DEPARTMENT OF TRANSPORTATION

Research and Special Programs Administration

49 CFR Part 199

[Docket No. PS-102, Amdt. No. 199-2]

RIN 2137-AB54

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

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

ACTION: Final rule; partial grant of petitions for reconsideration.

SUMMARY: This action responds to petitions for reconsideration, of the final rule, published in the **Federal Register** on November 21, 1988 (53 FR 47084), requiring operators of pipeline facilities for the transportation of natural gas or hazardous liquids and operators of liquefied natural gas facilities to have an anti-drug program for employees who perform certain sensitive safety-related functions covered by the pipeline safety regulations. On April 13, 1989, the implementation dates contained in the final rule were modified to permit reevaluation of the rule in light of recent decisional law and consideration of issues raised by the petitions for reconsideration. The petitions for reconsideration are granted in part and denied in part, for the reasons set forth below. This document amends the final rule to implement those portions of the petitions granted, and makes other clarifying changes and corrections.

EFFECTIVE DATE: The amendments in this document are effective January 17, 1990.

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SUPPLEMENTARY INFORMATION: On November 21, 1988, RSPA published a final rule (53 FR 47084) entitled "Control of Drug Use in Natural Gas, Liquefied Natural Gas, and Hazardous Liquid Pipeline Operations." The rule requires pipeline operators to have an anti-drug program which includes pre-employment, post-accident, random, and reasonable cause drug testing and an Employee Assistance Program (EAP) for education and training regarding the effects and consequences of drug use.

On April 13, 1989, RSPA published a notice of a delay in the implementation dates (54 FR 14922) to permit careful reevaluation of its rule in light of two recent Supreme Court decisions, as well as consideration of the issues raised by several petitions for reconsideration. Dates for commencement of drug testing were modified in the following manner: The date for commencement of drug testing for operators with more than 50 employees subject to testing was delayed to April 20, 1990, and the date for operators with 50 or fewer such employees was delayed to August 21, 1990. RSPA received timely petitions for reconsideration of the final rule from the American Gas Association, the Interstate Natural Gas Association of America, the MidCon Corporation, Tenneco Gas Pipeline Group, Pacific Gas and Electric Company, and El Paso Natural Gas Company, and a late-filed petition from the United Steelworkers of America, AFL-CIO. RSPA considered the issues raised in all seven petitions for reconsideration and also reviewed the rule in light of recent decisional law. Discussion of the issues and RSPA's response follows.

Request for Stay Pending Supreme Court Decisions. Pacific Gas and Electric Company (PG&E), the Interstate Natural Gas Association of America (INGAA), and the Tenneco Gas Pipeline Group (Tenneco) requested a delay in implementation of the final rule until the Supreme Court issued decisions in two cases that directly affect employee drug testing programs: *Skinner* v. *Railway Labor Executives' Association,* 109 S. Ct. 1402 (1989), and *National Treasury Employees Union* v. *Von Raab,* 109 S. Ct. 1384 (1989). INGAA requested a stay of one year after the constitutional issues are resolved.

RSPA Response. On March 21, 1989, the Supreme Court announced its decisions in both cases and upheld the constitutionality of certain types of federally-mandated employee drug testing. On April 13, 1989, RSPA published a notice delaying the implementation dates for the final rule to enable consideration of the Supreme Court decisions and of the pending petitions for reconsideration. RSPA thus effectively granted this portion of the petitioners' request. RSPA does not believe any additional delay in implementing the rule is needed.

Constitutional Issues. The American Gas Association (AGA) argued that mandatory random drug testing may violate the Fourth Amendment prohibition on unreasonable searches, and suggested that until the issue is resolved by the courts, operators should be given the option of instituting random testing, but should not be required to do so.

Specifically, the petitioners asserted that RSPA has not shown a compelling governmental safety interest sufficient to demonstrate the constitutionality of the final rule because DOT has acknowledged the excellent safety record of the pipeline industry and has been unable to provide any evidence of a drug problem in the pipeline industry. Two petitioners also noted that a U.S. District Court (Northern District of California) had issued a temporary restraining order against random and mandatory post-accident drug testing in the trucking industry, (which was subsequently expanded to a preliminary injunction) and suggested therefore that random testing was unlikely to withstand constitutional scrutiny.

INGAA asserted that a number of pipeline employees may have property interests in their jobs stemming from a collective bargaining agreement or other employment contract. INGAA contends that to the extent these employees have such a property interest, the drug testing regulations violate the due process clause of the Fifth Amendment because a positive urine test requires that the employee be removed immediately from his or her job duties without a hearing, and endangers his or her continued employment.

RSPA Response. The decisions the Supreme Court handed down in *Skinner* and *Von Raab* shed considerable light on the constitutional issues raised in the petitions. The Supreme Court agreed that the drug tests were "searches" and, therefore, implicated the Fourth Amendment's protection against "unreasonable searches and seizures"; however, the Court concluded that the tests were reasonable, under a "balancing test" that measured the privacy interests of the employees against the Government's public safety and law enforcement interests. The most important factors in this balancing were: The Government's compelling interest in detecting and deterring the use of drugs and alcohol by workers in safety or security-related jobs; the employees' diminished expectations of privacy resulting from either existing, pervasive governmental safety regulation, or the nature of the employees' duties; the search was not conducted pursuant to a criminal investigation; and the minimal intrusion on employee privacy from the tests, which were conducted in a medical-like environment and, generally, without direct observation.

The Court found the Government's interests in drug testing sufficiently compelling to make warrants, probable cause, or "individualized suspicion" unnecessary (reversing an earlier ruling by the U.S. Court of Appeals for the Ninth Circuit, *Railway Labor*

Executives' Association v. *Burnley*, 839 F.2d 575 (1988)). The Court noted that a substance-impaired employee performing a safety-sensitive job could cause tragic consequences long before any signs of impairment were noticeable. Significantly, the Court found that the Government's interest was served by the deterrent effect of the drug testing in both cases, notwithstanding that testing might reveal few drug users. In *Von Raab*, however, the Court held that the record evidence was insufficient to determine whether the drug testing was reasonable for employees subject to testing only because they had access to classified materials. The Court remanded this issue to the Fifth Circuit Court of Appeals.

Although *Skinner* and *Von Raab* did not consider random testing, recent decisions by the U.S. Court of Appeals for the District of Columbia Circuit make it clear that while the random nature of the testing is a consideration, the lower courts will follow substantially the same analysis used by the Supreme Court. *Harmon* v. *Thornburgh*, 878 F.2d 484 (D.C.Cir. 1989) (random testing of employees holding top secret security clearances is justified); *National Federation of Federal Employees* v. *Cheney*, No. 88–5080 (D.C.Cir., August 29, 1989) (random testing of certain civilian employees of the Army is reasonable); *American Federation of Government Employees* v. *Skinner*, No. 87–5417 (D.C.Cir., September 8, 1989) (random testing of DOT employees with safety-sensitive jobs is constitutional). The *Von Raab* and *Skinner* cases establish that if the Government can show that the testing program is reasonable, drug testing is permissible without a warrant, without probable cause, and without particularized suspicion.

In *Skinner*, the Court considered several factors in weighing individual privacy interests against the Government's objectives. The D.C. Circuit enumerated these factors, including "(1) the 'limited' intrusions occasioned by the testing procedures; (2) the diminished expectation of privacy that attaches to employment in an 'industry that is regulated pervasively to ensure safety'; and (3) the government's 'compelling' or 'surpassing' interest in railway safety." *Cheney*, slip. op. at 10 (citations omitted). These factors are directly relevant to the pipeline anti-drug rule. The same "limited" intrusions occasioned by the testing procedures are present in Part 199, which mandates use of 49 CFR Part 40, "Procedures for Transportation Workplace Drug Testing Programs" (DOT Procedures) (54 FR 49854, December 1, 1989). The DOT Procedures are modeled after and closely conform to the rigorous standards and procedures imposed by the Department of Health and Human Services (DHHS) for drug testing of federal employees (published at 53 FR 11970, April 11, 1988). In addition, the pipeline industry has been and is regulated pervasively to ensure safety so that a diminished expectation of privacy attaches to employment.

Finally, the Government has an obviously compelling interest in pipeline safety. Although pipelines have an excellent safety record, there are still deaths and injuries each year occurring as a result of pipeline accidents. Moreover, there is the potential for a catastrophic accident. Pipelines are often located in populated areas, near schools, homes, and industry, and adjacent to public rights-of-way. RSPA believes the categories of pipeline employees covered by the rule are appropriate in light of the recent court decisions. Employees performing regulated operation, maintenance, and emergency response functions may directly affect the safety of those who work or live near the pipeline.

RSPA does not agree with petitioners' concerns that the rule may result in a violation of employees' Fifth Amendment due process rights. In any event, the concerns are premature for employees may always challenge their removal from a safety-related position at the time it occurs. When RSPA determines that a generally applicable rule is necessary for safety reasons, that determination overrides inconsistent terms of labor-management agreements.

Post-Accident Testing. AGA indicated that AGA members are concerned about DOT's institution of a separate category for post-accident testing. AGA indicated that post-accident testing should be based on reasonable suspicion. AGA pointed out that in *Burnley*, the Ninth Circuit Court held that post-accident testing was permissible only when accompanied with reasonable suspicion.

Since the final rule was published, RSPA has received numerous requests to clarify the post-accident testing requirements in the event an employee is injured or unconscious.

RSPA Response. The Supreme Court decision in *Skinner* held that particularized suspicion was not required. RSPA believes that post-accident testing should be retained as a separate category because of the programmatic need to evaluate the factors in pipeline accidents. Accident investigation enables RSPA to examine its regulatory program and an operator's compliance to determine if changes are needed to enhance safety.

In response to the requests for clarification, RSPA has revised the post-accident testing requirement in 49 CFR 199.11(b) to clarify that all reasonable steps must be taken to obtain a urine sample if an employee is injured, unconscious, or otherwise unable to evidence consent to the drug test. These reasonable steps include the following procedures. Any injury to an employee should be treated first. The operator should notify the hospital of the need for a specimen. If the employee is injured or unconscious and unable to consent to a urine sample, the operator should wait until the treating physician determines the employee is able to understand a request to provide a sample.

Reasonable Cause Testing. AGA believes that if DOT is concerned with protecting the public safety by eliminating drug impaired employees from safety-sensitive positions, it should eliminate the reasonable cause standard and substitute the reasonable suspicion standard. AGA asserts that the reasonable cause standard is stricter, and requires that there be reasonable grounds for suspecting that a drug test will reveal evidence of drug abuse on the job. AGA contends that the reasonable suspicion standard, by contrast, would permit testing based upon observations of an employee's performance.

In addition, AGA opposes DOT's requirement that large operators with 50 or more employees have at least two of an employee's supervisors substantiate and concur in the decision to test the employee under the "reasonable cause" category as unnecessary and burdensome because of the subjective nature of reasonable cause testing. AGA argues that reasonable cause testing will be subjective regardless of the number of supervisors who concur in a decision to test. The findings of one properly trained supervisor, AGA argues, should be sufficient to initiate reasonable cause testing of an employee.

AGA noted that it supports the exception that an operator with 50 or fewer employees need only obtain the opinion of *one* trained supervisor to initiate reasonable cause testing and fails to see a clear distinction between the subjective nature of reasonable cause testing when applied by large or small operators.

AGA proposes that if RSPA retains the requirement that two or more supervisors substantiate and concur in a decision to test the employee of a large operator, RSPA should incorporate in

the rule language used in the preamble to the final rule to clarify that the concurrence between two supervisors may be made by telephone.

El Paso objected to the requirements for reasonable cause testing because RSPA failed to take into consideration that there may be locations where no supervisor is available, and there may be evidence of drug use other than by observable individual impairment, or behavior, such as possession of "roach clips" (marijuana smoking devices), information supplied by other employees, etc. El Paso noted that the rule precludes testing entire locations upon receipt of information that drug use is occurring. El Paso stated that it has found that drug testing of entire locations upon receipt of information concerning drug use is a demonstrated effective deterrent.

El Paso suggested "that DOT revise its regulations to permit reasonable cause testing of an individual based on documented observable performance or behavior by a supervisor based on information received either from within or outside its workforce of possible drug use." El Paso further suggested that the required concurrence of a second supervisor should be deleted from the rules and that such testing should require only the authorization of a member of the operator's management.

RSPA Response. RSPA agrees with the petitioners that the reasonable cause drug testing requirements should be clarified to incorporate language used in the preamble to the final rule, regarding the concurrence of two supervisors by telephone, and has modified 49 CFR 199.11(d) accordingly. RSPA does not agree, however, that this category of testing should be labeled reasonable suspicion. We have defined the conditions under which the test is performed and the label is, therefore, irrelevant. We see no basis for changing the conditions. Furthermore, while a determination to test based on reasonable cause will always be subjective to some extent, requiring two supervisors to concur lessens the subjectivity involved and the potential for harassment. The exception allowing employers with 50 or fewer employees to have only one supervisor substantiate the decision to test based on reasonable cause was provided to recognize that employees of smaller operators in many cases will not have two supervisors. The potential for a subjective judgment is no less real with a small operator, but the reality of the workplace dictated that RSPA make some provision for these operators.

With regard to El Paso's suggestions, evidence of illegal drug use, such as drug paraphernalia, or information received from a third party may certainly be considered in making a determination of reasonable cause, but neither should be the sole basis for making such a determination. Further inquiry must be made and the supervisor must conclude that there are objective factors indicative of probable drug use. RSPA believes that the concurrence of two of the employee's supervisors is necessary to lessen the possibility of an arbitrary determination and the potential for harassment. Requiring two supervisors in an employee's chain of command, rather than simply another member of the operator's management, provides an additional safeguard in that those supervisors are more likely to be familiar with the employee's work history and behavior. Accordingly, RSPA has not revised this portion of the rule except as noted above.

Statutory Authority. Tenneco, AGA, and INGAA argued that the Department does not have statutory authority to regulate the employees or the way in which they conduct their personal lives. Tenneco stated that neither the Natural Gas Pipeline Safety Act of 1968, its legislative history, nor any prior or existing regulations evidence any intent or purpose to regulate the physical or mental attributes, or conduct of employees other than to require that the product of their efforts be satisfactory.

RSPA Response. 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 drug 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. Section 101 and 201 of Public Law No. 100-561, enacted October 31, 1988.

Administrative Procedure Act (APA). Tenneco, AGA, and INGAA pointed out that the Act also requires the Secretary to consider:

(a) Relevant available pipeline safety data;

(b) Whether such standards are appropriate for the particular type of pipeline transportation or facility;

(c) The reasonableness of any proposed standards; and

(d) The extent to which such standards will contribute to public safety.

According to these petitioners, the Department acted outside its authority by failing to consider any of these factors in promulgating the final rule. Petitioners contention, however, is, at bottom, an argument that the rule is arbitrary and capricious. These petitioners argue that RSPA has not considered available pipeline safety data, has no evidence of a drug problem in the natural gas industry, and has acknowledged the excellent safety record of the industry.

Tenneco pointed out that the Department's safety data demonstrates the absence of any kind of a safety problem, and a complete dearth of safety problems relating to illicit drug use. According to Tenneco, considering the stringent pipeline pressure testing and inspection regulations which protect the integrity of the pipeline from a theoretically impaired employee, the extensive drug testing regulations are neither appropriate nor needed for any pipeline facility.

Tenneco indicated that some of the unreasonable burdens the Secretary failed to consider in promulgating this rule include (1) the regulations' conflict with state laws that prohibit random testing of employees; (2) civil liability, not only for the operator's employees but for contractor's employees; (3) the attenuated or piggyback jurisdiction in requiring operators to require random testing of independent contractors; and (4) the high cost to the industry without any corresponding benefit to the industry.

AGA, MidCon and Tenneco objected that the final rule is arbitrary and capricious in violation of the APA because RSPA assumed that there was a drug problem in the pipeline industry even though RSPA did not provide any evidence of a drug problem in the industry, and RSPA did not distinguish between the safety records of the various transportation industries. The petitioners particularly objected to the random testing requirements of the

regulation. Tenneco stated that RSPA's assumption that the problem of drug abuse exists in the pipeline industry in similar proportion to that existing in society as a whole is unsupported by the evidence. Tenneco contended that although the regulations could conceivably deter the small percentage of pipeline employees who may use drugs, they will not significantly increase safety because the test does not measure impairment. Since testing does not measure impairment, Tenneco contends, the regulation does not have a sufficient nexus to the government's legitimate concern and is therefore arbitrary. AGA argued that RSPA has no justification for imposing mandatory random testing on the pipeline industry because, unlike the other industries covered by the DOT rules, pipelines have an excellent safety record, do not carry people, and are located underground. AGA also contended that pipeline employees are highly supervised and frequently work in teams, making it less likely that an impaired employee could endanger the public. Moreover, AGA stated, most pipeline accidents are caused by third party excavators over which operators have little control. Finally, AGA argued that the examples RSPA used to discount the above factors; i.e., the 1987 train accident in Chase, Maryland, and the nuclear power industry, where the Nuclear Regulatory Commission had found evidence of drug-related accidents, do not support its position. AGA contended, therefore, that the final rule is arbitrary because RSPA could find no evidence of drug-related accidents in the natural gas industry.

RSPA Response. Part 199 established standards for ensuring that operator personnel who perform functions directly affecting the safety of pipeline transportation are free of drug-induced impairment. In promulgating Part 199, RSPA considered all of the required statutory criteria. RSPA acknowledged the excellent safety record of the industry, but concluded that the potential for harm was serious enough to warrant an anti-drug rule. Faced with substantial evidence of a societal drug problem, RSPA cannot ignore its responsibility to the public. The Supreme Court has held that the existence of a drug problem within a particular workplace is not a prerequisite for an anti-drug program. *Von Raab*, 109 S. Ct. at 1395. The pipeline anti-drug program is limited to those employees who may directly affect safety, and the standards and procedures are designed both to protect employees' privacy and to detect illegal drug use. With respect to Tenneco's contention concerning pressure testing and inspection, RSPA does not believe that these measures are sufficient to counteract the behavior of a drug-impaired employee. Pressure testing and inspection are conducted principally at the time of initial construction and detect flaws in the pipeline. After that time, many other factors, including human error, come into play in the operation of a pipeline. RSPA concluded, based on the record evidence and after considering public comments, that part 199 is the minimum standard needed under the circumstances to deter drug use in the pipeline industry. The petitioners have not advanced any arguments or information to convince us otherwise.

With regard to possible conflicts with state laws that prohibit random testing of employees, part 199 preempts, under the Supremacy Clause of the U.S. Constitution, any state or local law, rule, regulation, order, or standard that covers testing of pipeline employees for the presence of drugs or drug metabolites. This preemption exists to the extent that the state or local law interferes with implementation of the federal law. The rule does not preempt any state law that imposes sanctions for the violation of a provision of a state criminal code related to reckless conduct leading to actual loss of life, injury, or damage to property, whether such provisions apply specifically to pipeline employees or generally to the public.

The purported burdens of extending these regulations to contractor personnel are discussed later in this preamble under "Contractor Responsibility."

Finally, regarding Tenneco's comments about the burdens of these regulations because there is no corresponding benefit to the industry, RSPA concluded that these rules will result in a benefit to the public. The Final Regulatory Evaluation, filed in the docket, shows that benefits will exceed costs for these regulations.

RSPA has already responded to petitioners' arguments concerning the safety record of the pipeline industry and the evidence of a drug problem in the industry. Petitioners' arguments are no more persuasive in the APA context than in the constitutional context.

Regarding impairment, the Supreme Court has indicated that urinalysis testing, while it may not detect impairment, serves to deter it. *Von Raab*, 109 S. Ct. at 1393. The D.C. Circuit, following this reasoning, has rejected arguments that urinalysis testing is unconstitutional because it does not differentiate on- and off-duty impairment. *AFGE*, slip. op. at 25. A primary purpose of Part 199 is to deter illegal drug use that could compromise safety.

Regarding the differences between the pipeline industry and other transportation industries, RSPA acknowledged the fact that the pipeline industry does not transport people. The functions performed by pipeline employees, however, can directly affect the physical safety of people who live or work near the pipeline. The D.C. Circuit has upheld random testing of DOT hazardous materials inspectors (who do not transport people) because their "assigned duties require exposure 'to poisonous, explosive, and highly flammable commodities that could be * * * suddenly ignited by improper handling.' " *AFGE*, slip. op. at 14. Similarly, pipeline employees performing operation and maintenance functions may work in close proximity to, or otherwise affect, natural gas, gasoline, oil, and other hazardous materials which are explosive, flammable, or combustible, and pose great risks to personal and public safety.

The D.C. Circuit has also rejected arguments that drug testing is unreasonable because a system of safeguards and supervision can abate the risks posed by a drug-impaired employee, relying on the Supreme Court's decision in *Skinner* that the reasonableness of a particular technique does not depend on the existence of other alternatives the agency might have considered. *Chenev*, slip. op. at 15–16.

Random Testing—Non-Constitutional Issues. Issues raised by petitioners concerning the constitutionality or record support for random testing are discussed under "Constitutional Issues" or "Administrative Procedure Act."

AGA stated that mandatory random testing would impose a financial burden on employers, and asserted that RSPA did not conduct an adequate economic evaluation. The AGA indicated that RSPA did not distinguish the costs of testing between its own federal employees (where the costs of drug testing were obtained) and the other industries covered by the rule. In addition, AGA argued that RSPA did not adequately include all of the very significant costs of transporting workers to test sites, travel time for the employee being tested, lost productivity of workers being tested, the costs of maintaining an EAP, or the costs and procedures incurred by the Medical Review Officer. AGA also said that the Technical Pipeline Safety Standards

Committee and the Technical Hazardous Liquid Pipeline Safety Standards Committee voted against random testing and RSPA's published reasons for rejecting the Committees' recommendations were short, cursory, and merely referred to the Department's earlier responses to AGA and other commenters.

El Paso Natural Gas Company (El Paso) questioned whether the 50 percent rate of random testing is justified. El Paso stated that the 50 percent random testing rate was established because it is the rate established by DOT for its own employees and there is no evidence supporting any particular level of testing.

El Paso suggested that DOT revise its regulations to allow the operator to determine the level of testing deemed appropriate for its workforce, with a minimum of no more than 15 percent of the operator's covered employees.

El Paso is also concerned about the requirement to randomly select employees for testing by using a random number table or a computer-based number generator. El Paso's concern is that the random testing prescribed by the RSPA regulation would preclude testing an entire geographic location at one time and the regulations would require that the selected employees must be transported to the collection facility for each random test.

RSPA Response. As discussed in the preamble to the final rule, RSPA believes that unannounced testing based on random selection is an essential component of an effective drug testing program. Unannounced random testing has proven to be an effective deterrent to drug use and will provide safety benefits to the pipeline industry by reducing or eliminating drug use by pipeline personnel. Unannounced random testing programs initiated by the military, including the Coast Guard, and private industry show declining drug use, evidenced by a decrease in the number of individuals who test positive for drugs, over the course of the drug testing program.

Random selection 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 randomly selected numbers against an employee's social security number or payroll account number. With random testing, abstinence is the only alternative to possible detection. Using a true random selection basis, 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 use because an individual selected early in the testing cycle would still be subject to testing throughout the remainder of the year and would still risk detection if he or she used drugs after the first test.

RSPA reiterates that a 50 percent testing rate is necessary to establish a valid confidence level as well as to provide an adequate deterrent to drug use by employees. During the comment period on the proposed rule, RSPA requested specific advice on what the random testing rate should be. Although many commenters suggested rates of 10–20 percent, none provided any data to support a particular level. RSPA, therefore, chose a random testing rate of 50 percent in part based on DOT's experience with its own internal drug testing program, as well as the rates used by the military services. Although the military had used higher rates to achieve the deterrent affect referred to above, RSPA believed that the 50% rate offered a sufficient balance between a rate high enough to deter use while keeping costs reasonable. At this time, petitioners have not presented any information to warrant changing the rate. RSPA committed in the preamble to the final rule to analyzing random drug testing data after the program goes into effect to determine if the random testing program should be revised, including a revision of the random testing rate. RSPA has made one change to the rule to clarify that random testing is to be conducted at a rate equivalent to 50 percent of covered employees. While the preamble to the final rule was clear, the existing rule language, read literally, could have been interpreted to require the actual testing of half the operator's covered employees.

All employees subject to the anti-drug program must be included in the random testing pool. The selection method must ensure that all eligible employees have an equal probability of selection. Operators may randomly select sites and may test either all, or a predetermined percentage, of the eligible employees at the location. If an operator randomly selects a site for testing, the operator has to be very careful that there is no discrimination, for example, either for or against a particular group of employees because of their work schedules (e.g., shift workers or a core office staff that support other employees that are out in the field).

RSPA rejected the recommendations of the Technical Pipeline Safety Standards Committee and the Technical Hazardous Liquid Pipeline Safety Standards Committee that random testing be eliminated. The reasons given by RSPA for rejecting the advice given by these two advisory committees was that RSPA believes that random testing is a critical component of an anti-drug program and that a 50 percent drug testing rate is necessary to establish a valid confidence level as well as to provide a sufficient deterrent to drug use by employees. RSPA further stated that the 50 percent random testing rate will not impose an undue economic or administrative burden on operators and employees.

RSPA believes that the reasons given by RSPA for rejecting the Committees' recommendations were sufficient in light of the detailed and lengthy discussion on random testing set forth earlier in the final rule. The discussion set forth above also reiterates the earlier RSPA position on random testing and all of these arguments are equally applicable to the reasons for rejecting the Committees' recommendations to delete random testing from the anti-drug program. RSPA's commitment in the preamble to the final rule to analyze random drug testing data after the program goes into effect to determine if the random testing program should be revised is equally applicable to responding to the Committees' concerns regarding random drug testing.

Contractor Responsibility. AGA objected that although the final rule permits the operator to contractually require that the contractor implement its own drug program, the operator is still responsible for ensuring that the contractor comply with DOT regulations. According to AGA, this imposed duty to monitor the contractor means that while the operator does not conduct the testing, it must oversee and inspect the operations of another company. AGA argues that given the nature of the pipeline industry's operations and use of contractors and subcontractors without permanent work forces, it is unreasonable to make operators responsible for ensuring that contractors test their employees.

AGA provided an example of a large midwestern distribution operator that employs seven contractors. At any one time, those contractors provide workers equivalent to the operator's permanent workforce so that the operator's responsibility for providing a drug-free environment is doubled. In addition, the contractors typically hire workers from a labor pool and therefore have no

advance knowledge of which workers will be used on a given day. AGA stated that monitoring a drug testing program under those circumstances would be nearly impossible.

PG&E and MidCon made similar arguments regarding contractor employees, stating that including the contractor employees in a drug testing program, a program which their employees must administer, will result in extraordinary expense and operational delays. El Paso also raised this issue and suggested a revision to § 199.21(a) to require that the operator provide by contract that the contractor carry out the provisions of the rule, and provide written documentation of its compliance.

RSPA Response. RSPA noted, in the preamble to the final rule, that pipeline operators who choose to use contractors to perform their safety-related work have always been held responsible for compliance just as if the operator's own employees were performing the work. Furthermore, an operator can require a contractor to implement its own drug program and, as long as the operator is diligent about monitoring the contractor's compliance, the operator should be protected from civil liability. In addition, as noted in the preamble to the final rule, limiting the final rule to certain covered functions should minimize the impact on operators who hire unskilled contract laborers. In the example posed by AGA, it is not clear that those contract employees would be performing covered functions. If they were, however, the operator may insist as part of the contract that the contractor implement a drug program and test the entire pool of available workers. Based on a thorough review of this issue, RSPA believes that contractors must be covered and that operators must be responsible for the work performed by contractors. The performance of contract employees in covered positions is no less critical to safety than the performance of the operator's own employees.

Collective Bargaining. AGA argued that the final rule is in direct conflict with collective bargaining requirements. AGA stated that since DOT concedes that drug testing is a mandatory subject of collective bargaining agreements under section 8(b) of the National Labor Relations Act, the operator may not be able to impose the DOT regulations in their entirety on a unilateral basis. AGA stated that even with a delay in the effective date to allow more time for negotiation, DOT's rigid regulatory criteria will make it difficult for employers to bargain in good faith. AGA recommended, therefore, that operators be granted flexibility in the design and implementation of their drug testing programs.

The United Steelworkers of America, AFL–CIO (USWA) supported the petition for reconsideration filed by AGA. While the USWA did not concur with each of the specific objections of AGA, USWA believes that the AGA petition is an accurate reflection of the problems with the regulation. The specific example cited was with regard to the issue of the need for collective bargaining, since many of the USWA contracts with the gas industry expire in 1990 and 1991. USWA requested that the effective date of the regulations be stayed until all administrative and legal action on these regulations are concluded, and at least until 1991 to revise or adopt collective bargaining contracts.

RSPA Response. RSPA believes that the regulations in Part 199 provide operators sufficient flexibility in the design and implementation of the drug testing programs to be able to bargain in good faith. Drug programs can be tailored to meet the specific requirements of management and labor.

Moreover, the time provided for implementation of these drug regulations offers sufficient time to revise or adopt collective bargaining agreements. RSPA believes that sufficient modifications to existing collective bargaining agreements can be made to permit a transition until 1990 and 1991 when the existing contracts will expire. More importantly, RSPA safety regulations override collective bargaining agreements. The fact that a matter is a mandatory subject of collective bargaining means that the employer cannot unilaterally impose a requirement for testing. However, when a Federal regulation imposes a legal burden on the employer or employee, they must comply.

Medical Review Officer. AGA objected to the Medical Review Officer (MRO) process because they assert that they did not have an opportunity to comment on the need for or responsibilities of an MRO in the NPRM.

AGA believes that the RSPA requirement for an MRO expands the role of the MRO as established in the DHHS Guidelines. AGA also indicated that many operators would have to appoint numerous MRO's at great expense because of the numerous geographic locations of an operator's facilities.

AGA also stated that requirements for the MRO's are written in prescriptive language and urged RSPA to adopt performance language. AGA stated that the requirement that an MRO be a licensed physician is too restrictive and urged RSPA to permit operators to use a qualified person, such as an EAP counselor or industrial nurse, who is knowledgeable about drug abuse. Finally, AGA asked for clarification of whether an individual who fails a pre-employment drug test is subject to the MRO review process.

AGA requested that RSPA clarify whether individuals who are actually hired who: (1) Fall within the pre-employment testing category and (2) also test positive for drug use are included within the lengthy MRO review and interview procedures for "employees" described in § 199.15. AGA noted that RSPA stated in the preamble that "* * * an employer may not hire * * * anyone to perform certain functions until he or she has passed a drug test." Thus, it is unclear to AGA whether an individual described above is an employee for purposes of MRO review. AGA stated that many natural gas operators refuse to hire employment applicants who test positive and these operators should not be burdened with the requirement of providing expensive MRO services to employment applicants who test positive.

MidCon also raised some of the same arguments as AGA, particularly with respect to the cost of MRO's and the need for operators to employ several MRO's due to the numerous and often remote locations of manned facilities. El Paso stated that some of the duties ascribed to the MRO are more appropriately the responsibility of the operator's EAP counselor or Human Resources Officer. El Paso proposes that an EAP counselor should interview an employee about a confirmed positive test and determine the rehabilitation program required in each case, as well as determine when an employee may return to duty. El Paso suggested that, at most, the MRO interpret the results of a confirmed drug test and that all other duties be the responsibility of the operator's EAP counselor, with the exception of scheduling random testing.

RSPA Response. The preamble to the Notice of Proposed Rulemaking (53 FR 25892, July 8, 1988) stated that "testing would be required to be carried out according to the DHHS guidelines. Each operator would be required to make sure that any testing conformed to these guidelines." 53 FR 25898. The proposed rule included a notice that the guidelines were available for inspection and copying at RSPA. Commenters thus had the opportunity to comment on the MRO requirements.

RSPA does not agree that the final rule expanded the role of the MRO as established in the DHHS Guidelines. Section 199.15 conforms to the MRO duties in section 40.33 of the DOT Procedures, which are based on the DHHS Guidelines.

Section 199.15 retains the requirement that the MRO be a licensed physician because it requires a physician's medical training with knowledge of substance abuse disorders to interpret an individual's positive test to determine whether an employee who refused to take or did not pass a drug test may return to duty. This requires the skills of a licensed physician to determine whether there is a legitimate medical explanation, including the use of a legally prescribed medication, for the positive test result of an individual. Other duties of the MRO are to receive the results of all drug tests from the laboratory and verify that the laboratory report and assessment of drug test results are correct. The MRO's function with respect to negative tests is merely to provide an administrative review to be sure that chain of custody requirements have been met. This responsibility of the MRO is important to assure that the MRO is cognizant of all drug tests to determine the reasonableness of the overall drug test results of the operator's personnel. The MRO must report the results of each test to an individual designated by the operator to receive such information.

RSPA does not envision that an operator would need to hire multiple MRO's to serve at various locations. An MRO need not be physically present at a particular location to perform his or her duties. For example, an MRO can confer by telephone with an individual to determine if there is a legitimate explanation for a positive result from the laboratory.

In response to AGA's request for clarification, all testing performed under Part 199 must be performed in accordance with the DOT Procedures to ensure that test results are not misused. This means that if an individual is pre-employment tested, the sample must be collected in accordance with the DOT Procedures, subjected to an initial test at an approved laboratory, and if the initial test is positive, subjected to a confirmatory test using gas chromatography/mass spectrometry. If the sample is then confirmed positive, the result must be reported to the MRO for verification of the positive test result, including giving the individual an opportunity to discuss the test results with him or her. If the MRO then verifies the test as positive, the MRO reports the test result to the operator. The operator then may not hire the applicant for a covered position and may decline, at the operator's sole discretion, to hire the applicant for a non-covered position. It is necessary to have MRO involvement even for preemployment tests because applicants who have legitimate explanations for positive tests should not be deprived of an opportunity for a job.

Finally, § 199.11(e) has also been revised and retitled "Return to duty testing" because of the other deletions involving rehabilitation that are made in this document. Similar to the other deletions regarding rehabilitation, since the final rule does not require the operator to provide an opportunity for rehabilitation, it is inappropriate to base the "return to duty testing" in § 199.11(e) on an employee undergoing rehabilitation. This section has been further revised to include the duty of the MRO to determine whether and when an employee may return to duty. In addition, the definition of "Rehabilitation committee" in § 199.3 is deleted because the requirement to establish such a committee was deleted in the final rule.

Use of Drug Test Results in Arbitration and/or Wrongful Discharge Suits. The final rule limits release of an individual's drug test results to two cases: Upon written consent of the individual, or as part of an accident investigation. AGA requested that DOT create an additional exception in § 199.23(b) that information regarding an employee's drug test results may be used by the operator-employer in its defense in the event of a challenge. It appears to AGA that an employer who disciplines or discharges an employee with a positive drug test result does so at the risk of defending itself in an arbitration and/or wrongful discharge suit without the benefit of such test results. AGA believes that the regulations should allow an operator-employer access and use of those test results to defend itself in the event of such a challenge. AGA believes that the requested exception is consistent with § 40.29(n)(5) of the DOT Procedures. That section provides that a laboratory should have qualified personnel available to testify in an administrative or disciplinary proceeding against an employee when that proceeding is based on positive urinalysis results reported by the laboratory.

RSPA Response. RSPA agrees with AGA that the DOT Procedures contemplate that an employer should be able to use information regarding an individual's drug test results in the event of a challenge. RSPA has not amended its rule, however, because this issue is addressed in the final rule responding to comments on the DOT Procedures (54 FR 49861).

Executive Order 12291 and the Paperwork Reduction Act. INGAA asserted that ignoring burdens such as paperwork, liability for contractors, potential conflict with collective bargaining agreements, and compliance with the DOT Procedures, and by failing to show a need for the final rule, RSPA ran afoul of Executive Order 12291, which requires, inter alia, that:

(a) Administrative decisions shall be based on adequate information concerning the need for and consequences of proposed government action;

(b) Regulatory action shall not be undertaken unless the potential benefits to society for the regulation outweigh the potential costs to society;

(c) Regulatory objectives shall be chosen to maximize the net benefits to society;

(d) Among alternative approaches to any given regulatory objective, the alternative involving the least net cost to society shall be chosen; and

(e) Agencies shall set regulatory priorities with the aim of maximizing the aggregate net benefits to society, taking into account the condition of the particular industries affected by regulations, the condition of the national economy, and other regulatory actions contemplated for the future.

INGAA stated that RSPA failed to determine that there is a need for drug testing in the pipeline industry. Accordingly, RSPA failed to identify any benefit which would outweigh the burdens imposed by the final rule, thus defeating the Presidential policy of "reduc[ing] the burdens of existing and future regulations, increas[ing] agency accountability for regulatory actions * * * and insur[ing] well-reasoned regulations."

INGAA set forth a list of burdens which it believes outweigh the benefits of the anti-drug program. The burdens include: assuming responsibility for testing contractors, contractors' employees and subcontractors; establishing at least one collection site with all necessary personnel, materials, equipment, facilities, and supervision to provide for the collection, security, temporary storage, and shipping of urine specimens to a certified drug testing laboratory; hiring a "collection site person" to collect urine samples; having a supervisor available to the collection site person; providing transportation of urine samples from the collection site to

the laboratory; arranging to have urine samples tested at a certified laboratory; and hiring a "Medical Review Officer," a licensed physician with knowledge of substance abuse, to review laboratory results.

AGA stated that RSPA had not justified the need for the final rule, and did not address the administrative and financial burdens imposed by the final rule, concerning contractor employees, MRO procedures, chain of custody forms, written instructional materials for employees, testing, and permanent records of all tests. AGA also asserted that RSPA had not complied with the Paperwork Reduction Act. AGA noted that RSPA had not obtained the required clearance of the Office of Management and Budget (OMB) when the final rule was published in the **Federal Register.**

AGA also identified as another burden the potential conflicts between the final rule and collective bargaining agreements or other employment contracts.

RSPA Response. RSPA carefully considered all of the burdens raised by AGA and INGAA in developing the final rule. The Final Regulatory Evaluation was based on the costs associated with implementing the DOT drug testing program, a program with widely dispersed geographic specimen collection site locations and took into account all of the associated administrative costs, implementation costs, and paperwork costs of carrying out the anti-drug program.

With regard to the AGA and INGAA concerns regarding the widely dispersed geographic collection site locations, RSPA contacted INGAA, AGA, and the American Petroleum Institute regarding the approximate number of pipeline personnel working in each segment of the industry. From this information, RSPA considered that about two-thirds of pipeline personnel subject to these regulations work for distribution operators, and the other one-third work for transmission operators. In addition, about 85 large distribution operators, which serve over 85 percent of the U.S. gas consumers, are located in metropolitan areas, and most of the transmission operators, both hazardous liquid and natural gas, are headquartered in metropolitan areas. Therefore, RSPA believes that about 85 percent of personnel working for distribution operators and over half of the personnel working for transmission operators are in metropolitan areas and not in widely dispersed geographic locations.

The recordkeeping and reporting requirements of the final anti-drug rule were approved by OMB (OMB No. 2137-0579) in accordance with the Paperwork Reduction Act of 1980.

AGA's issue regarding collective bargaining agreements is discussed under "Collective Bargaining."

Prohibited Drugs. El Paso stated that in addition to the five drugs listed in the final rule it also tests for barbiturates, benzodiazepine, methadone, methaqualone, and opiate derivatives including codeine and heroin. El Paso believes that the five drugs listed in the rule are an appropriate minimum, but because operators may need to tailor their drug screening to the demographics of their workforce, they should be permitted to test for other drugs without being required to seek prior approval from RSPA, and without obtaining a second sample from the employee.

RSPA Response. In accordance with the DOT procedures, RSPA may not grant requests to test for additional drugs unless and until the DHHS has established collection and testing procedures and positive thresholds for the drugs to be added. The DHHS has not established collection and testing procedures applicable to additional drugs, so RSPA cannot provide for the testing of additional drugs at this time. This issue is addressed more fully in the final rule on the DOT Procedures (54 FR 49854). It should be noted that the rule does not prohibit an operator from testing for other drugs if the operator has the independent legal authority to do so and it obtains a second sample.

Miscellaneous Clarifying Changes. Section 199.7 has been changed to clarify that the anti-drug plan must contain procedures for notifying employees of the coverage and provisions of the plan. The discussion in the preamble to the final rule covered this issue but addressing it in the regulations clarifies the requirement.

Section 199.9(b) has been revised to delete references in the rule regarding the requirement for an employee to complete a rehabilitation program before returning to duty. The proposal to require the operator to provide an opportunity for rehabilitation was deleted from the final rule and such rehabilitation is left to the discretion of the operator. This clarifying revision now provides that an employee may return to work after passing a drug test and when the MRO has recommended to the operator that the employee may safely be returned to his or her job.

Economic Assessment

In accordance with the requirements of Executive Order 12291, RSPA reviewed the costs and benefits of the final anti-drug rule published on November 21, 1988. At that time, RSPA prepared a Final Regulatory Evaluation of the final rule. RSPA included that evaluation in the public docket. RSPA also summarized and analyzed the comments submitted by interested persons on the economic issues in the final rulemaking document.

This final rule does not change the basic regulatory structure and requirements promulgated in the final rule and therefore RSPA anticipates little or no costs associated with these minor changes.

Because any potential difference in costs and benefits would be minimal, RSPA has determined that revision of the Final Regulatory Evaluation for the final anti-drug rule is not necessary and preparation of a separate economic analysis is not warranted. This final rule will not result in an annual effect on the economy of $100 million or more and will not result in a significant increase in consumer prices; thus, the final rule is not a major rule pursuant to Executive Order 1229. However, the final anti-drug rule is significant under the Regulatory Policies and Procedures of the Department of Transportation (44 FR 11034; February 26, 1979) because it involves issues of substantial interest to the public.

Regulatory Flexibility Determination

The Regulatory Flexibility Act of 1980 requires a federal agency to review any final rule to assess its impact on small business. RSPA certifies that the amendments contained in this final rule will not have a significant impact on a substantial number of small entities.

Paperwork Reduction Act

The recordkeeping and reporting requirements of the final anti-drug rule published on November 21, 1988, previously were submitted to the Office of Management and Budget (OMB) and approved in accordance with the Paperwork Reduction Act of 1980. Because this final rule does not amend the recordkeeping and reporting requirements, it is not necessary to amend the prior approvals received from OMB.

Federalism Implications

The final rule adopted herein will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, RSPA has determined that this final rule 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.

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

PART 199—DRUG TESTING

0. The authority citation for part 199 continues to read as follows:

Authority: 49 App. U.S.C. 1672, 1674a, 1681, 1804, 1808, 2002, and 2040; 49 CFR 1.53.

§ 199.3 [Amended]

1. In § 199.3, the definition of "Rehabilitation committee" is removed.

2. Section 199.7 is revised as follows:

§ 199.7 Anti-drug plan.

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

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

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

(c) The name and address of the operator's medical review officer; and

(d) Procedures for notifying employees of the coverage and provisions of the plan.

3. Section 199.9 is amended by revising paragraph (b) to read as follows:

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

* * * * *

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

(1) Passed a drug test under DOT Procedures;

(2) Been recommended by the medical review officer for return to duty in accordance with § 199.15(c); and

(3) Not failed a drug test required by this part after returning to duty.

4. Section 199.11 is amended by revising paragraphs (b) through (e) to read as follows:

§ 199.11 Drug tests required.

* * * * *

(b) *Post-accident testing.* As soon as possible but no later than 32 hours after an accident, an operator shall drug test each employee whose performance either contributed to the accident or cannot be completely discounted as a contributing factor to the accident. If an employee is injured, unconscious, or otherwise unable to evidence consent to the drug test, all reasonable steps must be taken to obtain a urine sample. An operator may decide not to test under this paragraph but such a decision must be based on the best information available immediately after the accident that the employee's performance could not have contributed to the accident or that, because of the time between that performance and the accident, it is not likely that a drug test would reveal whether the performance was affected by drug use.

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

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

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

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

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

(e) *Return to duty testing.* An employee who refuses to take or does not pass a drug test may not return to duty until the employee passes a drug test administered under this part and the medical review officer has determined that the employee may return to duty. An employee who returns to duty shall be subject to a reasonable program of follow-up drug testing without prior notice for not more than 60 months after his or her return to duty.

5. Section 199.15 is amended by republishing paragraph (c) introductory text and by revising paragraphs (c)(3), (c)(4), and (c)(5) to read as follows:

§ 199.15 Review of drug testing results.

* * * * *

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

* * * * *

(3) Determine whether and when an employee who refused to take or did not pass a drug test administered under DOT Procedures may be returned to duty.

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

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

* * * * *

Issued in Washington, DC, on December 7, 1989.

Travis P. Dungan,

Administrator, Research and Special Programs Administration.

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