DEPARTMENT OF TRANSPORTATION

Research and Special Programs Administration

49 CFR Part 199

[Docket No. RSPA–00–8417; Amdt. 199–19]

RIN 2137–AD55

Drug and Alcohol Testing for Pipeline Facility Employees

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

ACTION: Final rule.

SUMMARY: We are conforming our pipeline facility drug and alcohol testing regulations with DOT's ''Procedures for Transportation Workplace Drug and Alcohol Testing Programs.'' In addition, we are changing the format of the regulations to make them easier to apply and understand. The purpose of these changes is to make the regulations clearer and consistent with DOT's drug and alcohol testing policies.

EFFECTIVE DATE: This Final Rule takes effect September 11, 2001.

FOR FURTHER INFORMATION CONTACT: L.M. Furrow by phone at 202–366–4559, by fax at 202–366–4566, by mail at U.S. Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590, or by e-mail at buck.furrow@rspa.dot.gov.

SUPPLEMENTARY INFORMATION:

Effective Date

Federal law requires pipeline safety standards to take effect 30 days after publication unless we for good cause establish a different effective date based on the time reasonably necessary to comply with the standards. The primary purpose of this Final Rule is to conform RSPA's drug and alcohol testing regulations with DOT's revised procedures on drug and alcohol testing. A secondary purpose is to make RSPA's regulations easier to apply and understand through appropriate changes in format. Agreement between RSPA's drug and alcohol regulations and DOT's revised procedures is essential to avoid overlap, conflict, duplication, or confusion in applying the regulations, and the format changes support this aim. Because DOT's revised procedures are effective August 1, 2001, any delay in achieving agreement after publication of this Final Rule would be contrary to the public interest. So we are making this Final Rule effective upon publication, rather than 30 days from now. Because the revised DOT procedures were published over eight months ago and RSPA's regulations already incorporate the DOT procedures by reference, affected parties have had ample time to prepare to implement the revised procedures to which this Final Rule refers.

Background

Last year DOT's Office of the Secretary comprehensively revised its regulations in 49 CFR Part 40 called ''Procedures for Transportation Workplace Drug and Alcohol Testing Programs'' (65 FR 79462; Dec. 19, 2000). Through separate regulations published by various DOT operating administrations, including RSPA, these DOT procedures apply to all employers who must test transportation personnel for illegal drugs and alcohol. RSPA's separate regulations for drug and alcohol testing apply to operators of gas and hazardous liquid pipeline facilities (49 CFR Part 199).

To conform the Part 199 regulations with the revised DOT procedures and make other clarifying changes to Part 199, we published a notice of proposed rulemaking (NPRM) (66 FR 21506; Apr. 30, 2001). The NPRM invited interested persons to submit written comments by June 14, 2001. We published the NPRM concurrently with similar notices published by other DOT agencies. In addition, we joined these other agencies and the Office of the Secretary in publishing a Common Preamble that gave an overview of significant issues (66 FR 21491; Apr. 30, 2001).

Disposition of Comments

This section of the preamble summarizes the written comments we received in response to the NPRM. It also describes how we treated those comments in developing this Final Rule. If a proposed section is not mentioned, no significant comments were received on that section and we are adopting it as final.

Validity testing and access to information. In a joint comment, the Air Line Pilots Association and the Transportation Trades Department, AFL–CIO, expressed concerns about the new requirement in 49 CFR 40.89 that laboratories must conduct validity testing to determine whether certain adulterants or foreign substances were added to the urine, if the urine was diluted, or if the urine specimen was substituted. In light of this new regulation, these commenters also questioned the adequacy of Part 40 provisions concerning release of information, and they objected to DOT agency proposals to delete their separate regulations on release of information. We believe this comment relates to across-the-board Part 40 issues that are beyond the scope of the NPRM. The NPRM did not propose to remove the separate Part 199 requirements on release of information. DOT's Office of the Secretary addressed these commenters' concerns in a separate **Federal Register** publication associated with this Final Rule entitled ''Transportation Workplace Drug and Alcohol Testing Programs: Response to Comments on Pre-Employment Inquiry Requirement; Common Preamble for DOT Agency Conforming Rules'' (66 FR 41955; Aug. 9, 2001).

Follow-up testing. Blair & Burke commented on the different wording that Part 199 and revised Part 40 use to state the authority of a substance abuse professional (SAP) to terminate follow-up testing. Existing §§ 199.111(f) and 199.243(c)(2)(ii) provide that a SAP may terminate follow-up testing at any time after the first six tests have been administered. In contrast, 49 CFR 40.307(f) states that SAPs may modify their determinations concerning follow-up tests but not the requirement that the employee take at least six follow-up tests within the first 12 months after returning to a safety-sensitive function. As an example, § 40.307(f) states that if the SAP recommends follow-up testing beyond the first 12 months, the SAP can terminate the testing requirement at any time after the first year of testing. Blair & Burke was concerned that if an SAP recommends more than six tests in the first 12 months, under § 40.307(f) the SAP could not terminate testing until after the first year of testing, not after the first six tests as §§ 199.111(f) and 199.243(c)(2)(ii) provide. We think Blair & Burke may have mistaken the example in § 40.307(f) for the rule. The example only concerns modification of testing that is to take place after the first 12 months, but the rule allows modification of any testing other than the minimum six tests in 12 months. So any required testing in the first 12 months beyond the minimum six tests could be terminated under § 40.307(f). We do not see any need to change §§ 199.111(f) and 199.243(c)(2)(ii) to make these rules consistent with § 40.307(f).

Affirming pre-employment testing exemptions and tests. Part 199 exempts an individual from pre-employment drug testing if the individual participates in an anti-drug program that conforms to the requirements of Part 199 (existing § 199.11(a)). To minimize erroneous exemptions, the Drug and Alcohol Testing Industry Association (DATIA) suggested that DOT agencies adopt the Federal Motor Carrier Safety

Administration's rule (49 CFR 382.301) that requires employers to investigate and document the validity of such programs. DATIA further suggested that we require managers of random testing pools to have written proof of pre-employment tests, or written proof of exemptions, before enrolling persons in random testing pools. We believe this comment relates to across-the-board Part 40 issues that are beyond the scope of the NPRM. The NPRM did not propose regulations on the matter DATIA advances in this comment. DOT's Office of the Secretary addressed this commenter's concern in a separate **Federal Register** publication associated with this Final Rule entitled ''Transportation Workplace Drug and Alcohol Testing Programs: Response to Comments on Pre-Employment Inquiry Requirement; Common Preamble for DOT Agency Conforming Rules'' (66 FR 41955; Aug. 9, 2001).

Self-employed individuals. DATIA suggested that DOT agencies authorize any Consortium/Third-party administrator (C/TPA) to determine if a self-employed individual has refused to take a drug or alcohol test requested by the C/TPA. DATIA said this rule change would bring accountability to the testing process for small companies. We believe this comment relates to across-the-board Part 40 issues that are beyond the scope of the NPRM. The NPRM did not propose regulations on the matter DATIA advances in this comment. DOT's Office of the Secretary addressed these commenter's concern in a separate **Federal Register** publication associated with this Final Rule entitled ''Transportation Workplace Drug and Alcohol Testing Programs: Response to Comments on Pre-Employment Inquiry Requirement; Common Preamble for DOT Agency Conforming Rules'' (66 FR 41955; Aug. 9, 2001).

Publishing random testing rate. The Common Preamble suggested that DOT agencies may consider adopting a proposal by the Federal Motor Carrier Safety Administration (FMCSA) to publish the random testing rate only when the rate changes. At present RSPA publishes the testing rate applicable to the pipeline industry annually, as existing § 199.11(c)(2) requires. DATIA recommended that we not adopt FMCSA's proposal. We agree with DATIA that annual publication is an important source of information for the industry, and so have not changed existing § 199.11(c)(2). DATIA also suggested that DOT agencies jointly publish their random testing rates. We believe the objective of this comment is being met by DOT's Office of Drug and Alcohol Policy by publishing each agency's random rate on its Web site (http://www.dot.gov/ost/dapc/main/testrate.htm).

Stand-down waivers. Regarding the proposed procedures for seeking stand-down waivers (proposed § 199.9 or new § 199.7), Equilon Pipeline Company, LLC, asked if we would consider a waiver request for all covered employees of a company or just specific employees. The proposed procedures relate to waivers authorized by 49 CFR 40.21. This regulation prohibits employers from temporarily removing employees from performing safety-sensitive functions based on an unverified positive drug test result unless a concerned DOT agency waives this restriction. Because waiver authority under § 40.21 is not limited to particular employees or groups of employees, neither are the proposed waiver procedures. So we will consider waiver requests on a company-wide basis provided the request contains all the information required by § 40.21 and new § 199.7.

Checking previous test results. Under 49 CFR 40.25 employers who intend to use a person for a safety-sensitive function must seek certain information from former DOT-regulated employers about that person's drug and alcohol testing records. The purpose of proposed new § 199.11 was simply to call operators' attention to this new information collection requirement. However, the Iowa Utilities Board (IUB) commented that § 199.11(a) lacked guidance for operators if an employee does not consent to release of information by a former employer. IUB was also concerned that proposed new § 199.11(b) would require a person who had violated a DOT agency drug or alcohol rule to undergo the new employer's return-to-duty process even if that person had successfully completed the previous employer's return-to-duty process. Both of these concerns are answered by § 40.25. Under § 40.25(a), if a person refuses to provide written consent, the employer may not permit the person to perform a safety-sensitive function. And under §§ 40.25(e) and (j), if an employer learns the person has violated a DOT agency drug or alcohol rule, the employer may not use the person to perform a safety-sensitive function unless the employer also obtains information that the person has successfully completed the return-to-duty process. Only if that process was not successfully completed would the person have to undergo the new employer's return-to-duty process.

In light of IUB's comments, it appears that proposed § 199.11 has the potential to cause varied applications of § 40.25. Considering that revised Part 40, including § 40.25, will apply to operators through incorporation by reference in Part 199, we decided proposed § 199.11 is not necessary and dropped it from this Final Rule.

Return-to-duty testing. IUB also thought the wording of proposed § 199.105(e) could be clearer. So we edited the wording in the final rule.

Drug and alcohol plans. The Southwest Gas Corporation asked that we allow operators at least 6 months to update their written drug and alcohol plans under § 199.7 (redesignated as § 199.101) and § 199.202 to conform to the Part 40 and Part 199 revisions. DOT published revised Part 40 on December 19, 2000, but delayed the effective date until August 1, 2001, to ease the impact of the transition between the old and revised rules. This delay of more than 6 months gave all covered employers, including pipeline operators, ample time to digest the rule changes and prepare to implement them. Because §§ 199.7 and 199.202 incorporate Part 40 by reference, and the NPRM did not propose to change these sections, operators have had notice since December 19, 2000, that they would have to revise their drug and alcohol plans to conform to revised Part 40. The NPRM simplified this task by advising operators their plans would no longer have to allow for inconsistencies between Parts 40 and Part 199. So we do not feel that operators as a whole need more time to conform their plans to revised Part 40 and Part 199. Should an individual operator have good reasons for not completing its revisions before revised Part 40 takes effect, RSPA inspection personnel will take the reasons into account in evaluating the operator's level of compliance. And we will encourage State authorities who participate in the Federal pipeline safety program to do likewise.

Additionally, Southwest Gas suggested that as a guideline for preparing revised drug and alcohol plans, we develop model plans similar to the ones we developed for the old rules. The old model plans Southwest Gas referred to are posted on the Web at *http://ops.dot.gov/pub.htm#pub.* These model plans now have limited usefulness because we have not yet updated them to reflect changes to Part 40. Even if the model plans are not updated in time to help operators before the August 1 deadline, this circumstance would not lessen the duty of operators to develop and follow revised alcohol and drug plans.

Structure and Organization

Although there were no comments on the proposed structural and organizational changes to Part 199, we have edited final §§ 199.1 and 199.2. In § 199.1, the title is changed from ''Scope and compliance'' to ''Scope,'' and the text is limited to stating that Part 199 requires operators of pipeline facilities subject to 49 CFR Part 192, 193, or 195 to test covered employees for the presence of prohibited drugs and alcohol. As proposed, the second sentence of the present § 199.1(a), concerning the exclusion from Part 199 of master meter and petroleum gas systems, is clarified and transferred to new § 199.2, Applicability. In addition, we edited and transferred paragraphs (c) and (d) of § 199.1 to this new section because these paragraphs also concern the applicability of Part 199.

As proposed, the present Subpart B on alcohol misuse is redesignated as Subpart C. The present §§ 199.7 through 199.25 are designated as new Subpart B—Drug Testing and then redesignated as §§ 199.101 through 199.119, respectively. In new Subpart B, we have added new § 199.100, Purpose, to parallel § 199.200, which explains the purpose of redesignated Subpart C.

The NPRM proposed to amend existing § 199.23(b) [or redesignated § 199.117(b)] to make this section consistent with revised Part 40 regulations on releasing name-specific drug testing records without the employee's consent in certain legal proceedings and to RSPA and jurisdictional state agencies. Although there were no comments on this proposal, we have recognized an inconsistency between § 199.23(b) and the parallel regulation for alcohol testing, § 199.231(b). The first sentence of existing and proposed § 199.23(b) reads in part: ''Information * * * may be released only upon the written consent of the individual. * * *'' In contrast, the first sentence of § 199.231(b) states: ''A covered employee is entitled, upon written request, to obtain copies of any records pertaining to the employee's use of alcohol, including any records pertaining to his or her alcohol tests.'' While § 199.231(b) requires operators to provide employees access to records of their alcohol testing upon written request, existing and proposed § 199.23(b) only authorize operators to provide employees access to drug testing information upon written request. To make §§ 199.23(b) and 199.231(b) consistent, in final § 199.23(b) we changed ''may be released'' to ''must be released.'' Because of this change, the reference to DOT Procedures in proposed § 199.23(b), which was stated as an exception, is stated affirmatively in the final rule.

Advisory Committee Consideration

We discussed the highlights of the NPRM with the Technical Pipeline Safety Standards Committee (TPSSC) and the Technical Hazardous Liquid Pipeline Safety Standards Committee (THLPSSC) at a meeting in Washington, DC on February 6, 2001 (66 FR 132; Jan. 2, 2001). The committees are statutorily mandated advisory committees that advise us on proposed safety standards and other policies for gas and hazardous liquid pipelines. Each committee has an authorized membership of 15 persons, five each representing government, industry, and the public. Each member is qualified to consider the technical feasibility, reasonableness, cost-effectiveness, and practicability of proposed pipeline safety standards. A transcript of the February 6 meeting as well as other material related to the committees' consideration of the NPRM are available in Docket No. RSPA–98–4470.

Following publication of the NPRM, we asked the members of each committee to review the NPRM and vote by letter-ballot on whether the proposed rules are technically feasible, reasonable, cost-effective, and practicable. We also sent each member a copy of the Regulatory Evaluation we prepared for this Final Rule. Of the TPSSC members who returned ballots, four voted to approve the proposed rules and three voted to approve the proposed rules with changes. All THLPSSC members who returned ballots voted to approve the proposed rules and no member commented on the Regulatory Evaluation. The changes recommended by the TPSSC members are discussed next.

Eric Thomas, Director of Engineering, Southern Natural Gas Company, objected to the stand-down waiver process under 49 CFR 40.21 and proposed § 199.9. He said the ability to remove from covered positions employees with unverified positive drug tests is imperative for safety, and the waiver process will overburden operators without any guarantee waivers will be granted. The preamble to the Part 40 revisions gave the reasons DOT established the prohibition against stand down in § 40.21: ''stand-down undercuts the rationale for [medical review officer] review, can compromise the confidentiality of test results, and may result in unfair stigmatization of an employee as a drug user.'' (65 FR 79463; Dec. 19, 2000). However, recognizing the safety concerns of commenters favoring stand-down, DOT also established a waiver process in § 40.21 to permit employers, on a case-by-case basis, to request DOT agency approval for a specific, well-founded stand-down plan that effectively protects the interests of employees. The purpose of proposed § 199.9 is merely to establish a mechanism to implement the waiver process for pipeline operators. RSPA does not have authority to change DOT policy expressed in § 40.21. Although Mr. Thomas is correct that there is no guarantee a waiver application will be successful, we will give each application full and fair consideration.

Mr. Thomas also opposed the proposal on checking previous test results (proposed new § 199.11), as did Ricky Cotton, Director of Pipeline Safety, Mississippi Public Service Commission, and John Leiss, Geologist, Federal Energy Regulatory Commission. Mr. Thomas and Mr. Cotton considered pre-employment testing alone to be a sufficient standard, and they thought requiring operators to check testing by previous employers would not be beneficial. In contrast, Mr. Leiss said we should expand the proposed rule to cover current covered employees and job applicants not previously employed by a DOT regulated employer. We proposed new § 199.11 simply to call operators' attention to the new information collection requirement in 49 CFR 40.25. We do not have authority to change DOT policy expressed in § 40.25. At the same time, we do not think the problem of illegal drug use among pipeline workers warrants establishing in Part 199 a regulation broader than § 40.25.

Because of maritime industry concerns, DOT recently opened a 30-day comment period on § 40.25 (66 FR 32248; June 14, 2001). DOT's Office of the Secretary will address the comments in a separate **Federal Register** publication associated with this Final Rule.

Regulatory Analyses and Notices

Executive Order 12866 and DOT Policies and Procedures

RSPA does not consider this rulemaking to be a significant regulatory action under Section 3(f) of Executive Order 12866 (58 FR 51735; Oct. 4, 1993). Therefore, the Office of Management and Budget (OMB) has not received a copy of this rulemaking to review. RSPA also does not consider this rulemaking to be significant under DOT regulatory policies and procedures (44 FR 11034: February 26, 1979).

The final rules are non-significant because they merely conform Part 199 to revised Part 40, which has already had extensive comment and analysis, and make other clarifying and organizational changes to Part 199. The economic impact of revised Part 40 was analyzed in connection with the Part 40 rulemaking, and the final Part 199 rules will not have any incremental economic impact of their own. As to the clarifying and organizational changes not directly related to revised Part 40, we assessed the economic impact of these changes as minimal. A copy of the Regulatory Evaluation of costs and benefits is available in the docket for this proceeding.

Regulatory Flexibility Act

The final rules are consistent with revised Part 40 and have no incremental economic impacts of their own. Therefore, based on the facts available about the anticipated impacts of this proposed rulemaking, I certify, pursuant to Section 605 of the Regulatory Flexibility Act (5 U.S.C. 605), that the final rules will not have a significant impact on a substantial number of small entities.

Paperwork Reduction Act

All the information collection requirements of Part 40 have been analyzed and approved by OMB. The final rules will not impose any information collection requirements that have not already been reviewed in the Part 40 rulemaking. So no further Paperwork Reduction Act review is necessary.

Executive Order 12612

The final rules will not have a substantial direct effect on states, on the relationship between the Federal Government and the states, or on the distribution of power and responsibilities among the various levels of Government. Therefore, in accordance with Executive Order 12612 (52 FR 41685; October 30, 1987), we have determined that the final rules will not have sufficient federalism implications to warrant preparation of a federalism assessment.

Executive Order 13084

The final rules have been analyzed in accordance with the principles and criteria contained in Executive Order 13084, ''Consultation and Coordination with Indian Tribal Governments.'' Because the final rules will not significantly or uniquely affect the communities of the Indian tribal governments and will not impose substantial direct compliance costs, the funding and consultation requirements of Executive Order 13084 do not apply.

Executive Order 13132

Revised Part 40 has been analyzed in accordance with the principles and criteria contained in Executive Order 13132 (''Federalism''). The final rules have no incremental Federalism impacts for purposes of Executive Order 13132. So no further analysis is needed for Federalism purposes.

Impact on Business Processes and Computer Systems

We do not want to impose new requirements that would mandate business process changes when the resources necessary to implement those requirements would otherwise be applied to ''Y2K'' or related computer problems. The final rules do not mandate business process changes or require modifications to computer systems. Because the final rules will not affect the ability of organizations to respond to those problems, we are not delaying the effectiveness of the requirements.

Unfunded Mandates Reform Act of 1995

The final rules will not impose unfunded mandates under the Unfunded Mandates Reform Act of 1995. The rules will not result in costs of $100 million or more to either state, local, or tribal governments, in the aggregate, or to the private sector, and are the least burdensome alternative that achieves the objective of the rules.

National Environmental Policy Act

We have analyzed the final rules for purposes of the National Environmental Policy Act (42 U.S.C. 4321 et seq.). Because the rules parallel present requirements of revised Part 40 or involve clarifying or organizational changes, we have determined that the rules will not significantly affect the quality of the human environment.

Executive Order 13211

This rulemaking is not a ''Significant energy action'' under Executive Order 13211. It is not a significant regulatory action under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Further, this rulemaking has not been designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action.

List of Subjects in 49 CFR Part 199

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

In consideration of the foregoing, we are amending 49 CFR part 199 as follows:

PART 199—DRUG AND ALCOHOL TESTING

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

Authority: 49 U.S.C. 5103, 60102, 60104, 60108, 60117, and 60118; 49 CFR 1.53.

2. The heading for subpart A is revised to read as follows:

Subpart A—General

3. Section 199.1, is revised to read as follows:

§ 199.1 Scope.

This part requires operators of pipeline facilities subject to part 192, 193, or 195 of this chapter to test covered employees for the presence of prohibited drugs and alcohol.

4. Section 199.2 is added to read as follows:

§ 199.2 Applicability.

(a) This part applies to pipeline operators only with respect to employees located within the territory of the United States, including those employees located within the limits of the ''Outer Continental Shelf '' as that term is defined in the Outer Continental Shelf Lands Act (43 U.S.C. 1331).

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

(c) This part does not apply to covered functions performed on—

(1) Master meter systems, as defined in § 191.3 of this chapter; or

(2) Pipeline systems that transport only petroleum gas or petroleum gas/air mixtures.

5. In § 199.3, the introductory text is revised, the definitions of ''Covered employee'' and ''Refuse to submit'' are removed, the definitions of ''Covered function,'' ''DOT Procedures,'' and ''Prohibited drug'' are revised, and definitions of ''Covered employee, employee, or individual to be tested,'' ''Performs a covered function,'' and ''Refuse to submit, refuse, or refuse to take'' are added in alphabetical order, to read as follows:

§ 199.3 Definitions.

As used in this part—

* * * * *

Covered employee, employee, or individual to be tested means a person who performs a covered function, including persons employed by operators, contractors engaged by

operators, and persons employed by such contractors.

Covered function means an operations, maintenance, or emergency-response function regulated by part 192, 193, or 195 of this chapter that is performed on a pipeline or on an LNG facility.

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

* * * * *

Performs a covered function includes actually performing, ready to perform, or immediately available to perform a covered function.

* * * * *

Prohibited drug means any of the following substances specified in Schedule I or Schedule II of the Controlled Substances Act (21 U.S.C. 812): marijuana, cocaine, opiates, amphetamines, and phencyclidine (PCP).

* * * * *

Refuse to submit, refuse, or refuse to take means behavior consistent with DOT Procedures concerning refusal to take a drug test or refusal to take an alcohol test.

* * * * *

6. Section 199.5 is revised to read as follows:

§ 199.5 DOT procedures.

The anti-drug and alcohol programs required by this part must be conducted according to the requirements of this part and DOT Procedures. Terms and concepts used in this part have the same meaning as in DOT Procedures. Violations of DOT Procedures with respect to anti-drug and alcohol programs required by this part are violations of this part.

7. Subpart B is redesignated as subpart C.

8. Existing §§ 199.7, 199.9, 199.11, 199.13, 199.15, 199.17, 199.19, 199.21, 199.23, and 199.25 are redesignated as §§ 199.101, 199.103, 199.105, 199.107, 199.109, 199.111, 199.113, 199.115, 199.117, and 199.119, respectively, in new subpart B, and a subpart B heading is added to read as follows:

Subpart B—Drug Testing

9. New § 199.7 is added to subpart A to read as follows:

§ 199.7 Stand-down waivers.

(a) Each operator who seeks a waiver under § 40.21 of this title from the stand-down restriction must submit an application for waiver in duplicate to the Associate Administrator for Pipeline Safety, Research and Special Programs Administration, Department of Transportation, Washington, DC 20590.

(b) Each application must—

(1) Identify § 40.21 of this title as the rule from which the waiver is sought;

(2) Explain why the waiver is requested and describe the employees to be covered by the waiver;

(3) Contain the information required by § 40.21 of this title and any other information or arguments available to support the waiver requested; and

(4) Unless good cause is shown in the application, be submitted at least 60 days before the proposed effective date of the waiver.

(c) No public hearing or other proceeding is held directly on an application before its disposition under this section. If the Associate Administrator determines that the application contains adequate justification, he or she grants the waiver. If the Associate Administrator determines that the application does not justify granting the waiver, he or she denies the application. The Associate Administrator notifies each applicant of the decision to grant or deny an application.

10. New § 199.100 is added to Subpart B to read as follows:

§ 199.100 Purpose.

The purpose of this subpart is to establish programs designed to help prevent accidents and injuries resulting from the use of prohibited drugs by employees who perform covered functions for operators of certain pipeline facilities subject to part 192, 193, or 195 of this chapter.

11. In redesignated § 199.103, paragraph (a)(1) is amended by removing the term ''§ 199.15(d)(2)'' and adding ''DOT Procedures'' in its place, and by revising paragraph (b)(2) to read as follows:

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

* * * * *

(b) * * *

(2) Been considered by the medical review officer in accordance with DOT Procedures and been determined by a substance abuse professional to have successfully completed required education or treatment; and

* * * * *

12. In redesignated § 199.105, paragraph (b) is revised, paragraphs (c)(3) and (c)(4) are amended by removing the term ''§ 199.25'' and adding ''§ 199.119'' in its place wherever the term appears, and paragraph (e) is revised, to read as follows:

§ 199.105 Drug tests required.

* * * * *

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

* * * * *

(e) *Return-to-duty testing.* A covered employee who refuses to take or has a positive drug test may not return to duty in the covered function until the covered employee has complied with applicable provisions of DOT Procedures concerning substance abuse professionals and the return-to-duty process.

* * * * *

13. In redesignated § 199.109, paragraphs (b), (c), and (d) are revised to read as follows:

§ 199.109 Review of drug testing results.

* * * * *

(b) *MRO qualifications.* Each MRO must be a licensed physician who has the qualifications required by DOT Procedures.

(c) *MRO duties.* The MRO must perform functions for the operator as required by DOT Procedures.

(d) *MRO reports.* The MRO must report all drug test results to the operator in accordance with DOT Procedures.

* * * * *

14. In redesignated § 199.111, the section heading and the first sentence of paragraph (b) are revised, the second sentence of paragraph (b) and paragraph (c) are amended by removing the term ''retesting'' and adding ''testing'' in its place wherever the term appears, and the last sentence of paragraph (b) is amended by removing the term ''retest'' and adding ''additional test'' in its place, to read as follows:

§ 199.111 Retention of samples and additional testing.

(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, and if timely additional testing is requested by the employee according to DOT Procedures, the split specimen must be tested. * * *

* * * * *

15. The first sentence of redesignated § 199.117(b) is revised to read as follows:

§ 199.117 Recordkeeping.

* * * * *

(b) Information regarding an individual's drug testing results or rehabilitation must be released upon the written consent of the individual and as provided by DOT Procedures. * * *

§ 199.201 [Removed and Reserved]

16. Section 199.201 is removed and reserved.

17. In § 199.202, the first sentence is revised to read as follows:

§ 199.202 Alcohol misuse plan.

Each operator must maintain and follow a written alcohol misuse plan that conforms to the requirements of this part and DOT Procedures concerning alcohol testing programs. * * *

§§ 199.203, 199.205 [Removed and Reserved]

18. Sections 199.203 and 199.205 are removed and reserved.

19. Section 199.207 is redesignated as new § 199.9 and transferred to subpart A, and redesignated § 199.9 is amended by removing the term ''subpart'' and adding ''part'' in its place wherever the term appears.

20. In § 199.209, the existing text is designated as paragraph (a) and new paragraph (b) is added to read as follows:

§ 199.209 Other requirements imposed by operators.

* * * * *

(b) Operators may, but are not required to, conduct pre-employment alcohol testing under this subpart. Each operator that conducts pre-employment alcohol testing must—

(1) Conduct a pre-employment alcohol test before the first performance of covered functions by every covered employee (whether a new employee or someone who has transferred to a position involving the performance of covered functions);

(2) Treat all covered employees the same for the purpose of pre-employment alcohol testing (i.e., you must not test some covered employees and not others);

(3) Conduct the pre-employment tests after making a contingent offer of employment or transfer, subject to the employee passing the pre-employment alcohol test;

(4) Conduct all pre-employment alcohol tests using the alcohol testing procedures in DOT Procedures; and

(5) Not allow any covered employee to begin performing covered functions unless the result of the employee's test indicates an alcohol concentration of less than 0.04.

§ 199.213 [Removed and Reserved]

21. Section 199.213 is removed and reserved.

§ 199.225 [Amended]

22. In § 199.225, paragraphs (a)(2)(ii) and (b)(4)(ii) are removed and reserved.

23. Section 199.231(g) is revised to read as follows:

§ 199.231 Access to facilities and records.

* * * * *

(g) An operator may disclose information without employee consent as provided by DOT Procedures concerning certain legal proceedings.

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Issued in Washington, DC, on August 29, 2001.

Edward A. Brigham,

Acting Deputy Administrator.

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