of the test laboratory used by the recipient.

§ 653.12 Guidelines for drug testing.

The recipient shall ensure that its drug testing program conforms with the HHS Drug Testing Guidelines.

§ 653.13 Fatal accident drug test report.

(a) Within 24 hours of receipt of a drug test result, a recipient shall prepare a report on the results.

(b) Refusals. If a recipient cannot report a drug test result because an employee refuses to give a sample or for other reasons, the recipient's report shall so provide.

§ 653.14 Driver fatalities.

(a) A recipient shall ensure that controlled substance testing is conducted on a deceased employee involved in an accident in accordance with the procedures of this subpart.

(b) If the employee is deceased, the recipient shall request the responsible local authority (e.g., a coroner or medical examiner) to obtain a body fluid or tissue sample as appropriate.

(c)(1) If urine is obtained, the responsible local authority should place 60 milliliters (ml) of urine in a standard 80 ml screw-top container.

(2) If blood is obtained, the responsible local authority should place 20 milliliters of blood in red-top glass tubes.

(3) If tissue is obtained, the responsible local authority should place 50 to 100 grams of liver, kidney, spleen, lung or muscle tissue, as available, or gastric content, up to 100 milliliters, as available, in a red-top glass tube.

(d) Sample handling, packaging, and mailing should follow the instructions prescribed in § 653.11(c) of this subpart.

Subpart C—Reasonable Cause Testing

§ 653.20 Testing requirements.

A recipient's drug program shall require an employee of the recipient in a sensitive-safety position to be tested upon reasonable cause for the use of controlled substances under the conditions specified in this subpart.

§ 653.21 Testing procedures.

(a) The recipient shall ensure that the employee of the recipient in a sensitive-safety position is transported immediately to a collection site for the collection of a urine sample.

(b) The recipient's program shall ensure that its drug-testing program conforms with the HHS Drug Testing Guidelines.

Subpart D—Pre-Employment Testing

§ 653.30 Testing requirements.

(a) A recipient's drug program shall require an applicant for employment for a sensitive-safety position to be tested as a condition to employment for the use of controlled substances as a condition of employment.

(b) Prior to collection of a urine sample an applicant for employment for a sensitive-safety position shall be notified that the sample will be tested for the presence of controlled substances.

(c) The applicant will be notified if the test is positive and be afforded an opportunity to explain the presence of a controlled substance.

(d) If the applicant is not hired, no record of the test results shall be maintained by the recipient.

§ 653.31 Testing procedures.

(a) The sample shall consist of a urine specimen.

(b) A recipient shall ensure its drug-testing program conforms with the HHS Drug Testing Guidelines.

Subpart E—Random Testing

§ 653.40 Testing requirements.

A recipient's drug program shall provide for a random selection process to select and require an employee of the recipient in a sensitive-safety position to be tested for the use of controlled substances.

§ 653.41 Testing procedures.

(a) The sample shall consist of a urine specimen.

(b) A recipient shall ensure its drug-testing program conforms with the HHS Drug Testing Guidelines.

Subpart F—Employee Assistance Programs and Rehabilitation

§ 648.50 Employee Assistance Program.

The employer shall provide an employee assistance program (EAP) for employees. The employer may establish the EAP as a part of its internal personnel services or the employer may enter into a contract with an entity that will provide EAP services to employees. Each EAP must include education and training on drug use for employees and the employer's supervisory personnel and [shall] [may] include an opportunity for rehabilitation as provided in this subpart.

§ 653.51 Opportunity for rehabilitation [Option #1].

Each employer shall provide one rehabilitation opportunity for the following employees:

- (a) Each employee who voluntarily enrolls in an EAP.
- (b) Each employee who is identified as a drug user through random, periodic, or post-accident testing, or testing based on reasonable cause.

§ 653.52 Job security [Option #1].

(a) Each employer shall retain or rehire an employee who—

- (1) Has successfully completed his or her first rehabilitation program after voluntary enrollment or notification to the employee that he or she failed a drug test;
- (2) Has not failed a drug test required by the employer's drug testing plan for employees who have completed rehabilitation; and
- (3) Has received a recommendation for return to duty as a result of that rehabilitation program.

(b) Employees who are identified as drug users on the job are not required to be afforded an opportunity for rehabilitation or to be retained or rehired.

§ 653.51 Opportunity for rehabilitation [Option #2].

Each employer shall provide one rehabilitation opportunity for the following employees:

- (a) Each employee who voluntarily enrolls in an EAP.
- (b) Each employee who is identified as a drug user through random or periodic testing.

§ 653.52 Job security [Option #2].

(a) Each employer shall retain or rehire an employee who—

- (1) Has successfully completed his or her first rehabilitation program after voluntary enrollment or notification to the employee that he or she has failed a random or periodic drug test;
- (2) Has not failed a drug test required by the employer's drug testing plan for employees who have completed rehabilitation; and
- (3) Has received a recommendation for return to duty as a result of the rehabilitation program.

(b) Employees who are identified as drug users on the job or as a result of testing based on reasonable cause or post-accident testing required by this appendix are not required to be afforded an opportunity for rehabilitation or to be retained or rehired.

§ 653.51 Opportunity for rehabilitation [Option #3].

Each employer shall provide one rehabilitation opportunity for each employee who voluntarily enrolls in an EAP.

§ 653.52 Job security [Option #3].

(a) Each employer shall retain or rehire an employee who—

- (1) Has successfully completed his or her first rehabilitation program after voluntary enrollment;
- (2) Has not failed a drug test required by the employer's drug testing plan for employees who have completed rehabilitation; and
- (3) Has received a recommendation for return to duty as a result of that rehabilitation program.

(b) Employees who are identified as drug users on the job or as a result of testing required by this appendix are not required to be afforded an opportunity for rehabilitation or to be retained or rehired.

§ 653.51 Opportunity for rehabilitation [Option #4].

Each employer shall determine, as part of its anti-drug program, whether to provide one rehabilitation opportunity for each employee who is identified as a drug user by one or more types of testing or who voluntarily enrolls in the EAP.

§ 653.52 Job security [Option #4].

(a) An employer may not retain or rehire for a sensitive safety position an employee who has been identified as a

drug user through a drug test or through voluntary enrollment in an EAP unless the employee—

(a) Has successfully completed his or her first rehabilitation opportunity after voluntary enrollment or notification to the employee that he or she has failed a particular type of drug test, if the employer's anti-drug program provides for a rehabilitation opportunity in that circumstance;

(2) Has not failed a drug test required by the employer's drug testing plan for employees who have completed rehabilitation; and

(3) Has received a recommendation for return to duty as a result of that rehabilitation program.

(b) Employees who are identified as drug users on the job are not required to be afforded an opportunity for rehabilitation or to be retained or rehired.

§ 653.53 EAP education program.

Each EAP must include an education program with the following elements:

- (a) Display and distribution of informational material;
- (b) Display and distribution of a community service hot-line telephone number for employee assistance; and
- (c) Display and distribution of the employer's policy regarding drug use in the workplace.

§ 653.54 EAP training program.

Each EAP must include a training program to be conducted annually for employees and employer's supervisory personnel. During the first year of the program, such training must be conducted for all such personnel. The training program must include at least the following elements: the effects and consequences of drug use on personal health, safety, and work environment; the manifestations and behavioral cues that may indicate drug use and abuse; and documentation of training given to employees and employer's supervisory personnel. EAP training programs for employees and supervisory personnel must consist of at least 60 minutes for each employee and supervisor each year.

Dated: June 30, 1988.

Alfred A. DelliBovi,

Administrator.

[FR Doc. 88-15094 Filed 7-7-88; 8:40 am]

BILLING CODE 4910-57-M

FRIDAY
JULY 8, 1988

Friday
July 8, 1988

Part IX

**Department of
Transportation**

Coast Guard

**46 CFR Parts 4, 5, and 16
Programs for Chemical Drug and Alcohol
Testing of Commercial Vessel
Personnel; Notice of Proposed
Rulemaking**

DEPARTMENT OF TRANSPORTATION

Coast Guard

46 CFR Parts 4, 5, and 16

[CGD 86-067]

Programs for Chemical Drug and Alcohol Testing of Commercial Vessel Personnel

AGENCY: Coast Guard, DOT.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: Due to the safety and health concerns associated with drug abuse by merchant marine personnel, as well as legal restrictions on drug use, the Coast Guard is proposing drug abatement programs which include periodic drug tests (urinalysis) as part of required physical exams, preemployment testing and random sampling programs for all marine employees, and post accident and reasonable cause testing. The post accident and reasonable cause portions of the program will also involve testing for alcohol use. Four options are proposed concerning rehabilitation for those individuals who are detected as drug users for the first time.

The Coast Guard is also proposing an implied consent provision for the chemical testing of license, certificate of registry, and merchant mariners document holders as well as for all individuals accepting employment on board any vessel on which licensed, certificated, or documented personnel are required.

Through chemical testing, the Coast Guard expects to discourage drug and alcohol use by merchant marine personnel, an activity which adversely impacts the users, their shipmates, the marine industry, and the public in general. Chemical testing should also reduce the potential for marine casualties related to drug and alcohol use.

DATE: Comments must be received on or before September 6, 1988.

ADDRESSES: Comments should be submitted to the Executive Secretary, Marine Safety Council (G-LRA-2/21) [CGD 86-067], U.S. Coast Guard, Washington, DC 20593-0001. Comments may be delivered to and will be available for inspection or copying between 8:00 a.m. and 3:00 p.m., Monday through Friday, at the Marine Safety Council (G-LRA-2/21), Room 2110, U.S. Coast Guard Headquarters, 2100 Second Street, SW., Washington, DC 20593-0001, (202) 267-1477.

FOR FURTHER INFORMATION CONTACT: Mr. Sean T. Connaughton, Project Manager, Merchant Vessel Personnel

Division, Office of Marine Safety, Security and Environmental Protection (G-MVP), Phone (202) 267-0229.

SUPPLEMENTARY INFORMATION:

Interested persons are invited to participate in this rulemaking by submitting written data, views, or arguments. Comments should include the name and address of the person making them, identify this notice (CGD 86-067), give the specific section of the proposal to which the comment applies, and the reasons for the comment. Persons desiring acknowledgement that their comment has been received should enclose a stamped, self-addressed postcard or envelope. All comments received before the expiration of the comment period will be considered to the extent practicable before final action is taken on this proposal.

No public hearing has been scheduled, however, the Coast Guard is considering holding a public hearing on this proposal. If a hearing is scheduled, the time and place will be published in a separate notice in the *Federal Register*.

Background*Drug and Alcohol Abuse in American Society*

Drug and alcohol abuse constitutes a major societal problem. Statistics compiled and reported by the National Institute of Drug Abuse (NIDA), and by media polls, indicate the use of drugs such as marijuana to be widespread. While the problem appears to be "youth centered," in that the majority of users are in the younger age categories, the problem also exists in older groups. For instance, based on random sampling and using population projections, data from the 1985 NIDA "National Survey on Drug Abuse," indicates the following:

- In the 18 to 25 age category:
- Sixty (60) percent reported using marijuana sometime during their life.
- Twenty-two (22) percent reported using marijuana within the last 30 days.
- Twenty-five (25) percent reported using cocaine sometime during their life.
- Eight (8) percent reported using cocaine within the last month.
- In the 26 and over age category:
- Twenty-seven (27) percent reported using marijuana sometime during their life.

Six (6) percent reported using marijuana within the past month.

Nine (9) percent reported using cocaine sometime during their life.

Two (2) percent reported using cocaine within the last month.

Because of statistics like the above, many members of the public have expressed concern that the use of drugs or alcohol by others may jeopardize

their personal safety. There is widespread public perception that drug or alcohol abusers should not be in safety-related occupations. A May-June 1986 national survey jointly conducted by Populus Incorporated, of Greenwich, Connecticut, and Decision/Making/Information of McLean, Virginia, produced the following results:

—88 percent favored testing airline pilots and air traffic controllers.

—85 percent favored testing police and other law enforcement agents.

—81 percent favored testing bus drivers.

As the researchers indicate, the respondents believed that people who are responsible for the physical safety of others should be tested.

Another survey conducted by American Viewpoint, Inc., on August 6-19, 1986, examined the public's attitude toward drug testing and produced informative results, specifically, "by a margin of 76 percent to 22 percent, Americans agree that the drug crisis today is serious enough for mandatory testing." The American Viewpoint survey used a "forced choice" list and asked which groups should submit to mandatory drug testing. While the transportation modes, e.g., railroad, aviation, highway, marine, etc., were not included in the list, safety and health related occupations such as police and firefighters (84 percent), armed forces (81 percent), and doctors and nurses (81 percent) were at the top of the list. Another interesting fact was that 80 percent of the respondents indicated that they would participate in voluntary testing if asked to do so by their employer.

The surveys suggest that the majority of the public is concerned about drug and alcohol abuse and favors the testing of persons in certain safety-related occupations. While the bulk of drug abuse occurs in the 25 and under category and overall usage may drop as this group grows older, maturation cannot be considered a solution to the problem. The Department of Transportation in its regulatory role must operate under the assumption that the various transportation modes do not significantly differ from the overall population in terms of drug and alcohol abuse.

In February 1987, the Federal Aviation Administration (FAA) began performing drug screens in connection with periodic medical examinations required of certain safety-sensitive agency employees. As of April 22, 1988, the FAA has received reports on 25,000 FAA employees urine specimens pursuant to its periodic testing program. Specimens

for 25 employees have been determined to include one or more illegal drugs. In addition, the Department implemented its employee drug testing program on September 8, 1987. As of April 22, 1988, DOT has received reports on 1651 urinalysis tests pursuant to its random drug testing program for DOT employees occupying critical safety- or security-sensitive positions. 15 employees have tested positive for illegal drugs. These employees are currently in counseling or rehabilitation programs and have been relieved of their critical safety duties pending successful completion of these programs. In addition, since the inception of the DOT program, 6 employees have tested positive for illegal drugs as a result of reasonable cause drug testing.

Drug and Alcohol Problem in the Merchant Marine

It is reasonable to assume that because there is a drug problem in society, there is also a potential drug problem in the merchant marine. However, while the threat posed to society by drug and alcohol use and abuse is diffused, the same cannot be said of the threat drugs and alcohol pose to transportation industries such as the merchant marine. Not only do personnel who use drugs and alcohol pose dangers to themselves and shipmates, they are in the position to cause, or contribute to, vessel casualties that may take human life, destroy property, and/or seriously harm the environment.

The problem in the marine industry is increased by the fact that personnel often live on board their vessels for long periods of time. What in another context might be considered "recreational" or off-duty drug or alcohol use can have a detrimental effect upon vessel safety because the vessel is frequently also where the individual lives. Intoxicated personnel cannot serve their vessel in an emergency, and pose a hazard if they attempt to perform any necessary safety-related functions.

Coast Guard data do not specifically identify the use of drugs or alcohol as a major causal effect in commercial vessel losses or casualty damage. However, the use of alcohol and drugs has had a substantial impact on marine safety. Coast Guard marine casualty records spanning the years 1981 to 1986 reveal 75 deaths, 52 injuries, and \$6.5 million in property damages resulting from casualties attributable to the use of intoxicants. In addition, during the same period, the Coast Guard took suspension or revocation action against 89 seamen for alcohol-related offenses and 134 seamen for drug-related offenses.

It is acknowledged that the above data are sparse and are not conclusive. However, fatal accidents and suspension and revocation proceedings cannot be the only basis on which to judge whether or not there is a problem with substance abuse. There is no way to gauge how many minor or near accidents there have been due to intoxication.

The absence of widespread data may be due to several factors. First, the use of drugs and the abuse of alcohol is something that many people go to great lengths to conceal. Second, detection by employers is not easy. Many merchant mariners never see their employers, or see them only on an infrequent basis, and full-time surveillance by the Coast Guard and others is neither practical nor economically feasible. Third, even when there is supervision or surveillance of individuals, few people (including fellow crewmembers) are trained in how to detect drug or alcohol abuse. As one commenter to the Federal Aviation Administration's Advance Notice of Proposed Rulemaking entitled "Control of Drug and Alcohol Use for Personnel Engaged in Commercial and General Aviation Activities," (FAAD 86-20, 51 FR 44432, December 9, 1986), stated, "We have been surprised by the persons who have tested positive. Employees whose personal habits, appearances and lifestyles appear to be above reproach have tested positive for drugs and subsequently admitted their use." Finally, it is possible there are individuals who are "enablers," in that they may tolerate or cover for a person with a drug or alcohol problem, especially if the person might suffer the loss of a job and the associated adverse financial consequences.

The Coast Guard has previously addressed the issue of drug and alcohol abuse in an Advance Notice of Proposed Rulemaking concerning Certification of Seamen (CGD 84-088, 50 FR 4875 February 4, 1985), and in a Final Rule concerning Operating a Vessel While Intoxicated (CGD 84-099, 52 FR 47526, December 14, 1987). A review of the comments submitted on these rulemakings indicates that there is wide support for drug screening among marine companies, industry associations, and marine personnel. A recent Towing Safety Advisory Committee (TSAC) recommendation objected to employer involvement in testing and enforcement, but otherwise endorsed the need to eliminate drug users and those who operate a vessel while intoxicated from the merchant marine. While the Coast Guard does not dispute the professionalism of the vast

majority of those in the marine industry and their commitment to a drug and alcohol abuse-free marine environment, reports from some shipping companies that screen their crews for drug usage indicate that a significant number of their employees were found to be users of drugs.

In light of these factors the Coast Guard is proposing regulations to require effective chemical testing programs for holders of licenses, certificates of registry, and merchant mariners documents and other maritime personnel in order to minimize the drug and alcohol problem in the merchant marine. The Coast Guard is very interested in receiving any additional data on the use of drugs in the maritime industry.

Readers will note that proposals by other modes in the Department of Transportation use the term "Sensitive Safety and Security Related Positions" when classifying personnel subject to testing programs. It is the position of the Coast Guard that all individuals engaged on board a vessel contribute to the function of the vessel or the accomplishment of its service. In addition to regularly assigned duties, each individual has responsibilities which relate to safety and to emergency situations. Non-performance of these duties could pose threats to the safety of the individual seaman, the vessel, other persons on board, and the marine environment. Therefore, the testing programs proposed in these rules do not differentiate between classes of personnel subject to testing. The proposal applies to all individuals engaged aboard any vessel on which licensed, certificated, or documented personnel are required; such individuals perform sensitive safety related duties.

Jurisdiction

Congress has long recognized the danger posed by drug and alcohol use among merchant marine personnel. This is evidenced by certain statutes contained in Title 46, United States Code (U.S.C.), regarding alcohol and drug use by merchant mariners, particularly those who hold licenses, certificates of registry, or merchant mariners documents.

46 U.S.C. 2302 provides for penalties for all marine personnel who operate a vessel in a negligent manner or while intoxicated. The Coast Guard considers "negligent manner" as including the operation of a vessel while under the influence of drugs or alcohol. The standard to be applied in determining intoxication for personnel operating commercial vessels was set out in the

Final Rule concerning Operating a Vessel While Intoxicated (CGD 84-099, 52 FR 47526, December 14, 1987). This Final Rule set both a behavioral standard and a blood alcohol concentration (BAC) standard of 0.04 percent.

For those who hold licenses, certificates of registry, or merchant mariners documents, the laws contain additional provisions regarding drug and alcohol use. 46 U.S.C. Chapter 77, "Suspension and Revocation," contains strict provisions concerning drug and alcohol use. The Secretary, under 46 U.S.C. 7703, can suspend or revoke a license, certificate, or document if an individual has committed an act of misconduct or negligence, or demonstrated incompetence. It is well settled that incompetence, misconduct, and negligence, include acts involving alcohol and drug use. Under 46 U.S.C. 7704, whenever drug use is proved at a suspension and revocation hearing, revocation is mandatory unless cure is shown.

For drug abuse, 46 U.S.C. 7704 states:

(b) If it is shown at a hearing under this chapter that a holder of a license, certificate of registry, or document issued under this part, within 10 years before the beginning of the proceedings, has been convicted of violating a dangerous drug law of the United States or of a State, the license, certificate, or document shall be revoked. (c) If it is shown that a holder has been a user of, or addicted to, a dangerous drug, the license, certificate, or document shall be revoked unless the holder is cured.

In addition, in Chapter 75, "General Procedures for Licensing, Certification, and Documentation," 46 U.S.C. 7503 dictates that:

A license, certificate, or document authorized to be issued under this part may be denied to an individual who: (1) within 10 years before applying for the license, certificate, or document, has been convicted of violating a dangerous drug law of the United States or of a State; or (2) when applying, has ever been a user of, or addicted to, a dangerous drug unless the individual provides satisfactory proof that the individual is cured.

In both chapters, "dangerous drug" is defined as "narcotic drug, controlled substance, and marihuana (as defined in section 102 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 802))."

It is clear that the statutes are intended to exclude drug users and violators of drug statutes from serving on U.S. merchant vessels, as well as preventing the operation of vessels by intoxicated personnel. The Coast Guard currently enforces the statutes through the examination of the criminal

conviction records of license and document applicants and holders, through the prosecution of those operating a vessel negligently or while intoxicated, and through administrative remedies such as civil penalty actions and suspension and revocation proceedings. However, these methods have not been particularly effective since, as a practical matter, an incident typically must occur before the Coast Guard obtains evidence on which to base remedial or punitive action. With advances in the reliability of methods utilized to detect drugs in urine, as well as the increased accessibility of test processing facilities and the relatively simple procedures involved in collecting samples for testing, the Coast Guard is offered the opportunity to propose requirements that will effectively identify drug abusers. The proposed requirements are similar in nature to those in place or proposed in the other regulated transportation industries, and are intended to ensure, to the extent feasible, uniformity within the transportation industries of the United States.

The Coast Guard's authority over commercial vessels is based primarily on the type of vessel. Some commercial vessels, such as fishing and towing vessels, are not required to be inspected and are subject to limited Coast Guard regulation. Although the vessel itself may be subject to limited regulation, some or all of the vessel's crew may, by statute or regulation, be required to hold a license, certificate, or document issued by the Coast Guard. To provide the greatest possible assurance that the commercial fleet has a safe, drug-free, work environment for all personnel, the Coast Guard is proposing that an individual may not be employed, including self employment, on a vessel in a position for which a license, certificate of registry, or merchant mariners document is required, unless the entire crew is covered by the proposed rules. This means that the entire crew of a fishing vessel over 200 gross tons, an uninspected passenger vessel, and a towing vessel, would be covered.

Proposals

Goals of Testing

The overall goal of testing is to foster a drug and alcohol abuse free transportation environment which will continue to merit public confidence. A drug-free environment means that an individual covered by this proposal does not have dangerous drugs in his or her system at any time. If drugs are used, the individual could lose the right to

work in his or her occupation. Thus, even "off-duty" use would be prohibited.

In the case of alcohol, present urine testing technology only permits a rough estimation of alcohol concentration levels in an individual's blood. For this reason, this proposal does not require urine testing for alcohol. The rule could be modified if there are advances in urine testing in the future.

This does not mean the Coast Guard condones abuse of alcohol. The Coast Guard has issued a Final Rule concerning Operating a Vessel While Intoxicated (CGD 84-099, 52 FR 47526, December 14, 1987) that prohibits an individual from consuming alcohol on-duty or performing duties while intoxicated. Off-duty use is limited and subject to the restrictions contained in the final rule. With reasonable cause, testing to determine blood alcohol levels can be directed.

In addition to determining whether drugs have been used, the chemical testing program outlined in this proposal will enable the Coast Guard to collect data as to the extent of substance abuse. This data will in turn enable the Coast Guard to plan future action, such as education and training to combat substance abuse.

This NPRM proposes specific requirements for testing procedures and rehabilitation programs. As noted below, the Coast Guard realizes that some of these requirements may be difficult to achieve as proposed. This may be especially true for small employers. The Coast Guard is interested in comments on ways in which its goals can be achieved through procedures or programs without the need for detailed regulatory requirements. For example, should Coast Guard permit programs developed by consortiums of marine employers that conform with the basic requirements of the following proposed specific program? As noted later in this preamble, the Coast Guard is also interested in obtaining comments on the feasibility and effectiveness of having Coast Guard approve company-specific programs that conform with the basic requirements of the proposed program. If this approach is adopted, an industry-wide program, developed by employers may be a viable and expedient mechanism to implement drug abatement programs. In addition, this type of approval may provide more flexibility to the industry. If so, the Coast Guard requests detailed comments on how such an approval program would be implemented. The Coast Guard believes that any divergence from the proposed specific

program would have to comply with its goals.

Chemical Testing Procedures

On April 11, 1988, the Department of Health and Human Services (HHS) published final guidelines for drug testing procedures and standards for certifying drug testing laboratories (53 FR 11970; April 11, 1988). The guidelines apply to drug testing programs conducted by Federal agencies themselves. This NPRM would direct regulated parties to conduct their drug-testing programs according to these guidelines as well.

The HHS guidelines include solutions to concerns such as the integrity of the sample collection process, maintaining a proper chain of custody, and ensuring that laboratories that do drug testing are qualified to do so.

The HHS guidelines establish what illegal drugs must be tested for (marijuana and cocaine), as well as additional drugs which may be tested (e.g., amphetamines, PCP, and opiates). In addition, the guidelines specify the levels of drug metabolites in a sample that would result in a positive test being reported. The Coast Guard invites comments as to which additional drugs, if any, should be included. Commenters should also provide cost and benefit data regarding any additional drug groups.

The guidelines specify the types of tests that would be required for initial screening tests (an immunoassay test) and confirmatory tests (a gas chromatography/mass spectrometry test). The guidelines also specify collection procedures. These include the use of toilet bluing agents, temperature monitoring, and other steps to ensure the integrity of the sample without requiring observation of the individual while he or she is providing the sample. The sample collection procedures also include filling out a chain-of-custody form to accompany the sample as it goes to the laboratory.

The guidelines for a laboratory processing of samples cover both technical and procedural steps designed to ensure that a proper chain of custody is maintained and that the test is conducted accurately. Intralaboratory chain-of-custody forms would be used; only authorized personnel would have access to the sample. Records concerning the calibration of testing instruments would be maintained. Laboratories would report test results to the employer in a timely manner, and statistics on the tests would be retained by the laboratory for 2 years.

In addition to setting forth qualifications for key laboratory

personnel and quality control procedures for the laboratories, the guidelines include standards and procedures through which HHS certifies laboratories. Regulated parties would be required to use only those laboratories which HHS has certified pursuant to these standards.

The guidelines also mandate the use of Medical Review Officer (MRO) to review test results. The MRO is specifically intended to ensure that drug tests were properly administered and that the test results were accurate.

While the use of any controlled drugs, unless medically prescribed, is not condoned, the Coast Guard recognizes that due to equipment limitations and possible "passive" exposure to drugs, any test results indicating drug or metabolite levels below the cut-offs may not be accurate reflections of whether an individual has used drugs. Therefore, drug or metabolite levels below these cut-offs will be considered a negative test result and will not disqualify a person from service in the merchant marine.

Prescription drug use, used as medically prescribed, would not generally be considered a reason for corrective action; however, partial or total impairment due even to prescribed drug use is nonetheless a threat to safety, and, as is current practice, the Coast Guard may deny or suspend licenses, certificates of registry, and merchant mariners documents for this reason in appropriate circumstances.

Implied Consent

The proposed regulations state that any individual accepting employment on board any vessel on which any individual is required to be licensed, certificated, or documented would be deemed to have consented to submit to chemical testing. This implied consent provision is consistent with the Federal Railroad Administration regulations dealing with substance abuse.

Note.—See 49 CFR Part 219.

The existence of an implied consent provision would facilitate the acquisition of breath, blood, or urine samples in a timely and efficient manner. An individual could still refuse testing since the regulations do not authorize physical coercion; however, refusal would be considered a violation of regulation and could subject an individual to proceedings which may result in suspension or revocation of a license, certificate, or document under 46 U.S.C. 7003 and Part 5 of Title 46, Code of Federal Regulations, or termination or refusal of employment in the case of an individual who does not

possess a license, certificate, or merchant mariners document.

Periodic Testing

The Coast Guard proposes to require urinalysis in connection with required physical examinations which are incident to various license or merchant mariners document transactions. Only those individuals required to receive a physical examination for a license or document transaction, or those required to receive periodic physical examinations, would be required to undergo a periodic urinalysis for drugs. The testing would be part of that physical examination. The results of the physical examination and urinalysis would have to be presented at the Regional Examination Center (REC) and an application would not be considered complete until the chemical test results required by these regulations have been submitted. All test results would be kept by the REC and become part of the individual's file.

Some individuals are required to receive periodic physical examinations, normally on an annual basis. When they renew their license, they would have to present documentation of each urinalysis taken with a physical examination since their last license transaction. This would ensure that the individual received all required drug tests.

An individual who has been subject to a random sampling program, and who has been tested under that program would not be subject to the requirement for periodic testing if the applicant provides satisfactory evidence certifying that he or she has been continuously subject to a random sampling program for not less than six months, has not tested positive for dangerous drugs, has not refused to participate in required chemical tests, and has been tested within the past six months. However, even if the above conditions are met, the periodic testing requirement would continue to be applicable to those individuals whose chemical test is part of a physical examination for issuance of an original license or merchant mariners document.

Because the date of periodic testing is known to the employee, an individual who uses drugs could stop taking them prior to the test in order to avoid detection. However, not all individuals would have sufficient control over their drug use to do so. Periodic testing would have the advantage of being less costly, since it would be performed during an already required exam. Because of the scheduled nature of periodic testing, comment is requested concerning its

effectiveness. Should this type of testing be a part of all future drug programs, or should it be phased out after several years when the other forms of testing are established and working smoothly? Periodic testing would appear more likely to detect dependent drug users as opposed to casual users. After an initial round of periodic tests, most of the dependent users should be detected and, therefore, the benefits of additional periodic testing may decrease. The Coast Guard, therefore, is also considering only requiring periodic testing once for each licensed individual. This alternative would significantly cut down on the costs of testing, and in light of other testing measures such as pre-employment and random testing, commenters should address the costs and benefits associated with this alternative.

Preemployment Testing Programs

The Coast Guard is proposing that preemployment testing be required of all applicants for employment aboard any vessel on which licensed, certificated, or documented personnel are required. The purpose of testing applicants is twofold: One, it would convey a clear message that the employer is serious about establishing and maintaining a drug-free environment; and two, it would help identify those who are either addicted to or so dependent upon drugs that they cannot abstain from drug use. Applicants would be informed that tests will be conducted to determine the presence of drugs. The concept of preemployment testing is flawed to some extent because individuals can avoid detection by abstinence. However, data on preemployment testing in the airline industry reveals some positive test results ranging from 4.2 percent to 20 percent among selected carriers. As such, preemployment testing does provide a valuable service in the selection of employees.

It is intended that the preemployment testing program be employer sponsored, however, the Coast Guard will consider other arrangements that would produce equivalent coverage. The Coast Guard recognizes that, in many instances, employment on commercial vessels is of relatively short duration, such as a single voyage, and that unduly repetitive testing of an individual could result. For pilots, their term of employment on a particular vessel, or for a particular employer, is frequently measured in hours. The Coast Guard specifically invites suggestions by unions, associations, or other organizations for alternative testing programs that would provide adequate assurance to

employers that a prospective employee is not a substance abuser.

The Coast Guard also recognizes that employment of crewmembers frequently takes place on short notice and test results may not be available prior to signing on a new crewmember at the time of vessel sailing. While this could result in some instances where a crewmember could not be readily replaced at the time the results were made available to the employer, the Coast Guard anticipates that the number of such occurrences would not be significant since many experienced mariners will already be subject to random sampling programs from previous employers. However, the Coast Guard may revise the regulations to ensure that preemployment test results are made available before a vessel sails, or make provision for the acceptance of test results from previous periodic or random tests in lieu of the preemployment test. Comments on how to address this issue are specifically invited.

Random Sampling Programs

In addition to the testing programs outlined above, the Coast Guard is proposing the implementation of employer-sponsored random drug sampling programs. The proposed rules delineate the basic requirements for a random sampling program.

Random drug sampling applies the principle of random selection in that individuals are subject to drug testing at any given time. Periodic and preemployment screening on their own may not be sufficient deterrents since they permit individuals to schedule periods of abstinence from drug use. It is believed that random sampling programs are the most effective method currently available to limit potential drug use since they prevent a drug user from preparing for the screening in advance. There are data suggesting that random drug screening can reduce drug use. In the Defense Department's 1985 Worldwide Survey of Drug and Alcohol Abuse, overall drug use was registered to have dropped from 27 percent in 1980, to 19.0 percent in 1982, and then to only 8.9 percent in 1985. This drop in drug use corresponds to the implementation of servicewide random sampling programs. The Coast Guard's own experience with random sampling of its uniformed personnel has resulted in detected drug use falling 75 percent in the five years since the program was implemented. The success of the military's program, as well as those in industry, leads the Coast Guard to believe that random sampling would significantly limit the use of drugs in the marine industry.

It is envisioned that random sampling programs would be mandatory for all employers owning or operating vessels on which crewmembers are required to hold licenses, certificates of registry, or merchant mariners documents. Testing would be required for all personnel on inspected vessels and uninspected vessels on which any one or more personnel are required to be licensed, registered, or certificated. The Coast Guard's regulatory authority over these types of vessels and personnel is generally contained in 46 U.S.C. 2103, 3306, 7101, 7301, and 7701.

Besides employer-sponsored programs, there are alternative approaches that could be used to implement random programs, including Coast Guard or State administered programs. However, both of these alternatives were considered and rejected due to perceived problems with effectiveness, authority, cost, and applicability on both the federal and state level. The Coast Guard believes that employer-sponsored programs are the most effective because employers maintain routine contact with their personnel and have a vested interest in ensuring that their vessels and equipment are used properly.

Random selection means that every member of a given population has an equal chance of selection on a scientifically valid basis. Random selection would be accomplished through the use of a random-number table or computer based, random-number generator. Both methods select individuals by matching random numbers against employees' identification numbers, e.g., social security number of employee, payroll account number, etc.

The Coast Guard desires that the standards utilized for random sampling ensure randomness and selection of a sufficient number of employees to force drug users to modify their behavior. The Coast Guard requests comments on a range of possible annual testing rates up to 125 percent for random selection. This does not mean that the rate will be set at that percentage, but it serves as a cap upon which comment and data are requested. In particular, the Coast Guard invites comments on documented cases or examples of other random sampling programs, the testing rates that were used, and their success. How would different sampling rates affect the numbers of drug users who volunteer for rehabilitation under each of the rehabilitation options appearing elsewhere in this text? Is there any evidence to support alternative assumptions regarding the rates at

which drug users would volunteer for rehabilitation? What is the lowest sampling rate for random testing that would be effective in determining drug abuse? Would a lower rate be more effective if the severity of the penalties increase? Would higher sampling rates result in sufficiently higher benefits to justify the costs? Do lower sampling rates necessarily result in lower benefits? Is it reasonable to assume that benefits are directly proportional to the sampling rate? Would the higher sampling add sufficient deterrence to reduce the costs of and need for rehabilitation? The Coast Guard intends to select an appropriate rate based on effectiveness, deterrence, costs, and benefits. Commenters need to identify what that rate should be and provide the basis for their views.

Random drug testing requires a specific implementation plan to deter drug use. For instance, a 125 percent plan would mean that a population of 1,000 would be targeted to provide 1,250 annual samples. Using a true random selection basis, employees selected for each weekly/monthly increment would be returned to the pool of eligibles and subject to reselection. The possibility of reselection ensures continuous deterrence in that an individual selected early in the testing cycle would still be subject to testing throughout the remainder of the year. One feature of this plan (which could be considered a drawback) is that some employees might not be selected at all during the first year and others could be selected more than once.

The Coast Guard is considering whether the drug programs should provide for adjustment of the minimum sampling rate based upon the success of the program. Although a numerical target is needed as a benchmark for discussion, in actual practice there may come a point of sharply diminishing returns from any set level as the mix of countermeasures detects most chronic substance abuse and deters casual use. The testing program could be designed so that it could be phased up or down as appropriate and in response to the pattern of results obtained through the program. In combination with post-accident testing experiences, the results of random testing would provide the most useful gauge of the need. The Coast Guard is considering whether there are circumstances under which the program should allow for the level of effort to be increased or scaled back based on a method of evaluation stated in the rule or, if an approval process is used, based on individual applications, and specially requests comments on this

issue. The Coast Guard also solicits comments on whether companies that develop exemplary records should be relieved at some future time from some or all of the requirements of this proposal. As with other issued rules, the Coast Guard reserves the right to make appropriate adjustments in the rule in response to public comments. Are there any other ways to reduce costs or improve the effectiveness of the proposed rule? For example, are there any ways to grant employers flexibility without compromising the objectives of the rule? What would be the likely cost savings, if any, in a more flexible approach. The Coast Guard also requests comments as to whether the rule should contain a provision allowing a company with a high level of safety with regard to drug use, demonstrated over a designated time period, more latitude in determining the application of its anti-drug program.

The Coast Guard is concerned that the standards developed for random sampling protect an employee from harassment or discrimination. Thus, the Coast Guard is proposing to require employers to adopt a method of selection which ensures randomness (e.g., random number table), and to conduct this portion of its drug testing program at unannounced intervals.

In view of the above, the following questions regarding the standards for random sampling are posed:

1. Should the Coast Guard specify the method to be used by employers to select employees for testing?

2. Should the rule permit employers, especially the small ones, to use a third party to set up and maintain their drug testing program? They could choose to comply with the rule through the use of several options, including: (a) Form consortiums made up of small employers that would develop a centrally administered random testing program; (b) Form consortiums, and hire a contractor to develop and implement a random testing program; (c) Contract separately with an outside company that would set-up and provide these services; (d) Have existing industry-related groups (e.g. trade associations) set-up drug program in which small entities could participate; (e) Arrange to be included as a part of a larger company's drug testing program, who would be responsible for their implementation? Oversee their operation?

3. Another issue in this area is the matter of "randomness" among shall or isolated populations. What, for example, is the meaning of a random test to an employee population consisting of only one employee, or a few employees? This

problem is particularly acute if the owner or manager of the business is also the sole person, or one of only a few persons, subject to testing. Similarly, although surprise is an essential feature of a true random sampling program, how can this be achieved when the employee is located in a remote location and must be transported some distance to provide a sample? This could result in the loss of the element of surprise in many cases.

A fundamental issue with a requirement for employer-sponsored random sampling programs is how to implement programs that are effective yet take into consideration the differences in the industry operations. Such problems as high turnover of personnel, vessels operated by only one licensed person, companies with small staffs, and differences in vessel operations and service all combine to make uniform implementation of random programs an extremely difficult proposition. To deal with these problems, the proposal also allows for the random sampling programs to be conducted by an association, union, or other organization with which individuals serving in the marine industry are associated. The Coast Guard encourages small operators to organize for this purpose.

One of the more difficult problems associated with random programs is the implementation of testing for individuals who own and operate their own vessels. These individuals are both employer and employee, and occasionally operate with a small staff to assist them. The same problem exists for pilots, who in most cases operate independently from any "steady" employer and instead work on a contract to contract basis. We recognize that a requirement for random sampling by and for these individuals would be extremely difficult to implement, and the Coast Guard welcomes any comments on how best to include them in the drug testing.

The requirement for random sampling may not only present practical problems, but may also have a disproportionate impact upon the owner or operator of a small vessel. The proposed rule is applicable to all inspected vessels and those uninspected vessels which must be operated by persons holding licenses, certificates or registry, or merchant mariners documents, regardless of the size of a company or number of individuals in a vessel's crew. For small vessels having only two or three affected crew members, the cost of actually conducting the chemical test and verifying the test results should be in the range of \$100 to \$300 per year, assuming

a random test rate of 125%, the use of a Medical Review Officer (MRO) under the HHS Guidelines, and that outside resources are readily available for an employee assistance program. Of more concern is the administrative burden on the owners and operators in establishing and conducting a random test program and arranging for MRO services, employee assistance counseling, and rehabilitation. Because the Coast Guard is concerned with the adverse effect this rule may have upon small entities, comments concerning this issue are requested. Specific comments are requested on whether cut-offs could be used to limit the applicability of the rule, i.e. size of vessel's crew, total number of company seagoing personnel, the gross revenue of the company, etc. It should be kept in mind that many of the unlicensed and undocumented personnel on these vessels later advance to hold a license or merchant mariners document and serve on larger vessels.

While the Coast Guard is currently considering only applying random sampling programs to vessel personnel, there are numerous categories of personnel in other marine related positions who, if intoxicated, can jeopardize the safety of vessel operations. Shipboard personnel today are only a small percentage of the personnel necessary for vessel operation. Shoreside personnel perform many functions that are essential to vessel operations, such as handling lines, loading or unloading cargo, operating ship or shoreside cargo gear and cranes, or transferring fuel. The potential for these shoreside personnel causing a dramatic marine accident is often just as great, and in some cases greater, than for those who actually serve on board the vessels. For this reason, the Coast Guard requests any comments on including shore-based personnel in an employer sponsored program.

The Coast Guard envisions that for any covered individuals who test positive for drug use, remedial action could be taken. If illicit drug use is determined, the individual would be ineligible for seagoing employment in the merchant marine until (1) he or she had been rehabilitated, if the individual did not hold a license, certificate of registry, or merchant mariners document, or (2) he or she was reissued a license, certificate of registry, or merchant mariners document, if the individual originally held one. Reissuance of the license, certificate, or document would be contingent on successful completion of rehabilitation.

Commenters should address whether the types of procedures afforded an employee should vary depending upon the consequences of a positive test, and whether the burden of proof on time validity of test result should be borne by the employer or the employee. The issues of employer rights to terminate or retain an individual and whether employers must reemploy individuals after rehabilitation are discussed below.

It should be noted that it is not envisioned that the Coast Guard will actually review and approve random sampling programs. It is estimated that over 19,000 vessels would be covered by these rules, and most are owned or operated by companies which have only one or two vessels. The size and diversity of this population would create an enormous administrative burden both on the Coast Guard and the marine employers. By permitting program self-certification, this administrative burden would be avoided while permitting program sponsors to more easily implement programs which meet their operational needs. However, in cases where questions arise as to whether a program is meeting the standards proposed in this rule, the Coast Guard will review the program to ensure compliance with the standards. The employer is responsible for carrying out the anti-drug programs, including compliance with the applicable HHS Guidelines. Failure of the employer to do so, like any failure of a regulated party to comply with Coast Guard regulations, makes the employer subject to enforcement action, including civil penalties. This should ensure that employers do not circumvent the rules.

The Coast Guard does not envision that any Government funds will be expended for random sampling, except those costs associated with suspension and revocation proceedings for those holders of licenses, certificates of registry and merchant mariners documents who test positive for drug use. This does not include costs associated with data collection discussed below. Other than these, all costs would be borne by the industry, either the employer, the mariner, or any association or union that represents them. These groups could cut costs by joining together to negotiate volume or large scale testing contracts, since volume orders with laboratories will allow the price per sample to drop significantly. The Coast Guard is considering defining what it considers an "employer" sponsored program to include those innovative cost sharing schemes that may arise and which are legitimate. However, for an alternative

scheme to be acceptable it should not represent a decrease in coverage or effectiveness.

Reasonable Cause Testing

In the Final Rule concerning Operating a Vessel While Intoxicated (CGD 84-099, 52 FR 47526, December 14, 1987), the Coast Guard included a section, 33 CFR 95.035, concerning reasonable cause for testing to determine whether an individual is intoxicated. These proposals would go a step further by requiring testing based on a reasonable and articulable belief that an employee is using drugs, but is not necessarily intoxicated. Even if no mistakes are made at work, the employee may demonstrate a change in character or behavior that is symptomatic of drug use or alcohol abuse. Such changes are normally characterized by mood swings and changes in appearance, attitude, and speech.

Because of the subjectivity of the criteria and the possibility of employee harassment, at least two of the employee's supervisory personnel would have to concur in the decision to test an employee based on a reasonable suspicion of drug or alcohol use. At least one of these supervisors would have to be trained in detecting symptoms of drug use or alcohol abuse. Are there practical problems to this approach? Should the observers have to be supervisors? There will be situations where only one supervisor is available or the only persons in a position to observe an employee are not the employee's supervisors. What other criteria could be used that would protect a disfavored employee from potential harassment through testing? Should there be a limit to the number of times an employee can be subjected to reasonable cause testing, in order to prevent unwarranted harassment.

The Federal Railroad Administration has specified, in its existing chemical testing rule, the types of incidents that could justify requiring an employee to undergo testing. Should there be specified circumstances, such as particular rule violations, under which chemical testing would be automatic? If so, what kinds of rule violations would suggest a drug or alcohol problem and should trigger reasonable cause testing? Could a similar program work in the marine industry? One difficulty lies in identifying which of the many operating rules applicable to vessels are sufficiently related to the mental and physical condition of the person responsible for compliance to permit inference that the violation of the rule

may be due to drug or alcohol use. Should all operating rules so identified be treated equally, with a violation of any rule establishing reasonable cause for testing, or should violation of only the more important or critical rules be treated in this manner? Would the impact of establishing a list of specific rule violations fall disproportionately on masters or persons directing the movement of the vessel and have little or no application to engineering personnel and others performing tasks that may be equally important to the safety of the vessel but not directly related to its navigation? The Coast Guard welcomes comments on whether this provision should be included in the final rule, how this provision might be implemented, and recommendations for specific operating rules which, when violated, would indicate reasonable cause.

We propose to authorize employers to test for any Schedule I or Schedule II drug, if there is reasonable cause to believe that a particular drug was used, even though any Schedule I and Schedule II substances would not be tested for in pre-employment, periodic, and random testing.

Commenters also should present any data on the effectiveness of existing programs which use reasonable cause- or suspicion-type testing. At least one program that we are aware of provides for rehabilitation similar to that proposed under option 3, but which was worked out by labor and management. Sanctions, in terms of salary loss, are potentially quite severe for persons discovered to have drugs in their systems as a result of a test. Commenters should address the benefits, costs and deterrence value of such a program.

Post-Accident Testing

A number of toxicological sampling and chemical testing methods are available today for accurately assessing post-accident drug and alcohol levels in the human body:

Breath alcohol testing is a well accepted and instantaneous means of indirectly determining the blood alcohol concentration (BAC) level in a person's system at the time of the sampling if the test is properly administered through the use of a correctly calibrated evidential breath testing (EBT) device. Breath alcohol testing will not detect the presence of drugs in the person's system. BAC standards have been empirically related to functional impairment, and blood alcohol testing is widely accepted as proof of intoxication due to alcohol if conducted in a timely fashion following a serious incident. In

this instance, what constitutes testing in a timely fashion is partially dependent on the sensitivity and operating capabilities of the specific EBT being used. Breath alcohol testing may be conducted by non-medical personnel. However, prior to being considered qualified, an EBT operator must undergo a formalized course of instruction covering such subjects as the effect of alcohol on the human body, scientific concepts related to breath alcohol testing, and proper use, calibration, and maintenance of the specific EBT being used. Data obtained through breath alcohol testing must be properly documented, but is not subject to chain of custody considerations.

Urine testing will detect the presence of alcohol and/or drugs in the urine at the time of the test. However, urine testing is of limited value in determining the recency of drug use because of the wide variances in the time periods over which drug metabolites dissipate, or remain detectable, in the urine (e.g., marijuana is detectable for several weeks or more after use, while cocaine remains for no more than 2-4 days). Collection of urine samples requires no specialized training and can be conducted by non-medical personnel. However, to ensure the validity of sampling and subsequent testing, procedural safeguards are required.

Blood testing provides the most accurate and comprehensive determination of the level of alcohol and drugs in the blood at the time of the test. Also, blood test results are well accepted as a means of specifically identifying impairment due to alcohol if sampling is conducted in a timely fashion following the incident. Impairment standards are not yet available for drugs, but are currently being studied by the National Institute of Drug Abuse, U.S. Department of Health and Human Services. Blood specimens must be taken at a medical facility or by qualified medical personnel, and must be obtained in a timely manner (within a maximum of 8-12 hours after an incident) because of the relatively rapid elimination of drugs and alcohol from the blood. Blood samples must be refrigerated and the chain of custody must be preserved.

In a direct effort to improve the quantity and quality of marine safety data and to implement provisions of the Coast Guard Authorization Act of 1984 (Pub. L. 98-557), the Final Rule concerning Operating a Vessel While Intoxicated (52 FR 47526, December 14, 1987), imposed a requirement for the owner, charterer, managing operator, agent, master, or person in charge (hereinafter designated as the "marine

employer") to determine whether there was any evidence of alcohol or drug use by individuals directly involved in a marine casualty. The rule provides two methods by which the above determination may be made: by personal observation of an individual's demeanor, appearance, etc.; or through optional chemical testing methods including breath analysis, or urine and blood sample testing.

The Coast Guard believes that many marine employers will opt to make a post-casualty intoxication determination through personal observation methods rather than through chemical testing. This belief is based on two reasons. First, some employers will consider the expenses associated with purchasing sampling or testing equipment, training personnel, and arranging chemical analysis of samples, to be too great. Second, since marine casualty reports may be referenced in potential civil litigation proceedings related to the casualty, some marine employers may be reluctant to obtain definitive evidence of the role of alcohol or drugs in the casualty.

While personal observation is a valid qualitative method for determining intoxication, obtaining blood, urine, and breath samples and chemically testing such samples is absolutely necessary to accurately determine blood alcohol concentration (BAC) levels and to detect the presence of specific drugs in the body. Therefore, while the Coast Guard believes that the existing rules will improve marine casualty data to a degree, requiring chemical testing is considered essential for better defining the extent of alcohol and drug involvement as primary or contributing causes of such incidents and for providing more reliable information upon which to base enforcement actions and is proposing mandatory post-accident testing. However, vessel personnel may not be physically compelled to provide samples under this proposal.

Requiring blood, urine, or breath sampling and chemical testing following the occurrence of *all* categories of reportable marine casualties would provide the most complete picture of the incidence of alcohol/drug-related accidents. However, to do so for all casualties would not be practical nor economically reasonable. The Coast Guard therefore is proposing to require sampling and testing following only those marine incidents which result in death, injury, or significant property or environmental damage. These would be called "serious marine incidents." A "serious marine incident" includes any

marine casualty involving a commercial vessel which results in: One or more deaths; an injury to a crewmember, passenger, or other person which requires professional medical treatment beyond first aid, and in the case of a person employed aboard a commercial vessel, which renders the crewmember unfit to perform routine or emergency vessel duties (Note: It is also proposed to revise the definition of reportable injury in the present 46 CFR 4.05 in order to conform with these new requirements.); damage to property in excess of \$100,000; actual or constructive total loss of any vessel subject to inspection under 46 U.S.C. 3301; or actual or constructive total loss of any self-propelled vessel, not subject to inspection under 46 U.S.C. 3301, of 100 GT or more. The term "serious marine incident" also includes a discharge of oil of 10,000 gallons or more into the navigable waters of the United States, as defined in 33 U.S.C. 1321, whether or not resulting from a marine casualty; and a discharge of a reportable quantity of a hazardous substance into the navigable waters of the United States, or a release of a reportable quantity of a hazardous substance into the environment of the United States, whether or not resulting from a marine casualty.

The Coast Guard recognizes that the extent of injury or damages associated with a marine casualty, or the quantities involved in a pollution incident may be difficult to discern or estimate in the immediate aftermath of such an occurrence. Nevertheless, the marine employer would be required to make a timely, good-faith judgment as to whether or not an incident is, or is likely to become, a serious marine incident.

When reporting marine casualties to which the sampling and testing requirements are applicable, marine employers would be required to submit a Toxicological Sampling Report (Form CG-2692B) directly to the Coast Guard along with the Report of Marine Casualty or Accident (Form CG-2692). The Toxicological Sampling Report (Form CG-2692B) would be required to be submitted whether or not sampling or testing was conducted. (Note: Please refer to § 4.06-1 of the proposed regulations for details concerning Form CG-2692B.) A second copy of the completed form CG-2692B would also be required to be included with any blood and urine samples being shipped to the laboratory. A properly completed Form CG-2692B would constitute appropriate documentation of the chain of custody on the part of the marine employer from the time of sampling until

shipment. The laboratory would then indicate receipt of the samples which will complete the chain of custody.

Following a serious marine incident that is not a reportable marine casualty, such as a pollution incident not resulting from a casualty, submission of a Report of Marine Casualty or Accident (Form CG-2692) would not be required. However, submission of a Toxicological Sampling Report (CG-2692B) would be required in these cases, in the manner specified above.

All marine employers would be required to arrange and pay for blood and urine sampling at an American medical facility or by qualified medical personnel as soon as possible after the occurrence of a serious marine incident, in all cases where it is feasible to obtain samples within 24 hours following the incident. Each employer would be required to have available an appropriate blood and urine sampling and shipping kit for use by medical personnel. Employers would also be required to ensure the chain of custody of samples and prompt shipment of samples to a laboratory for analysis. In some cases, chain of custody and shipment could be handled by the medical facility or medical personnel collecting the samples. These requirements would be applicable to foreign vessels which experience serious marine incidents in U.S. territorial waters. However, operators of such vessels would have the option to have American steamship agents arrange for blood and urine sampling of involved foreign seamen.

Because certain classes of vessels routinely operate beyond 24 hours from American medical facilities, it is recognized that in a substantial number of cases, the obtaining of blood and urine samples at American medical facilities or by medical personnel will not be feasible. For this reason, inspected vessels certificated for unrestricted ocean routes (i.e., tankers, freighters, MODUs, and most offshore supply vessels) and inspected vessels certificated for restricted overseas routes would additionally be required to be equipped with evidential breath testing devices (EBTs) and the means to provide secure storage of urine samples. When a serious marine incident occurs involving vessels of this type, and blood and urine samples of appropriate personnel cannot be obtained at American medical facilities within 24 hours, breath testing and collection of urine samples would be required to be performed on board as soon as possible after the serious marine incident. Marine employers would be required to train

appropriate personnel in proper EBT equipment use, to provide for secure storage of urine samples aboard the vessel, to ensure the chain of custody, and to ensure prompt shipment of urine samples to the designated laboratory.

All marine employers would be required to have available blood and urine sampling and shipping kit(s) for use whether samples are collected aboard the vessel or ashore. Marine employers operating one or more vessels within a local geographic area could satisfy this requirement by maintaining a kit or kits at a central shoreside location. Standardized sampling and shipping kits would be made available for purchase through a designated laboratory, for an estimated cost of \$25 per box.

Evidential breath testing devices (EBTs) would be required aboard inspected vessels certificated for unrestricted ocean routes (i.e., tankers, freighters, MODUs, and most offshore supply vessels) and aboard inspected vessels certificated for restricted overseas routes. They are to be selected from among those listed on the Conforming Products List of Evidential Breath Measurement Devices amended and published periodically by the National Highway Traffic Safety Administration (NHTSA), Department of Transportation. This listing would also be available through Coast Guard Marine Safety Offices and Marine Inspection Offices. Similarly, EBTs would be required to be calibrated by use of a unit listed on the NHTSA Conforming Products List of Calibrating Units for Breath Alcohol Testers. Calibration would be required to be performed with sufficient frequency to ensure the accuracy of the device, but not less frequently than provided for in the manufacturer's instructions. Calibration frequency varies from as often as before each breath test to once a year, depending on the sophistication of the device being used.

It should be noted that the proposed regulations specify that a BAC of less than .02 percent is considered to be a negative result. 33 CFR Part 95 presently defines intoxication as .04 BAC and above, however, the Coast Guard desires to know any EBT test results above .02 BAC to determine whether alcohol could have contributed in any way to an accident, as well as whether there was a violation of 33 CFR 95.045 with its rules limiting alcohol use. A BAC of .02 is the present limit for accurate EBT equipment readings, therefore, any BAC level .02 or above should be noted on Form CG-2692B.

even if the intoxication standard of .04 BAC was not violated.

In addition to the good-faith determination previously described concerning whether an incident fits the definition of a serious marine incident, the marine employer would be further required to determine whether obtaining blood and urine samples at a medical facility or by medical personnel within 24 hours is practicable. In this respect, the Coast Guard also recognizes that commercial marine operations are unique when compared to other transportation modes due to the frequent remoteness of vessels from land or medical facilities and personnel, and the inherent need for vessel crew members to provide the initial trained response for indefinite periods of time to a wide variety of emergency situations such as fire, explosion, grounding, flooding, oil or chemical spill, etc. until the arrival of and relief by shore-based or other assistance. Factors to be considered when determining whether samples can be reasonably or safely obtained include, but are not limited to, the vessel's capability to reach port within 24 hours; the feasibility of transporting personnel to a medical facility ashore or transporting medical personnel to the vessel; whether compliance will adversely affect the safety of life, property, or the environment; etc. Cases of serious marine incidents in which sampling is not conducted will be carefully scrutinized on a case by case basis to determine whether compliance could have been reasonably and safely achieved. When it is determined that samples could have been reasonably and safely obtained but were not, the Coast Guard would consider initiating appropriate enforcement action under 46 U.S.C. 6103 or 46 U.S.C. 7703.

A person who needs to be tested after a serious marine casualty is a "person directly involved in a marine casualty or serious marine incident." This is considered to be a person who supervises, performs assigned duties in connection with, or otherwise actively participates in, any commercial vessel operation or any activity occurring aboard a commercial vessel which is a substantial factor in the events leading to the marine casualty or serious marine incident. The term "person directly involved in a marine casualty or serious marine incident" also includes any individual serving aboard a commercial vessel who is fatally injured or who is injured to the degree specified in 46 CFR 4.03-2. The following guidelines are given for determining the persons

typically directly involved in a serious marine incident;

(1) For a vessel casualty such as a collision or grounding: The master, person in charge of the vessel, pilot, deck or engineroom watchstanders, lookouts, and any other person who may have been performing duties related to the operation or navigation of the vessel, as appropriate, may be directly involved.

(2) For a vessel equipment casualty, such as failure of propulsion, steering equipment, or auxiliary machinery: The chief engineer, engineroom watchstanders, and any other person involved in causing the casualty, may be directly involved.

(3) For fires and explosions: The master, chief engineer, and any other person possibly involved in causing the casualty, may be directly involved.

(4) For injuries or deaths: The injured or deceased person(s), the person's supervisor, if the person was performing duties when the injury or death occurred, and any other person involved in the accident, may be directly involved.

(5) For oil or chemical pollution incidents not resulting from a marine casualty: The person supervising the oil or chemical transfer operation, any other individual participating in such an operation, and any person performing any duties or activities who may have caused or contributed to causing the pollution incident, may be directly involved.

The Coast Guard recognizes that situations will undoubtedly arise in which the master or person in charge of a vessel is one of the individuals directly involved in a serious marine incident and is subject to providing blood and urine samples, or breath testing, as appropriate. Such individuals would still be required to ensure that the necessary samples are obtained and tests performed, including their own. However, owners, managing operators, and charterers are equally responsible under 46 U.S.C. 6101 for arranging contingency plans for such eventualities. On a large vessel such as a tank or cargo vessel, for example, the chief mate, chief engineer, or other responsible, licensed personnel could and should be trained to assist the master in ensuring that samples are obtained, as well as to arrange and witness the master's participation when necessary. On a smaller vessel such as a towing vessel with a single licensed operator aboard, the owner could establish contingency plans which involve the assistance or supervision of shoreside personnel.

Similarly, a situation may arise in which the owner, managing operator, master, and person in charge of a vessel are the same person; for example, the owner/operator of an inspected or uninspected small passenger vessel. In that instance, the single owner/operator would also be required to arrange for sampling, including his or her own. If that individual is unwilling or unable to comply with the sampling requirements, due to possible intoxication, injury, or other reason, the Coast Guard may become actively involved in arranging for sampling, if notified of the incident. Limited numbers of Coast Guard personnel will be trained and equipped to respond in such situations.

As previously indicated, the Coast Guard would evaluate any situation in which samples could not be obtained to determine whether or not samples could have been reasonably or safely obtained. When it is determined that samples could have and should have been obtained, but were not, the Coast Guard would consider initiating appropriate enforcement action under 46 U.S.C. 6103 or 46 U.S.C. 7703.

At room temperature, blood samples will deteriorate within a matter of hours following extraction from the body. Blood samples would therefore be required to be kept in cool or refrigerated storage until shipment to a designated laboratory for analysis; to be shipped in a standardized shipping box which is lined with styrofoam and which includes a sealable ice can for cold preservation during shipment; and to be shipped via an overnight freight service to ensure arrival at the laboratory within 24 hours of shipment. These provisions are designed to maintain the integrity of each blood sample to the maximum degree that is reasonable, and to provide the most valid sample for analysis purposes.

At room temperature, drug metabolites and other substances in urine will also dissipate, though much more slowly than blood. For this reason, urine samples need not be refrigerated after collection if expeditious shipment to the laboratory is ensured; however, for practical purposes, urine samples obtained at an American medical facility could be shipped in the same cooled shipping kit along with blood samples. Urine samples obtained on board an inspected vessel to which on-board urine sampling requirements apply would not be required to be shipped to the laboratory by overnight freight service; however, they would be required to be shipped by the next most expeditious means available.

For analysis, marine employers must provide the samples to a laboratory which meets the HHS Guidelines. This may require increased costs to the marine employer in connection with overnight shipment of samples to the lab, however, this will provide a much higher level of consistency and confidence in analysis results, and would ensure timely, accurate reporting of analysis results to the Coast Guard.

Rehabilitation

The NPRM proposes four different options concerning the circumstances under which employees would or would not be given an opportunity to seek rehabilitation. Under the first option, an employee who comes forward voluntarily or tests positive for drugs for the first time would be eligible for rehabilitation rather than be discharged. Non-employees given a preemployment drug test need not be given an opportunity for rehabilitation. Once rehabilitated, the employee could be reinstated into his or her prior position. The second option would give rehabilitation rights to employees who come forward voluntarily or who are identified as drug users during periodic or random tests, but would not require that the same opportunity be afforded to drug users identified in reasonable cause or post-accident tests; those not afforded the right to rehabilitation could be discharged. In the third option, only volunteers could claim rehabilitation rights. Anyone testing positive for drugs could be fired immediately. In the fourth option, employers would not be required to offer an opportunity for rehabilitation. However, the employers could voluntarily offer a rehabilitation program. In all cases, employers would be free to offer more rehabilitation options than the minimum proposed. For example, an employer could voluntarily offer two chances for rehabilitation rather than one, however, drug use following rehabilitation would subject an individual's license, certificate of registry, or merchant mariners document to revocation proceedings. Employees who undergo rehabilitation, whether voluntary or mandatory, and want to retain or regain their position would have to meet the requirements of this rule to complete the program and receive a recommendation for reinstatement.

Each of these approaches has its own merits. For example, the broad rehabilitation program anticipated by the first alternative is likely to maximize the benefits to society by ensuring that more drug users will get the help they need. If users are simply fired, they will often lose access to, and perhaps

incentive to use, rehabilitation services, and they will continue to be drug users. However, it could be argued that employees who are found to be drug users through reasonable cause tests are less deserving of an opportunity for rehabilitation, and the second alternative would therefore exclude them. The third alternative would be lower in direct costs, because rehabilitation would only be required for employees who seek it voluntarily, but for the same reason this alternative might produce less in societal benefits. To what extent would each of the three alternatives raise or lower costs and benefits? Is it reasonable to assume that more drug users would self-identify under option (3) than under either of the other two options? Are the costs of required rehabilitation programs warranted by the reduction in societal costs resulting from drug abuse? The Coast Guard specifically invites comment on which of these or other alternatives offers the greatest benefits at the lowest cost, while remaining consistent with the intent and purpose of 46 U.S.C. 7704.

The fourth option, under which rehabilitation would not be mandated, would be the lowest in costs. This alternative may provide the most flexibility to labor and management to determine the need for and the shape of any rehabilitation program and that it also could provide deterrence to drug use and thus may yield large benefits with low costs. Commenters should address whether this alternative would be effective for the maritime industry. How would this alternative affect the deterrence value of the Coast Guard proposal? What impact would it have on the costs and benefits? Would not requiring rehabilitation foster other approaches to combating drug usage?

Under the first three proposed options, rehabilitation would only be required to be made available to those individuals testing positive for the first time; a second positive, including a positive detected during the monitoring program, would subject the individual's license, certificate of registry, or merchant mariners document to revocation proceedings or termination of employment of an individual who does not possess a license, certificate, or merchant mariners document. In addition, refusal to surrender the license, certificate or registry, or merchant mariners document would initiate revocation proceedings.

Present Coast Guard regulations provide that an individual who voluntarily deposits his or her license, certificate of registry, or merchant

mariners document and subsequently demonstrates a satisfactory rehabilitation or cure and complete non-association with dangerous drugs for a period of six months, can have the documents returned or reissued. A person whose license, certificate of registry, or merchant mariners document was revoked for use or possession of drugs is still subject to the three years waiting period in 46 CFR 5.901; however, the rules permit waiver of the three years upon completion of a rehabilitation program followed by a one year period of complete non-association with dangerous drugs.

The Coast Guard is considering applying similar voluntary deposit provisions to seamen who are detected as having used drugs as the result of an employer-sponsored program. Seamen who are eligible for and choose to undertake rehabilitation would be allowed to deposit their license, certificate of registry, or merchant mariners document with the Coast Guard. After completion of a drug rehabilitation program, the individual would have to enroll in a drug monitoring program, which would include unscheduled drug tests. At the end of this period, the individual would have to present to the Coast Guard evidence of successful completion of the drug rehabilitation and drug monitoring programs.

At the time of the adoption of a final rule in this proceeding, we intend to provide procedures for the conduct of such tests. We invite public comment on what the final rule should contain. For example, should there be a uniform testing period after rehabilitation, or should this be determined on a case-by-case basis? Who should make such a determination: The medical review officer, the EAP counselor, or both together? Should the employee be involved? How could employee involvement be accomplished? If we adopt a uniform post-rehabilitation period, how long should it be? Is six months reasonable? Would longer periods constitute an unacceptable burden on employees and on the employer? Others might argue that a long follow-up period, such as one year, is called for. Should the length of the follow-up period depend on the kind of drug that was detected? Should it depend on the severity of the individual's drug problem, as indicated by the kind of treatment that was found to be necessary? For example, should someone undergoing inpatient rehabilitation be subject to post-rehabilitation testing for a longer time

than someone who needs only abatement counseling?

During the post-rehabilitation period, should we prescribe the minimum and/or maximum number of tests to be administered? We would want to ensure that any necessary tests would be given frequently enough to ensure that the employee is free of drugs. At the same time, however, we do not want drug testing to become an instrument of harassment of the employee or an undue burden on the employer. Here again is the issue of whether the number of tests given should vary with the kind of drug used and the severity of the employee's problem.

One alternative, on which we also invite comments, is a specified post-rehabilitation testing period that would apply only if the employee, the EAP counselor, and perhaps the employer failed to agree on an individualized program. Such a fall-back system could provide, for example, for up to four additional tests over the 12 months following rehabilitation.

Ideally, the seaman would be retained in an employee status, which could include leave without pay while undergoing in-patient or other intensive rehabilitation program, and employment as other than a crewmember while undergoing an out-patient monitoring program. For holders of a license, certificate, or document, upon return of the individual's license, certificate of registry, or merchant mariners document; or for those not holders of a license, certificate, or document, upon successful completion of a rehabilitation program; the individual would be entitled to resume the seagoing position he or she previously held or an equivalent position.

The Coast Guard seeks comment on practical problems that may arise incident to rehabilitation efforts. For example, vessels subject to the inspection and manning requirements of Subtitle II, Title 46 U.S.C., have prescribed minimum manning levels that necessitate the immediate hiring of personnel to replace the seaman undergoing rehabilitation. Even large vessels have few, if any, positions that do not require a license, certificate of registry, or merchant mariners document, and many vessel operators do not have suitable alternate employment available ashore. These problems are intensified for small vessels with limited crew and shoreside employees.

In considering the feasibility of implementing a comprehensive program for assisting and rehabilitating employees, the following questions are applicable:

(1) What is the minimum employment relationship that an owner or operator should be required to maintain while an employee is undergoing rehabilitation and monitoring?

(2) Should an employer be required to pay for rehabilitation and the drug monitoring program? (The NPRM does not propose such a requirement.)

(3) What is the appropriate duration of a monitoring program and the number of random chemical tests that should be conducted during the program?

(4) What should be considered a bona fide rehabilitation and monitoring program?

(5) What are the appropriate roles for the owner or operator and the Coast Guard in overseeing the monitoring program?

(6) Are the costs of required rehabilitation programs warranted by the reduction in the societal costs resulting from drug abuse?

The Coast Guard believes there may be some employees whose normal period of employment is too short to make it practical to require rehabilitation and reemployment. For example, even if a short term hire tested positive for drugs, the end of the scheduled employment term might come before completion of the rehabilitation program. Therefore, the Coast Guard does not propose to require employers to offer an opportunity for rehabilitation to temporary employees who are hired for a short period. That is, if such employees test positive, they could be dismissed immediately.

The Coast Guard is considering defining a temporary employee as one hired for a period of 90 days or less. However, there may be a considerable number of vessels that typically hire seasonal employees for periods slightly in excess of 90 days. For example, some small passenger carrying vessels hire additional personnel for the annual summer tourist season that lasts from Memorial Day to Labor Day. Should the temporary employment period be 120 days or some other period? Should the definition of temporary employment provide for different categories, by type of vessel or employee, and, if so, what categories are appropriate? Would it be feasible to define the temporary employment period as not more than 90 days, but provide for individual waivers or extensions?

We recognize that some employees hired on a "temporary" basis are actually regularly reemployed. Some of these employees are recurring seasonal employees, others are continually reemployed at the end of a specified term. These persons are regular members of the industry, and thus

should not be excluded from the opportunity for rehabilitation and reemployment. Comment is requested on how to include these individuals under the rehabilitation and reemployment program.

The Coast Guard specifically requests comments on the (1) the merits of excluding temporary employees from the opportunity for rehabilitation, and (2) the definition of temporary employee.

The Coast Guard is also considering not requiring employers to provide an opportunity for rehabilitation and rehire under two other situations: employees on strike and employees scheduled for layoff. The Coast Guard specifically requests comments on the merits of excluding striking employees or employees scheduled for layoff, and asks commenters to define "scheduled for layoff."

Another problem concerns new employees. Should a seaman be offered the opportunity of rehabilitation and reemployment even though he or she may have joined a company only recently and might still be on some sort of probation? Should eligibility for rehabilitation and reemployment be based on length of service, hiring status, or some other criteria?

Employee Assistance Programs

One method of preventing, as well as encouraging the voluntary cessation of, drug and alcohol use is the establishment of an Employee Assistance Program (EAP). An EAP, in addition to including any of the rehabilitation options described above, includes education and training components.

An EPA program is multi-faceted and supportive in that it offers education and training as a means of combating and preventing drug or alcohol abuse. It must be recognized that an EPA itself will not seriously deter drug or alcohol abuse unless accompanied by the threat of discovery by drug testing. The Coast Guard had a Drug Exemption Program that was intended to encourage Coast Guard military personnel to seek rehabilitation by voluntary disclosure of past illegal drug use. A Commanding Officer's grant of a one-time exemption, following disclosure, precluded disciplinary action and administrative action other than an honorable discharge. Rehabilitation for members who were retained included counseling, education, and inpatient treatment at U.S. Navy facilities for members diagnosed as drug-dependent. Users detected without voluntary disclosure were subject to disciplinary or other adverse administrative action. The

Coast Guard's experience between 1980 to 1982 disclosed that the Drug Exemption Program failed to convince members using illegal drugs to seek help and cease their misconduct. Very few drug-dependent members were identified or treated and the incidence of drug use did not appear to decline as a result of the program.

Based on the above results, the Coast Guard cancelled the exemption program and initiated a random drug testing program which witnessed a decrease in the number of routine confirmatory urinalysis tests from 103 per 1,000 in 1983 to 29 per 1,000 in 1986. Thus, it is felt that the threat of detection through random sampling is a necessary part of an effective drug program. It should motivate individuals to stop using drugs and may encourage them to seek help through EAPs voluntarily.

The type of EAP services provided should consist of the following:

(1) Educational materials regarding drug and alcohol abuse and the consequences of such use from an employment, safety, and personal health/welfare perspective.

(2) Annual and other recurring training in the form of classes, forums, speakers, etc. for supervisory personnel.

(3) If adopted, rehabilitation, to consist of referral and other services as well as procedures for returning a rehabilitated employee to work, and monitoring their continued drug-free status.

The establishment of an EAP would not require payment of compensation for absence from work to obtain counseling and treatment. Compensation remains a matter between employee and employer.

Who should be afforded EAP services and under what circumstances? What is the estimated level of voluntary enrollment in EAP services at sampling rates of 125 percent and at 12.5 percent under each rehabilitation option? What are the estimated costs of individual EAP rehabilitation services under each rehabilitation option? Should training be mandatory for employees only in the first year and required annually only for supervisors? Should the Coast Guard specify a minimum training period?

It is recognized that not all employers will have the fiscal resources to implement a "company" EAP; however, the employer has a responsibility to both employees and the public to provide for a drug and alcohol abuse free environment to the maximum extent practical. As such, employers could provide or make EAP type services available through one of the following means: (1) A company operated EAP; (2) contractor/consortium arrangement; (3) arrangements with local community

service organizations; or (4) other alternatives justified as being workable and providing an equivalent level of services. Comment is requested on the other possible alternatives.

Oversight of the Chemical Testing Program

Procedures for testing and analysis of tests, as well as the accreditation of laboratories, must follow the HHS Guidelines under this proposal. However, because of the nature of the marine transportation industry, there is always the possibility that testing will be required of employees in remote locations. It is expected that every employer will attempt to ensure that all the requirements of the testing program are met. However, it is realized that in some cases an employer will not be able to supervise testing or even ensure testing is performed; therefore, the Coast Guard intends to establish guidelines on acceptable deviations from the testing requirements and procedures. These guidelines would not exempt employers from the testing requirements, but would outline the instances in which testing deviations may be acceptable to the Coast Guard. Employers would be required to make good faith efforts to ensure that testing is conducted in the most expedient but proper method available; non-compliance may result in administrative penalties.

Employer Flexibility

The Coast Guard recognizes that drug use is a complex problem that requires dynamic responsive solutions. The Coast Guard believes that its proposed program meets the agency's statutory mandate to promote safety and that it responds to the public's need for a safe and drug free marine environment. The Coast Guard is also interested in comments on whether there are ways to increase flexibility in the program or reduce costs without decreasing safety. For example, should the Coast Guard allow covered employers the option of submitting to the Coast Guard a company-specific anti-drug program that conforms with the basic requirements of the Coast Guard proposed rule?

The Coast Guard recognizes the costs and burdens associated with drug abatement in general, and wants to ensure that marine anti-drug programs are as cost-effective as practicable. Would providing for company-specific programs encourage the development of innovative solutions that may be less costly and more effective? How? Could similar innovations be developed under the proposal set forth in this notice? How can the Coast Guard ensure that its

final rule promote the development of efficient and effective solutions?

The proposed Coast Guard program includes a required random sampling rate that could range as high as 125 percent of the tested population. This level has proven to be effective in reducing drug use among Coast Guard personnel, but we have asked for comments on how low a testing percentage could be adopted without undermining the deterrent effect of the testing program. Whatever sampling rate is chosen as the industry-wide norm, would it be possible for a company-specific program to be designed in a way that would allow employers who can justify a need to test at a lower or higher sampling rate to test at this rate. How could this be accomplished?

The Coast Guard also requests comments on whether employers could also limit the size of the population subject to a full range of testing strategies to those sub-groups of employers where an initial round of testing has revealed a more serious drug-use program. In such a case, the employers may be able to rely on a less costly set of requirements to ensure that employees in sub-groups with less serious or more easily determined problems, remain risk-free. In addition, are there ways employers may avail themselves of less costly and less intrusive technologies as such advances are made while ensuring an appropriate-level of safety? Are there other types of flexibility that the Coast Guard should consider? Commenters are requested to submit any empirical data that support their views.

Could the current proposal provide similar flexibility by simply providing a waiver for companies that, for example, ask to use a test they establish which achieves an equivalent level of safety? What, if any, fundamental requirements should be present in an acceptable company-specific drug abatement program, and what guidelines would the Coast Guard use in reviewing requests for waivers or amendments if such modifications are allowed? Should, for example, the Coast Guard be required to approve any modifications that are designed to achieve a safe and drug-free marine environment? Should these requirements or review guidelines be different from modifications submitted by small companies? Should the Coast Guard be required to act on an application for approval of a company-specific program, an amendment, or a waiver request, within a set time period? What form should the application take? What impact would allowing these

alternatives for increasing flexibility have on the Coast Guard?

The Coast Guard invites comments as to what methods might be used to facilitate the inclusion of small entities in the program and whether all small entities should be required to develop and implement a drug abatement program. Commenters who believe that the proposed rule should not cover small entities, either in whole or in part, should explain the basis for their views and describe how they would define small entity for this purpose.

Employee Privacy

The Coast Guard specifically requests public comment on what, if any, procedures and safeguards should be prescribed to minimize the invasion of the privacy of the persons being tested. Since the provisions of 46 U.S.C. 7704 require revocation of the license, certificate of registry, or merchant mariners document of an individual convicted of violating a drug law or shown to be a user or addicted to drugs, the proposed rules would require that the Coast Guard be notified of all positive tests of individuals holding licenses, certificates, or documents. A second positive would result in revocation proceedings being initiated against an individual's license, certificate of registry, or merchant mariners document. Are there ways to ensure that an employer is aware of a person's past testing history without denying that person an appropriate level of confidentiality?

The Coast Guard is concerned with the circumstances under which test results would be given to persons other than the employer sponsoring the testing program or the employee. For example, should test results be submitted to a prospective employer? If so, should the data be given at the request of the future employer, at the discretion of the employer conducting the test, or at the request of the employee? Another option is authorizing the release of test results only in specified circumstances, such as cases where the employee had their license, certificate of registry, or merchant mariners document revoked after refusing to undergo rehabilitation or had failed a second test after rehabilitation.

The potential for the release of data may also complicate the issue of an employee's right to contest the results of a test. A urine sample that had been subject to tampering could unjustly end an employee's career even with another employer, and it might be necessary to permit the employee to challenge the integrity of the test procedure.

There are other persons who may wish to know the results of drug tests, and it may be appropriate to develop rules to govern the release of test data to them. For example, should the Coast Guard prohibit providing access to test results to the general public, including the news media? Does the Coast Guard have the authority to do so? What about access by other government agencies which might want data for statistical, regulatory, or law enforcement purposes?

A related issue involves whether to distinguish between releasing general statistical data, such as the total number of positive tests at a company in a month or year, and name-specific data. Small companies and their employees may have an especially difficult problem since small organizations will have fewer people to test at any given time period. It may be that even seemingly neutral statistical data would have the effect of identifying an individual. This potential may be exacerbated if only a small portion of the population is tested in a year.

Should the Coast Guard treat the privacy issue for the various testing programs differently?

The Coast Guard is proposing under some of the rehabilitation options discussed above that employees not be fired on the basis of a single positive drug test. As described elsewhere in this notice, the employee may have an opportunity for rehabilitation following the first positive drug test. If the employee declines to take advantage of this opportunity, or if the employee does not successfully complete rehabilitation, he or she may be fired and their license, certificate of registry, or merchant mariners document subject to suspension and revocation proceedings. If, however, following successful completion of rehabilitation, the employee again tests positive for drug use, the employee may be fired and the employee's license, certificate of registry, or merchant mariners document is subject to suspension and revocation proceedings without further opportunity for rehabilitation. This policy may involve some complications in practice. Implementation of the policy seems straightforward when an employer continuously employs the individual throughout the process, but in some instances employment is more transient, with many employees regularly moving from one employer to another. An employee might test positive with one employer and, with or without having completed rehabilitation successfully, move on to another job. This possibility is great if the individual does not hold a

license, certificate of registry, or merchant mariners document.

In these situations, how is the second employer to know of the first positive test, especially if the individual does not hold a license, certificate of registry, or merchant mariners document? How is a subsequent employer to know of a series of two positive tests with two different employers? What action should each of these parties take upon learning of a positive drug test or tests with a former employer?

One possible way of dealing with these questions is to require employers covered by these rules to require job applicants to disclose, in writing, all instances in which they have tested positive for drugs within a certain period of time. A false response would itself be grounds for firing the worker. Comments on the merits of this disclosure approach are requested. In addition, if this approach was used, to what period of time should the disclosure requirement refer? (e.g., one, two, or three years? Any time in the applicant's work history?) Should the disclosure requirement apply only to positive drug tests under the provisions of this rule, or should any positive drug test (e.g., one conducted in connection with athletics or school activities) have to be disclosed?

Another issue pertains to a situation in which an employer has hired an individual who the employer knows, perhaps through voluntary disclosure, to have had a prior positive drug test, and the employee again tests positive for drugs. Should the employer then be authorized to fire the worker, even though this is the first instance of a positive drug test while the worker has worked for the current employer? Should the employer treat the positive test as a "first positive test" and provide an opportunity for rehabilitation if the last prior positive test was a certain amount of time in the past (e.g., more than three years ago)?

What is the position of an employer confronted with an applicant for employment who tested positive twice within the disclosure period, but who at the time of his application is "clean" or alleges that he or she has been successfully rehabilitated? Should the employer refuse to hire (or, indeed, be barred from hiring) the applicant? (Where they apply, statutes prohibiting nondiscrimination on the basis of handicap, such as section 504 of the Rehabilitation Act of 1973, as amended, may forbid a refusal to hire a drug abuser unless the individual's current drug use poses a danger to persons or property.)

Regulatory Evaluation

These proposed regulations are considered to be non-major under Executive Order 12291 and significant under the DOT regulatory policies and procedures (44 FR 11034, February 26, 1979). A draft regulatory evaluation has been prepared and placed in the rulemaking docket. It may be inspected or copied at the Marine Safety Council (G-CMC/21) (CGD 86-067), Room 2110, U.S. Coast Guard Headquarters, 2100 Second Street SW., Washington, DC 20593, from 8 a.m. to 3 p.m. Copies may also be obtained by referring to the "FOR FURTHER INFORMATION CONTACT" paragraph.

The proposed regulations would require proof of an individual's drug-free condition through the use of various testing programs. The proposed regulations mandate periodic urinalysis in connection with required physical examinations for licensed and documented personnel, and pre-employment and random sampling of all employees aboard any vessel on which licensed, certificated, or documented personnel are required. The testing programs also contain requirements concerning reasonable cause and post accident testing. Under the options proposed for comment, rehabilitation would be made available to certain personnel testing positive for drug use the first time, or those who volunteer for rehabilitation, with the opportunity to return to their previous position after undergoing a six month drug monitoring program. The Coast Guard does not believe these requirements will impose significant costs on either the private or public sectors, and the costs will normally be proportional to the size of the vessel or operation. There may be a substantial administrative burden on the operators of small vessels and some individuals.

Commenters should be aware that other operating administrations within the Department of Transportation also are proposing drug testing programs. Elsewhere in today's *Federal Register* are NPRMs issued by Urban Mass Transportation Administration and the Research and Special Programs Administration. In addition, the Federal Aviation Administration published an NPRM in the *Federal Register* on March 14, 1988 (53 FR 8368); the Federal Railroad Administration's NPRM was published on May 10, 1988 (53 FR 16640); and the Federal Highway Administration (FHWA) published its NPRM on June 14, 1988 (53 FR 22268). Each of these rulemakings addresses the costs and benefits of the proposals and are generally consistent with one

another. In some instances, however, and generally as a result of differences in the industries affected, the assumptions differ from those discussed in this proposed rulemaking. Obviously, changes in assumptions could affect the costs and benefits. Because of the nature of some industries, costs for similar elements also may vary or could vary enough to warrant sensitivity analyses. Other changes in assumptions, such as test costs or rehabilitation costs, also can have an effect on the economic analyses. Commenters may find it helpful to review the notices of proposed rulemakings or the economic analyses prepared by the other operating administrations. Comparisons may aid commenters in reviewing data on this proposal and in formulating comments. In reviewing the economic analysis and the basic assumptions made, commenters should address specific areas where they agree or disagree with the assumptions and the basis for the comment. Commenters are directed to the other rulemakings and their assumptions as a source of information in submitting comments. A copy of each of the documents has been placed in the docket.

There were several alternatives considered. These included: Not addressing the problem in regulation or policy; only requiring periodic drug screens for personnel receiving physical examinations; requiring only pre-employment testing; requiring only random sampling programs; requiring only reasonable cause testing; requiring only post accident testing; having the Coast Guard or States conduct testing; or requiring random sampling programs in combination with periodic, pre-employment, reasonable cause, and post accident testing.

The last alternative was determined to be the most acceptable, since all crewmembers on vessels covered by the rules will be subject to random and pre-employment testing programs administered by employers, associations, and unions as well as providing for periodic testing of individuals holding licenses or merchant mariners documents. Random programs are believed to be the most effective method in deterring drug use because of the increased probability of detection. Concurrently, those personnel not subject to a random screening program for the prescribed period of time or those initially applying for employment in the merchant marine would still be screened for drug use. In addition, the evaluation of the role of drugs and alcohol in marine accidents will be possible. This approach facilitates

program flexibility, increases probabilities of detection, eases the administrative burden, lowers cost, and provides greater effectiveness, while at the same time ensuring that all crewmembers on covered vessels are subject to testing.

Program Costs

The approximate costs (in constant 1986 dollars) of the regulatory proposal associated with the requirement for drug screening are as follows:

Periodic Testing

The estimated number of annual license and merchant mariners document transactions that require physical examinations (39,250), multiplied by the estimated cost of an initial drug screen (\$25), gives the total costs of initial periodic drug test (\$.98 million). Using that figure, and an assumed percentage of possible positive testings of 25%, gives an estimate of the number of required second, confirmatory testings (9,812). Using a cost of \$60 per confirmatory screen the average annual cost expected for confirmatory tests is \$.59 million. The total estimated annual cost of the periodic drug screening would be \$1.57 million.

If all the individuals subject to periodic testing are enrolled in employer-sponsored or equivalent testing programs, and therefore eligible for testing at costs comparable for pre-employment and random sampling (\$15 for initial tests, and \$25 for confirmatory tests), the total estimated annual cost of the periodic screening would be reduced to \$.84 million.

It should be noted that these testing costs do not take into consideration those individuals obtaining raises of grade who have had physical examinations for original licenses or renewals within three years nor those individuals holding First Class Pilot licenses but not serving on them and therefore not required to receive an annual physical examination. Actual costs are therefore expected to be less than those shown above.

Preemployment Testing Programs

Due to the career paths of many mariners, the costs of a preemployment testing program are extremely difficult to assess. Computation of the program's estimated cost will be dependent on how preemployment testing is applied and whether or not unions and other organizations are to be considered employers.

It is estimated that 131,700 individuals are employed on vessels on which

licensed, certificated, or documented personnel are required. Until comments are received relative to application of this program, it is assumed, for purposes of the evaluation, that 10 percent of the total individuals are new to the industry each year, and, of the remainder, 20 percent change employers each year. Therefore, an estimated 36,876 mariners would receive preemployment testing annually.

Multiplying the number of mariners tested by the cost of an initial drug screen (\$15), it will cost \$.55 million for initial preemployment drug tests. Assuming a need to confirm a percentage of possible positive testings of 25%, the projected number of required second, confirmatory testing is 9,219. Multiplying this figure times the estimated cost of confirmatory tests (\$25), it is estimated that it will cost \$.23 million for confirmatory testing. With an average annual administrative cost of sample testing of \$.23 million ($36,876 + 9,219 \times \5), the total estimated annual cost of the preemployment testing program is \$1.01 million.

(Note.—Estimated testing cost is lower for preemployer testing than periodic testing due to volume contracts.)

Random Sampling Programs

(Note.—A 125% random selection rate is used for this analysis. This is the same rate used by the Coast Guard for testing its military personnel. If a lower rate is adopted in the final rule, the following costs will be correspondingly less.)

The total annual cost of the random sampling program is estimated to be \$4.5 million. This was arrived at by assuming that out of an estimated affected population of 131,700 seamen, 125 percent are to be tested each year. Therefore, 164,625 samples are to be tested annually. Multiplying this figure times the estimated cost of an initial drug screen (\$15), it will cost \$2.5 million for initial random drug tests. Assuming a need to confirm a percentage of possible positive testings of 25%, the projected number of required second, confirmatory testing is 41,156. Multiplying this figure times the estimated cost of confirmatory tests (\$25), it is estimated that it will cost \$1 million for confirmatory testing. With an average annual administrative cost of sample testing of \$1 million ($164,625 + 41,156 \times \5), the total estimated annual cost of the random testing program is \$4.5 million.

(Note.—Estimated testing cost is lower for random sampling than periodic testing due to volume contracts.)

Reasonable Cause Testing

Reasonable cause testing is discretionary, highly subjective, and contingent on the availability of more than one supervisor, as well as the level of training of the supervisor(s). In addition, there is little or no data available concerning the incidence of drug use in the commercial marine industry. For these reasons, it is difficult to estimate the number of instances in which such testing would be potentially necessary or undertaken, nor is it possible to accurately assess the cost/benefit impacts of such testing.

In general, however, it is evident that the primary value of reasonable cause testing is its potential capability for detecting and determining drug use prior to the occurrence of marine casualties or other significant events. It is not possible to estimate how many such incidents could be prevented. As discussed later, if even a small percentage of deaths, injuries, or property/environmental damage is prevented through reasonable cause testing, the benefits will outweigh the associated costs.

As an estimate, it is believed that up to 7.5 percent of the seamen covered by this program could be tested annually. The total annual cost of the reasonable cause testing is therefore estimated to be \$.27 million. This was arrived at by assuming that out of an estimated affected population of 131,700 seamen, and a testing rate of 7.5 percent, 9,878 samples are to be tested annually. Multiplying this figure times the estimated cost of an initial drug screen (\$15), it will cost \$.15 million for initial drug tests. Assuming a need to confirm a percentage of possible positive testings of 25%, the projected number of required second, confirmatory testings is 2,470. Multiplying this figure times the estimated cost of confirmatory tests (\$25), it is estimated that it will cost \$.06 million for confirmatory testing. With an average annual administrative cost of sample testing of \$.06 million ($9,878 + 2,470 \times \5), the total estimated annual cost is \$.27 million.

Post Accident Testing

Based on historical data, there are approximately 4800 marine casualties per year. Of these, approximately 1900 can be considered "serious marine incidents." It is estimated that, for various reasons, only 75 percent of the serious marine incidents will be able to conduct testing in a timely and efficient manner. The following costs are estimated for those 1425 incidents where testing will occur.

Of the estimated 1425 serious marine incidents occurring each year and where testing will be possible, it is estimated 66 percent (950) will occur in locations where blood and urine samples can be collected at American medical facilities within 24 hours. Using an estimate of three (3) persons being tested in each incident, 2850 samples will have to be taken. Multiplying that number by the estimated medical fees for obtaining the samples (\$50 per sample), the cost of transporting personnel to be tested (\$50 per individual), and the cost of shipping the samples to an approved laboratory (\$50 per sample), it is estimated that it will cost \$.43 million to conduct this testing. Adding this number to the cost of analyzing the samples (\$100 per sample), it is estimated that it will annually cost \$.72 million to conduct this type of testing.

Of the estimated 1425 serious marine incidents occurring each year and where testing will be possible, it is estimated 33 percent (475) will occur in locations where urine samples can only be collected by ship's crew. Using an estimate of three (3) persons being tested in each incident, 1425 samples will have to be taken. Multiplying that number by the estimated cost of shipping the samples to an approved laboratory (\$50 per sample), it is estimated that it will cost \$.07 million to conduct this testing. Adding this number to the cost of analyzing the samples (\$100 per sample), it is estimated that it will annually cost \$.21 million to conduct this type of testing.

In addition to the testing, the cost of providing shipboard sample kits and EBTs are necessary. It is estimated 35,000 kits will be purchased at a cost of \$.25 apiece for a one time cost of \$.88 million. Each year, due to accidents, 1425 kits would have to be restocked for a cost of \$.04 million. Additionally, there are approximately 1600 vessels certificated for unrestricted ocean routes, or for restricted overseas routes, which will provide an EBT at an approximate cost of \$440 apiece, for a total cost of \$.7 million. Training for personnel to use EBT (approximately 9600 people) is estimated to be \$.48 million if it costs \$500 to train each one. The total equipment and training costs will be approximately \$.72 million.

The costs of the post casualty testing requirements is \$.65 million.

Rehabilitation

The costs involved with rehabilitation and drug monitoring are difficult to compute since the type of services available vary with the drug involved. Also, the number of personnel who will

take advantage of the opportunity for rehabilitation are unknown. However, the following are offered as estimates for the total costs of Option 1, the broadest option under consideration.

(Note—The detection rate used for this analysis is based on a 125% random selection rate. If a lower random selection is adopted in the final rule, the detection rate, and the following costs, will be correspondingly less.)

The number of persons employed on vessels required to have individuals holding a license, certificate of registry, or merchant mariners document is estimated to be 131,700. Multiplying that number by .075 (7.5 percent estimated detection rate), the total number of personnel who could be eligible for rehabilitation is 9,878. Multiply that number by .33 (33 percent) to determine the number of personnel who are eligible for, and undergo, rehabilitation (3,260). An estimated 67 percent of detected drug users will not undergo rehabilitation because they: (1) Refuse to be rehabilitated; (2) are not eligible for rehabilitation because they are temporary employees; (3) will decline the opportunity for rehabilitation; or (4) will be subject to termination of employment and/or subject to suspension or revocation proceedings because they tested positive for drug use a second time. This percentage applies to the marine industry and reflects the composition of its workforce.

Multiply that figure by the maximum estimated cost for an in-patient rehabilitation program (\$13,000) to receive the estimated annual cost for in-patient rehabilitation (\$42.4 million). The Coast Guard is proposing that all persons undergo in-patient rehabilitation. 46 U.S.C. 7704 mandates that a person be "cured" in order to forego revocation of their license, certificate of registry, or merchant mariners document. Since many individuals detected for drug use may not require full in-patient care, lowering this 100% requirement to another percentage, e.g. 5% as has been used by the FAA in their NPRM (March 14, 1988, 53 FR 8368), would decrease the costs substantially.

Multiply the number of individuals undergoing rehabilitation by the maximum estimated cost for a six month out-patient monitoring program (\$1,800) to determine the cost of out-patient rehabilitation (\$5.9 million). The total annual estimated cost of rehabilitation is \$48.3 million.

No estimate is offered for the costs of employing an individual during rehabilitation or rehiring them after rehabilitation. There is no requirement that the individual be paid during

rehabilitation, therefore, the costs of paying an employee during rehabilitation will depend totally upon company policy or the labor agreement an employer has with the employee. Costs can range from the price of the rehabilitation solely, to full pay up to six months or more.

Administrative costs will also vary, being dependent upon the type of program an employer adopts. However, for the majority of employers, it is believed the administrative costs will be minimal since most employers will contract out for rehabilitation services and include the administrative costs in the total rehabilitation cost.

Option four, which does not mandate any type of rehabilitation program, would have negligible costs.

Transportation

Periodic, Preemployment, Random and Reasonable Cause Testing: The costs associated with transportation and test taking are difficult to accurately calculate since such numbers are entirely dependent upon whether the merchant mariner will have to go to a laboratory or other facility for testing or whether test samples will be collected incident to employment. Many sample takings will be conducted during an individual's free time, since the requirement for a test is for a personal license, certificate, or document. However, it is assumed that, for the most part, mariners will be within one-half hour of a testing facility when located at their residence, place of employment, or Regional Examination Center, and that it should take fifteen minutes to complete a test. Therefore, it is projected that it will take a typical mariner one and one-quarter hours to complete this requirement, with the majority of testing during an individual's free time. Also many employers currently have some type of testing program in place that, with little or no program alteration, may meet the criteria the Coast Guard is proposing.

Rehabilitation: The costs associated with transportation are difficult to accurately calculate since such numbers are entirely dependent upon whether the merchant mariner will have to visit a rehabilitation or monitoring center or whether the employer will have a program run at the place of employment. However, it is assumed that, for the most part, mariners will be within one-half hour of a rehabilitation or monitoring facility when located at their residence or place of employment. Therefore, it is projected that it will take a typical mariner one hour travel to complete this requirement, with the

majority of this time during an individual's free time.

Option four, which does not mandate any type of rehabilitation program, would have negligible costs unless an employer chose to provide for rehabilitation voluntarily.

Post casualty Testing: For the 1425 serious marine incidents after which toxicological sampling will be feasible, it is estimated that an average of 1 hour will be required to transport individuals to and from medical facilities for blood and urine sampling following approximately 950 incidents, and 1 hour will be required for collecting samples. An estimated 3 persons will be subject to sampling for each incident. This will result in 5700 hours expended by the persons being tested. Also an estimated 2 supervisory personnel will be necessary for witnessing and documentation. These individuals would require 1 hour for the round trip to the medical facility, 1 hour at the medical facility, and 1 hour for completing documentation and for arranging shipment of samples to the designated laboratory. This would result in 5700 hours expended by supervisory personnel. The total hours associated with obtaining blood and urine samples at medical facilities would be 11,400 hours.

It is estimated that toxicological sampling aboard vessels will occur following approximately 475 serious marine incidents. An estimated 3 persons per incident would be subject to sampling, and 0.5 hour would be required for the urine sampling and breath alcohol testing procedure. This would result in 713 hours expended by persons providing samples. An additional 2 supervisory personnel would participate for witnessing and documenting the sampling. Approximately 0.5 hour per person sampled and tested would be expended by the supervisors, as well as 0.5 hour for completing required documentation. This would result in 950 hours expended by supervisory personnel. Finally, delivery of samples to a shipping location upon reaching port would require one person approximately 1.5 hours roundtrip. This would result in 713 hours expended in shipment of samples. The total hours associated with obtaining urine samples and conducting breath alcohol testing aboard vessels would therefore be 2376 hours.

The total hours required to support the proposed requirements for drug and alcohol testing following serious marine incidents would be $11,400 + 2376 = 13,776$ hours.

Total Cost

The total first year maximum cost of the drug testing programs, plus the cost of rehabilitation, is estimated to be:

	Million
Periodic testing.....	\$1.57
Preemployment testing.....	1.01
Random testing.....	4.50
Reasonable cause testing.....	0.27
Post casualty testing.....	6.65
Rehabilitation.....	48.30
Total.....	62.30

Based on experience with in place chemical testing programs, such as DOD and the Coast Guard, the percentage of persons testing positive should drop significantly over a period of time. Since the worker population in the marine industry is highly mobile as compared to servicemen in the armed forces, no prediction can be made as to how fast this decrease in positive test results will occur. Therefore, it has been assumed that costs will decrease constantly over the first three years, and thereafter costs for confirmation tests and rehabilitation should decrease to 33% of the amounts calculated above, thereby reducing the costs in subsequent years to approximately \$22 million.

Program Benefits

As shown in a June 1984 U.S. Department of Health and Human Services report entitled *Economic Costs to Society of Alcohol and Drug Abuse and Mental Illness: 1980*, the economic costs to society at large from drug abuse is estimated to be \$66 billion annually. Using this annual figure, the total cost to society from drug abuse over the 10-year period following 1988 would be \$405.5 billion more if corrective measures are not taken. Over 50 percent of the \$66 billion estimate of the cost of drug abuse in society at large is in the form of reduced income of drug users compared with those who do not use drugs. Is it reasonable to assume that a corresponding percentage of benefits would result from increased productivity of the covered marine employers? Are there more accurate estimates and estimating methodologies that should be used in estimating the potential benefits associated with this proposal? The Coast Guard has placed the 1984 report in the public docket, and invites commenters to submit their views on the applicability of the study's conclusion to this notice.

Although revisions to the casualty reporting program have recently been effected, existing data does not readily identify drug-related casualties;

therefore, the Coast Guard will not estimate the total cost benefits of this proposal at this time. However, the following must be kept in mind. In 1984 there were approximately 2300 commercial vessel casualties (excluding fishing vessels), resulting in \$237 million in damages and 68 deaths. Of these, 1133 were directly attributable to personnel-related causes, i.e., carelessness, misjudgment, etc., resulting in \$77 million in damages and 29 deaths. (It should be noted that these statistics do not include personnel deaths or injuries which are not associated with vessel accidents.)

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

Regulatory Flexibility Analysis

The costs of the proposed random sampling will be proportional to the number of personnel employed. For small vessels, having only two or three affected crew members, the cost should be in the range of \$100 to \$300 per year. For post-accident testing, the cost would basically be \$25 for a sampling and shipping kit. However, as discussed previously in the preamble, even this seemingly low amount may have an adverse impact on small entities. Since the Coast Guard is considering a number of alternatives to this proposal for small entities, it is not possible to evaluate the economic impact at this time. The Coast Guard has solicited comment on the impact on small entities and will consider those responses and evaluate the impact prior to issuing a final rule.

Federalism Assessment

This regulatory proposal has been analyzed in accordance with the principles and criteria contained in Executive Order 12612, and it has been determined that the proposed rulemaking does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment. The proposed rules affect the safety of vessels in interstate and foreign commerce and are directly related to the qualifications of personnel licensed by the U.S. Coast Guard and their working conditions on vessels. These are express statutory

responsibilities of the U.S. Coast Guard and there are no similar State responsibilities or programs in these areas.

Information Collection

This proposed rulemaking contains information collection requirements in the following sections proposed: Proposed subparts B and C, plus proposed sections 46 CFR 4.06-1 and 4.06-8. They are being submitted to the Office of Management and Budget for approval under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). Persons desiring to comment on these information collection requirements should submit their comments to: Office of Information and Regulatory Affairs, Office of Management and Budget, 726 Jackson Place, NW., Washington, DC 20503, ATTN: Desk Officer, Coast Guard. Persons submitting comments to OMB are also requested to submit a copy of their comments to the Coast Guard as indicated under "ADDRESS."

Commenters should especially provide their views on the accuracy of Coast Guard's estimates of the burdens associated with these requirements, the practical utility of the information obtained, and less burdensome reporting alternatives to those proposed in this notice.

List Of Subjects**46 CFR Part 4**

Administrative practice and procedures, Investigations, Accidents, Marine safety, National Transportation Safety Board, Reporting requirements, Alcohol and alcoholic beverages, Drugs.

46 CFR Part 5

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

46 CFR Part 16

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

Proposed Rule

For the reasons set out in the preamble, Title 46, Chapter I, of the Code of Federal Regulations, is proposed to be amended as follows:

PART 4—[AMENDED]

1-2. The authority citation for Part 4 is revised to read as follows:

Authority: 33 U.S.C. 1231, 43 U.S.C. 1333; 46 U.S.C. 103, 2306, 6101, 6301, 6305, 50 U.S.C. 198; 49 CFR 1.46, except subpart 4.40 for which the authority is: 49 U.S.C. 1903(a)(1)(E); 49 CFR 1.46.

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

§ 4.03-2 Serious marine incident.

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

(a) Any marine casualty as defined in § 4.03-1 of this part which results in any of the following:

- (1) One or more deaths;
- (2) An injury to a crewmember, passenger, or other person which requires professional medical treatment beyond first aid, and in the case of a person employed aboard a commercial vessel, which renders the crewmember unfit to perform routine or emergency vessel duties;
- (3) Damage to property, as defined in § 4.05-1(f) of this part, in excess of \$100,000;
- (4) Actual or constructive total loss of any vessel subject to inspection under 46 U.S.C. 3301; or
- (5) Actual or constructive total loss of any self-propelled vessel, not subject to inspection under 46 U.S.C. 3301, of 100 GT or more.

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

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

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

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

§ 4.03-4 Person directly involved in a marine casualty or serious marine incident.

The term "person directly involved in a marine casualty or serious marine incident" is a person who supervises, performs assigned duties in connection with, or otherwise actively participates in, any vessel operation or any activity occurring aboard a vessel which is a significant factor in the events leading to or causing a casualty or serious marine incident. The term "person directly involved in a marine casualty or serious marine incident" also includes any individual serving aboard a commercial vessel who is fatally injured or who is

injured to the degree specified in § 4.03-2 of this part.

§ 4.03-5 Medical facility.

The term "medical facility" means an American hospital, clinic, physician's office, or laboratory, where blood samples can be collected according to recognized professional standards and urine samples can be collected consistent with 46 CFR 16.301.

§ 4.03-6 Qualified medical personnel.

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

4. Section 4.05-1 is amended by revising paragraph (e) to read as follows:

§ 4.05-1 Notice of marine casualty.

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

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

Subpart 4.06—Mandatory Drug and Alcohol Testing Following Serious Marine Incidents Involving Commercial Vessels

Sec.

- 4.06-1 Responsibilities of the marine employer.
- 4.06-5 Responsibilities of persons directly involved in serious marine incidents.
- 4.06-10 Blood and urine sample collection at a medical facility or by qualified medical personnel.
- 4.06-15 Testing with evidential breath testing devices (EBTs).
- 4.06-20 Urine sample collection by the marine employer.
- 4.06-25 Sample collection in incidents involving fatalities.
- 4.06-30 Sample handling and shipping.
- 4.06-35 Sample analysis and follow-up procedures.
- 4.06-40 Reporting and review of results.
- 4.06-45 Employee Assistance Programs (EAPs).

Subpart 4.06—Mandatory Drug and Alcohol Testing Following Serious Marine Incidents Involving Commercial Vessels**§ 4.06-1 Responsibilities of the marine employer.**

(A) All commercial vessels.
(1) Following the occurrence of a marine casualty, a discharge of oil into the navigable waters of the United States, a discharge of a hazardous

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

(2) When it is determined that a casualty or incident has occurred that meets, or is likely to meet, the criteria in § 4.03-2, the marine employer shall take all practicable steps to assure that any person directly involved in the casualty or incident is transported to a medical facility or to qualified medical personnel for the purpose of obtaining blood and urine samples as soon as possible, or to transport qualified medical personnel to the vessel for the same purpose as soon as possible, when it is feasible to do so within 24 hours after the incident. This requirement shall not be construed to inhibit those vessel personnel required to be tested from performing duties in the aftermath of a serious marine incident, when such performance is necessary for the preservation of life or property, or the protection of the environment.

(3) The marine employer shall ensure that a blood and urine sampling and shipping kit meeting the requirements of § 4.06-30 of this part is readily available for use following serious marine incidents. The sampling and shipping kit need not be maintained aboard each vessel if it can be made available for sampling at a medical facility or by qualified medical personnel within 24 hours from the time of the occurrence of the serious marine incident.

(4) The marine employer shall ensure that all employees serving aboard vessels are fully indoctrinated in the requirements of this subpart, and that appropriate licensed vessel personnel are trained as necessary in the practical applications of these requirements.

(5) The marine employer shall submit the following information on Form CG-2692B (Toxicological Sampling Report) to the Coast Guard after a serious marine incident:

(i) Name of vessel, official number, date and location of serious marine incident.

(ii) Names and other identifying data for each person directly involved in the serious marine incident.

(iii) Exact information concerning location and duties of each person directly involved at the time of the serious marine incident.

(iv) Whether or not sampling or testing was conducted. If not, an explanation concerning why sampling or testing was not conducted.

(v) The names and other identifying data for each person from whom urine or blood samples are obtained or who undergoes breath testing.

(vi) Location of sampling or testing, either aboard vessel or ashore. If ashore at a medical facility, name and address of facility.

(vii) Type of sampling or testing conducted. If breath alcohol test was conducted aboard vessel, specific results of the test.

(viii) Identification of medical or vessel personnel conducting sampling or testing.

(ix) Identification of medical or vessel personnel witnessing sampling or testing.

(x) Exact disposition of all blood or urine samples following sampling (i.e. information concerning shipment to laboratory).

(6) Following a serious marine incident, the Form CG-2692B shall be submitted as soon as possible to the Officer in Charge, Marine Inspection (OCMI), at the port in which the incident occurred or nearest the port of first arrival. When blood or urine sampling is conducted, a copy of the form shall be forwarded to the designated laboratory with the samples.

(b) Inspected vessels certificated for ocean or overseas routes.

(1) When a serious marine incident occurs involving an inspected vessel certificated for unrestricted ocean operations or involving an inspected vessel certificated for a restricted overseas route, and it does not appear feasible to transport involved personnel to a medical facility or to qualified medical personnel within 24 hours, the marine employer shall ensure that urine samples are collected and breath tests administered on board the vessel as soon as possible for any person directly involved in the casualty incident. Breath testing and urine sampling shall be conducted in accordance with the procedures outlined in §§ 4.06-15 and 4.06-20 of this part.

(2) When a person directly involved in a serious marine incident cannot be transported to a medical facility or to qualified medical personnel, and the person is unconscious or otherwise unable to indicate consent in providing urine samples or participate in breath testing, the marine employer is not required to attempt to conduct breath testing or to obtain urine samples on board the vessel.

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

(a) Any individual employed aboard any vessel on which an individual is

required by law or regulation to be licensed, certificated, or documented under Subpart B of this chapter, who is determined to be directly involved in a serious marine incident by their marine employer or a law enforcement officer, shall provide a blood, urine, or breath sample when directed to do so by a marine employer or law enforcement officer.

(b) Under § 16.110 of this chapter, any individual employed aboard any vessel on which an individual is required by law or regulation to be licensed, certificated, or documented, is deemed to have given his or her consent to toxicological sampling following serious marine incidents. No individual may be forcibly compelled to provide blood, urine, or breath samples, however, refusal or failure to submit to sampling is considered a violation of regulation and will subject the individual to suspension and revocation proceedings under Part 5 of this chapter, and/or termination of employment.

§ 4.06-10 Blood and urine sample collection at a medical facility or by qualified medical personnel.

(a) When obtaining blood and urine samples under this subpart, the marine employer shall comply with the requirements of this subpart and shall ensure that the collection process is supervised by either qualified medical personnel from the medical facility, the marine employer, a law enforcement officer, or the marine employer's representative.

(b) When urine samples are collected at a medical facility or by qualified medical personnel, the marine employer shall ensure that the collection procedures specified in 46 CFR 16.301 are followed to the extent practicable. Certification of the sampling process and documentation of the chain of custody shall be accomplished through proper completion of applicable portions of the Form CG-2692B (Toxicological Sampling Report).

(c) When compliance with any procedure specified in 46 CFR 16.301 is not feasible, the marine employer shall provide an explanation of the circumstances on the Form CG-2692B.

(d) Blood samples shall only be drawn by qualified medical personnel. The marine employer shall ensure that the following procedures are observed after collection of blood samples:

(1) The individual providing the sample and the person supervising the process shall keep the blood specimen in view at all times prior to the sample being sealed and labeled. If the specimen is transferred to a second container, the person supervising the

process shall request that the individual providing the sample observe the transfer.

(2) The person supervising the process shall request that the individual witness the sealing of the blood specimen tube with evidence tape placed over the cap and down the sides. The individual shall also be requested to initial the blood specimen tube and to witness the labeling of the tube. The person supervising the process shall label the tube with the time and date, the individual's full name, and specimen number if assigned.

(3) Certification of the sampling process and documentation of the transfer of the chain of custody of blood samples must be accomplished through proper completion of the Form CG-2692B (Toxicological Sampling Report).

(e) The marine employer shall ensure that blood samples are promptly shipped to the designated laboratory following collection in accordance with procedures outlined in 46 CFR 4.06-30, and that urine samples are shipped according to 46 CFR 16.301.

(f) In the case of an injured individual from whom samples are required, the marine employer shall request that the treating medical facility obtain the necessary samples. If an injured employee is unconscious or otherwise unable to indicate consent to the sampling procedure, and the medical facility declines to obtain a blood sample after having been advised of the requirements of this subpart, the marine employer shall immediately notify the nearest Coast Guard Officer in Charge of Marine Inspection (OCMI).

(g) Nothing in this subpart shall be construed as limiting the discretion of qualified medical personnel to determine whether drawing a blood sample is neither medically acceptable or advisable.

§ 4.06-15 Testing with evidential breath testing devices (EBTs).

(a) All inspected vessels certificated for unrestricted ocean routes, and all inspected vessels certificated for restricted overseas routes, are required to have on board at all times an evidential breath testing device (EBT). EBTs must be selected from among those listed on the Conforming Products List of Evidential Breath Measurement Devices amended and published periodically by the National Highway Traffic Safety Administration (NHTSA), Department of Transportation.

(b) The marine employer shall ensure that evidential breath measurement devices are maintained and calibrated through the use of a unit listed on the

NHTSA Conforming Products List of Calibrating Units for Breath Alcohol Testers. The marine employer shall ensure that calibration is performed with sufficient frequency to ensure the accuracy of the device, but not less frequently than provided for in the manufacturer's instructions.

(c) The marine employer shall ensure that breath testing is conducted through the use of an approved testing device. Breath testing must only be conducted by a person trained and qualified to operate the breath measurement device. The marine employer shall ensure that appropriate vessel personnel receive formal instruction in the following subject areas prior to being considered qualified operators of breath testing devices:

(1) The effects of alcohol on the body, including absorption, distribution, and elimination phases.

(2) Scientific concepts and technology of breath testing as a means for determining blood alcohol concentration in the human body, as well as theoretical and practical qualities of the particular breath testing device selected by the marine employer.

(3) Practical laboratory exercises involving the operation and calibration of the selected testing device.

(d) The marine employer shall ensure that operators of breath testing devices receive periodic refresher training following their initial qualification.

(e) The marine employer shall ensure that breath testing is conducted in accordance with procedures specified by the manufacturer of the testing device, consistent with sound technical judgment, and shall include appropriate restrictions on ambient air temperature.

(f) If a test indicates a BAC of .02 or more, the individual must be tested again after the expiration of a period of 15 minutes, in order to ensure that the test has properly measured the alcohol content of deep lung air.

(g) Because of the inherent limitations of instrumentation, any indicated breath test result of less than .02 percent is deemed a negative test.

§ 4.06-20 Urine sample collection by the marine employer.

(a) When urine samples are collected by the marine employer, the marine employer shall ensure that the collection procedures specified by 46 CFR 16.301 are followed to the extent practicable. Certification of the sampling process and documentation of the transfer of the chain of custody shall be accomplished through the proper completion of applicable portions of the Form CG-2692B (Toxicological Sampling Report).

(b) When compliance with any procedure specified by 46 CFR 16.301 is not feasible, the marine employer shall provide an explanation of the circumstances on the Form CG-2692B.

(c) The marine employer shall ensure that urine samples are promptly shipped to the designated laboratory as soon as the vessel reaches a location from which the requirements of 46 CFR 16.301 may be satisfied.

§ 4.06-25 Sample collection in incidents involving fatalities.

(a) In the case of a fatality occurring to the covered employee of a marine employer as a result of a marine casualty, body fluid samples must be obtained from the remains of the employee for chemical testing, if practicable to do so at an appropriate medical facility. To ensure that samples are obtained in a timely manner, the marine employer shall notify the appropriate local authority, such as the coroner or medical examiner, as soon as possible, of the fatality and of the requirements of this subpart. The marine employer shall make available the sampling and shipping kit and request that the local authority assist in obtaining the necessary body fluid samples. The marine employer shall also seek the assistance of the custodian of the remains, if a person other than the local authority.

(b) If the local authority or custodian of the remains declines to cooperate in obtaining the necessary samples, the marine employer shall immediately notify the nearest Coast Guard Officer in Charge of Marine Inspection (OCMI) with the pertinent information.

§ 4.06-30 Sample handling and shipping.

(a) As a minimum, a toxicological sampling and shipping kit must have:

(1) Six (06) 4 ounce plastic urine specimen bottles with tight fitting screw-type lids,

(2) Twelve (12) 10 milliliter evacuated blood specimen tubes containing potassium oxalate and sodium fluoride for sterile preservation,

(3) A cardboard box suitable for shipping, measuring approximately 11 inches x 8 inches x 11 inches, which contains an inner styrofoam liner,

(4) A sealable quart can for ice,

(5) A roll of evidence tape or other appropriate moisture-resistant, stick-on labels for marking specimen bottles and tubes, and,

(6) A set of Forms CG-2692B in triplicate, and

(7) A sealable plastic bag for protection of forms or documents being placed in the shipping box.

(8) A 3-tube styrofoam blood sample mailer.

(b) The marine employer shall ensure that blood samples collected at a medical facility or by qualified medical personnel are shipped in a cooled condition by pre-paid air freight (or other means adequate to ensure delivery within twenty-four (24) hours) to a designated laboratory.

(c) Urine samples need not be shipped in a cooled condition by overnight delivery. The marine employer shall ensure that urine samples are shipped by the next most expeditious means available.

(d) The marine employer shall ensure that the shipping kit containing blood or urine samples is securely sealed with tape and shall sign and date across the tape.

(e) The marine employer shall ensure that a copy of form CG-2692B, completed in accordance with § 4.06-1(a)(5), if forwarded in the shipping kit along with blood or urine samples.

(f) Samples shall be shipped to a laboratory approved by the Department of Health and Human Services.

§ 4.06-35 Sample analysis and follow-up procedures.

Each laboratory will provide prompt analysis of samples collected under this subpart, consistent with the need to develop all relevant information and to produce a complete analysis report. A urine sample which indicates the presence of a dangerous drug at a level equal to or exceeding the levels established by 46 CFR 16.301 is considered a positive indication of prior drug use by the individual providing the sample. A blood sample indicating any concentration of alcohol is considered a positive indication of prior alcohol use by the individual providing the sample. Analysis results which indicate the presence of alcohol or drugs shall not be construed by themselves as constituting a finding of the probable cause of a serious marine incident.

§ 4.06-40 Reporting and review of results.

The reporting and review of the results of urine tests for drug use shall proceed as provided by 46 CFR 16.301.

§ 4.06-45 Employee Assistance Programs (EAPs)

The marine employer shall follow the requirements of 46 CFR 16.310, which concern employee assistance programs and rehabilitation.

PART 5—[AMENDED]

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

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

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

§ 5.569 Selection of an appropriate order.

Table 5.569—Suggested Range of an Appropriate Order:

Type of offense	Range of order (in months)
Violation of Regulation:	
Failure to submit to required chemical test.....	12-24

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

PART 16—CHEMICAL TESTING

Subpart A—General

- Sec.
16.101 Purpose of regulations.
16.105 Definitions of terms used in this part.
16.110 Implied consent.

Subpart B—Required Chemical Testing

- Sec.
16.201 Application.
16.205 Events requiring chemical testing.
16.210 Required random sampling programs.

Subpart C—Standards

- Sec.
16.301 HHS guidelines.
16.305 General.
16.310 Employee Assistance Program (EAP).

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

Subpart A—General

§ 16.101 Purpose of regulations.

(a) The intent of the regulations in this part is to provide a means to minimize the use of dangerous drugs by merchant marine personnel and to promote a drug free and safe work environment.

(b) The regulations in this part delineate the minimum standards, procedures, and means necessary to test for the use of dangerous drugs.

(c) Nothing in this part is intended to limit an employer's ability to set lawful standards, procedures or means of testing employees for the use of dangerous drugs in excess of the requirements contained in this Part.

§ 16.105 Definitions of terms used in this part.

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

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

"Dangerous Drug Level" means the amount of traces of dangerous drugs or their metabolites in an individual's breath, blood, urine, and/or saliva.

"Preemployment Testing Program" means a preemployment testing program which is sponsored and administered by an employer or sponsoring organization.

"Random Sampling Program" means a random sampling program which is sponsored and administered by an employer or sponsoring organization, and satisfies the criteria contained in Subpart B of this part.

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

"Urinalysis" means a chemical test of an individual's urine for dangerous drugs.

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

§ 16.110 Implied consent.

(a) Any individual applying for, or acting under the authority of, a license, a certificate of registry, or a merchant mariners document issued under Subchapter B of this chapter after [the effective date of this rule], is deemed to have given his or her consent to testing as required by this part. Any individual accepting employment on board any vessel owned in the United States on which any individual is required by law or regulation to be the holder of a license, certificate of registry, or merchant mariners document, is also deemed to have given his or her consent to testing under this part.

(b) Each individual subject to paragraph (a) of this section shall participate in testing as required under conditions set forth in this part, in Part 4 of this chapter, and in 33 CFR Part 95. Refusal or failure to participate is considered a violation of regulation and will subject the individual to suspension or revocation of his or her license, certificate, or document under the procedures contained in Part 5 of this chapter and/or termination of employment.

(c) When an individual is required to be tested under Part 4 of this chapter or 33 CFR Part 95, and is taken to a medical facility for observation or

treatment after a marine casualty or incident, that individual shall be deemed to have consented to the release to the Coast Guard of the following:

(1) The remaining portion of any body fluid sample taken by the treating facility within 24 hours of the accident or incident that is not required for medical purposes, together with the medical facility record(s) pertaining to the taking of such sample;

(2) The results of any laboratory tests conducted by or for the treating facility on such sample; and

(3) The identity, dosage, and time of administration of any drugs administered by the treating facility prior to the time samples were taken by the treating facility or prior to the time samples were taken in compliance with this part.

(d) Any individual who is required to be tested under Part 4 of this chapter or 33 CFR Part 95, is deemed to have consented to removal of body fluid and/or tissue samples necessary for toxicological analysis from the remains of the individual, if the individual dies within 12 hours as a result of a marine casualty.

(e) Nothing in this part shall be construed to authorize the use of physical coercion or any other deprivation of liberty in order to compel chemical testing.

Subpart B—Required Chemical Testing

§ 16.201 Application.

The regulations in this Subpart apply to:

(a) All individuals applying for, or acting under the authority of, a license, a certificate of registry, or a merchant mariners document issued under this subchapter;

(b) All other individuals employed or applying for employment aboard any vessel owned in the United States that is required by law or regulation to engage or be operated by an individual holding a license, certificate of registry, or merchant mariners document; and,

(c) All employers (1) owning or operating vessels owned in the United States that are required by law or regulation to engage or be operated by an individual holding a license, certificate of registry, or merchant mariners document, or (2) owning or operating vessels inspected, or subject to inspection, under 46 U.S.C. 3301.

§ 16.205 Events requiring chemical testing.

(a) Whenever a physical examination is required for an individual by this subchapter, a urinalysis must be

included as a part of the physical examination. If a physical examination is required for a license or merchant mariners document application, the applicant shall provide the results of the urinalysis administered as part of the physical examination to the Regional Examination Center. For those individuals required to receive physical examinations on a more frequent basis, the individual shall present to the Regional Examination Center the results of all required urinalyses for the past five years when applying for license renewal.

(b) The prospective employer of an individual applying for employment aboard any vessel owned in the United States that is required by law or regulation to engage or be operated by an individual holding a license, certificate of registry, or merchant mariners document, shall at the time of application require the applicant to undergo a urinalysis.

(c) An individual to whom this subpart applies shall submit to a chemical test when directed to do so under Title 33 CFR Part 95, or when directed to do so under Part 4 of this chapter.

(d) An individual who has been subject to a random sampling program under § 16.210 of this part, and who has been tested under that program is not subject to the provision of paragraphs (a) and (b) of this section provided:

(1) The urinalysis required by paragraph (a) of this section is not part of a physical examination for issuance of an original license or merchant mariners document; and,

(2) The applicant provides satisfactory evidence certifying that he or she has been continuously subject to a random sampling program meeting the criteria of § 16.210 of this part for not less than six months, has not tested positive for unacceptable dangerous drug levels, has not refused to participate in required chemical tests, and has been tested within the past six months.

(e) Each employer shall test each employee to whom this subpart applies when there is reasonable suspicion that the employee has used dangerous drug(s) or alcohol in violation of this part and 33 CFR Part 95. At least two of the employee's supervisors shall substantiate and concur in the decision to test an employee who is reasonably suspected of drug or alcohol use. At least one of these supervisors shall be trained in detecting symptoms of drug and alcohol use. The decision to test must be based on a reasonable and articulable belief that the employee is using a dangerous drug or alcohol on the basis of physical indications of probable

use (e.g., the employee's manner of speech or physical appearance).

§ 16.210 Required random sampling programs.

(a) Employers of personnel to which this subpart applies shall provide for the chemical testing of their personnel on a random basis for dangerous drugs.

(b) Random basis means that every member of a given population has an equal chance of selection on a scientifically valid basis. Random selection is to be accomplished through the use of a random-number table or computer based, random-number generator.

(c) The employer annually shall test on a random basis (a percentage of covered employees to be determined up to 125 percent).

(d) All crewmembers on the following vessels must be subject to testing on a random basis:

(1) Inspected vessels and vessels subject to inspection under 46 U.S.C. 3301;

(2) Uninspected vessels which are required by law or regulation to engage or be operated by an individual holding a license, certificate of registry, or merchant mariners document.

(e) An individual may not be engaged or employed, including self employment, on a vessel in a position for which a license, certificate of registry, or merchant mariners document is required by law or regulation unless all crewmembers are subject to a random sampling program.

(f) The employer shall report the results of positive chemical tests to the cognizant Coast Guard Officer in Charge, Marine Inspection.

(g) Employers of personnel to which this Section applies shall maintain records of the results of their random sampling program sufficient to satisfy the requirements of § 16.205(d). These records shall be maintained for a period of at least 5 years and shall be made available, upon request, to persons tested and Coast Guard officials.

Subpart C—Standards

§ 16.301 HHS guidelines.

Drug testing programs subject to this regulation shall be operated consistent with the "Mandatory Guidelines for Federal Workplace Drug Testing Programs" published by the Department of Health and Human Services (53 FR 11970, April 11, 1988). Terms and concepts referenced in this part shall have the same meaning as in those guidelines. Where the guidelines refer to "Federal agencies" or "the agency," this shall mean "the employer" for the

purpose of this regulation. This part contains requirements for drug testing programs in addition to those in the HHS guidelines. Drug testing programs governed by the regulation shall use only drug testing laboratories certified by the Department of Health and Human Services under the guidelines. These guidelines are available for inspection and copying at U.S. Coast Guard Headquarters, Marine Safety Council (G-LRA-2/21), Room 2110, 2100 Second Street SW., Washington, DC 20593-0001.

§ 16.305 General.

(a) If a chemical test required under § 16.205 of this part determines the existence of unacceptable dangerous drug levels as listed in the HHS Guidelines, the individual will be presumed to be a user of dangerous drugs and any license, certificate of registry, or merchant mariners document application will be denied.

(b) If a chemical test required under this part, Part 4 of this chapter, or 33 CFR Part 95 determines the existence of unacceptable dangerous drug levels as listed in the HHS Guidelines, the individual will be presumed to be a user of dangerous drugs. Subject to the rehabilitation options of § 16.310 of this part, an individual who currently holds a license, certificate of registry, or merchant mariners document, will be subject to suspension and revocation of his or her license, certificate, or document under Part 5 of this chapter. An individual who does not hold a license, certificate of registry, or merchant mariners document shall, subject to the rehabilitation options of § 16.310 of this part, be removed from the vessel or denied employment.

(c) If a chemical test required under this part, Part 4 of this chapter, or 33 CFR Part 95 determines the existence of unacceptable dangerous drug levels as listed in the HHS Guidelines, the individual will be presumed to be a user of dangerous drugs and may not serve on a vessel subject to this part, until:

(1) That individual is rehabilitated, if the individual is not a holder of a license, certificate of registry, or merchant mariners document; or

(2) That individual is reissued his or her license, certificate of registry, or merchant mariners document, if the individual is a holder of a license, certificate of registry, or merchant mariners document.

(d) Regardless of the rehabilitation options specified in § 16.310 of this part, if a chemical test required under this part, Part 4 of this chapter, or 33 CFR Part 95 determines the existence of

unacceptable dangerous drug levels as listed in the HHS Guidelines, and this is the individual's second confirmed positive test, the individual will be presumed to be a user of dangerous drugs. An individual who currently holds a license, certificate or registry, or merchant mariners document, shall be subject to suspension and revocation of his or her license, certificate, or document under Part 5 of this chapter. An individual who does not hold a license, certificate of registry, or merchant mariners document shall be removed from the vessel or denied employment.

§ 16.310 Employee Assistance Program (EAP).

The employer shall provide an EAP for all employees. 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 an employee. Each EAP must include education and training on drug use for employees and the employer's supervisory personnel and an opportunity for rehabilitation, as provided below:

(a) EAP rehabilitation program (Option 1).

(1) Each employer shall provide one rehabilitation opportunity for the following employees:

- (i) Each employee who voluntarily enrolls in an EPA;
- (ii) Each employee who is identified as a dangerous drug user through random, periodic, reasonable cause, or post casualty testing.

(2) Each employer shall retain or rehire an employee who:

- (i) Has successfully completed his or her first rehabilitation program after voluntary enrollment or notification to the employee that he or she has failed a drug test;
- (ii) Has not failed a drug test required by the employer's drug monitoring plan for employees who undergo rehabilitation; and

(iii) Has received a recommendation for return to duty as a result of that rehabilitation program.

(3) Employees who are identified as having used dangerous drugs on the job are not required to be afforded an opportunity for rehabilitation or to be retained or rehired.

(b) EAP rehabilitation program (Option 2).

(1) Each employer shall provide one rehabilitation opportunity for the following employees:

- (i) Each employee who voluntarily enrolls in an EAP;
- (ii) Each employee who is identified as a dangerous drug user through random or periodic testing.

(2) Each employer shall retain or rehire an employee who:

(i) Has successfully completed his or her first rehabilitation program after voluntary enrollment or notification to the employee that he or she has failed a random or periodic drug test;

(ii) Has not failed a drug test required by the employer's drug monitoring plan for employees who undergo rehabilitation; and

(iii) Has received a recommendation for return to duty as a result of that rehabilitation program.

(3) Employees who are identified as having specifically used drugs on the job or through reasonable cause or post casualty testing required by this part are not required to be afforded an opportunity for rehabilitation or to be retained or rehired.

(c) EAP rehabilitation program (Option 3).

(1) Each employer shall provide one rehabilitation opportunity for each employee who voluntarily enrolls in an EAP.

(2) Each employer shall retain or rehire an employee who:

- (i) Has successfully completed his or her first rehabilitation program after voluntary enrollment; and
- (ii) Has received a recommendation for return to duty as a result of that rehabilitation program.

(3) Employees who are identified as having used dangerous drugs on the job or through testing required by this part are not required to be afforded an opportunity for rehabilitation or to be retained or rehired.

(d) EAP rehabilitation program (Option 4).

(1) Each employer can decide its policy concerning whether rehabilitation will be offered.

(2) Individuals who are offered an opportunity for rehabilitation provided voluntarily by the employer, and who wish to be retained or rehired to their previous or similar position, should:

- (i) Successfully complete his or her first rehabilitation program; and
- (ii) Receive a recommendation for return to duty as a result of that rehabilitation program.

(e) 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 employee assistance; and display and distribution of the employer's policy regarding drug and alcohol use in the workplace.

(f) EAP training program: Each EAP training program must be conducted annually employer's 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 employees and employer's supervisory personnel. EAP training programs for employees and supervisory personnel must consist of at least 60 minutes for each employee and supervisor.

Date: June 30, 1988.

P.A. Yost,

Admiral, U.S. Coast Guard, Commandant.
[FR Doc. 88-15137 Filed 7-7-88; 8:45 am]

BILLING CODE 4910-14-M