September 11, 1989

Mr. John E. Adams, Jr.
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Clarke-Mobile Countries Gas District
P.O. Box 608
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Dear Mr. Adams:

Ms. Bea Vandervalk asked me to provide further information in response to your letter of May 15, 1989, regarding our drug testing requirements for pipeline employee (49 CFR Part 199).

The following relates to the alphabetized questions in your letter which I have restated for simplicity:

Question (A). After the first 12 months of random testing, may the full 50 percent be tested all at once or must the testing be conducted evenly through the year?

Answer: The rule regarding random testing ?199.11(c), requires that during the initial 12-month phase-in period, random testing must be "spread reasonably through the 12-month period." Although the rule does not expressly require either reasonable or even spacing of tests after the first year, we interpret the rule to require this practice so that the sampling process will be truly random and the testing will be less disruptive.

Question (B): Given that determining whether reasonable cause exists to believe an employee is using a prohibited drug is a subjective judgement, and that testing is not required if the employee's supervisors do not substantiate and concur in the decision to test (a matter outside the operator's control), will operators be subject to sanctions for failure to conduct reasonable-cause tests. How can operators safeguard against such sanctions?

Answer: An operator is required to conduct a reasonable-cause test under ?199.11(d) when it becomes aware, or should be aware, of evidence of probable illegal drug use by an employee, and supervisors of the employee substantiate and concur in the operator's decision to test on the basis of that evidence. Operators will be subject to sanctions for failing to test under these circumstances, or for failing to seek the concurrence of supervisors when faced with such evidence, even though the determination regarding reasonable cause is somewhat subjective. Note that the subjectivity is minimized by the guidance provided in the rule itself, and by the training supervisors must be given to recognize symptoms of illegal drug use. If the supervisors do not substantiate and concur in the decision to test, reasonable-cause testing is not required, and no sanctions will be incurred. The

best safeguard against sanctions is preparation and implementation of an adequate anti-drug plan under ?199.7 to comply with the reasonable-cause testing requirement.

Question (C): If an employee refuses a random drug test on constitutional grounds before the Supreme Court rules on the issue, assuming reassignment is not possible, how does an operator avoid the dilemma of a losing lawsuit for wrongful discharge if the Supreme Court later decides that random testing is unconstitutional or of incurring DOT penalties if the employee is not discharged.

Answer: An operator should not face a lawsuit for wrongful discharge if it is complying with the regulations regarding random drug testing in Part 199, even if the Supreme Court later decides that random drug testing is unconstitutional.

Question (D): Are operators responsible for compliance with the Part 40 and 199 requirements regarding specimen collection, laboratory analysis, and MRO actions, and subject to sanctions for noncompliance by those who perform these functions? Does use of a laboratory certified under the DOT Procedures relieve the operator from compliance with requirements regarding lab functions? Similarly, can an operator seek approval of its collecting agent and MRO to avoid responsibility for compliance with requirements regarding these functions?

Answer: Operators are responsible for compliance with all aspects of the drug testing rules in Parts 40 and 199. Use of a certified lab is required, and does not relieve the operator from assuring that the laboratory performs in accordance with the Part 40 and 199 requirements. We do not entertain requests for approvals of collecting agents or MROs.

Question (E): How are operators to keep records under ?199.23(a)(3) showing that employees passed a drug test if the MRO only reports confirmed positive test results to the operator?

Answer: The intent of ?199.15(c)(1) is that each operator require its MRO to review and report all drug test results to the operator.

I have enclosed a copy of our guidelines for compliance with Part 199.

Sincerely,

James C. Thomas
Acting Director
Office of Pipeline Safety