

DEPARTMENT OF TRANSPORTATION

Research and Special Programs
Administration

49 CFR Part 199

[Docket No. PS-102, Amdt. No. 199-1]

RIN 2137-AB54

Control of Drug Use in Natural Gas,
Liquefied Natural Gas, and Hazardous
Liquid Pipeline OperationsAGENCY: Research and Special Programs
Administration (RSPA), DOT.ACTION: Final rule; modification of
implementation dates.

SUMMARY: RSPA has received petitions for reconsideration of its final rule requiring operators of pipeline facilities used for the transportation of natural gas or hazardous liquids and operators of liquefied natural gas facilities to have an anti-drug program for persons who perform certain sensitive safety-related functions covered by the pipeline safety regulations. On March 21, 1989, the Supreme Court upheld as constitutional a related rule issued by DOT requiring post-accident and reasonable suspicion drug testing for rail employees performing safety functions as well as a drug-testing program instituted by the U.S. Customs Service to test certain of its employees. RSPA is delaying the implementation dates stated in its rule to permit careful reevaluation of its rule in light of the Supreme Court's recent guidance, as well as consideration of the issues raised by the petitions for reconsideration now pending before it.

DATES: The amendments in this document are effective April 13, 1989. RSPA expects to issue a notice concerning its reevaluation of the rule by October 2, 1989, and thereafter undertake necessary and appropriate action on all related and pending matters, including the petitions for reconsideration. Dates set forth in the final rule for commencement of drug testing are modified in the following manner: The dates for operators with more than 50 employees subject to drug testing to begin the drug testing required by the final rule is delayed from December 21, 1989 to April 20, 1990, and the date for operators with 50 or fewer such employees to begin to conduct the program is delayed from April 23, 1990 to August 21, 1990.

FOR FURTHER INFORMATION CONTACT: Cesar DeLeon, Assistant Director for Regulation, Office of Pipeline Safety, Research and Special Programs Administration, 400 Seventh Street SW., Washington, DC 20590, (202) 366-1640.

SUPPLEMENTARY INFORMATION: On November 21, 1988, RSPA published a final rule (53 FR 47084) entitled "Control of Drug Use in Natural Gas, Liquefied Natural Gas, and Hazardous Liquid Pipeline Operations." The rule requires pipeline operators to have an anti-drug program which includes pre-employment, post-accident, random, and reasonable cause drug testing and an employee assistance program for education and training regarding the effects and consequences of drug use. Since the rule was published, several intervening events have led RSPA to conclude that reevaluation of the rule is necessary.

RSPA has received petitions for reconsideration of the final rule from the American Gas Association, the Interstate Natural Gas Association of America, the Midcon Corporation, Tenneco Gas Pipeline Group, Pacific Gas and Electric Company, and El Paso Gas Company. The petitions remain under consideration, and RSPA intends to issue notice of the action taken on the petitions following completion of its reevaluation of the rule.

On March 21, 1989, the Supreme Court announced its decisions in two cases that directly affect employee drug testing programs: *Skinner v. Railway Labor Executives' Association*, No. 87-1555, and *National Treasury Employees Union v. Von Raab*, No. 86-1979.

At issue in *Skinner* was another DOT rule requiring railroads to conduct drug tests of employees involved in major train accidents and authorizing testing of employees who violated certain safety rules. In *Von Raab*, the Court considered a U.S. Customs Service testing program applicable to employees (or applicants for employment) seeking positions involving the interdiction of drug traffic or requiring the carrying of firearms. In both, the Court upheld the constitutionality of federally-mandated drug testing.

The Supreme Court agreed that the drug tests were "searches" and, therefore, implicated by the Fourth Amendment's protection against "unreasonable searches and seizures;" however, the Court concluded that the tests were reasonable, under a "balancing test" that measured the privacy interests of the employees against the Government's public safety and law enforcement interests. The most important factors in this balancing were: The Government's compelling interest in detecting and deterring the use of drugs and alcohol by workers in safety or security-related jobs; the employees' diminished expectations of privacy resulting from either existing, pervasive governmental safety regulation or the

nature of the employees' duties; and the minimal intrusion on employee privacy from the tests, which were conducted in a medical-like environment and, generally, without direct observation.

The Court found the Government's interests in drug testing sufficiently compelling to make unnecessary warrants, probable cause or "individualized suspicion" (reversing an earlier ruling by the U.S. Court of Appeals for the Ninth Circuit, 839 F.2d 575). The Court noted that a substance-impaired employee performing a safety-sensitive job could cause tragic consequences long before any signs of impairment were noticeable. Significantly, the Court found the Government's interest served by the deterrent effect of the drug testing in both cases, notwithstanding that testing might reveal few drug users. In *Von Raab*, however, the Court held that the record evidence was insufficient to determine whether the drug testing was reasonable for employees subject to testing only because they had access to classified materials. The Court remanded this issue to the Fifth Circuit Court of Appeals.

This recent, important guidance from the Supreme Court speaks directly to issues now before RSPA on reconsideration (including the appropriate scope of coverage of the rule, the nature of RSPA's pipeline safety mandate in relation to the privacy interests of pipeline workers, and the importance of deterrence). Therefore, RSPA has determined that it is appropriate to reevaluate the rule.

RSPA will reevaluate its drug rule in light of these decisions to ensure that the rule comports with the guidance set forth by the Court and that RSPA can take full advantage of the imprimatur that the Court has put on employee drug testing programs. RSPA's goal remains, as noted in the final rule, a drug-free, and hence safer, pipeline operating environment. 53 FR 47084.

Unlike the remainder of the DOT drug testing rules, the RSPA drug rule applies to an industry which does not transport people (i.e., operators or passengers), namely, the pipeline industry. In addition, the nature of the safety functions performed by pipeline employees and the definition of those employees who would be subject to the RSPA rule, when compared to other DOT-regulated industries, warrant further consideration in light of the Supreme Court's recent decisions.

This final rule amendment also addresses the issue of the international impact of the final rule. In the rule issued November 21, 1988, RSPA

provided that Part 199 is not effective until January 1, 1990, with respect to any person for whom a foreign government contends that application of the part raises questions of compatibility with that country's domestic laws or policies. RSPA had intended that the rule provide an additional year to initiate testing in order to enable government-to-government discussions to reach permanent resolution of any conflict between the final rule and a foreign country's laws or policies. Therefore, as amended, the rule will be effective January 1, 1991, for persons for whom a foreign government contends that there are issues of compatibility of our rule with its laws or policies.

Notwithstanding the generally good safety record of the pipeline transportation industry, RSPA still believes that mandated drug testing programs are needed to assure a continued good safety record. However, reevaluation of the rule, particularly its scope, is appropriate at this time. Because of the complexity of the issues involving the RSPA rule and the proximity of the dates for implementation, RSPA will delay those dates in order to allow full consideration of the issues. If, on October 2, 1989, further delay appears to be needed, it will be provided for.

Reason for No Notice and Comment

These amendments to the final anti-drug rule are needed immediately to delay the compliance dates specified in the final rule. Under the implementation schedule published in the *Federal Register* on November 21, 1988, certain pipeline operators would have been required to begin testing by December 21, 1989. RSPA believes that delay of the date by which testing must begin will enable it to reevaluate its rule in light of the Supreme Court's recent guidance and consider the issues raised by the petitions for reconsideration.

For these reasons, RSPA has determined that good cause exists to make this final rule effective without notice and public comment procedures. Such procedures are impracticable, unnecessary, and contrary to the public interest in this matter.

Economic Assessment

In accordance with the requirements of Executive Order 12291, RSPA reviewed the costs and the benefits of the final anti-drug rule published on November 21, 1988. At that time, RSPA prepared a Final Regulatory Evaluation of the final rule. RSPA included that evaluation in the public docket. RSPA

also summarized and analyzed the comments submitted by interested persons on the economic issues in the final rulemaking document.

This final rule merely extends certain compliance dates to enable consideration of issues raised subsequent to publication of the final rule on November 21, 1988. This rulemaking action does not change the basic regulatory structure and requirements promulgated in the final anti-drug rule. Therefore, RSPA anticipates that there would be little or no cost associated with the extension of the compliance dates. Because any potential difference in costs and benefits would be minimal, RSPA has determined that revision of the Final Regulatory Evaluation for the final anti-drug rule is not necessary and preparation of a separate economic analysis for this final rule is not warranted. This final rule will not result in an annual effect on the economy of \$100 million or more and will not result in a significant increase in consumer prices; thus, the final rule is not a major rule pursuant to Executive Order 12291. However, the final anti-drug rule is significant under the Regulatory Policies and Procedures of the Department of Transportation (44 FR 11034; February 26, 1979) because it involves issues of substantial interest to the public.

Regulatory Flexibility Determination

The Regulatory Flexibility Act of 1980 requires a Federal agency to review any final rule to assess its impact on small business. The amendments contained in this final rule extend certain compliance dates. In consideration of the nature of these amendments, RSPA certifies that this final rule will not have a significant impact on a substantial number of small entities.

International Trade Impact Statement

This final rule contains an amendment that extends the effective date for persons for whom a foreign government contends that there are issues of compatibility of our rule with its laws or policies. Thus, RSPA has determined that this final rule will not have an impact on trade opportunities for U.S. firms doing business overseas or on foreign firms doing business in the United States.

Paperwork Reduction Act

The recordkeeping and reporting requirements of the final anti-drug rule, published on November 21, 1988, previously were submitted to the Office of Management and Budget (OMB) and

approved in accordance with the Paperwork Reduction Act of 1980. Because this final rule does not amend the recordkeeping and reporting requirements, it is not necessary to amend the prior approvals received from OMB.

Federalism Implications

The final rule adopted herein will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

Therefore, in accordance with Executive Order 12612, RSPA has determined that this final rule does not have sufficient federalism implications to warrant preparation of a Federalism Assessment.

List of Subjects in 49 CFR Part 199

Pipeline safety, Drug testing.

In view of the foregoing, RSPA amends 49 CFR Part 199 as follows:

PART 199—[AMENDED]

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

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

2. Section 199.1(b) and (d) are revised to read as follows:

§ 199.1 Scope and compliance.

(b) Operators with more than 50 employees subject to drug testing under this part need not comply with this part until April 20, 1990. Operators with 50 or fewer employees subject to drug testing under this part need not comply with this part until August 21, 1990.

(d) This part is not effective until January 1, 1991, 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, 1991.

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

M. Cynthia Douglass,
Administrator, Research and Special
Programs Administration.

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