

DEPARTMENT OF TRANSPORTATION**Research and Special Programs Administration****49 CFR Part 199**

[Docket No. PS-129]

RIN 2137-AB95

Drug Testing: Management Information System (MIS) Standardized Data Collection and Reporting

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

ACTION: Final rule.

SUMMARY: This final rule sets forth regulations to require operators of gas, hazardous liquid and carbon dioxide pipelines and liquefied natural gas (LNG) facilities who are subject to 49 CFR parts 192, 193, and 195 to implement, maintain, and submit an annual report for their drug testing program data. This final rule is essential for RSPA to collect the drug testing statistical data and use the data to analyze its current approach to deterring and detecting illegal drug abuse in the pipeline industry, and, as appropriate, plan a more efficient and effective approach.

EFFECTIVE DATE: This rule will be effective January 1, 1994.

FOR FURTHER INFORMATION CONTACT: Mr. Richard L. Rippert, Office of Pipeline Safety Compliance, RSPA, DOT, 400 7th Street, SW., Washington, DC 20590-0001 (202-366-6223) or the Dockets Unit (202) 366-4453, for copies of this final rule or other material in the docket.

SUPPLEMENTARY INFORMATION:**Background**

On December 15, 1992, RSPA published a Notice of Proposed Rulemaking (NPRM) (57 FR 59720), to require pipeline operators subject to part 199 to submit specific drug testing data to RSPA annually. The NPRM proposed that operators would maintain all drug testing data on a calendar-year basis with a closing date of December 31 each year. The Office of the Secretary (OST), also issued an NPRM in the *Federal Register* the same day outlining MIS format and requirements for reporting drug program data.

The OST NPRM proposed that MIS reports would require specific drug testing data elements on standardized forms and these items were outlined in 49 CFR part 40, § 40.81. OST has elected not to amend Part 40 by adding the provisions as proposed in § 40.81. The MIS requirements for operator reporting

are set forth in this final rule. Elsewhere in today's *Federal Register* is a common preamble to this and other DOT agency MIS final rules which addresses the common issues relevant to the MIS requirements for the transportation industries.

The OST NPRM proposed that operators with employees who fall under two or more DOT agency regulations requiring drug testing shall submit data to each agency for those employees covered by that agency rule. Under this final rule, employees who perform functions covered by more than one DOT agency shall be identified by the operator as to which covered function they will be reported under. Drug testing data on dual covered employees shall be reported to RSPA and/or any other appropriate DOT agency.

Discussion of Comments

The comment period for RSPA's NPRM closed on April 14, 1993, and all comments received were considered, as well as, the testimony of 16 individuals who presented statements at the three public hearings held on February 26, 1993, in Washington, DC; on March 2, 1993, in Chicago, Illinois; and on March 5, 1993, in San Francisco, California, respectively. RSPA received 46 comments in response to the NPRM, including comments from 36 pipeline operators, three industry associations, two consortia, one state agency, and four from individuals. The majority of the commenters had no objection to the basic concept of the MIS drug test reporting requirements as proposed. Several commenters indicated that submission of such drug testing data to RSPA would support their position that substance abuse in the pipeline industry is not widespread and that random test rates should be lowered. A number of the commenters provided detailed comments on proposed changes to the MIS report format which included such items as streamlining the reporting format, limiting the number of data elements, and suggested submission dates for the reports.

Specific Issues**Covered Employees Categories**

Several commenters indicated that requiring operators to identify and report separately on employees who perform operation, maintenance, or emergency-response functions would place an undue burden on operators and provide no visible benefit to RSPA. They believe this requirement would increase the recordkeeping requirements for operators and increase associated

costs of maintaining records. Many operators, such as the Columbia Gas Distribution companies, indicated that the overlap of job categories make it very difficult for operators to distinguish these job categories.

RSPA Response

RSPA has determined that requiring operators to classify employees by separate covered employee categories, as proposed, is not feasible given the general overlap of employee functions among the numerous operators within the pipeline industry. Therefore, the reporting format has been revised to use one category, "covered employees", representing all individuals who perform operation, maintenance, or emergency-response functions on the pipeline.

Report Format

Many commenters were opposed to one or more of the reporting elements proposed in the NPRM. Comments submitted by Exxon and the Interstate Natural Gas Association of America (INGAA) addressed several areas of the form that they contended would present an undue burden in the collection and reporting of data. These comments included objections to the proposed employee categories outlined; dual coverage/reporting for employees covered by other DOT agencies; and, the requirement to submit annual reports no later than February 15th. Some operators objected to the size and complexity of the report format and the numerous detailed instructions required to complete the form. One consortium indicated that costs of designing software and implementing this type of informational software into the current drug management programs would be immense. Another consortium, which represents numerous small operators and municipalities, suggested that consortia should be allowed to report on behalf of the companies they serve, thus reducing the paperwork required. Many operators provided suggested changes and modifications to reduce the recordkeeping and reporting burden.

RSPA Response

RSPA has incorporated some of these refinements into the final MIS report forms, which appear as exhibits A and B to this final rule. RSPA has eliminated the requirement to report separately the covered employees' functions. To reduce the reporting burden on operators who have no verified positive test results, RSPA has limited the information to be provided and has developed a simplified "E-Z form" for submitting their reports.

RSPA has also reduced some of the MIS reporting burden on operators in this final rule based on information developed from the MIS pilot project. A notice published on February 8, 1993, (58 FR 7506) sought volunteer participation of pipeline operators to evaluate the proposed MIS forms and submission procedures. The MIS pilot project was coordinated with OST and the other DOT operating administrations. Seven operators were selected and received the MIS packages. Of the seven, six operators were interviewed. Three of the operators did not complete the data collection forms, so only four collection forms were available for analysis. The findings and conclusions from the pilot project have been considered in the development of this final rule. A copy of the summarized findings has been placed in the RSPA NPRM docket number PS-129.

The MIS pilot concluded that drug testing data availability is good for operators testing under the RSPA rule; however, there are some data that cannot be provided by the operator. Test results by employee category cannot be provided due to overlap in employee function. Periodic testing is not required by the RSPA rule. Finally, covered employee training and refresher training are not required by the RSPA drug testing rule.

Instead of including the reporting forms as an appendix to Part 199, as proposed in the NPRM, RSPA is requiring data to be submitted to RSPA in the standard form and manner prescribed by the Administrator. The current MIS report forms are published in today's *Federal Register* as exhibits A and B immediately following this rule. RSPA has determined that while the drug testing data elements are properly a matter of regulation, the format in which the data are reported should remain within the discretion of the Administrator. This will enable RSPA to make any revisions to the format that become necessary without undertaking additional rulemaking.

RSPA has also decided to issue separate final rules on the drug and alcohol portions of the MIS. Therefore, alcohol testing program data elements are not included in this final rule or on the reporting forms. Alcohol testing MIS reporting requirements would be included in a final rule to implement alcohol misuse prevention programs. Separation of the drug and alcohol data elements should reduce the burden associated with the use of a new form.

Reporting Burden on Small Operators

Some commenters opposed the extensive reporting requirements being proposed by RSPA. They indicated no justification for an approach that relies heavily on submitting all records to RSPA for review. One operator stated that it does not believe that comprehensive data from all operators is required for RSPA to evaluate the effectiveness of the program. They suggested that RSPA could determine what could comprise a representative sample of the industry and request specific data from particular operators for purposes of making an evaluation.

RSPA Response

RSPA has determined that approximately 2,419 operators would be subject to the reporting provisions of this final rule. RSPA estimates that approximately one-third of these operators have fewer than 50 employees performing covered functions. RSPA believes that excluding these small operators from the reporting requirement would not adversely effect the overall drug testing data that would represent the pipeline industry. From time to time RSPA would survey these small operators and require them to prepare and submit such reports to this agency. This data would be analyzed and compared with data being submitted by the large operators.

Therefore, RSPA is not requiring small operators (50 or fewer covered employees) to submit annual MIS reports, at this time. The final rule includes a provision requiring small operators to submit data to RSPA upon request. If at some future time, RSPA decides that annual data submission from small operators is necessary, RSPA would undertake additional rulemaking.

Submission Date

Numerous commenters, including Southern Natural Gas, Hope Gas Inc. and INGAA, recommended that the date for the submission of the MIS reports be revised. A wide variety of dates and reasons was suggested. Many operators are subject to other reporting requirements by other federal and state regulatory agencies and many of these reports, as well as the year-end financial statements, are due at approximately the same time as the proposed February 15 deadline. The commenters indicated that adding a month to the proposed submission date should alleviate some of the administrative burdens associated with the numerous reporting obligations of the operators.

RSPA Response

RSPA agrees that allowing operators until March 15 to submit their annual MIS drug testing reports will not affect the timeliness of the data and will allow sufficient time for operators to compile and prepare their reports. The final rule establishes a March 15 due date.

Contractor Statistical Data

RSPA's NPRM discussed several issues regarding the inclusion of a contractors' drug testing statistical data in an operator's MIS drug report. RSPA sought comments on whether RSPA should defer for the first year the requirement that pipeline operators report information on contractor employees' drug testing results. RSPA was concerned about any potential difficulties in collecting data from contractors and consortia. RSPA was also concerned about multiple reports with duplicative information from contractors being submitted by the various operators for whom the contractor may perform services.

The majority of the commenters were opposed to requiring operators to collect and submit contractor employee drug testing statistical data. The American Gas Association (AGA) contends that "contractors, not operators, should be responsible for reporting to RSPA on the operation of their testing programs. The current system is susceptible to widespread inaccuracies because many pipeline and transmission companies use some of the same contractors, leading to duplicative reporting." Many commenters suggested that RSPA require contractors to submit their MIS reports directly to RSPA and not include the statistics in the operator's report. Other commenters suggested that operators maintain the contractor drug testing statistical data and have it available for review during audits or inspections by the federal and state agencies.

RSPA Response

RSPA has considered all the factors concerning the requirement to have pipeline operators report contractor employee drug testing statistical data on their annual reports to this agency. RSPA contends that requiring submission of contractor drug testing data, by operators, would result in major problems such as duplicative reporting and inaccurate data which could affect the overall pipeline industry positive rate. RSPA has decided not to require pipeline operators to report drug information, as required in § 199.25, for contractor employees who are subject to the part 199 drug testing regulations.

Operators shall continue to maintain the records required by § 199.23 and shall ensure that all contractors are maintaining the same type of records. This issue will be evaluated during the review of reports in the first year and methods may be developed to collect contractor drug testing data.

Electronic Submission

In the OST NPRM, comments were requested concerning the usefulness of electronically transmitting operator MIS data. Only two comments were received which addressed the issue of electronic submission. One consortium recommended that electronic reporting should be utilized where possible; but that small operators without the capability of electronic reporting should not be penalized either through cost or undue administrative burden. One operator stated that without electronic filing capability, the February 15 deadline is unrealistic.

RSPA Response

Although RSPA is exploring the steps necessary to implement electronic MIS data submission, this option is not yet available because RSPA does not have the capability to receive data electronically. RSPA will pursue this recommendation and, if feasible, issue a document addressing this matter in a future edition of the Federal Register.

Cost Data

The OST NPRM discussed whether the Department should obtain from employers the cost of implementing the program as an element of information to evaluate program effectiveness.

RSPA Response

RSPA did not propose and does not intend at this time to require operators to report information regarding costs associated with implementing their anti-drug programs.

Elimination of "age" Data Element

Many operators have questioned RSPA's requirement to maintain the "age" of applicants/employees who test positive or refuse to test under the current regulations. They contend that collection of this data element provides no beneficial data.

RSPA Response

RSPA has revised the recordkeeping requirements in § 199.23(a)(2) to avoid duplicative information collection requirements. Section 199.23(a)(2) requires operators to keep certain records on employees who have a positive drug test result, including the type of test, and records that

demonstrate rehabilitation, if any. The required information includes:

- (i) The functions performed by the employee;
- (ii) The prohibited drug(s) used;
- (iii) Disposition of the employee; and
- (iv) The age of the employee.

The MIS report will require operators to maintain and report the information currently required in items (i)-(iii), as well as the type of test. RSPA has eliminated from recordkeeping or reporting requirements the fourth item concerning the age of each employee who failed a drug test. RSPA does not believe this is an essential data element.

Reason for Expedited Effective Date

This rule is being made effective in less than the 30 days from publication otherwise required by law. With an effective date of January 1, 1994, RSPA can ensure that information is collected under this final rule for calendar year 1994 and, subsequently, that the benefits from this final rule are realized without delay. Because the first report under this rule will not be due until March 15, 1995, and most of the data must be maintained under pre-existing regulatory requirements, operators subject to this rule will not be unduly burdened by an effective date of less than 30 days. RSPA has therefore determined that good cause exists under the provisions of 5 U.S.C. 553(d)(3) to warrant an expedited effective date.

Regulatory Analyses and Notices

E.O. 12866 and DOT Regulatory Policies and Procedures

The final rule is part of a package of alcohol and drug testing regulation that is a significant regulatory action under Executive Order 12866. It has been reviewed under this order. It is significant under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979) because it is of substantial public interest. This final rule would cause minimal changes in the existing compliance burden and cost of the anti-drug programs affected by the amendment. Therefore, we have not further evaluated the costs and benefits of this final rule.

Paperwork Reduction Act

The final rule sets forth new drug program information collection requirements. These requirements have been submitted to the Office of Management and Budget (OMB) for approval under the Paperwork Reduction Act of 1980 (44 U.S.C. Chap. 35) and 5 CFR Part 1320. See common preamble on status of Paperwork Act approval.

Regulatory Flexibility Act

The final rule affects all entities subject to part 192, except operators of master meter systems and liquefied petroleum gas (LPG) operators, 193, or 195, which are exempt. Master meter systems and LPG operators constitute the bulk of small businesses or other small entities that operate gas pipeline systems subject to part 192. There are few, if any, small entities that operate hazardous liquid or carbon dioxide pipelines subject to part 195, or LNG facilities subject to part 193. Therefore, I certify under Section 605 of the Regulatory Flexibility Act (5 U.S.C. 605) that this final rule would not have a significant economic impact on a substantial number of small entities.

Executive Order 12612

This regulation will not have substantial direct effects on states, on the relationship between the Federal Government and the states, or on the distribution of power and responsibilities among the various levels of Government. Therefore, in accordance with Executive Order 12612 (52 FR 41685; October 30, 1987), RSPA has determined that this regulation does not have sufficient federalism implications to warrant preparation of a Federalism Assessment.

List of Subjects in 49 CFR Part 199

Pipeline safety, Drug testing, Recordkeeping and reporting.

In consideration of the foregoing, RSPA is amending 49 CFR part 199 as follows:

PART 199—DRUG TESTING

1. The authority citation for Part 199 is revised to read as follows:

Authority: 49 App. U.S.C. 1672, 1674a, 1681, 1804, 1808, and 2002; 49 CFR 1.53.

2. Section 199.1 is amended by revising the second sentence of paragraph (a) to read as follows:

§ 199.1 Scope and compliance.

(a) * * * However, this subpart does not apply to operators of "master meter systems" as defined in § 191.3 of this chapter or to liquefied petroleum gas (LPG) operators.

* * * * *

3. Section 199.23 is amended by revising paragraph (a)(2) to read as follows:

§ 199.23 Recordkeeping.

(a) * * *

(2) Records of employee drug test results that show employees who had a positive test, and the type of test (e.g.,

post-accident), and records that demonstrate rehabilitation, if any, must be kept for at least 5 years, and include the following information:

(i) The function performed by each employee who had a positive drug test result.

(ii) The prohibited drug(s) that were used by an employee who had a positive drug test.

(iii) The disposition of each employee who had a positive drug test or refused a drug test (e.g., termination, rehabilitation, removed from covered function, other).

* * * * *

4. Part 199 is amended by adding a new section 199.25 to read as follows:

§ 199.25 Reporting of anti-drug testing results.

(a) Each large operator (having more than 50 covered employees) shall submit an annual MIS report to RSPA of its anti-drug testing results in the form and manner prescribed by the Administrator, not later than March 15 of each year for the prior calendar year (January 1 through December 31). The Administrator shall require by written notice that small operators (50 or fewer covered employees) not otherwise required to submit annual MIS reports to prepare and submit such reports to RSPA.

(b) Each report, required under this section, shall be submitted to the Office of Pipeline Safety Compliance (OPS), Research and Special Programs Administration, Department of

Transportation, room 2335, 400 Seventh Street, SW., Washington, DC 20590.

(c) Each report shall be submitted in the form and manner prescribed by the Administrator. No other form, including another DOT Operating Administration's MIS form, is acceptable for submission to RSPA.

(d) Each report shall be signed by the operator's anti-drug program manager or designated representative.

(e) Each operator's report with verified positive test results or refusals to test shall include all of the following informational elements:

(1) Number of covered employees.

(2) Number of covered employees subject to testing under the anti-drug rules of another operating administration.

(3) Number of specimens collected by type of test.

(4) Number of positive test results, verified by a Medical Review Officer (MRO), by type of test and type of drug.

(5) Number of employee action(s) taken following verified positive(s), by type of action(s).

(6) Number of negative tests reported by an MRO by type of test.

(7) Number of persons denied a position as a covered employee following a verified positive drug test.

(8) Number of covered employees, returned to duty during this reporting period after having failed or refused a drug test required under the RSPA rule.

(9) Number of covered employees with tests verified positive by an MRO for multiple drugs.

(10) Number of covered employees who refused to submit to a random or

non-random (post-accident, reasonable cause, return-to-duty, or follow-up) drug test and the action taken in response to each refusal.

(11) Number of supervisors who have received required initial training during the reporting period.

(f) Each operator's report with only negative test results shall include all of the following informational elements:

(1) Number of covered employees.

(2) Number of covered employees subject to testing under the anti-drug rules of another operating administration.

(3) Number of specimens collected by type of test.

(4) Number of negative tests reported by an MRO by type of test.

(5) Number of covered employees who refused to submit to a random or non-random (post-accident, reasonable cause, return-to-duty, or follow-up) drug test and the action taken in response to each refusal.

(6) Number of supervisors who have received required initial training during the reporting period.

Issued in Washington, DC on December 10, 1993.

Rose A. McMurray,
Acting Administrator, Research and Special Programs Administration.

Note: The following appendix will not appear in the Code of Federal Regulations.

Appendix—Information Systems Data Collection Forms

BILLING CODE 4810-60-P