DEPARTMENT OF TRANSPORTATION

Research and Special Programs Administration

49 CFR Part 199

[RSPA Docket No. PS-102]
RIN 2137-AB54

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

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

ACTION: Final rule.

SUMMARY: This final rule sets forth regulations to require operators of pipeline facilities, other than master meter systems, used for the transportation of natural gas or hazardous liquids and operators of liquefied natural gas (LNG) facilities to have an anti-drug program for employees who perform certain sensitive safety-related functions covered by the pipeline safety regulations. Testing under these rules will be conducted prior to employment, after an accident, randomly, and on the basis of reasonable cause. In addition, these regulations require that an operator provide an Employee Assistance Program (EAP) for conducting education and training regarding the effects and consequences of drug use. The rules are intended to ensure a drug-free, and hence safer, pipeline operations environment.

DATES: *Effective Date:* This rule will be effective December 21, 1988.

Operators with more than 50 employees subject to drug testing do not have to begin the drug testing required by this final rule until December 21, 1989, and operators with 50 or fewer such employees do not have to begin to conduct the program until April 23, 1990.

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SUPPLEMENTARY INFORMATION:

Background

On July 8, 1988, RSPA published a Notice of Proposed Rulemaking (NPRM) (53 FR 25892) entitled "Control of Drug Use in Natural Gas, Liquefied Natural Gas and Hazardous Liquid Pipeline Operations." This NPRM proposed to require operators of pipeline facilities (including LNG facilities but excluding master meter systems) used for the transportation of natural gas or hazardous liquids to have an anti-drug program for employees who perform sensitive safety- and security-related functions. The NPRM invited comments from the public on these proposed rules and 73 written comments were received by the end of the comment period on September 6, 1988. These comments are in the public docket and have been reviewed in the development of the final rule.

The RSPA held public hearings on these proposed regulations on August 17, 1988, in Irving, Texas, and on September 6, 1988, in Washington, DC. Twenty-six persons testified at these hearings and the testimony was recorded by a court reporter. The transcripts of the hearings and any statements or other material submitted at the hearings are in the public docket and have been reviewed in the development of the final rule.

The NPRM proposed that this regulation would be included in Part 192, 193, or 195, as appropriate. In response to a few commenters who suggested that drug testing regulations should not be included with those commodity-specific regulations, the RSPA has adopted a new Part 199 specifically for these regulations.

Drug Testing Program Guidelines. In the NPRM for this rule, RSPA proposed that all drug testing take place in accordance with the "Mandatory Guidelines for Federal Drug Testing Programs" of the Department of Health and Human Services (DHHS) (53 FR 11970; April 11, 1988). These guidelines describe the collection and testing procedures applicable to all drug testing in the federal government, and they include safeguards for the accuracy and privacy of testing.

The DOT has determined that certain modifications of the DHHS Guidelines are appropriate in the context of this and other DOT operating administration drug-free workplace regulations. The result is the DOT *Procedures for Transportation Workplace Drug Testing Programs.* These "DOT Procedures" are intended to preserve, to the greatest extent practicable, the important safeguards provided by the DHHS Guidelines.

The Office of the Secretary of the Department of Transportation is publishing elsewhere in today's **Federal Register** an Interim Final Rule and request for comments entitled, *Procedures for Transportation Workplace Drug Testing Programs.* These Procedures, which will be codified in 49 CFR Part 40, are based on Department of Health and Human Services Guidelines for Drug Testing, with appropriate modifications to allow them to apply to private industry and state and local governments. The new 49 CFR Part 40 provides detailed information for implementation of the drug testing requirements of this rule, setting forth requirements for such things as specimen collection procedures, laboratory procedures, and quality assurance.

Some of the modifications to the DHHS Guidelines are editorial in nature (for example, references to responsibilities of "agencies" are changed to references to "employers"). Other modifications are intended to take into account differences in the situations of federal agencies and DOT regulated industries. For example, in testing at remote sites, DOT regulated industries may find it necessary to conduct some kinds of testing in medical facilities or through use of mobile units, rather than the more permanent collection sites contemplated by the DHHS Guidelines. It may not be practicable for regulated parties to maintain on-site permanent log books. Consequently, the DOT Procedures permit alternative collection and recordkeeping procedures in these circumstances.

During the comment period on the NPRM and anti-drug rules proposed by other operating administrations, comments were received concerning the DHHS Guidelines. These comments will be incorporated in the docket for the OST interim final rule creating 49 CFR Part 40. The OST will respond to those comments, as well as comments received during the comment period for Part 40, in its notice following the end of the comment period on the interim rule.

Discussion of Comments

The RSPA received 73 timely comments in response to the NPRM, including five comments from labor unions, five from state and federal government agencies, eight from pipeline industry associations, a few comments from individuals and others, and the remainder from pipeline operators. The majority of the commenters were opposed to one or more aspects of the proposed rule, while some commenters generally supported the proposed rule. The RSPA considered all timely-filed comments submitted in response to the NPRM as well as the testimony of the 26 individuals who presented statements at the two public hearings. Discussion of the comments received on major issues and RSPA's response follows.

Specific Issues

Constitutionality of Mandatory Drug Testing. Many commenters, raising issues related to the Fourth Amendment and right of privacy, question the constitutionality of drug testing programs for pipeline personnel. The majority of commenters who raised the constitutional issues questioned the wisdom of proceeding with a drug rule while cases involving constitutionality of drug testing are pending in the Supreme Court. The commenters specifically noted that, in *Railway Labor Executives' Association v. Burnley*, the Ninth Circuit has ruled that a mandatory drug testing program of railroad employees violated the Fourth Amendment because the program required testing of entire operation crews involved in accidents without requiring the existence of a reasonable and particularized suspicion of drug use or drug-related impairment on the part of those to be tested. The Fifth Circuit took a contrary view in *National Treasury Employees Union v. Von Raab* by holding that drug testing of Customs Service employees seeking transfer to certain sensitive positions is permissible. Both cases are now pending before the United States Supreme Court. Commenters also point to the recent case of *Mark B. Harmon v. Edwin Meese III.* (No. 88–1766 GHR, U.S. District Court for the District of Columbia, decided July 29, 1988). In that case, the United States District Court for the District of Columbia granted the plaintiffs, Department of Justice employees, a preliminary injunction to enjoin the Department from implementing mandatory random drug testing on grounds that the program constituted an unreasonable search and seizure. The Court subsequently made the injunction permanent.

RSPA Response. The RSPA recognizes that there are legitimate and significant constitutional concerns surrounding drug testing in general and random drug testing as a specific component of drug testing. The RSPA acknowledges the current wide-scale litigation and apparent disparate judicial opinions on drug testing programs. Although the state of the case law is still evolving in rapid fashion and the Supreme Court has not resolved many of the relevant and complex issues, the RSPA is confident that testing of employees under this rule will withstand judicial scrutiny on constitutional grounds.

Of particular concern to the commenters was the relevance of the Fourth Amendment to drug testing. The principles of the Fourth Amendment to the U.S. Constitution are paramount in scrutinizing the fundamental legality of many drug testing programs. The Fourth Amendment applies to "searches" conducted or mandated by the government (i.e., "state action") and protects individuals against "unreasonable searches and seizures." Action by a private party does not constitute state or federal action unless there exists a close nexus between the state and the action in question. *See Jackson v. Metropolitan Edison*, 419 U.S. 345 (1974); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972).

Because drug testing programs required under the final rule are imposed by the government, two collateral issues arise concerning whether the proposed urine tests under these programs constitute a search or a seizure and, if so, is the search or seizure unreasonable within the meaning of the Fourth Amendment. Although most courts to address the issue to date have ruled that toxicological testing of employees for the purpose of determining fitness for duty is a search within the meaning of the Fourth Amendment, the issue is not entirely settled. *See Wyman v. James*, 400 U.S. 309, 317–338 (1971) (government welfare caseworker's "home visit" as a precondition for assistance payments is not a Fourth Amendment search). *See also, Lovvorn v. City of Chattanooga*, 846 F.2d 1539, 1553–54 (6th Cir. 1988) (Guy, J., dissenting) *vacated and rehearing en banc granted* (6th Cir. Aug. 3, 1988); *National Treasury Employees Union v. von Raab*, 808 F.2d 1057, 1060, 1062 (5th Cir. 1987) (Higginbotham, J., concurring). *Cf. Mack v. United States, F.B.I.*, 814 F.2d 120, 125 n.2 (2nd Cir. 1987).

Also assuming, *arguendo*, that urine tests of personnel for prohibited substances are "searches" within the meaning of the Fourth Amendment, it is clear that while searches ordinarily must be conducted pursuant to a warrant issued on probable cause grounds, such a requirement is not always necessary. *Almeida-Sanchez v. United States*, 413 U.S. 266, 277 (1973) (Powell, J., concurring). Where, for example, "* * * the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search * * *," the Supreme Court has routinely held that a warrant is not required by the Fourth Amendment (citing *Camera v. Municipal Court*, 387 U.S. 523, 533 (1967). *See e.g., Griffin v. Wisconsin*, 107 S.Ct. 3164, 3167 (1987) (plurality opinion); *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985). The Supreme Court has likewise found that the probable cause standard is inappropriate where it would defeat the purpose that the search is designed to achieve. *See e.g., New Jersey v. T.L.O.*, 469 U.S. at 340–342; *United States v. Martinez-Fuerte*, 428 U.S. 543, 560–561 (1976) (footnotes omitted) (while "* * * some quantum of individualized suspicion is usually a prerequisite to constitutional search or seizure[,] * * * the Fourth Amendment imposes no irreducible requirement of such suspicion").

Rather, "[t]he fundamental command of the Fourth Amendment is that searches and seizures be reasonable * * *." *New Jersey v. T.L.O.*, 469 U.S. at 340. In determining the reasonableness of a search, the Supreme Court has repeatedly stressed the importance of the facts particular to the search while acknowledging that the test of reasonableness "* * * is not capable of precise definition or mechanical application." *Bell v. Wolfish*, 441 U.S. 520, 559 (1979). In analyzing a drug testing program, "* * * what is reasonable depends on the context within which a search takes place." *New Jersey v. T.L.O.*, 469 U.S. at 337.

In scrutinizing whether a particular search comports with the Fourth Amendment, courts have adopted a balancing test. In general, to support a claim that a search of an individual or the individual's property is reasonable, the government must demonstrate that, on balance, the public's legitimate interest in conducting the search outweighs the individual's legitimate expectation or privacy. *See e.g., United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985); *United States v. Villamonte-Marquez*, 462 U.S. 579, 588 (1983); *Delaware v. Prouse*, 440 U.S. 648, 654 (1979). Thus, the courts must "* * * consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." *Bell v. Wolfish*, 441 U.S. at 559.

Viewed in this light, the clear public interest in assuring that certain sensitive safety-related pipeline personnel perform their duties free of prohibited substances provides justification for testing and its limited intrusion on privacy expectations of covered employees. The drug problem in society in general and probability of drug use in the pipeline industry were discussed in the preamble of the NPRM. The impairing effects of drugs and the substantial risks to public safety posed by sensitive safety-related pipeline personnel who use drugs underlies the compelling governmental interest in the promulgation of this rule.

It is important to note that the drug testing requirements of the final rule are limited in scope and involve a minimal intrusion on privacy. As the Supreme Court has indicated, where searches are undertaken in situations where individualized suspicion is lacking, other safeguards must be relied upon to ensure that the discretion of the party conducting the search is properly defined and the scope of the search is limited. *See Delaware v. Prouse,* 440 U.S. at 654–655 (footnote omitted); *New York v. Burger,* 107 S.Ct. 2636 (1987). The drug testing requirements of the final rule place significant constraints on an operator's discretion in conducting drug testing. For example, the requirement for random drug testing calls for selection of an employee to be tested in a scientifically-acceptable manner, such as by use of a computer-based random number generator. Requirements for testing based on reasonable cause or post-accident testing also are severely circumscribed in order to limit an employer's discretion in administering these tests to employees.

The actual testing procedures that each employer is required to implement under this final rule are narrowly tailored to respect an employee's reasonable expectations of privacy. The DOT Procedures governing collection of urine samples are carefully designed to preserve privacy while protecting the integrity of the sample. The final rule contains a number of important employee safeguards, including privacy during collection under most types of tests, stringent laboratory safeguards, and provisions for challenging the test results. Other employee drug testing programs incorporating the collection and testing procedures of the DHHS Guidelines have been upheld against constitutional challenge. *See American Federation of Government Employees v. Dole,* 670 F.Supp. 445 (D.D.C. 1987), *appeal filed,* No. 87–5417 (D.C.Cir. Dec. 11, 1987) (upholding the constitutionality of the Department of Transportation program for random drug testing of safety-sensitive agency employees); *National Association of Air Traffic Specialists v. Dole,* 2 Ind.Emp.Rts. Cases (BNA) 68 (D.Alaska 1987) (denying a motion for a preliminary injunction against the FAA's use of urinalysis drug testing as part of an annual physical examination of the agency's air traffic specialists).

Equally significant is the fact that urine drug testing of sensitive safety-related employees is to be conducted in the "context" of the employment relationship. As the Supreme Court has noted, "[t]he operational realities of the workplace * * * may make *some* employees' expectation of privacy unreasonable." *O'Connor v. Ortega,* 107 S.Ct. 1492 (1987) (emphasis in original). This is particularly important in circumstances where the employee works in an industry in which an employee's activities are subject to extensive regulation. Thus, persons who work in such "closely regulated" industries have a "reduced expectation of privacy" [*New York v. Burger,* 107 S.Ct. 2636 (1987)] and, "in effect consent[] to the restrictions placed upon them" [*Almeida-Sanchez v. United States,* 413 U.S. at 271]. For these reasons, two federal courts of appeals have upheld urinalysis testing, in the absence of particularized suspicion, in industries where pervasive regulation has reduced an employee's expectation of privacy. *See Rushton v. Nebraska Public Power Dist.,* 844 F.2d 562, 566 (8th Cir. 1988) (nuclear plant operators); *Shoemaker v. Handel,* 795 F.2d 1136, 1142 (3rd Cir.), *cert. denied,* 479 U.S. 986 (1986) (jockeys); *Policemen's Benevolent Ass'n, Local 318 v. Township of Washington,* 850 F.2d 133 (3rd Cir. 1988) (police officers).

The RSPA recognizes that a number of federal and state courts have rejected government-mandated drug testing programs on Fourth Amendment grounds. However, even courts striking drug testing programs have recognized that drug testing is appropriate in other contexts. *See e.g., Lovvorn v. City of Chattanooga,* 846 F.2d 1539, 1553–54 (6th Cir. 1988) (Martin, J.), *vacated and rehearing en banc granted* (6th Cir., August 3, 1988) ("When determining, then whether a mandatory drug search is 'reasonable,' we believe that, as the costs to society of an impaired employee increase, the requisite level of suspicion that a drug problem exists decreases."); *Policemen's Benevolent Ass'n, Local 318 v. Township of Washington,* 672 F.Supp. 779, 792 (D.N.J. 1987), rev'd 850 F.2d 133 (3rd Cir., 1988) ([T]he need to prevent a major airline disaster presents a far more compelling rationale than those presented [by the municipality in support of testing its police officers.]"); *American Federation of Government Employees v. Meese,* No. C–88–1419–SAW (N.D.Cal. June 17, 1988) (issuing a preliminary injunction against a Bureau of Prison plan to test randomly all agency employees but nonetheless noting that "[t]here are cases in which compulsory drug testing may be justified in the interest of public safety or security." Memorandum opinion at 2).

The RSPA also is aware of the recent Ninth Circuit decision that held that the Federal Railroad Administration's mandatory blood and urine tests after certain accidents, incidents, or rule violations are unconstitutional because the rules do not require a showing of "particularized suspicion" of drug or alcohol impairment prior to testing. *Railway Labor Executives' Association v. Burnley,* 839 F.2d 575 (9th Cir. 1988), *cert. granted,* 108 S.Ct. 2033 (1988). The Supreme Court has granted a government petition for *writ of certiorari* in this case and has ordered that the case be argued this term "in tandem" with *National Treasury Employees Union v. von Raab,* 816 F.2d 170 (5th Cir. 1987), *cert. granted,* 108 S.Ct. 1072 (1988) (upholding drug testing of applicants for critical safety or security sensitive positions in the U.S. Customs Service). Decisions in these cases may not be forthcoming until the Spring of 1989. Numerous commenters urge that RSPA should delay a decision on a final drug rule until these cases are resolved. The RSPA disagrees.

Although currently not resolved, the RSPA believes that RSPA's anti-drug program and similar drug testing regimens proposed by other administrations within the Department will be ruled constitutional. The critical public safety need for properly administered drug testing to ensure that employees in the transportation industry are free from drugs while performing certain sensitive safety-related functions outweighs the practical considerations which would delay rulemaking so that it could be tailored to any guidance that may be offered by the Supreme Court when the pending cases are ultimately decided. Such a decision would unnecessarily delay the adoption of this important safety rule well beyond that needed to allow reasonable time for implementation. Furthermore, partly in response to the comments that urge delay pending the Supreme Court decisions, RSPA has adjusted the implementation dates provided in this rule. This delayed implementation of the rule will ensure that it can be implemented as soon as practical and will allow time to amend the rule in the unlikely event the Supreme Court provides guidance that makes that necessary or appropriate.

Need for Pipeline Anti-Drug Program. Many commenters who oppose drug testing in general, and random testing in particular, and even commenters who support the comprehensive drug testing proposals, expressed the belief that there is not sufficient evidence of a drug problem in the pipeline industry to warrant mandated drug testing requirements. Many commenters indicated that the proposed rule did not

discuss or recognize the exemplary safety record in the pipeline industry. They also said that neither the pipeline industry nor the RSPA could show any pipeline accident that could be attributable to an employee that had been impaired due to the use of drugs. Many commenters further note that most pipeline accidents are caused by third party excavators over which the pipeline operators have little control.

The American Gas Association (AGA) also pointed out that pipelines are unique forms of transportation which do not carry people, unlike other forms of transportation regulated by DOT. Therefore, there are no passengers that depend upon the physical condition of the pipeline for their safety. Pipeline employees usually work in groups or teams, which make it less likely for an impaired worker to endanger the public. The AGA further argued that pipelines also have built-in safety features that would preclude a drug-impaired employee from causing an accident.

Comments from the Ohio Gas Association state that the presence of drugs in a person is an inadequate gauge of a person's present impairment and a person's performance on complex tasks does not necessarily suffer when under the influence of drugs. That Association cites one study that examined how well 12 daily users of an opiate could perform complex tasks. The results showed that the regular drug users performed as well as a nonuser control group.

The American Petroleum Institute (API) said it believed that any regulatory requirement, regardless of its worthwhile intentions, must demonstrate both a need and a solution that bears a positive relationship between costs and benefits. The API further asserts that a thorough assessment resulting in a demonstrated and compelling need must precede any broad and costly regulatory remedy for such a problem and they recommend that DOT undertake such a study.

The Service Employees International Union (SEIU) representing 10,000 members employed in the gas industry, primarily in gas distribution, is opposed to random and universal drug testing stating that the presence of drugs in a person's system does not indicate impairment on the job. The SEIU says that often tests detect the use of drugs in the past or during off-duty hours, and they object to the control of a worker's actions beyond the time the employee is at work.

On these bases, the commenters assert that the RSPA cannot justify the comprehensive proposals contained in the NPRM. Many of these commenters maintain that the industry should police itself in the area of drug use and abuse.

RSPA Response. RSPA does recognize the excellent safety record of the hazardous liquid and natural gas pipeline industry. However, as stated in the NPRM, RSPA also has in the record evidence of a serious drug problem in our society generally. In fact, one in five Americans used drugs in the last year and one in ten in the last month. RSPA also believes that this societal problem may extend into the pipeline workplace. While many commenters do not believe there is a problem in their industry, no commenter presented any statistically reliable data to prove there is not a drug problem similar to the societal problems. In fact, the reason that neither RSPA nor the commenters have such data is because very little testing has been done.

On the other hand, the large majority of commenters, even those opposing the rule, agree that a drug-impaired employee should not be performing a safety-related function on a pipeline. In fact, the majority of pipeline companies commenting on the rule stated that they had implemented anti-drug programs which generally included pre-employment, post-accident, and reasonable cause testing. The RSPA believes that the safety positions on a pipeline should not be performed by those impaired by drugs and that this rulemaking action to deter drug use is warranted and will promote safety.

The RSPA does not adopt safety regulations only after an "accident" occurs. A safety regulatory agency must anticipate potential problems and act in a rational, reasonable, and practicable way to prevent "accidents" from occurring.

Although pipelines do not transport passengers, this is not a critical determinant in deciding whether an anti-drug abuse rule is needed. Many, if not most, of the transportation employees who are or are proposed to be covered in other of the Department's anti-drug abuse programs are involved in freight rather than passenger transportation. Drug-using transportation employees can endanger not just passengers but other members of the public as well. Pipelines criss-cross the nation with transmission pipeline systems and there are extensive natural gas distribution systems located in the heart of most populated areas. Release of the hazardous commodities transported by these pipelines can endanger both pipeline employees and any member of the public who may happen to live, work, attend school near, or simply pass by the pipeline. Risk is even greater for people living near LNG storage facilities where the sudden release of a large volume of LNG can engulf surrounding areas with a flammable vapor cloud and create the potential for conflagration.

The RSPA also rejects claims that the degree of supervision afforded pipeline employees, the fact that they work in groups, and the existence of numerous built-in safety features on pipelines, renders an anti-drug abuse program unnecessary. In this regard, pipelines are not unlike many other transportation industries. For example, train operators are heavily supervised and work in teams, operating trains which are frequently equipped with safety devices that check the performance of the train operator. Yet in the January 4, 1987, Chase, Maryland, train accident, a Conrail movement passed an absolute restrictive signal and went through a switch into the path of a high-speed Amtrak train. Sixteen persons were killed and 174 were injured. The engineer and conductor of the Conrail train later admitted smoking marijuana in the cab just prior to the collision. The built-in safety devices had been tampered with.

As further example, the nuclear industry is much more extensively supervised with substantial built-in safety devices. Anti-drug programs have been recognized as appropriate under these conditions because of the grave risk to public safety. *Rushton v. Nebraska Public Power Dist.*, cited above. No amount of supervision or peer observation in the pipeline industry will assure that a drug abusing employee does not report for duty with drug use undetected and no built-in safety device is truly fail-safe.

Many reports, some referenced in the NPRM, clearly illustrate that the use of drugs impair employees' performance in the workplace. The effects of drugs have been documented in numerous studies and the RSPA is not persuaded by the few studies, mentioned by some commenters, that drugs do not affect the performance of employees and the safety of the workplace.

Accuracy of Drug Test Results. A few commenters base their opposition to drug testing on the perceived inaccuracy of analysis and test results. The commenters include the issues of false-positive test results, passive inhalation of illicit drugs, and misidentification of licit drugs resulting in a positive drug test result.

The Steelworkers' comments included the testimony of Mr. Lawrence Miike of the Office of Technology Assessment that he gave on April 9, 1987, before the Senate Committee on the Judiciary. That

testimony details the pitfalls and costs of extensive drug testing procedures and methodology where the population tested is small.

RSPA Response: The RSPA is aware of these expressed concerns because each of these issues surfaced in the early 1980's with the first series of drug testing programs introduced in the military and the private sector. In the early years of drug testing and analysis, laboratory security and analytical procedures had not reached today's level of sophistication. False-positive test results occur primarily during analysis of a specimen during an initial screening test, although contemporary screening tests, such as immunoassay tests, have become extremely accurate and approach 99 percent accuracy levels. Despite its accuracy, the initial screening test remains a less expensive test used only to yield a preliminary indication of the possible presence of drugs or drug metabolites. In order to ensure the integrity and accuracy of any final test result, each positive initial screening test result must be confirmed using the gas chromatography/mass spectrometry (GC/MS) test as approved by DHHS. The GC/MS confirmation test is an extremely accurate and sophisticated test and is virtually error-free when used in compliance with the DOT Procedures.

Operators must comply with the DOT Procedures when conducting a testing program pursuant to these rules. The DOT Procedures provide a system of checks and balances during collection and analysis of specimens to ensure the integrity and accuracy of the tests using appropriate scientific methods and rigid chain-of-custody procedures. An operator may only use a laboratory that has been certified by DHHS to process and analyze specimens. Since the mid-1980's, laboratories have become increasingly sophisticated in their analytical methods and chain-of-custody procedures. Many laboratories have compiled extensive records demonstrating scientific accuracy and protection of individual specimens.

For example, since 1980, one major drug testing laboratory has analyzed over 500,000 urine samples, conducting discrete testing for nine different drugs which resulted in nearly five million distinct analyses of these specimens. The company also has analyzed approximately 750,000 urine samples for the presence of two different drugs, resulting in nearly 1.5 million analyses of these specimens, pursuant to its contract with the military. None of the over six million analyses performed for DOT, the military, and other private and public entities has resulted in a false-positive test result.

The RSPA does not believe that the issue of "passive inhalation" of marijuana smoke will prove to be a significant issue leading to false-positive test results. First, the threshold levels at which a drug test would yield a positive result for the presence of marijuana or marijuana metabolites are set at a level sufficiently high to preclude the possibility that such result was based on passive inhalation of marijuana smoke. Second, studies conducted to simulate the conditions that result in passive inhalation have been conducted in artificially-devised and extremely confining areas that were poorly ventilated. Also, in order to obtain a positive test result, testing was conducted immediately after this prolonged and intensive exposure to the marijuana smoke. It is unlikely that the identical circumstances would be encountered or accurately reproduced outside a laboratory.

Finally, the RSPA believes that the safeguards that will be provided in the DOT Procedures and by the medical review officer (MRO) review process will preclude misidentification of food substances or licit drugs that might produce a false-positive test result. The DOT Procedures provide an individual with an opportunity to report any legal or prescription drugs that he or she may be taking at the time of collection of the specimen. The MRO's broad authority to interpret each confirmed positive test result, to evaluate and interview an employee, based on the MRO's knowledge of drug abuse disorders, and to verify that a confirmed positive test result is accurate should preclude misidentification of licit drugs taken in accordance with a valid prescription or food substances. In summary, the RSPA believes that the two-step testing process, coupled with the DOT Procedures and the MRO procedures, provides a process by which an individual is protected from erroneous false-positive drug test results.

Employees Who Must be Tested. Many commenters requested that RSPA broadly identify employees to be tested. They argued that RSPA should not attempt to define each sensitive safety- and security-related function by job category. Some commenters stated that operators should include in their Operations and Maintenance (O&M) Plans a list of job classifications they consider to be sensitive safety- and security-related positions.

A smaller number of commenters were concerned that the term "sensitive safety- and security-related functions" would be subject to varying interpretation by different operators. Those commenters thought that operator decisions on the types and degree of sensitive safety- and security-related functions represented by an individual's job responsibility would be arbitrary and would subject an operator to significant potential liability from employee suits. A few commenters pointed out that more specificity was needed to preclude a court challenge based on state statutes that limit random testing to very specifically identified positions or functions. A few commenters thought all employees of pipeline operators should be tested.

Practically all commenters objected strongly to including employees of contractors in the drug testing program. Some of the commenters based their objections to testing contractor employees on the transient nature of many unskilled contractor employees. Most commenters pointed out that it would be extremely difficult to assure that contractor employees had been drug tested. Transok, Inc., states that because several months pass between jobs conducted by contractors, operators would need to test these contractor employees every time that they were called in for a job.

RSPA Response. Those "sensitive safety- and security-related functions" that were proposed for testing in the NPRM have been more narrowly identified in the definition of "employee" in the final rule. An "employee" has been defined to mean a person who performs duties for an operator in the following three functional areas regulated by Part 192, 193, or 195—operation, maintenance, or emergency-response. This narrower definition of "employee" applies only to persons performing functions directly related to the pipeline safety regulations. This does not include clerical, truck driving, accounting, or any other functions not subject to Part 192, 193, or 195. These regulations do not apply to employees who perform design or construction functions regulated by Part 192, 193, or 195. The RSPA believes that the design function is subject to many varying levels of review and the employees performing those functions need not be tested. The RSPA also believes that it is not necessary to apply these regulations to employees that perform construction functions. Because the pipeline is pressure tested for strength or leakage upon completion of construction, the RSPA believes that the pressure test will ensure detection of any construction defects that may have

been caused by drug impaired employees.

Security-related functions are not covered by the final rule because functions performed by security personnel do not directly impact on the safe operation of the pipeline systems. Instead, security personnel provide secondary security protection from outside parties (primary protection being provided by fences, alarms, lighting, etc.). Given the indirect nature of this potential impact on safety, we have decided not to include such personnel within the anti-drug abuse program at this time. We do, however, encourage operators to voluntarily include such personnel in their programs.

The "employee" definition includes contractors and contractor workers. Although these persons may not be under the direct control of operators, their job performance is no less critical than the performance of employees who are employed directly for operators. Pipeline operators who choose to use contractors to perform their safety-related work have always been held responsible for compliance with safety regulations just as if the operator's own employees were performing the work. A decision to use a contractor rather than one's own employees should not result in a level of safety lower than intended.

However, two aspects of the final rule should assist operators in compliance when they use contractors: First, operators may require contractors to implement their own drug programs instead of including contractor employees in the operator's own program. So long as the operator is diligent about monitoring the contractor's compliance with such a requirement, the "knowingly" requirement should protect an operator from unfair liability. Second, limiting the employees covered by the drug rule to those who perform regulated operation, maintenance, or emergency-response functions, including welding, radiography and corrosion control on existing pipelines, should minimize the effects of the rule on operators who employ or contract for unskilled transient labor.

Pre-employment Testing. Most of the commenters who addressed pre-employment testing agreed with its use and many stated that they were already conducting pre-employment testing. However, some interpreted the proposal to be broader than intended and thus to apply to all job applicants. It was recommended that pre-employment testing be limited to otherwise successful applicants. A few commenters said that pre-employment drug testing was easily administered because such testing could be conducted as part of the medical examination that is required by most operators for new employees.

RSPA Response. The RSPA believes that pre-employment testing is a necessary component of an effective anti-drug program. Pursuant to the rule, a pre-employment drug test is required only when an applicant has been selected for employment to perform certain regulated functions. In order to clarify the applicability of this requirement, the RSPA has revised the proposed rule. Therefore, the pre-employment testing provision does not require an operator to test each applicant for a position. The rule simply states that an employer may not hire or use anyone to perform certain functions until he or she has passed a drug test. Therefore, the employer need only test a prospective employee who the operator intends to hire and use for a position subject to drug testing. The proposal that operators would be required to notify applicants that pre-employment drug testing would be conducted has been dropped from the final rule because such a notice is not necessary to accomplish the intent of the operator's drug program. The RSPA believes that such notice should be left to the operator's discretion.

The RSPA believes that the frequency of pre-employment testing is mitigated by the continuity of an employee's involvement in a drug testing program under these new regulations in Part 199. So long as an employee is currently subject to an operator's RSPA-required anti-drug program, another operator may use that employee to perform certain functions. If an individual is not currently subject to an operator's or contractor's RSPA-required anti-drug program, whether by termination of a previous contract or previous employment, an operator would be required to conduct a pre-employment drug test before using that individual in a position subject to drug testing.

Under the amendment, it would be permissible for an operator to allow a contractor or contractor's employee to continue in the operator's anti-drug program after termination of a contract. Similarly, a contractor may choose to run its own anti-drug program in conformity with Part 199 requirements to maintain continuity. Particularly in the case of an operator who engages employees pursuant to a series of short-term contracts, both the operator and the employee benefit if the employee is continuously subject to a Part 199 anti-drug program. The operator could "rehire" the employee at any time but would not be required to give the employee another pre-employment drug test. In addition, the employee could provide functions for another operator on a temporary basis but would not be required to participate in the other operator's anti-drug program or to submit to another pre-employment drug test.

Random Testing. A majority of commenters strongly oppose random testing for a variety of reasons. Among these reasons are the lack of evidence of drug use or abuse in the pipeline industry, invasion of individual privacy, violation of constitutionally-protected rights, and the high costs of conducting such testing. Many commenters said that such a testing program would be disruptive of the normal business activities of pipeline operators and would have a detrimental effect upon worker morale. This would result in unnecessary administrative and financial burdens.

The RSPA received many comments regarding the proposed random testing rates. However, of those commenters endorsing random testing, most suggested that a random testing rate of 10 percent to 20 percent is sufficient to deter drug use in the pipeline industry.

Some commenters argued that if the RSPA proceeds in the promulgation of a final rule, the random testing of employees should be delayed until the Supreme Court issues a decision on this issue. Some commenters also indicated that requirements to randomly test employees for the presence of drugs violated state statutes (Ohio and Vermont were among the states mentioned).

The United Steelworkers of America (Steelworkers) oppose government imposition of mandatory drug testing. The Steelworkers stated that while the public supports mandatory drug tests, as cited by the NPRM, that does not mean the public supports random tests.

RSPA Response. The comments opposing random testing on the basis of the constitutionality of and need for the rule have been discussed previously. The costs are discussed below in the Economic Analysis section. The RSPA believes that unannounced testing based on random selection is a fundamental component of an effective drug testing program. Unannounced random testing has proven to be an effective deterrent to drug use and will provide safety benefits to the pipeline industry by reducing or eliminating drug use by pipeline personnel. Unannounced random testing programs initiated by the military, including the Coast Guard, and private industry show declining drug

use, evidenced by a decrease in the number of individuals who test positive for drugs, over the course of the drug testing program.

The NPRM proposed a testing rate of up to 125 percent. No commenters provided any data to support a particular level of testing. The RSPA believes that a 50 percent testing rate is sufficient and necessary to establish a valid confidence level as well as to provide an adequate deterrent to drug use by employees. At the same time, this rate should avoid the imposition of an undue economic or administrative burden on employers and employees subject to the requiremens of the regulation. In addition, the 50 percent random testing rate will produce a sufficient data base for the RSPA to analyze the scope of any drug problem in the pipeline industry generally or within any particular sector of the pipeline industry. Analysis of the random drug testing data will allow the RSPA to determine if the random testing program should be revised, including a revision of the random testing rate.

The 50 percent random testing rate is consistent with the random testing program currently applicable to sensitive safety-related employees of DOT. The DOT random testing program began in September 1987 and the random testing rate has gradually increased and will reach a level of 50 percent by the end of this year.

According to the provisions of the final rule, all operators are required to randomly select a sufficient number of employees to enable the operator to conduct unannounced testing of 50 percent of employees, who perform the applicable sensitive safety-related duties for the operator, during a calendar year. In order to test 50 percent of the employees who perform such functions, an operator may be required to select in excess of 50 percent of the employees who perform these functions for unannounced tesing. Selection of a greater number of employees enables the operator to reach a 50 percent testing level despite absences due to vacations and medical leave or an inability to reach a collection site due to travel or duty requirements.

For some operators, particularly those with a large number of employees subject to drug testing, it may be a substantial burden to move from no drug testing directly to a 50 percent random testing rate. If required to have tested 50 percent of all covered employees by the end of the first year, operators might have to test at rates far above a 50 percent rate toward the end of the year, to make up for lower rates at the beginning. Operators should be permitted to start out at a lower testing rate and work up to 50 percent as experience is gained and the testing procedure becomes administratively more routine. The RSPA does not want to create a situation which might lead to mistakes by requiring initial testing at too high a rate.

The final rule, therefore, provides an implementation procedure that allows operators to phase in random drug testing during the first 12 months in which tests are conducted. Operators would not be required to reach an annualized rate of 50 percent until the last test collection. The tests would have to be spaced reasonably through the 12-month period to permit the operator to phase in to the 50 percent rate, and the total number of tests conducted would have to be equal to at least 25 percent of the covered population.

Suppose, for example, that an employer has 1,000 sensitive safety-related employees. At a 50 percent annual rate, 500 tests would have to be conducted during each 12-month period. During the phase-in period, however, the operator could conduct only a few drug tests at the beginning of the program and then gradually increase the number of tests until, by the end of the first 12 months, the annualized rate of 50 percent was achieved. Thus, during the phase-in if the operator's anti-drug plan calls for administering random tests on 12 occasions, the operator would need to administer at least 42 tests (500 divided by 12) on the last testing occasion, but could administer fewer tests on earlier occasions. Overall, the operator would have to conduct at least 250 random tests during the phase-in period. In subsequent 12-month periods, the 50 percent rate would be maintained.

Post-accident Testing. Many industry commenters stated that their drug programs provided for conducting post-accident testing and were generally supportive of this part of the proposed regulation. However, industry commenters suggested that such testing should be limited to accidents that reasonably could have resulted from performance by an employee who was drug impaired. The commenters argued that the proposed rule to test employees whose performance is directly related to an accident was overly broad.

The National Transportation Safety Board (NTSB) recommended that a time limit of 4 hours be set for the collection of test specimens because a longer delay seriously limits the ability of tests to detect the parent drug or its psychoactive components in the blood. The NTSB further commented that toxicological samples collected even after 4 hours may provide useful information and therefore samples should be collected even if the 4-hour period has expired. The NTSB also recommended that collection of blood specimens be required in all post-accident testing.

Some commenters objected to post-accident testing as a separate category and suggested that an accident should be one factor in deciding to conduct a "for cause" test.

RSPA Response. The RSPA agrees with the commenters who recommended limiting post-accident testing and has limited such testing to employees whose performance either contributed to an accident or cannot be completely discounted as a contributing factor to the accident. An exception is also provided when an employee's performance (e.g., maintenance) may have contributed to an accident, but whose performance occurred so far in advance of the accident that drug testing would not be useful in detecting drug use at the time of performance. This limitation in the final rule will ensure that testing is conducted only when the employee's performance may be causally linked to the accident and should allay the concerns of some commenters that a great number of employees would be subject to post-accident testing.

The final rule requires that post-accident testing be conducted as soon as possible but no later than 32 hours after an accident. This will ensure that such testing is not delayed and that the testing be conducted with dispatch. The RSPA strongly encourages employers to promptly determine if an employee is subject to post-accident testing, particularly in cases where there is little or no uncertainty that an employee's performance was a contributing factor in the accident. The RSPA intends to vigorously enforce the regulation where there is unreasonable delay in determining whether an employee should be tested under this provision or where there is unreasonable delay in testing after the determination to test is made.

The NTSB's suggestion that the RSPA require an employer to conduct post-accident testing within 4 hours after an accident is based on the time-sensitive nature of toxicological testing of blood samples. On the other hand, urinalysis testing does not involve the extreme time-critical considerations associated with collection and testing of blood samples. The RSPA believes that post-accident urinalysis testing is sufficient at this time to demonstrate an individual's drug use, evidenced by the

presence of a drug or a drug metabolite in the individual's system. Also, the RSPA proposed only urine testing in the NPRM, specifically excluding blood testing as an option, for all drug tests that would be conducted under the anti-drug program. Further, as noted in the NPRM, the blood test method of checking for the presence of drugs is considered to be a more invasive procedure. Therefore, the RSPA considers NTSB's suggestion to be beyond the scope of the notice and the RSPA has not adopted NTSB's suggestion to require post-accident testing by collecting a blood sample.

Reasonable Cause Testing. The commenters generally supported the concept of testing of an employee based on reasonable cause. However, they recommended that testing be based on reasonable suspicion of drug use, rather than on reasonable cause because the reasonable cause standard is a more restrictive standard. The commenters stated that adopting a "reasonable suspicion standard" rather than a "reasonable cause standard" would reduce the weight of evidence needed to support and invoke that standard and thus increase the frequency of such tests.

Many commenters also thought that the proposal that at least two of the employee's supervisors substantiate and concur in the determination that reasonable cause exists to test an employee is too restrictive. While having two supervisors concur that an employee's behavior warrants drug testing might be desirable in light of the subjectivity of reasonable cause testing, the commenters thought it would not be practical in all circumstances. The particular location of the job site or the time of day might make it impractical for two supervisors to concur, since many job sites may only have one supervisor and the next level of management may be many miles away. The commenters wanted operators to be given flexibility in determining whether reasonable cause exists. The NTSB questions the requirement for two supervisors to concur in the determination that "reasonable cause" exists and recommended that RSPA modify this requirement to require that one supervisor can call for reasonable cause testing, but with appropriate supervisory oversight to discourage abuse.

RSPA Response. The RSPA has not revised the regulation to be based on reasonable suspicion, because there does not appear to be a clear distinction between reasonable cause and reasonable suspicion. Also, reasonable cause is the basis for testing adopted by other DOT agencies in their anti-drug rules. The RSPA is not persuaded that only one supervisor should determine reasonable cause because the seriousness of such a subjective determination should require the concurrence of two persons. The rule requires that at least two of the employee's supervisors, one of whom is trained in detection of possible symptoms of drug use, shall substantiate and concur in the decision to test an employee who is believed to be using a prohibited drug. The decision to test must be based on a reasonable and articulable belief that the employee is using a prohibited drug on the basis of specific, contemporaneous physical, behavioral, or performance indicators of probable drug use. The rule does not require that two supervisors observe the behavior of a suspected employee. The rule merely requires the concurence of two supervisors. The RSPA believes that such concurrence between two supervisors can be accomplished by phone, by discussions a few hours later, or by having another supervisor travel to the job site, if only one supervisor is available at that particular job site.

An exception has been made for small operators having 50 or fewer employees subject to the drug testing program because sometimes these operators do not have two supervisors for every employee. For these operators, the substantiation of one supervisor is sufficient to require that an employee be tested for drugs, provided that supervisor has received training as required.

The RSPA has written the description of circumstances that might trigger testing under this provision in performance-type language. In addition to the broad criteria listed in the rule, evidence of repeated errors on the job, regulatory or company rule violations, or unsatisfactory time and attendance patterns, if coupled with a specific, contemporaneous event that indicates probable drug use, could provide additional, cumulative evidence to support a decision to test an employee based on reasonable cause.

Retesting. The final rule requires that confirmed-positive samples be retained for at least 365 days. The rule also creates a right to have the original sample retested if the employee makes a written request within 60 days of receipt of a final test result from the MRO. The employee may designate retesting by the original laboratory or another DHHS certified laboratory. The operator may require the employee to pay the cost of re-analysis in advance, subject to reimbursement if the retest is negative.

Employee Assistance Programs

Rehabilitation. The RSPA sought comment in the NPRM regarding four different EAP rehabilitation options. These options specified the circumstances under which an employee would be given the opportunity to seek rehabilitation. Option 1 would allow all employees to seek an opportunity for rehabilitation regardless of how the employee's drug use was detected. Option 2 would allow employees, except those employees whose drug use was detected as a result of post-accident testing or testing based on reasonable cause, to seek an opportunity for rehabilitation. Option 3 would only allow employees who volunteer to seek rehabilitation and would exclude all employees whose drug use was detected by any other means. Option 4 would permit each operator to determine its policy concerning whether rehabilitation would be offered.

Most commenters indicated that rehabilitation of employees should be left to the operator's determination because federal regulations should not interfere in the management-labor relationship. Most commenters also said that drug rehabilitation was part of union collective bargaining agreements and those issues should not be subject to federal regulations. Some commenters pointed out the significant problems faced by small operators if a position would have to be held open while the employee was rehabilitated. Most labor unions supported Option 1. Most pipeline operators supported Option 4. The NTSB supported Option 3 because the Board believed that employers should be required to remove from service all those employees in safety-sensitive positions when testing confirms drug use.

RSPA Response. RSPA agrees that rehabilitation is a labor-management decision and is not directly relevant to the safe operation and maintenance of the pipeline. Further, there are significant problems in applying rehabilitation regulations to all segments of the pipeline industry. Therefore, an EAP rehabilitation program is not mandated by these regulations. Nonetheless, the RSPA hopes that pipeline operators will provide rehabilitative assistance to the employee, especially those employees with long and significant service, by providing those employees an opportunity to be rehabilitated. With respect to NTSB's comment, the final rule prohibits an operator from using an employee in certain sensitive safety-related functions when drug use has

been confirmed, unless that individual has successfully completed a rehabilitation program.

Education and Training. Most commenters supported the EAP education and training program. Some commenters, however, thought that the type and length of EAP training should be left to the discretion of the operator.

RSPA Response. The education and training proposal in the NPRM has been adopted in the final rule. In response to a few commenters, some minor editorial changes were made to these requirements to distinguish the difference in these two facets of the drug program. The final rule permits an operator to develop and provide education and training as part of an internal program or to contract for these services. Operators may determine the extent of employee training. The 60 minutes of training proposed in the NPRM as a minimum for both employees and supervisors has been limited in the final rule to 60 minutes for supervisory personnel who will determine whether an employee must be drug tested based on reasonable cause. The RSPA believes that operators will not have difficulty in developing education and training programs for employees and supervisory personnel because of the many EAP's that are already being conducted by pipeline operators throughout the country.

Post-rehabilitation Testing. Some commenters stated that the RSPA should not specify the number of post-rehabilitation tests that should be conducted. The commenters recommended that post-rehabilitation testing should be left to the discretion of rehabilitation and medical personnel after taking into consideration the particular circumstances of each case.

RSPA Response. The RSPA has included a provision regarding unannounced testing after an employee's return to duty. This section requires an operator to subject an employee who has returned to duty following rehabilitation to a reasonable program of follow-up drug testing for not more than 60 months after the employee's return to duty. The RSPA believes that this program is required as a minimum to ensure that rehabilitation has been successful.

Confidentiality. Most commenters stated that drug test results should remain a confidential matter between the employer and the employee, as should any rehabilitation information. Several commenters stated that even employers should not have access to test results that would identify employees, but that such information should be available only to medical and EAP personnel. Commenters were concerned that disclosure to anyone other than the employer, without the consent of the individual, could expose the employer to liability, including defamation and slander suits. Several commenters noted that disclosure would violate state privacy laws and compromise legitimate privacy interests of individuals. Most commenters objected to providing test results to prospective or future employers, and several suggested that test results should be destroyed if an applicant was not hired. Commenters differed on whether RSPA or state pipeline safety agencies should have access to records kept on testing and rehabilitation. Most commenters opposed access to records but stated that they would not object to release of general information in the form of statistics. These commenters stated that statistical information, such as the number of persons tested and the number testing positive for certain drugs, could be released to RSPA or state pipeline safety agencies.

RSPA Response. The RSPA Has decided that the legitimate individual privacy rights of an individual warrant strict limitations on the availability of drug testing results and rehabilitation information. With one exception, the final rule provides that, other than in statistical form, an individual's drug test results and information about an individual's rehabilitation program may be released only with the written consent of the individual. The exception is that individual information must be released upon request by RSPA or an appropriate state pipeline safety agency as part of an accident investigation.

Preemption of State and Local Laws. Many commenters stated that state and local laws, especially those prohibiting or limiting an employer's ability to conduct random drug testing of its employees, could conflict with this rule. Several of these commenters recommended that RSPA include a regulatory provision that explicitly preempts state or local law on drug testing in the work place.

RSPA Response. The RSPA agrees with the commenters that conflicting state and local laws would interfere with an effective anti-drug program. Inconsistent state or local laws applicable to the subject matter of this final rule would frustrate the safety purposes of the rule and severely hamper implementation and administration of an anti-drug program. RSPA intends that issuance of the final rule, which mandates the conduct of an anti-drug abuse program that includes random testing, preempt, under the Supremacy Clause of the U.S. Constitution, any state or local law, rule, regulation, order, or standard that covers testing of pipeline employees for the presence of drugs or drug metabolites. This preemption exists to the extent that the state or local law interferes with implementation of the federal law. The rule does not preempt any state law that imposes sanctions for the violation of a provision of a state criminal code related to reckless conduct leading to actual loss of life, injury, or damage to property, whether such provisions apply specifically to pipeline employees or generally to the public. Consistent with RSPA policy that recognizes that a declaration of preemption is a judicial prerogative, no express provision has been included in the rule.

Collective Bargaining. A major issue raised by many commenters concerns the effect of collective bargaining on the ability of operators to implement Federally-imposed regulations fully and in a timely manner.

Those commenters point out that operators who are parties to collective bargaining agreements are required under the National Labor Relations Act to bargain in good faith with labor unions on issues involving wages, hours, and other conditions of employment. Drug testing for industry employees and job applicants is a mandatory subject of bargaining under section 8(b) of the National Labor Relations Act. In *NLRB General Counsel Memorandum GC 87-5,* the General Counsel of the National Labor Relations Board stated that the implementation of a drug testing program would constitute a substantial change in working conditions. Thus, the commenters state that compulsory urinalysis testing is a condition of employment with regard to which employers who are parties to collective bargaining agreements must bargain in good faith.

Operators who are parties to collective bargaining agreements may have a more difficult time in adopting anti-drug programs that satisfy Part 199 criteria than in adopting broad guidelines that allow more flexibility. The commenters urged DOT to address the collective bargaining issue in its final rule in terms of granting operators sufficient time to adopt a drug plan and in allowing operators flexibility in the design and implementation of their drug programs. Commenters stated that employers will be required to bargain on the effects of drug testing, such as which positions would be covered, which drugs would be tested for, chain-of-custody procedures, who will pay, the random selection method to be used, and

whether union representatives should be involved in "for cause" decisions.

Several commenters suggested that RSPA provide additional time to develop and implement drug programs. Suggestions included 120 days after expiration of existing agreements, 12 to 15 months after issuance of the rule, and 12 months to develop and 18 months to implement a drug testing program. Commenters also mentioned grievance and arbitration issues which could delay implementation.

RSPA Response. Based on the comments, the final rule establishes an extended period to prepare for implementation of the anti-drug program. Operators with more than 50 employees subject to drug testing will have 1 year after the general effective date of this final rule to set up testing programs and EAP services. Drug testing does not have to begin until 1 year after the effective date of the rule. Operators with 50 or fewer employees subject to testing will have 16 months beyond the effective date to implement the anti-drug program. These periods should provide sufficient time to revise or adopt collective bargaining agreements.

Economic Analysis. Many commenters disagreed with the economic analysis of costs and benefits conducted in the Draft Regulatory Evaluation.

First, they state that the costs to conduct the anti-drug testing of employees were underestimated. The AGA thought that the cost of the initial urinalysis test and confirmatory test would average $200 per employee. The AGA further indicated that the per employee costs of random testing should include the urinalysis sampling, confirmation tests, transporting workers to test sites, lost productivity of workers being tested, testing contractor employees, operating a test lab facility, maintaining a rehabilitation program, and complying with DOT recordkeeping requirements. They estimated that 240,000 employees were in sensitive safety- and security-related positions and would be subject to testing, instead of the 116,500 employees thought to be subject to testing by the RSPA. The AGA stated that they thought it would cost $60 million dollars per year for random testing alone at the proposed 125 percent sampling rate. The AGA and several other commenters further pointed out that the $33 million in estimated benefits erroneously assumed that all accidents in which human error was involved would have been prevented by drug testing.

RSPA Response. A Final Regulatory Evaluation has been prepared to reflect the changes in the final rule. The cost estimates of conducting testing have been revised to be $25 per initial test, $35 per confirmation test, and $35 for administrative costs. These costs have been verified by DOT based on its own testing program. The DOT program indicates that the $35 administrative costs include specimen collection, recordkeeping, and chain-of-custody procedures. The cost of the program has been significantly reduced by limiting the random testing rate to 50 percent, by deleting the significant costs associated with rehabilitation of employees, by limiting the types of sensitive safety-related employees that must be drug tested, and by eliminating security-related positions. The discounted costs over a 10-year period of these regulations are estimated to be $29.1 million.

The benefits of the program have been revised in the Final Regualtory Evaluation to limit the impact to employees that may have been under the influence of drugs in accidents that were due to human error or other causes. In addition, the evaluation notes the important benefits that would accrue by preventing even one major accident. The estimated discounted benefits of the program over a 10-year period are $41.6 million.

Additional Issues

More Stringent Anti-Drug Programs. Some commenters said that their companies' drug testing programs went beyond the proposed federal rules and suggested changes to the proposed rules to allow more stringent requirements.

The final rule sets forth minimum requirements that must be included in an operator's anti-drug plan. However, the rule generally does not set forth detailed program administration requirements in most areas of the program. As a result, a significant degree of flexibility is retained for an employer's administration of its anti-drug program.

Section 199.11 of this regulation provides that an employer may test the sample obtained under this rule only for the drugs required or specifically authorized to be tested under this rule. That is, an employer must test the sample for the five major drugs listed in each DOT drug regulation. Only if, in the context of reasonable cause testing, the RSPA authorizes testing for additional Drug X under 49 CFR Part 40 (an approval which would be granted only after consultation with the Department of Health and Human Services, and only on the basis of an HHS-established testing protocol and positive threshold) may the employer also test the sample for that drug.

Absent such an approval, if the employer wants to test, in addition, for Drug Y, the employer must obtain a second sample from the employee. The obtaining of this second sample is not under the authority of the DOT regulation. The employer must base its request for the second sample on whatever other legal authority is available, since the employer cannot rely on the DOT regulation as the basis for the request.

Alcohol. Many commenters suggested that the RSPA include alcohol as a tested substance in any required testing program. These commenters pointed out that alcohol is probably the substance most abused by the public. The comments indicated that some operators already include alcohol in their anti-drug program.

The RSPA expressly excluded the issue of alcohol testing from this rulemaking for a variety of reasons stated in the NPRM; therefore, these comments are beyond the scope of the rulemaking. Alcohol testing was not proposed because the two preferred methods of testing an individual for the presence of alcohol are by breath analysis and by drawing blood. If tests were run for alcohol and for drugs, two different types of tests (blood alcohol concentration and urinalysis) would have to be conducted. This would greatly complicate the process as well as increase costs. Also, the blood test method generally is considered to be a more invasive procedure. Finally, it is easier to identify someone who abuses alcohol and reports for work impaired than someone who uses drugs.

Excluding alcohol testing from this rulemaking should not be construed to mean that the RSPA is ignoring the possibility that alcohol may be a substance of widespread abuse in the pipeline industry. The RSPA may consider rulemaking action against alcohol abuse in the future. Additionally, an operator is not prohibited from testing its employees for alcohol if the operator has the independent legal authority to do so.

Prohibited Drugs. The NTSB believes that the list of prohibited drugs is too narrow. The NTSB indicates that it has investigated a number of accidents in other modes of transportation caused by individuals impaired by drugs in Schedules III to V of the Controlled Substances Act.

In the final rule the definition of "prohibited drug" has been limited to the five substances for which drug testing is required: marijuana, cocaine, opiates, amphetamines, and phencyclidine (PCP), except that if an

operator wishes to test for other substances during reasonable cause or post-accident testing, it may do so provided it has obtained approval from RSPA, as specified in 49 CFR Part 40. In addition, the rule does not prohibit an operator from testing for other drugs if the operator has the independent legal authority to do so.

Medical Review Officer (MRO). The RSPA has clarified and expanded the role of the MRO which is established in the DHHS guidelines. For example, the MRO also is the final arbiter regarding disputes on anti-drug testing programs and schedules for unannounced testing. The MRO is also responsible to determine a schedule of unannounced testing, and when applicable, in consultation with the rehabilitation committee, for an employee who has returned to duty after rehabilitation.

State Agency Inspectors. Most commenters that commented on the subject thought that state pipeline safety agency inspectors should also be subject to a drug testing program. The RSPA plans to establish standard qualifications for state pipeline safety inspectors. The comments on the need for a drug testing program for state inspectors will be considered in any future rulemaking regarding those standards.

Small Operators. Most commenters thought that small operators should also be subject to these drug testing programs. The American Public Gas Association (APGA) recommended that master meter systems should not be excluded from participation in this program. A few commenters, such as the Iowa Association of Municipal Utilities, thought that operators having 25 or fewer employees should not be included in this rule.

The RSPA believes that the problem of drug abuse is so universal that small operators should be subject to these rules to ensure that all the nation's pipeline transportation system is protected from the hazards of drug impaired pipeline employees. Furthermore, because small operators are typically distribution companies supplying gas to the public in populated areas, the public exposure is greater. Therefore, small operators are subject to these rules, except that a change has been made to the reasonable cause testing for operators with fewer than 50 employees subject to this part. In that case, only one supervisor is necessary to determine that there is reasonable cause for an employee to be drug tested. In addition, small operators are given additional time to begin their testing programs.

The RSPA has not changed the final rule with regard to master meter systems. Those systems are still excluded from the requirements of these regulations because they do not usually perform the functions traditionally considered as operating or maintaining a pipeline. The gas distribution company is responsible for the operational characteristics of the pipeline system. Under the pipeline safety rules, the master meter operator is responsible for maintenance of the pipelines on his property. He normally contracts this out to a local maintenance or plumbing company. If there is a leak, he does not shut off the system or lower the pressure. Instead, the resident of a unit usually calls the gas distribution company, which in turn checks to see if there is a problem and then takes appropriate action. Therefore, the types of incidents that would arise, such as leaks or explosions, would not be prevented by the drug testing of master meter operators.

Action that May be Taken by an Operator. Some commenters objected to the proposal that an operator may not discipline or terminate an employee for drug-related causes if the employee successfully completes rehabilitation. They argued that the proposed rule interjected the federal government into decisions and regulations between management and labor—an untenable situation to both the supervisors and supervised employees.

The RSPA agrees and has deleted this proposal from the final rule.

Suggested Alternative Plan. Transok, Inc., suggests that instead of mandating drug testing, the RSPA should impose a fine on employers of $500 for the first drug or alcohol related accident and $5,000 for subsequent accidents occurring within 5 years of the initial accident. This, according to Transok, Inc., would ensure a drug-free transportation system by penalizing employers who do not adequately supervise employees.

The RSPA believes that this approach would not ensure the prevention of drug use by pipeline industry employees. First, without a drug testing program, the RSPA would not be able to identify the accidents caused by drug-impaired employees. Secondly, such an approach would not be preventative since the accidents would already have occurred.

Conflict with Foreign Laws. We have determined not to make the final rule applicable in any situation where compliance would violate the domestic laws or policies of another country. In addition, because of the potential confusion that may exist involving application of this rule in situations where compliance could violate foreign laws or policies, we have determined not to make the rule applicable, until January 1, 1990, in any situation where a foreign government contends that compliance with our rule raises questions of compatibility with its domestic laws or policies. During the next year, the Department and other U.S. government officials will be working closely with representatives of foreign governments with the goal of reaching a permanent resolution to any conflict between our rule and foreign laws and policies. The U.S. and Canadian Governments have already established a bilateral working group in an attempt to achieve this objective. We believe that considerable progress has already been made, and further meetings will be held in the near future. While we believe that this can be a model for addressing the concerns of other countries, it is not intended to be the exclusive means. The Administrator may delay the effective date further under this section, if such delay is necessary to permit consultation with any foreign governments to be successfully completed.

It is the agency's intention to issue a notice no later than December 1, 1989, that would make any necessary amendments to the rule as a result of discussions with foreign governments. Shortly after their issuance, any such notices will be published in the **Federal Register**. While we recognize that any decision not to apply our rule to foreign citizens has the potential to create some anomalous conditions in competitive situations, it is the intention of the U.S. government to make every effort to resolve potential conflicts with foreign governments in a manner that accommodates their concerns while ensuring the necessary level of safety by those we regulate.

Advisory Committee Review

Section 4(b) of the NGPSA, as amended (49 App. U.S.C. 1673(b)), requires that each proposed gas pipeline safety standard be submitted to the Technical Pipeline Safety Standards Committee (TPSSC) for its consideration. Similarly, under section 204(b) of the HLPSA (49 App. U.S.C. 2003(b)), proposed hazardous liquid pipeline safety standards must be submitted to the Technical Hazardous Liquid Pipeline Safety Standards Committee (THLPSSC). These Committees discussed the proposed rule at a joint meeting held on September 14, 1988, in Washington, DC. The official report of each Committee and the

transcript of the meeting is in the docket.

The following sets forth the recommendations of each of the advisory committees regarding the feasibility, reasonableness, and practicability on the proposed rule and disposition of these recommendations by RSPA.

TPSSC. The TPSSC voted nine to four that the proposed rule is feasible, reasonable, and practicable with the following recommended changes:

• Section VI. Adopt Option 4, which leaves rehabilitation to an operator's discretion.

RSPA Response. RSPA agrees and the requirement for a mandatory rehabilitation program has been deleted in this final rule.

• Section VI.C. Eliminate random testing.

RSPA Response. As noted previously, the RSPA believes that random testing is a critical component of an anti-drug program and that a 50 percent drug testing rate is necessary to establish a valid confidence level as well as to provide a sufficient deterrent to drug use by employees. The RSPA believes that the 50 percent rate will not impose an undue economic or administrative burden on operators and employees.

• Section VII. Eliminate this section regarding restrictions on employee discipline.

RSPA Response. RSPA concurs, and this section has been eliminated since rehabilitation is discretionary in the final rule.

• Section VIII.A. Change time for preparing anti-drug plan from 120 days to 1 year.

RSPA Response. The RSPA agrees more time is needed and has adjusted the compliance date of the final rule.

• Section I. Eliminate applicability to contractor employees in definition of "employee."

RSPA Response. As noted previously, the RSPA believes that contractor employees should be included in the group of employees that must undergo drug testing. Although these persons may not be under the direct control of operators, their job performance is no less critical than the performance of employees who work directly for operators. The RSPA has limited the employees covered by the drug rule to those who perform regulated operation, maintenance, or emergency-response functions, which should minimize the effects of the rule on operators who contract for unskilled transient laborers.

• Section IV.C. Use more performance language in training.

RSPA Response. The RSPA believes that the requirements proposed for training generally were already in performance language. However, the proposal to require at least 60 minutes of training annually has been deleted as too specific. The final rule requires that operators provide 1 hour of training for supervisory personnel who will determine whether an employee must be drug tested based on reasonable cause. The training should include the effects and consequences of drug use and the manifestations and behavioral cues that may indicate drug use and abuse. The RSPA believes the rule provides sufficient flexibility and performance language to permit the tailoring of a training program to fit the operations of each particular operator. If an operator wishes to provide training in excess of the minimum requirements of this rule, the operator has the option to do so.

• Section IX. Limit access to records to circumstances following accidents.

RSPA Response. The RSPA has limited access to the drug testing records of a particular employee to when RSPA or a state pipeline safety agency are conducting an accident investigation.

THLPSSC. The THLPSSC voted 11 to 0 not to support the NPRM on drug testing because the need for such a rule has not been demonstrated. However, that advisory committee recommended that if the RSPA issues a final rule, the RSPA should consider the following recommendations:

• Section IV.C. Eliminate random testing.

RSPA Response. As noted previously, the RSPA believes that random testing is a critical component of an anti-drug program, and that a 50 percent drug testing rate is necessary to establish a valid confidence level as well as to provide a sufficient deterrent to drug use by employees. The RSPA believes that the 50 percent testing rate will not impose an undue economic or administrative burden on operators and employees.

• Section IV.D. Eliminate reasonable cause of testing.

RSPA Response. The RSPA has not eliminated this section. The RSPA believes that testing for "reasonable cause" is a necessary element and one of the cornerstones of the testing program. If an employee is believed to be taking prohibited drugs or under the influence of a prohibited drug while on duty, it is incumbent on the operator to determine if that employee is using prohibited drugs. More over, the comments indicate that most large operators are already conducting drug testing when their employees are believed to be using prohibited drugs.

• Section VI. Adopt Option 4, which leaves rehabilitation to an operator's discretion.

RSPA Response. The requirement for a rehabilitation program has been deleted in the final rule.

• Eliminate the applicability of the proposed rule to contractor employees.

RSPA Response. This has not been done for the reasons stated previously.

• Section I. "DHHS Guidelines" should be a minimum requirement.

RSPA Response. The DOT has modified the DHHS Guidelines and adopted them as the DOT Procedures. As in all pipeline safety regulations, the operator may exceed the requirements as set forth in the federal regulations.

• Section IX. The RSPA should be given access to statistical information only.

RSPA Response. As mentioned before, the RSPA has limited access to the drug testing records of a particular employee to when RSPA or a state pipeline safety agency are conducting an accident investigation.

• Section 195.401(d)(3). Eliminate the absolute prohibition against an employee having any amount of a prohibited drug in his system.

RSPA Response. The RSPA has eliminated this requirement to be consistent with the "DOT Procedures" covering the amount of drug in an employee's physiological system that constitutes failure of an initial or confirmatory drug test.

• Section VII. Eliminate the restrictions on employee discipline. However, don't eliminate the employee discipline restrictions if random testing and testing based on reasonable cause are included in final rule.

RSPA Response. The proposed employee discipline restrictions are not in the final rule. The RSPA does not believe that any restriction on employee discipline is needed because the final rule does not mandate rehabilitation. Absent mandatory rehabilitation, any restriction on disciplinary action would unnecessarily interject RSPA into the management-employee relationship.

• Section VIII. Change time for preparing anti-drug plan from 120 days to 1 year.

RSPA Response. The RSPA agrees more time is needed and has adjusted the compliance date of the final rule.

Regulatory Flexibility Determination

These final rules apply to all entities subject to RSPA's jurisdiction under Part 192, 193, or 195, other than operators of master meter systems. Operators of master meter systems constitute the bulk of small businesses or other small

entities that operate gas pipeline systems. There are few, if any, small entities that operate hazardous liquid pipelines subject to Part 195 or LNG facilities that are subject to Part 193. The final rule provides additional time for small operators to prepare their anti-drug plans and begin drug testing. In addition, the rule provides small operators flexibility in testing for reasonable cause by allowing one supervisor trained in detection to substantiate the decision to test. Therefore, I certify that pursuant to section 605 of the Regulatory Flexibility Act, this final rule will not have a "significant economic impact on a substantial number of small entities."

Paperwork Reduction Act

The final rule requires that the operator develop a written program and maintain records on drug testing and training. In accordance with the Paperwork Reduction Act of 1980 (Pub. L. 96-511), these information collection requirements have been submitted to the Office of Management and Budget for approval. Information need not be collected under this rule until OMB clearance is received and the OMB clearance number is published in the **Federal Register.**

Federalism Implications

The RSPA has reviewed the final rule in light of the Federalism considerations set forth in Executive Order 12612. Although the final rule will have to be adopted by states participating in the federal-state relationships prescribed in the Natural Gas Pipeline Safety Act of 1968 and the Hazardous Liquid Pipeline Safety Act of 1979, the impact of such adoption based upon currently available information would not be substantial. In addition, RSPA does not expect that such adoption would have a substantial direct effect on the relationship between the federal government and the states or on the distribution of power and responsibilities among the various levels of government. This expectation takes into account the preemption of inconsistent state or local laws governing drug testing as discussed supra. Accordingly, preparation of a Federalism Assessment under Executive Order 12612 is not warranted.

Significance

This final rule has been reviewed under Executive Order 12291 and determined not to be a major rule because it would not have an impact on the economy in excess of $100 million annually, would not result in a major change in costs or prices for consumers, individual industries, government, or any geographic region, and would not significantly affect competition. However, it is significant under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979) because it concerns a matter on which there is substantial public interest and because it involves important Departmental policy. The Draft Regulatory Evaluation has been revised to reflect the changes in the final rule. The total discounted cost of these regulations over a 10-year period is now estimated to be $29.1 million. The discounted benefits of the program have been revised and are now estimated to be $41.6 million over a 10-year period. A copy of the Final Regulatory Evaluation has been placed in the docket.

List of Subjects in 49 CFR Part 199

Pipeline safety, Drug testing.

In view of the foregoing, RSPA amends Title 49 of the Code of Federal Regulations by adding a new Part 199 as follows:

PART 199—DRUG TESTING

Sec.

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

§ 199.1 Scope and compliance.

(a) This part requires operators of pipeline facilities subject to Part 192, 193, or 195 of this chapter to test employees for the presence of prohibited drugs and provide an employee assistance program. However, this part does not apply to operators of "master meter systems" defined in § 191.3 of this chapter.

(b) Operators with more than 50 employees subject to drug testing under this part need not comply with this part until December 21, 1989. Operators with 50 or fewer employees subject to drug testing under this part need not comply with this part until April 23, 1990.

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

(d) This part is not effective until January 1, 1990, with respect to any person for whom a foreign government contends that application of this part raises questions of compatibility with that country's domestic laws or policies. On or before December 1, 1989, the Administrator shall issue any necessary amendment resolving the applicability of this part to such person on and after January 1, 1990.

§ 199.3 Definitions.

As used in this part—

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

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

"DOT Procedures" means the "Procedures for Transportation Workplace Drug Testing Programs" published by the Office of the Secretary of Transportation in Part 40 of this title.

"Employee" means a person who performs on a pipeline or LNG facility an operating, maintenance, or emergency-response function regulated by Part 192, 193, or 195 of this chapter. This does not include clerical, truck driving, accounting, or other functions not subject to Part 192, 193, or 195. The person may be employed by the operator, be a contractor engaged by the operator, or be employed by such a contractor.

"Fail a drug test" means that the confirmation test result shows positive evidence of the presence under DOT Procedures of a prohibited drug in an employee's system.

"Operator" means a person who owns or operates pipeline facilities subject to Part 192, 193, or 195 of this chapter.

"Pass a drug test" means that initial testing or confirmation testing under DOT Procedures does not show evidence of the presence of a prohibited drug in a person's system.

"Prohibited drug" means any of the following substances specified in Schedule I or Schedule II of the Controlled Substances Act, 21 U.S.C. 801.812 (1981 & 1987 Cum.P.P.): marijuana, cocaine, opiates, amphetamines, and phencyclidine (PCP). In addition, for the purposes of reasonable cause testing, "prohibited drug" includes any substance in Schedule I or II if an operator has obtained prior approval from RSPA, pursuant to the "DOT Procedures" in 49 CFR Part 40, to test for such substance, and if the Department of Health and Human Services has established an

approved testing protocol and positive threshold for such substance.

"Rehabilitation committee" means the individuals who develop and determine an employee's rehabilitation plan and a schedule for the employee's return to work. The committee consists of the operator or the operator's designated representative, the medical review officer, and the individual in charge of the employee's rehabilitation.

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

§ 199.5 DOT procedures.

The anti-drug program required by this part must be conducted according to the requirements of this part and the DOT Procedures. In the event of conflict, the provisions of this part prevail. Terms and concepts used in this part have the same meaning as in the DOT Procedures.

§ 199.7 Anti-drug plan.

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

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

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

(3) The name and address of the operator's medical review officer.

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

(a) An operator may not knowingly use as an employee any person who—

(1) Fails a drug test required by this part and the medical review officer makes a determination under § 199.15(d)(2); or

(2) Refuses to take a drug test required by this part.

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

(1) Successfully completed a rehabilitation program and passed a drug test under DOT Procedures;

(2) Been recommended by the medical review officer for return to duty as a result of the rehabilitation program; and

(3) Not failed a drug test required by this part after the successful completion of a rehabilitation program.

§ 199.11 Drug tests required.

Each operator shall conduct the following drug tests for the presence of a prohibited drug:

(a) *Pre-employment testing.* No operator may hire or contract for the use of any person as an employee unless that person passes a drug test or is covered by an anti-drug program that conforms to the requirements of this part.

(b) *Post-accident testing.* As soon as possible but no later than 32 hours after an accident, an operator shall drug test each employee whose performance either contributed to the accident or cannot be completely discounted as a contributing factor to the accident. An operator may decide not to test under this paragraph but such a decision must be based on the best information available immediately after the accident that the employee's performance could not have contributed to the accident or that, because of the time between that performance and the accident, a drug test is useless to determine whether the performance was affected by drug use.

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

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

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

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

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

(e) *Testing after rehabilitation.* A person who returns to duty as an employee after rehabilitation shall be subject to a reasonable program of follow-up drug testing without prior notice for not more than 60 months after his return to duty.

§ 199.13 Drug testing laboratory.

(a) Each operator shall use for the drug testing required by this part only drug testing laboratories certified by the Department of Health and Human Services under the DOT Procedures.

(b) The drug testing laboratory must permit—

(1) Inspections by the operator before the laboratory is awarded a testing contract; and

(2) Unannounced inspections, including examination of records, at any time, by the operator, the Administrator, and if the operator is subject to state agency jurisdiction, a representative of that state agency.

§ 199.15 Review of drug testing results.

(a) *MRO appointment.* Each operator shall designate or appoint a medical review officer (MRO). If an operator does not have a qualified individual on staff to serve as MRO, the operator may contract for the provision of MRO services as part of its anti-drug program.

(b) *MRO qualifications.* The MRO must be a licensed physician with knowledge of drug abuse disorders.

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

(1) Review the results of drug testing before they are reported to the operator.

(2) Review and interpret each confirmed positive test result as follows to determine if there is an alternative medical explanation for the confirmed positive test result:

(i) Conduct a medical interview with the individual tested.

(ii) Review the individual's medical history and any relevant biomedical factors.

(iii) Review all medical records made available by the individual tested to determine if a confirmed positive test resulted from legally prescribed medication.

(iv) If necessary, require that the original specimen be reanalyzed to determine the accuracy of the reported test result.

(v) Verify that the laboratory report and assessment are correct.

(3) Determine whether and when an employee involved in a rehabilitation program may be returned to duty.

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

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

(d) *MRO determinations.* The following rules govern MRO determinations:

(1) If the MRO determines, after appropriate review, that there is a legitimate medical explanation for the confirmed positive test result other than the unauthorized use of a prohibited drug, the MRO is not required to take further action.

(2) If the MRO determines, after appropriate review, that there is no legitimate medical explanation for the confirmed positive test result other than the unauthorized use of a prohibited drug, the MRO shall refer the individual tested to an employee assistance program, or to a personnel or administrative officer for further proceedings in accordance with the operator's anti-drug program.

(3) Based on a review of laboratory inspection reports, quality assurance and quality control data, and other drug test results, the MRO may conclude that a particular drug test result is scientifically insufficient for further action. Under these circumstances, the MRO should conclude that the test is negative for the presence of a prohibited drug or drug metabolite in an individual's system.

§ 199.17 Retention of samples and retesting.

(a) Samples that yield positive results on confirmation must be retained by the laboratory in properly secured, long-term, frozen storage for at least 365 days as required by the DOT Procedures. Within this 365-day period, the employee or his representative, the operator, the Administrator, or, if the operator is subject to the jurisdiction of a state agency, the state agency may request that the laboratory retain the sample for an additional period. If, within the 365-day period, the laboratory has not received a proper written request to retain the sample for a further reasonable period specified in the request, the sample may be discarded following the end of the 365-period.

(b) If the medical review officer (MRO) determines there is no legitimate medical explanation for a confirmed positive test result other than the unauthorized use of a prohibited drug, the original sample must be retested if the employee makes a written request for retesting within 60 days of receipt of the final test result from the MRO. The employee may specify retesting by the Department of Health and Human Services. The operator may require the employee to pay in advance the cost of shipment (if any) and reanalysis of the sample, but the employee must be reimbursed for such expense if the retest is negative.

(c) If the employee specifies retesting by a second laboratory, the original laboratory must follow approved chain-of-custody procedures in transferring a portion of the sample.

(d) Since some analytes may deteriorate during storage, detected levels of the drug below the detection limits established in the DOT Procedures, but equal to or greater than the established sensitivity of the assay, must, as technically appropriate, be reported and considered corroborative of the original positive results.

§ 199.19 Employee assistance program.

(a) Each operator shall provide an employee assistance program (EAP) for its employees and supervisory personnel who will determine whether an employee must be drug tested based on reasonable cause. The operator may establish the EAP as a part of its internal personnel services or the operator may contract with an entity that provides EAP services. Each EAP must include education and training on drug use. At the discretion of the operator, the EPA may include an opportunity for employee rehabilitation.

(b) Education under each EAP must include at least the following elements: display and distribution of informational material; display and distribution of a community service hot-line telephone number for employee assistance; and display and distribution of the employer's policy regarding the use of prohibited drugs.

(c) Training under each EAP for supervisory personnel who will determine whether an employee must be drug tested based on reasonable cause must include one 60-minute period of training on the specific, contemporaneous physical, behavioral, and performance indicators of probable drug use.

§ 199.21 Contractor employees.

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

(a) The operator remains responsible for ensuring that the requirements of this part are complied with; and

(b) The contractor allows access to property and records by the operator, the Administrator, and if the operator is subject to the jurisdiction of a state agency, a representative of the state agency for the purpose of monitoring the operator's compliance with the requirements of this part.

§ 199.23 Recordkeeping.

(a) Each operator shall keep the following records for the periods specified and permit access to the records as provided by paragraph (b) of this section:

(1) Records that demonstrate the collection process conforms to this part must be kept for at least 3 years.

(2) Records of employee drug test results that show employees failed a drug test, and the type of test failed (e.g., post-accident), and records that demonstrate rehabilitation, if any, must be kept for at least 5 years, and include the following information:

(i) The functions performed by employees who failed a drug test.

(ii) The prohibited drugs which were used by employees who failed a drug test.

(iii) The disposition of employees who failed a drug test (e.g., termination, rehabilitation, leave without pay).

(iv) The age of each employee who failed a drug test.

(3) Records of employee drug test results that show employees passed a drug test must be kept for at least 1 year.

(4) A record of the number of employees tested, by type of test (e.g., post-accident), must be kept for at least 5 years.

(5) Records confirming that supervisors and employees have been trained as required by this part must be kept for at least 3 years.

(b) Information regarding an individual's drug testing results or rehabilitation may be released only upon the written consent of the individual, except that such information must be released regardless of consent to the Administrator or the representative of a state agency upon request as part of an accident investigation. Statistical data related to drug testing and rehabilitation that is not name-specific and training records must be made available to the Administrator or the representative of a state agency upon request.

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

M. Cynthia Douglass,

Administrator, Research and Special Programs Administration.

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