

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

[Docket No. PS-128; Notice No. 1]

RIN 2137-AC21

Alcohol Misuse Prevention Program**AGENCY:** Research and Special Programs Administration (RSPA), DOT.**ACTION:** Notice of proposed rulemaking.

SUMMARY: This proposed 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 RSPA regulations to implement an alcohol misuse prevention program for employees who perform certain safety-sensitive functions covered by the pipeline safety regulations. The proposed rule is consistent with proposed DOT regulations and the other operating administration alcohol rules.

The proposed rule would require pre-employment/pre-duty, random, reasonable suspicion, post-accident, return-to-duty, and follow-up testing to detect and deter such conduct. As required by this rule, operators would have to remove employees who engaged in prohibited conduct from safety-sensitive functions until certain requirements had been met.

Additionally, operators would be required to provide employees with written materials that specifically identify the employees covered by the rule, explain the requirements of this rule, and establish the consequences of engaging in prohibited conduct. Finally, employers would be required to maintain records concerning this program and to report data regarding employee alcohol misuse to RSPA in an annual report. When finalized this rule should increase the overall safety of pipeline operations.

DATES: Comments should be received by April 14, 1993. Late-filed comments will be considered to the extent practicable. Comments on the Secretary's notices appearing elsewhere in today's *Federal Register* should be submitted as directed by that notice. Parties commenting on the testing procedures are requested to file their comments with both the Department of Transportation's (DOT) Docket in that rulemaking and with RSPA's Docket in this rulemaking. RSPA requests that commenters highlight any pipeline industry-specific issues regarding the testing procedures. Commenters should

be aware that it is DOT's intention that testing procedures apply to any alcohol testing conducted under regulations issued by the Department's Operating Administrations (OAs).

ADDRESSES: Send comments on this notice in duplicate to the **Dockets Unit**, room 8421, Research and Special Programs Administration, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590. Identify the docket and notice numbers stated in the heading of this notice. All comments and other docketed material will be available for inspection and copying in room 8421 between the hours of 8:30 a.m. and 5 p.m. each working day.

FOR FURTHER INFORMATION CONTACT: Mr. Richard L. Rippert, Office of Pipeline Safety Enforcement, RSPA, DOT, 400 Seventh Street, SW., Washington, DC 20590 (202 366-6223).

SUPPLEMENTARY INFORMATION:**Background**

The misuse of drugs and alcohol by individuals performing safety-sensitive pipeline functions has long been of concern to RSPA and to DOT. RSPA has promulgated drug testing regulations addressing part of this concern. DOT, seeking to determine the extent of any alcohol problem in the transportation industries, issued an advance notice of proposed rulemaking (ANPRM) on November 2, 1989. The ANPRM asked for comment on a variety of issues related to preventing alcohol misuse by transportation workers. The comments to this ANPRM are discussed in detail in the general preamble published by the DOT Secretary's Office elsewhere in today's issue of the *Federal Register*.

The Omnibus Transportation Employee Testing Act of 1991 requires the Secretary of Transportation to issue regulations mandating alcohol testing for highway, aviation, mass transit and rail employees regulated by the Federal Highway Administration (FHWA), Federal Aviation Administration (FAA), Federal Transit Administration (FTA) (formerly Urban Mass Transportation Administration), and Federal Railroad Administration (FRA) respectively. RSPA is today proposing alcohol testing rules under its own existing statutory authority to ensure application of DOT's drug and alcohol testing regulations to all safety-sensitive employees in the transportation industry. This Notice of Proposed Rulemaking (NPRM) is consistent with the NPRMs of other OAs, with such alterations as necessary to meet the special circumstances of the pipeline industry.

On November 21, 1988 (53 FR 47084), RSPA published a final rule setting forth

regulations requiring pipeline operators subject to part 192 (natural gas), 193 (liquefied natural gas), or 195 (hazardous liquids, including carbon dioxide) to implement an anti-drug program for employees who perform operation, maintenance, or emergency-response functions on a pipeline or at an LNG facility. However, the anti-drug rules do not apply to operators of "master meter systems" defined in § 191.3. On December 18, 1989 (54 FR 51842) RSPA published a final rule which addressed petitions submitted for reconsideration. Drug testing, under part 199, became effective on April 20, 1990, for large operators and August 21, 1990, for small operators. Many aspects of the proposed alcohol misuse prevention program would mirror those of the anti-drug program, including covered employers, covered employees, and the use of phased-in implementation.

Comments to the DOT ANPRM

As noted above, in late 1989, DOT issued an ANPRM in which it asked a number of questions about regulating alcohol use in the various transportation industries. Of the 23 commenters representing pipeline related interests, nine believed that limited alcohol testing should be instituted in the pipeline context. Several commenters indicated that while drugs are a societal problem, alcohol abuse is the most abused substance in the pipeline industry. Others indicated that alcoholism is usually found as a cohabitant in substance abuse whenever drug abuse is detected and treated. In many cases, they indicated that alcohol abuse leads to drug abuse. One commenter indicated that its employee assistance program reported that among substance abusers, there were approximately four times as many individuals counseled for alcohol abuse as there were for drug abuse. The other 14 commenters believed that RSPA's current regulatory scheme for drug testing was sufficient to address any problem that might exist, although most commenters also felt that there was no indication that such a problem did, in fact, exist. Several commenters noted their long-standing alcohol testing programs have been successful without governmental regulation. Those few commenters who believed that further action by RSPA would be appropriate favored a combination of alcohol education and training and enforcement of the drug regulations already in place.

Statutory Authority

The two primary statutes under which RSPA administers the pipeline safety program are the Natural Gas Pipeline

Safety Act of 1968, as amended (49 App. U.S.C. 1671 *et seq.*) and the Hazardous Liquid Pipeline Safety Act of 1979, as amended (49 App. U.S.C. 2001 *et seq.*). RSPA also regulates operators of offshore gas gathering lines under the Hazardous Materials Transportation Act (49 App. U.S.C. 1801 *et seq.*).

Authority to implement alcohol education, awareness, and testing programs is derived from the broad authority granted in the above-cited statutes. This authority is applicable to various aspects of pipeline facilities affecting pipeline safety, including design, installation, inspection, emergency plans and procedures, testing, construction, extension, operation, replacement, and maintenance of pipeline facilities. [49 App. U.S.C. 1672 and 2002.] Under this authority, RSPA can set qualifications, such as experience and training, for pipeline personnel. This authority extends to allow RSPA to mandate certification programs for such personnel. [49 App. U.S.C. 1672(a)(1) and 2002(c).]

In *International Brotherhood of Electrical Workers, Local 1245, et al. v. Skinner*, 913 F.2d 1454 (9th Cir. 1990), the Court upheld RSPA's drug testing rules even though there was no evidence of a particularized drug program in the pipeline industry. The Court also concluded, based upon an analysis of the statutory guidelines for issuance of regulations, that the rules were not arbitrary or capricious.

Alcohol Misuse Prevention Program

Section-by-Section Analysis

Applicability

The RSPA proposed rule contains a section specifically describing the applicability of the rule for various operators under the Pipeline Safety Regulations. This is necessary for clarity, since many RSPA operators have portions of their operations regulated by other operating administrations within the Department.

Definitions

The proposed definitions of accident, Administrator, covered employee, employer, safety-sensitive function and State agency are consistent with the definitions used in the anti-drug program.

Preemption of State and Local Laws

The proposed rule would include the test for preemption of State or local pipeline safety standards under the Natural Gas Pipeline Safety Act and the Hazardous Liquid Pipeline Safety Act. Clear expression of the preemptive

effect intended by this Federal safety rule is important to preserve the careful balances (private versus public rights, benefits versus costs) which are achieved in the rule. Constitutional limitations on State and local inconsistent regulation preserve these balances. Therefore, the proposed rule also includes the two-pronged test derived from judicial decisions on preemption of inconsistent State and local regulation under the Constitution.

As proposed, State and local requirements are preempted when: (1) It is not possible to comply with both the Federal and the State or local requirements, (2) Compliance with the State or local government requirement would frustrate the Federal requirement, or (3) The State or local requirement is a pipeline safety standard applicable to interstate pipeline facilities.

Employers Who Would Be Required To Establish Programs

During the development and implementation of RSPA's industry anti-drug program, RSPA carefully considered the appropriate scope of the rule. This NPRM proposes to include essentially the same classes of employers and covered functions as are covered by the anti-drug rule. Operators of gas, hazardous liquid and carbon dioxide pipelines and liquefied natural gas facilities, who are subject to 49 CFR part 192, 193, or 195, are required to implement an alcohol misuse prevention program for covered employees who perform certain safety-sensitive functions covered by the pipeline safety regulations.

RSPA has been carefully evaluating the scope of covered functions since implementation of the anti-drug rule in 1990 and believes that the scope remains appropriate and should be proposed for this rule. At this point we are not persuaded that the increased benefit to safety that would accrue by including other functions warrants the imposition of an alcohol testing requirement on individuals performing those functions. However, RSPA is soliciting comment on this issue, with specific focus on the following questions:

1. Are there covered functions the performance of which appears to sufficiently implicate safety to warrant regulating alcohol-related conduct and imposition of a testing requirement?
2. Do pipeline operators have any data on the size of the population that would be affected and the incidence of alcohol misuse by this population?
3. What additional costs would be incurred by inclusion of other functions and what would be the offsetting

benefits (e.g., in terms of accident prevention, productivity, employee lost time, etc.)?

4. Does the industry or public have any information on alcohol-related accidents?

5. Are there other ways that RSPA could reduce the burden on small operators?

Regulating Employers Rather Than Employees

RSPA's authority to enforce pipeline safety regulations is directed at the employer and not to the employees. The proposed rules requires employers to develop a program and implement that program in compliance with these regulations. In each case, it is the employer's responsibility and in some cases this means having responsibility for the actions of its safety-sensitive employees and its contractors.

Reasonable Suspicion

RSPA is proposing that a supervisor who makes the determination that reasonable suspicion exists to test a covered employee shall not conduct the breath alcohol test on that employee, if another supervisor is readily available. The purpose of this provision is to protect a covered employee from being unfairly targeted by a supervisor. However, RSPA recognizes that in the pipeline industry situations may occur, particularly in remote areas, where another supervisor is not readily available. In such a situation the supervisor who made the determination, could conduct the alcohol test.

Alcohol Testing Programs

RSPA proposes to include a requirement that employers maintain and follow a written alcohol misuse prevention plan. This process proved beneficial in assisting the industry in establishing programs and educating the industry about the requirements of the drug rule. RSPA will not require employers to submit their alcohol misuse prevention plans for review and approval. However, RSPA is considering development of a drug and alcohol "model" plan. The model plan could be used by employers and contractors that provide services to employers subject to the regulations. RSPA seeks specific comments on whether a model drug and alcohol plan would be beneficial to employers to standardize the requirements of the rules and assist in compliance issues.

Recordkeeping, Reporting, and Confidentiality.

This rule would require employers to maintain detailed records related to

their alcohol misuse prevention programs, including records of alcohol tests performed under this rule. The records would have to be maintained in a secure location and could be released only as required under the rule or with the express written consent of the employee. As proposed in this NPRM, an employee would have the right to receive records pertaining to his or her use of alcohol. The employer would be required to provide the records promptly. In response to concerns raised in the context of drug testing, the rule would prohibit making access to the records contingent on paying for records other than those specifically requested by the employee. RSPA has not addressed payment for those records that are requested by the employee, and believes that this would be an issue that would be determined between the employer and its employees. The rule would also provide for release of all records (including individual alcohol test results) to RSPA or other DOT agency with regulatory authority over the employer or its covered employees, and to the decisionmaker in a lawsuit, grievance, or other proceeding in an action initiated by or on behalf of an individual and arising from the individual's alcohol test or other alcohol misuse.

RSPA is aware that some employers have hesitated to release information related to drug test results to subsequent employers. Under the anti-drug rule, such releases are based on the general permissive authority given to employers to release information upon the written consent of the covered employee. This rule would require the release of employee-specific information to a subsequent employer if the original employer receives a written request from the covered employee. RSPA believes that providing a regulatory mandate for such release and removal of employer discretion would relieve employers' concerns about possible litigation.

The rule would also require operators to provide RSPA access to their facilities to conduct on-site inspections of employer's alcohol programs, including the alcohol testing process. RSPA's experience with compliance monitoring under the anti-drug rule has indicated that the individuals managing employers' programs are frequently persons with human resources or administration backgrounds. These people often have had no experience with other RSPA inspections (e.g., risk-based inspections) and are often unaware of RSPA's authority to conduct such inspections. While the Administrator or his designee has such

authority even absent a regulatory provision, RSPA determined that inclusion of such a provision in this rule would be appropriate to ensure industry awareness of RSPA's authority to monitor compliance.

Finally, RSPA believes that reporting of statistical information by employers is an essential tool for monitoring compliance with the rule. RSPA's experience with reports indicates that annual reporting is sufficient to ensure that RSPA can adequately monitor the rule. This NPRM therefore proposes submission of annual statistical data on each operator's drug and alcohol testing program. The drug and alcohol report format is contained in RSPA's Management information system, Notice of proposed rulemaking published elsewhere in today's *Federal Register*.

Contractor Compliance

RSPA believes that contractor employees should be included in the group of employees that must undergo alcohol misuse testing. Although these persons may not be under the direct control of operators, their job performance is no less critical than the performance of employees who work directly for operators. RSPA has limited the employees covered by the alcohol misuse rule to those who perform regulated operation, maintenance, or emergency-response functions, on the pipeline or LNG facility and perform regulated functions under part 192, 193, or 195, which should minimize the effects of the rule on operators who contract for unskilled transient laborers.

Regulatory Analyses and Notices

E.O. 12291 and DOT Regulatory Policies and Procedures

The proposed rule is not major under Executive Order 12291 (46 FR 13193; February 19, 1981). It is significant under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979) because the proposal involves issues of substantial interest to the public.

Paperwork Reduction Act

The reporting and recordkeeping requirements associated with this rule are being submitted to the Office of Management and Budget for approval in accordance with 44 U.S.C. Chapter 35 under DOT No. ; OMB No. ; Administration: Research and Special Programs Administration; Title: Alcohol Misuse Prevention Program; Need for Information: The information requested is necessary to properly monitor the effectiveness of the program and to ensure compliance with the rule.

Statistical data collected will build a data base to determine the continuing need for the rule; Frequency: Annual report; Burden Hours per Respondent: RSPA has estimated that the recordkeeping and reporting burden hours per operator would be 17 hours (4 hours for annual reports and 13 hours for recordkeeping). For further information contact: The Information Requirements Division, M-34, Office of the Secretary of Transportation, 400 Seventh Street, SW., Washington, DC 20590, (202) 366-4735 or Edward Clarke, Office of Management and Budget, New Executive Office Building, room 3228, Washington, DC 20503, (202) 395-7340.

Regulatory Flexibility Act

The proposed rule affects all entities subject to part 192 (other than operators of master meter systems), 193, or 195. Operators of master meter systems 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 proposed rule would not, if adopted as final, have a significant economic impact on a substantial number of small entities.

E.O. 12612

The proposed rulemaking action would 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 notice does not have sufficient federalism implications to warrant preparation of a Federalism Assessment.

List of Subjects in 49 CFR Part 199

Alcohol testing, Drug testing, Pipeline safety, Reporting and recordkeeping requirements, Safety, and Transportation.

In consideration of the foregoing, RSPA proposes to amend 49 CFR part 199 as follows:

1. The heading of part 199 is proposed to be revised to read as follows:

PART 199—ANTI-DRUG AND ALCOHOL MISUSE PREVENTION PROGRAMS

2. The authority citation for part 199 is proposed to be revised to read as follows:

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

§§ 199.1 through 199.23 [Redesignated as Subpart A]

3. Part 199 is proposed to be amended by redesignating §§ 199.1 through 199.23 as a new subpart A entitled Anti-Drug Program.

4. Part 199 is proposed to be amended by adding a new subpart B as set forth below:

Subpart B—Alcohol Misuse Prevention Program

Sec.	Purpose.
199.200	Purpose.
199.201	Applicability.
199.202	Alcohol misuse plan.
199.203	Alcohol testing procedures.
199.205	Definitions.
199.207	Preemption of State and local laws.
199.209	Other requirements imposed by operators.
199.211	Requirement for notice.
199.213	Starting date for alcohol testing programs.
199.215	Alcohol concentration.
199.217	Behavior and appearance.
199.219	On-duty use.
199.221	Pre-duty use.
199.223	Use following an accident.
199.225	Refusal to submit to a required alcohol test.
199.227	Alcohol tests required.
199.229	Retention of records.
199.231	Reporting of results in a management information system.
199.233	Access to facilities and records.
199.235	Removal from safety-sensitive function.
199.237	Required evaluation and testing.
199.239	Other alcohol-related conduct.
199.241	Operator obligation to promulgate a policy on the misuse of alcohol.
199.243	Training for supervisors.
199.245	Referral, evaluation, and treatment.
199.247	Contractor employees.

Subpart B—Alcohol Misuse Prevention Program

§ 199.200 Purpose.

The purpose of this subpart is to establish programs designed to help prevent accidents and injuries resulting from the misuse of alcohol by employees who perform safety-sensitive functions for operators of pipeline facilities subject to part 192, 193, or 195 of this chapter.

§ 199.201 Applicability.

This subpart applies to gas, hazardous liquid and carbon dioxide pipeline operators and liquefied natural gas

operators subject to part 192, 193, or 195 of this chapter. However, this subpart does not apply to operators of master meter systems defined in § 191.3 of this chapter.

§ 199.202 Alcohol misuse plan.

Each operator shall maintain and follow a written alcohol misuse plan that conforms to the requirements of this subpart and the DOT procedures. The plan shall contain methods and procedures for compliance with all the requirements of this subpart, including required education and training elements.

§ 199.203 Alcohol testing procedures.

Each operator shall ensure that all alcohol testing conducted under this subpart complies with the procedures set forth in part 40 of this title. The provisions of part 40 of this title that address alcohol testing are made applicable to operators by this subpart.

§ 199.205 Definitions.

As used in this subpart:

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

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

Alcohol means ethyl alcohol (ethanol).

Alcohol concentration (or content) means the alcohol in a volume of breath expressed in terms of grams of alcohol per 210 liters of breath as indicated by an evidential breath test under this subpart. When the indicated alcohol concentration of a covered employee on an initial alcohol test is different from an indicated alcohol concentration on a confirmatory test, the employee shall be considered to have the lower indicated concentration.

Alcohol use means the consumption of any beverage, mixture, or preparation, including any medication, containing alcohol.

Confirmatory test means a second analytical procedure, separate from the screening test, to determine the concentration of alcohol in a covered employee's system. The confirmatory test may or may not use a different chemical principle from that of the screening test, but shall employ a scientifically recognized method of testing capable of providing quantitative

data regarding alcohol concentration. For specific requirements concerning evidential breath testing devices see part 40 of this title.

Consortium means an entity, including a group or association of employers, recipients, or contractors, that provides alcohol testing as required by this subpart or other DOT alcohol testing rules and that acts on behalf of the operators.

Covered employee means a person who performs on a pipeline or at an LNG facility an operating, maintenance, or emergency-response function regulated by part 192, 193, or 195 of this chapter. As used in this part, *employee* includes an applicant for employment. *Covered employee* and *individual or individual to be tested* have the same meaning for the purposes of this subpart. The term *covered employee* does not include clerical, truck driving, accounting, or other functions not subject to part 192, 193, or 195. The person may be employed by the operator, be a contractor engaged by the operator, or be employed by such a contractor. For the purposes of pre-employment/pre-duty testing only, the term *covered employee* includes a person applying to perform a safety-sensitive function.

DOT agency means an agency (or operating administration) of the United States Department of Transportation administering regulations requiring alcohol testing (14 CFR part 61, 49 CFR parts 199, 219, 382, and 654) in accordance with part 40 of this title.

Employer or operator means a person who owns or operates a pipeline or LNG facility subject to part 192, 193, or 195 of this chapter.

Initial alcohol test (or screening test) means an analytical procedure to determine whether a covered employee may have a prohibited concentration of alcohol in his or her system.

Performing (a safety-sensitive function): An employee is considered to be performing a safety-sensitive function during any period in which he or she is actually performing, ready to perform, or immediately available to perform such covered functions.

Refuse to submit (to an alcohol test) means that a covered employee fails to provide adequate breath for testing without a valid medical explanation after he or she has received notice of the requirement to be tested in accordance with the provisions of part 199 of this chapter and part 40 of this title or engages in conduct that clearly obstructs the collection process.

Safety-sensitive function means an operation, maintenance, or emergency-response function that is performed on

a pipeline or LNG facility and the function is regulated by part 192, 193, or 195.

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

Substance abuse professional means a licensed physician (Medical Doctor or Doctor of Osteopathy), or a licensed or certified psychologist, social worker, or employee assistance professional with knowledge of and clinical experience in the diagnosis and treatment of alcohol-related disorders.

§ 199.207 Preemption of State and local laws.

(a) Except as provided in paragraph (b) of this section, this subpart preempts any State or local law, rule, regulation, or order to the extent that:

(1) Compliance with both the State or local requirement and this subpart is not possible;

(2) Compliance with the State or local requirement is an obstacle to the accomplishment and execution of any requirement in this subpart; or

(3) The State or local requirement is a pipeline safety standard applicable to interstate pipeline facilities.

(b) This subpart shall not be construed to pre-empt provisions of State criminal law that impose sanctions for reckless conduct leading to actual loss of life, injury, or damage to property, whether the provisions apply specifically to transportation employees or employers or to the general public.

§ 199.209 Other requirements imposed by operators.

Except as expressly provided in this subpart, nothing in this subpart shall be construed to affect the authority of operators, or the rights of employees, with respect to the use or possession of alcohol, including authority and rights with respect to alcohol testing and rehabilitation.

§ 199.211 Requirement for notice.

Before performing an alcohol test under this subpart, each operator shall notify a covered employee that the alcohol test is required by this subpart. No operator shall falsely represent that a test is administered under this subpart.

§ 199.213 Starting date for alcohol testing programs.

(a) *Large operators.* Each operator with more than fifty covered employees on [the effective date of the final rule]

shall implement the requirements of this subpart on [date one year after the effective date of the final rule].

(b) *Small operators.* Each operator with fifty or fewer covered employees on [effective date of the final rule] shall implement the requirements of this subpart on [date two years after the effective date of the final rule].

(c) All operators shall have an alcohol misuse program that conforms to this subpart by [date two years after the effective date of the final rule], or by the date an operator begins operations, whichever is later.

§ 199.215 Alcohol concentration.

No operator shall allow a covered employee to report for duty or remain on duty requiring the performance of safety-sensitive functions while having an alcohol concentration of .04 or greater. No operator having actual knowledge that a covered employee has an alcohol concentration of .04 or greater shall permit the employee to perform or continue to perform safety-sensitive functions.

§ 199.217 Behavior and appearance.

Notwithstanding the absence of a reasonable suspicion test under § 199.227(d), no operator having actual knowledge that a covered employee's behavior or appearance is characteristic of alcohol misuse or that the covered employee's ability to perform his or her assigned functions is adversely affected by alcohol use shall permit the covered employee to report for duty or remain on duty requiring the performance of safety-sensitive functions. Each operator shall prohibit a covered employee whose behavior or appearance is characteristic of alcohol misuse or whose ability to perform his or her assigned functions is adversely affected by alcohol from reporting for duty or remaining on duty requiring the performance of safety-sensitive functions.

§ 199.219 On-duty use.

Each operator shall prohibit a covered employee from using alcohol while performing safety-sensitive functions. No operator having actual knowledge that a covered employee is using alcohol while performing safety-sensitive functions shall permit the employee to perform or continue to perform safety-sensitive functions.

§ 199.221 Pre-duty use.

Each operator shall prohibit a covered employee from using alcohol within four hours prior to performing safety-sensitive functions. No operator having actual knowledge that a covered

employee has used alcohol within four hours prior to performing safety-sensitive functions shall permit a covered employee to perform or continue to perform safety-sensitive functions.

§ 199.223 Use following an accident.

No operator shall permit a covered employee who has actual knowledge of an accident in which his or her performance of safety-sensitive functions has not been discounted by the operator as a contributing factor to an accident shall use alcohol for eight hours following the accident, unless he or she has been given a post-accident test under § 199.227(b), or the operator has determined that the employee's performance could not have contributed to the accident.

§ 199.225 Refusal to submit to a required alcohol test.

Each operator shall require a covered employee to submit to a post-accident alcohol test required under § 199.227(b), a random alcohol test required under § 199.227(c), a reasonable suspicion alcohol test required under § 199.227(d), or a follow-up alcohol test required under § 199.227(e). No operator shall permit an employee who refuses to submit to such a test to perform or continue to perform safety-sensitive functions.

§ 199.227 Alcohol tests required.

Each operator shall conduct the following types of alcohol tests for the presence of alcohol:

(a) *Pre-employment/pre-duty testing.*

(1) Prior to the first time a covered employee performs safety-sensitive functions for an operator, the operator shall ensure that the employee undergoes testing for alcohol. No operator shall allow a covered employee to perform safety-sensitive functions, unless the employee has been administered an alcohol test with a result indicating an alcohol concentration less than .04. If a pre-employment/pre-duty test result under this section indicates an alcohol content of .02 or greater but less than .04, the provisions of § 199.239 shall apply.

(2) An operator is not required to administer an alcohol test required by paragraph (1) of this section, if:

(i) The employee has undergone an alcohol test required by this section or the alcohol misuse regulations of another DOT agency under part 40 of this title within the previous six months, with a result indicating an alcohol concentration less than .04; and

(ii) The operator ensures that no prior operator of the covered employee of

whom the operator has knowledge has records of a violation of this subpart or the alcohol misuse regulations of another DOT agency within the previous six months.

(b) *Post-accident.* (1) As soon as practicable following an accident, each operator shall test each surviving covered employee for alcohol if that employee's performance of a safety-sensitive function either contributed to an accident or cannot be completely discounted as a contributing factor to the accident. The decision not to administer a test under this section shall be based on the operator's determination, using the best available information at the time of the determination, that the covered employee's performance could not have contributed to the accident.

(2) If a test required by this section is not administered within two hours following the accident, the operator shall submit a report to the appropriate Regional Office of Pipeline Safety stating the reasons the test was not promptly administered. If a test required by this paragraph (b) is not administered within eight hours following the accident, the operator shall cease attempts to administer an alcohol test and shall submit the same report.

(3) A covered employee who is subject to post-accident testing who leaves the scene of an accident without a valid reason prior to submission to such test may be deemed by the operator to have refused to submit to testing. Nothing in this section shall be construed to require the delay of necessary medical attention for injured people following an accident or to prohibit a covered employee from leaving the scene of an accident for the period necessary to obtain assistance in responding to the accident or to obtain necessary emergency medical care.

(c) *Random testing.* (1) Each operator shall, at various times, randomly select employees for unannounced alcohol testing. The selection of employees shall be made by use of a scientifically valid method, such as a random-number table or a computer-based random number generator that is matched with employees' Social Security numbers, payroll identification numbers, or other comparable identifying numbers. Each covered employee shall have an equal chance of being tested under the selection process used.

(2) During each 12-month period following the start of random alcohol testing by the operator, the operator shall meet the following conditions:

(i) The dates for administering unannounced testing of randomly-selected covered employees shall be

spread reasonably throughout the 12-month period; and

(ii) The number of employees randomly selected for testing during the 12-month period shall equal an annual rate of not less than [10-50] percent of the total number of employees subject to alcohol testing under this subpart or the alcohol misuse regulations of another DOT agency. If the operator conducts random testing through a consortium, the annual rate may be calculated for each individual operator or for the total number of covered employees subject to random testing by the consortium.

(3) A covered employee shall only be tested while the employee is performing safety-sensitive functions; just before the employee is to perform safety-sensitive functions; or just after the employee has ceased performing such functions.

(4) Each operator shall require that each covered employee who is notified of selection for random testing proceeds to the testing site immediately. However, if the employee is performing a safety-sensitive function at the time of the notification, the operator shall instead ensure that the employee ceases to perform the safety-sensitive function and proceeds to the testing site as soon as possible.

(d) *Testing based on reasonable suspicion.* (1) Each operator shall require any covered employee to submit to an alcohol test when the operator has reasonable suspicion to believe that the employee has violated the prohibitions in this subpart.

(2) The operator's determination that reasonable suspicion exists to require the employee to undergo an alcohol test shall be based on specific, contemporaneous, articulable observations concerning the appearance, behavior, speech, or body odors of the employee. The required observations shall be made by a supervisor who is trained in detecting the symptoms of alcohol misuse. The supervisor who makes the determination that reasonable suspicion exists shall not conduct the breath alcohol test on that employee, if another supervisor is readily available.

(3) Alcohol testing is authorized by this section only if the observations required by paragraph (d)(2) of this section are made during or just preceding the period of the work day that the employee is required to be in compliance with this subpart. A covered employee may be required to undergo reasonable suspicion testing for alcohol while the employee is performing safety-sensitive functions; just before the employee is to perform safety-sensitive functions; or just after the

employee has ceased performing such functions.

(e) *Return-to-duty testing.* Each operator shall ensure that before a covered employee returns to duty requiring the performance of a safety-sensitive function after engaging in conduct prohibited by §§ 199.215-199.225, the employee shall undergo a return-to-duty alcohol test with a result indicating an alcohol concentration of less than .02.

(f) *Follow-up testing.* Following a determination under § 199.245(b) that a covered employee is in need of assistance in resolving problems associated with alcohol misuse, each operator shall ensure that the employee is subject to unannounced follow-up alcohol testing as directed by a substance abuse professional in accordance with the provisions of § 199.245(c)(2)(ii).

(g) *Retesting of covered employees with an alcohol concentration of .02 or greater but less than .04.* Each operator shall retest a covered employee to ensure compliance with the provisions of § 199.239, if the operator chooses to permit the employee to perform a safety-sensitive function within eight hours following the administration of an alcohol test indicating an alcohol concentration of .02 or greater but less than .04.

§ 199.229 Retention of records.

(a) *General requirement.* Each operator shall maintain records of its alcohol misuse prevention program as provided in this section. The records shall be maintained in a secure location with controlled access.

(b) *Period of retention.* Each operator shall maintain the records in accordance with the following schedule:

(1) *Five years.* Records of employee alcohol test results with results indicating an alcohol concentration of .02 or greater, documentation of refusals to take required alcohol tests, calibration documentation, and employee evaluation and referrals shall be maintained for a minimum of five years.

(2) *Two years.* Records related to the collection process (except calibration of evidential breath testing devices) and training shall be maintained for a minimum of two years.

(3) *One year.* Records of negative test results (as defined in 49 CFR part 40) shall be maintained for a minimum of one year.

(c) *Types of records.* The following specific records shall be maintained:

(1) *Records related to the collection process:* (i) Collection logbooks, if used.

(ii) Documents relating to the random selection process.

(iii) Calibration documentation for evidential breath testing devices.

(iv) Verification of breath alcohol technician training.

(v) Documents generated in connection with decisions to administer reasonable suspicion alcohol tests.

(vi) Documents generated in connection with decisions on post-accident tests.

(vii) Documents verifying existence of a medical explanation of the inability of a covered employee to provide adequate breath for testing.

(2) *Records related to test results:* (i) The operator's copy of the alcohol test form, including the results of the test.

(ii) Documents related to the refusal of any covered employee to submit to an alcohol test required by this subpart.

(iii) Documents presented by a covered employee to dispute the result of an alcohol test administered under this subpart.

(3) *Records related to other violations of this subpart.*

(4) *Records related to evaluations:* (i) Records pertaining to a determination by a substance abuse professional concerning a covered employee's need for assistance.

(ii) Records concerning a covered employee's compliance with the recommendations of the substance abuse professional.

(5) *Records related to education and training:* (i) Materials on alcohol misuse awareness, including a copy of the operator's policy on alcohol misuse.

(ii) Documentation of compliance with the requirements of § 199.233.

(iii) Documentation of training provided to supervisors for the purpose of qualifying the supervisors to make a determination concerning the need for alcohol testing based on reasonable suspicion.

(iv) Certification that any training conducted under this subpart complies with the requirements for such training.

§ 199.231 Reporting of results in a management information system.

(a) Each operator shall submit to RSPA an annual report covering the calendar year, summarizing the results of its alcohol misuse prevention program.

(b) Each operator that is subject to more than one DOT agency alcohol regulation shall identify each employee covered by the regulations of more than one DOT agency. The identification will be by the total number and category of covered function. Prior to conducting any alcohol test on a covered employee subject to the regulations of more than

one DOT agency, the employer shall determine which DOT agency rule or rules authorizes or requires the test. The test result information shall be directed to the appropriate DOT agency or agencies.

(c) Each operator shall ensure the accuracy and timeliness of each report submitted by the operator or a consortium.

(d) Each operator shall submit the required annual reports no later than February 15 of each year. The report shall be submitted on the form specified by RSPA. Each report shall contain:

(1) Number of covered employees by employee category.

(2) Number of covered employees in each category subject to testing under the alcohol misuse regulations of another DOT agency, identified by each agency.

(3) (i) Number of initial tests by type of test and employee category.

(ii) Number of confirmatory tests, by type of test and employee category.

(4) Number of confirmatory alcohol tests indicating an alcohol concentration of .04 or greater, by type of test and employee category.

(5) Number of confirmatory alcohol tests indicating an alcohol concentration of .02 or greater but less than .04, by type of test and employee category.

(6) Number of persons denied a position as a covered employee following a pre-employment/pre-duty alcohol test indicating an alcohol concentration of .04 or greater.

(7) Number of covered employees with a confirmatory alcohol test indicating an alcohol concentration of .04 or greater who were returned to duty in covered positions (having complied with the recommendations of a substance abuse professional as described in §§ 199.237 and 199.245).

(8) Number of covered employees who were administered alcohol and drug tests at the same time, with both a positive drug test and an alcohol test indicating an alcohol concentration of .04 or greater.

(9) Number of covered employees who were found to have violated other provisions of §§ 199.215–199.225, and the action taken in response to the violation.

(10) Number of covered employees who refused to submit to an alcohol test required under this subpart, and the action taken in response to the refusal.

(11) Number of supervisors who have received training during the reporting period in determining the existence of reasonable suspicion of alcohol misuse.

§ 199.233 Access to facilities and records.

(a) Except as required by law or expressly authorized or required in this

subpart, no employer shall release covered employee information that is contained in records required to be maintained in § 199.229.

(b) A covered employee is entitled, upon written request, to obtain copies of any records pertaining to the employee's use of alcohol, including any records pertaining to his or her alcohol tests. The operator shall promptly provide the records requested by the employee. Access to an employee's records shall not be contingent upon payment for records other than those specifically requested.

(c) Each operator shall permit access to all facilities utilized in complying with the requirements of this subpart to the Secretary of Transportation or any DOT agency with regulatory authority over the operator or any of its covered employees.

(d) Each operator shall make available copies of all results for operator alcohol testing conducted under this subpart and any other information pertaining to the operator's alcohol misuse prevention program, when requested by the Secretary of Transportation or any DOT agency with regulatory authority over the operator or covered employee.

(e) When requested by the National Transportation Safety Board as part of an accident investigation, operators shall disclose information related to the operator's administration of a post-accident alcohol test administered following the accident under investigation.

(f) Records shall be made available to a subsequent employer upon receipt of written request from the covered employee. Disclosure by the subsequent employer is permitted only as expressly authorized by the terms of the employee's request.

(g) An operator may disclose information required to be maintained under this subpart pertaining to a covered employee to the employee or the decisionmaker in a lawsuit, grievance, or other proceeding initiated by or on behalf of the individual, and arising from the results of an alcohol test administered under this subpart, or from the operator's determination that the covered employee engaged in conduct prohibited by §§ 199.215–199.225 (including, but not limited to, a worker's compensation, unemployment compensation, or other proceeding relating to a benefit sought by the employee.)

(h) An operator shall release information regarding a covered employee's records as directed by the specific, written consent of the employee authorizing release of the information to an identified person.

Release of such information by the person receiving the information is permitted only in accordance with the terms of the employee's consent.

§ 199.235 Removal from safety-sensitive function.

Except as provided in §§ 199.241–199.245, no operator shall permit any covered employee to perform safety-sensitive functions if the employee has engaged in conduct prohibited by §§ 199.215–199.225 or alcohol misuse regulations of another DOT agency.

§ 199.237 Required evaluation and testing.

No operator shall permit a covered employee who has engaged in conduct prohibited by §§ 199.215–199.225 to perform safety-sensitive functions unless the employee has met the requirements of § 199.245. Nothing in this section shall be construed to prohibit the continued performance of safety-sensitive functions necessary to respond to an emergency.

§ 199.239 Other alcohol-related conduct.

(a) No operator shall permit a covered employee tested under the provisions of § 199.227, who is found to have an alcohol concentration of .02 or greater but less than .04, to perform or continue to perform safety-sensitive functions, until:

- (1) The employee's alcohol concentration measures less than .02; or
- (2) The start of the employee's next regularly scheduled duty period, but not less than eight hours following administration of the test.

(b) Except as provided in paragraph (a)(1) of this section, no operator shall take any action under this subpart against an employee based solely on test results showing an alcohol concentration less than .04. This does not prohibit an operator with authority independent of this subpart from taking any action otherwise consistent with law.

(c) Nothing in this section shall be construed to prohibit the continued performance of safety-sensitive functions necessary to respond to an emergency.

§ 199.241 Operator obligation to promulgate a policy on the misuse of alcohol.

(a) *General requirements.* Each operator shall provide educational materials that explain the requirements of this subpart and the employer's policies and procedures with respect to meeting those requirements. Each employer shall provide written notice to every covered employee and to representatives of employee

organizations of the availability of this information.

(b) *Required content.* The materials to be made available to covered employees shall include detailed discussion of at least the following:

- (1) The identity of the person designated by the operator to answer covered employee questions about the materials.
- (2) The categories of employees who are subject to the provisions of this subpart.
- (3) Sufficient information about the safety-sensitive functions performed by those employees to make clear what period of the work day the covered employee is required to be in compliance with this subpart.

(4) Specific information concerning covered employee conduct that is prohibited by this subpart.

(5) The circumstances under which a covered employee will be tested for alcohol under this subpart.

(6) The procedures that will be used to test for the presence of alcohol, protect the covered employee and the integrity of the breath testing process, safeguard the validity of the test results, and ensure that those results are attributed to the correct employee.

(7) The requirement that a covered employee submit to alcohol tests administered in accordance with this subpart.

(8) An explanation of what constitutes a refusal to submit to an alcohol test and the attendant consequences.

(9) The consequences for covered employees found to have violated this subpart, including the requirement that the employee be removed immediately from safety-sensitive functions, and the procedures under § 199.245.

(10) The consequences for covered employees found to have an alcohol concentration of .02 or greater but less than .04.

(c) *Optional provisions.* The materials supplied to covered employees may also include information on additional operator policies with respect to the use or possession of alcohol, including any consequences for an employee found to have a specified alcohol level, that are based on the operator's authority independent of this subpart. Any such additional policies or consequences shall be clearly and obviously described as being based on independent authority.

§ 199.243 Training for supervisors.

Each operator shall ensure that persons designated to determine whether reasonable suspicion exists to require a covered employee to undergo alcohol testing under § 199.227(d)

receive at least 60 minutes of training on the physical, behavioral, speech, and performance indicators of probable alcohol misuse.

§ 199.245 Referral, evaluation, and treatment.

(a) Each operator shall ensure that a covered employee who engages in conduct prohibited under §§ 199.215–199.225 shall be advised of the resources available to the covered employee in evaluating and resolving problems associated with the misuse of alcohol, including the names, addresses, and telephone numbers of substance abuse professionals and counseling and treatment programs.

(b) Each covered employee who engages in conduct prohibited by §§ 199.215–199.225 shall be evaluated by a substance abuse professional who shall determine what assistance, if any, the employee needs in resolving problems associated with alcohol misuse.

(c)(1) Before a covered employee returns to duty requiring the performance of a safety-sensitive function after engaging in conduct prohibited by §§ 199.215–199.225, the employee shall undergo a return-to-duty alcohol test with a result indicating an alcohol concentration of less than .02.

(2) In addition, each covered employee identified as needing assistance in resolving problems associated with alcohol misuse—

(i) Shall be evaluated by a substance abuse professional to determine that the employee has properly followed any rehabilitation program prescribed under paragraph (b) of this section, and

(ii) Shall be subject to unannounced follow-up alcohol tests administered by the operator following the employee's return to duty. The number and frequency of such follow-up testing shall be determined by a substance abuse professional, but shall consist of at least six tests in the first 12 months following the employee's return to duty. Follow-up testing shall not exceed 60 months from the date of the employee's return to duty. The substance abuse professional may terminate the requirement for follow-up testing at any time after the first six tests have been administered, if the substance abuse professional determines that such testing is no longer necessary.

(d) Evaluation and rehabilitation may be provided by the operator, by a substance abuse professional under contract with the operator, or by a substance abuse professional not affiliated with the operator. The choice of substance abuse professional and assignment of costs shall be made in

accordance with operator/employee agreements and employer policies.

(e)(1) The provisions of this paragraph (e) apply if the policy of the operator permits reinstatement of an employee who has violated the provisions of this subpart.

(2) The operator shall designate a substance abuse professional to evaluate—

(i) The needs of the employee with respect to rehabilitation services such as counseling or treatment; and

(ii) Where rehabilitation services are required, the progress of the employee in establishing control over any substance abuse disorder before return to a safety-sensitive function. In deciding whether and under what conditions the employee is able to return to a safety-sensitive function, the substance abuse professional acts as the agent of the operator.

(3) At the operator's discretion, the designated substance abuse professional may be a salaried employee (e.g., an employee assistance counselor), a contractor, or a member of the staff of an otherwise unaffiliated health care provider.

(4) Nothing in this subpart shall be construed to determine the responsibility of the operator, employee, health insurance carrier or other person to bear the costs of substances abuse evaluation or rehabilitation services. Nothing in this subpart shall be construed to abridge existing agreements or policies with respect to payment or reimbursement of such costs.

§ 199.247 Contractor employee.

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

(b) The operator remains responsible for ensuring that the requirements of this subpart and part 40 of this title are complied with; and

(c) The contractor allows access to property and records by the operator, the Administrator, DOT agency with regulatory authority over the operator or covered employee, and if the operator is subject to the jurisdiction of a state agency, a representative of the state agency for the purposes of monitoring the employer's compliance with the requirements of this subpart and part 40 of this title.

Issued in Washington, DC, on December 2, 1992.

Andrew H. Card, Jr.,
Secretary of Transportation.

Douglas B. Ham,
Acting Administrator, Research and Special Programs Administration.

[FR Doc. 92-29687 Filed 12-10-92; 10:00 am]

BILLING CODE 4810-60-M

Research and Special Programs Administration

49 CFR Part 199

[Docket No. PS-129; Notice No. 1]

RIN 2137-AB95

Drug Testing: MIS Standardized Data Collection and Reporting

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

ACTION: Notice of proposed rulemaking.

SUMMARY: Today's Federal Register contains a notice of proposed rulemaking issued by the Department of Transportation regarding the collection and reporting of drug and alcohol testing data. The Department's proposed rule concerns a DOT plan to measure the effectiveness of drug testing programs in all DOT-regulated modes of transportation, including pipeline. The present RSPA notice proposes a rule that is necessary to carry out the DOT plan with respect to pipeline operators. Together, the two proposed rules would require pipeline operators who are subject to drug and alcohol testing requirements to report annually to RSPA certain information about their drug and alcohol testing programs. RSPA would use the data to analyze its current approach to deterring and detecting illegal drug and alcohol misuse use in the pipeline industry, and, as appropriate, plan a more efficient and effective approach.

Elsewhere in today's Federal Register is the parallel "MIS" NPRM regarding 49 CFR part 40. The preamble to that NPRM contains many comments, discussions and questions that should be considered in reviewing this Operating Administration NPRM. Your comments on this NPRM should indicate that you are responding to questions or comments in the generic NPRM under 49 CFR part 40 or the specific NPRM under this Operating Administration rule.

DATES: Comments should be received by April 14, 1993. Late-filed comments will be considered to the extent practicable. Comments on the Secretary's notice

appearing elsewhere in today's Federal Register should be submitted as directed by that notice.

ADDRESSES: Send comments on this notice in duplicate to the Dockets Unit, room 8421, Research and Special Programs Administration, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590-0001. Identify the docket and notice numbers stated in the heading of this notice. All comments and other docketed material will be available for inspection and copying in room 8421 between the hours of 8:30 a.m. and 5 p.m. each working day.

FOR FURTHER INFORMATION CONTACT: Mr. Richard L. Rippert, Office of Pipeline Safety Enforcement, RSPA, DOT, 400 7th Street, SW., Washington, DC 20590-0001 (202) 366-6223.

SUPPLEMENTARY INFORMATION:

Background

On November 21, 1988, RSPA published final drug testing rules (53 FR 47084). The rules are codified in 49 CFR part 199. These rules require each operator of pipelines or liquefied natural gas facilities used in the transportation of gas subject to 49 CFR part 192 or 193 (except master meter systems) or the transportation of hazardous liquids subject to 49 CFR part 195 to implement a drug testing program for specific categories of employees. The programs apply to employees that perform operation, maintenance, or emergency-response functions on pipelines or liquefied natural gas facilities.

DOT's Office of Drug Enforcement and Program Compliance oversees drug policies and programs for the Secretary of Transportation. That office created a working group with representatives from the operating administrations to develop a comprehensive plan for a Management Information System (MIS) to obtain and analyze employer drug and alcohol testing data. Two of the operating administrations currently have reporting requirements in their regulations. The MIS system is designed to measure the effectiveness of the drug and alcohol testing programs in each mode of transportation. The MIS plan identified standard data elements that are critical to the review and management of the RSPA drug and alcohol program. The data would be the basis for monitoring implementation and addressing compliance and enforcement issues and evaluating the overall effectiveness of the operators' drug and alcohol testing programs.

To begin the administrative process necessary to collect these data, the