

of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);

- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);

- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);

- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4);

- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);

- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);

- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);

- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and

- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it

is published in the **Federal Register**. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by September 28, 2009. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements (see section 307(b)(2)).

#### List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: July 10, 2009.

**Jane Diamond,**

*Acting Regional Administrator, Region IX.*

■ Part 52, Chapter I, Title 40 of the Code of Federal Regulations is amended as follows:

#### PART 52—[AMENDED]

■ 1. The authority citation for Part 52 continues to read as follows:

**Authority:** 42 U.S.C. 7401 *et seq.*

#### Subpart F—California

■ 2. Section 52.220, is amended by adding paragraph (c)(354)(i)(E) to read as follows:

##### § 52.220 Identification of plan.

\* \* \* \* \*

(c) \* \* \*

(354) \* \* \*

(i) \* \* \*

(E) San Joaquin Valley Unified Air Pollution Control District

(1) Rule 4662, “Organic Solvent Degreasing Operations,” Adoption April 11, 1991 and amended September 20, 2007

(2) Rule 4663, “Organic Cleaning Storage, and Disposal,” Adoption December 20, 2001 and amended September 20, 2007

\* \* \* \* \*

[FR Doc. E9-18001 Filed 7-29-09; 8:45 am]

**BILLING CODE 6560-50-P**

## DEPARTMENT OF TRANSPORTATION

### Office of the Secretary

#### 49 CFR Part 40

[Docket OST-2003-15245]

RIN 2105-AD89

#### Procedures for Transportation Workplace Drug and Alcohol Testing Programs

**AGENCY:** Office of the Secretary, DOT.

**ACTION:** Final rule.

**SUMMARY:** This amendment reinstates the requirement for direct observation collections for all return-to-duty and follow-up tests. This provision was stayed by the United States Court of Appeals for the District of Columbia Circuit effective November 1, 2008, but that stay was lifted on July 1, 2009. This amendment, therefore, restores language to the version that became a final rule on June 25, 2008.

**DATES:** *Effective Date:* August 31, 2009.

**FOR FURTHER INFORMATION CONTACT:** Jim L. Swart, Director, U.S. Department of Transportation, Office of Drug and Alcohol Policy and Compliance, 1200 New Jersey Avenue, SE., Washington, DC 20590; (202) 366-3784 (voice), (202) 366-3897 (fax), or [jim.swart@dot.gov](mailto:jim.swart@dot.gov); or Robert C. Ashby, Deputy Assistant General Counsel for Regulation and Enforcement, U.S. Department of Transportation, same address, (202) 366-9310 (voice), (202) 366-9313 (fax), or [bob.ashby@dot.gov](mailto:bob.ashby@dot.gov).

#### SUPPLEMENTARY INFORMATION:

##### Background

The Department issued a final rule on June 25, 2008 (73 FR 35961) that, among other changes, modified 49 CFR 40.67(b) and added a new paragraph (i) concerning the use of direct observation collections, a very significant tool the Department employs to combat attempts by employees to cheat on their drug tests. The amendment to 49 CFR 40.67(b) required direct observation collections for all return-to-duty and follow-up tests. Section 40.67(i) required that direct observations be conducted so as to allow the observer to check the individual for prosthetic or other cheating devices.

Several petitioners asked the Department to delay the effective date of these two provisions, seek further comment on them, and reconsider them. In response, the Department issued a notice delaying the effective date of 49 CFR 40.67(b)—the provision for making direct observation collections mandatory for all return-to-duty and

follow-up tests—until November 1, 2008 (73 FR 50222; August 26, 2008). We opened a comment period on 49 CFR 40.67(b), which closed on September 25, 2008. The Department did not delay the effective date of 49 CFR 40.67(i), and that provision went into effect, as scheduled, on August 25, 2008.

The Department fully considered the comments filed in the public docket regarding the amendment to 49 CFR 40.67(b). On October 22, 2008, at 73 FR 62910, the Department issued a notice responding to the comments and stated “the Department remains convinced that conducting all return-to-duty and follow-up tests under direct observation is the most prudent course from the viewpoint of safety.” (73 FR 62918) The Department decided not to change the amendment and announced that the revised 49 CFR 40.67(b) would go into effect, as scheduled, on November 1, 2008.

On October 24, 2008, several of the petitioners again requested that the Department further postpone the revised 49 CFR 40.67(b). On October 30, 2008, the Department denied that petition. Several of the petitioners then filed a motion for stay with the United States Court of Appeals for the District of Columbia Circuit. On October 31, 2008, the Court issued a temporary administrative stay to allow more time for the court to consider the request for stay. On November 12, 2008, the court issued a further order to stay the effectiveness of section 40.67(b) (*BNSF Railway Company v. Department of Transportation*, U.S. Court of Appeals for the D.C. Circuit, September Term 2008, No. 08–1265, November 12, 2008). This stay remained in effect until the court issued a decision on the merits of petitioners’ challenge to the provisions of 40.67(b). On November 20, 2008, at 73 FR 70283, in response to the stay, the Department issued a final rule to return to the language of section 40.67(b) that existed prior to June 25 final rule “pending further order of the Court.”

Therefore, direct observation collections for return-to-duty and follow-up testing remained an employer option, rather than mandatory. All other requirements of the June 25, 2008 final rule that went into effect on August 25, 2008, including the direct observation provision at 40.67(i) [directing observers to check for prosthetic and other devices used to carry “clean” urine and urine substitutes] were not affected and have continued in effect.

On May 15, 2009, the United States Court of Appeals for the District of Columbia Circuit unanimously upheld DOT’s direct observation drug testing rules applicable to return-to-duty,

safety-sensitive transportation industry employees who have already failed or refused to take a prior drug test. (*BNSF Railway Company v. Department of Transportation*, 566 F.3d 200 (DC Cir. 2009)). Because there was an opportunity for the parties to seek rehearing of the Court’s ruling, the Court’s stay of the direct observation rule continued in effect. The Court issued a Mandate on July 1, 2009, which finalized the decision, thereby lifting the stay. This document, therefore, reinstates the language of 49 CFR 40.67(b) that the Department originally issued on June 25, 2008, and that would have gone into effect on November 1, 2008, but for the court’s stay.

### The Court’s Decision

In its May 15, 2008 decision on the merits of section 40.67, the Court determined that direct observation drug testing for return-to-duty employees was not arbitrary and capricious because the Department had chosen a reasonable way of responding to the compelling governmental interest in transportation safety. The circumstances the Court took into account included the recent development of a wide array of available cheating devices, and the substantial incentive for these return-to-duty employees to use such devices to cheat on required return-to-duty and follow-up drug tests. The Court’s unanimous decision also held that the rules did not violate the Fourth Amendment constitutional prohibition on unreasonable searches and seizures, taking into account, among other factors, the diminished expectation of privacy of employees who have failed or refused a prior drug test.

### Administrative Procedure Act Analysis

The Court determined that the Department’s issuance of the revised regulation was not arbitrary and capricious. In reaching this determination, the court noted that the “Department marshaled and carefully considered voluminous evidence of the increasing availability of a variety of products designed to defeat drug tests.” *BNSF Railway Company v. Department of Transportation*, 566 F.3d at 203. Since any successful use of cheating devices would not show up in statistics, the Court agreed with the Department’s reasoning that it was “illogical” to require statistical evidence of cheating. *Id.* In this regard, the Court cited a recent Supreme Court decision, which said that “It is one thing to set aside agency action under the Administrative Procedure Act because of failure to adduce empirical data that can readily be obtained. It is something else to insist

upon obtaining the unobtainable.” *FCC v. Fox Television Stations, Inc.*, No. 07–582, 2009 WL 1118715, at \*11 (U.S. Apr. 28, 2009) (citation omitted) *Id.* at 203–204.

The Court stated “the Department’s approach was sound. Acknowledging the intrusiveness of direct observation testing, the Department sought to limit it to situations posing a high risk of cheating \* \* \* and then concluded—reasonably in our view—that returning employees have a heightened incentive to cheat, and that this incentive, coupled with the increased availability of cheating devices, creates such a high risk, \* \* \*.” *Id.* at 204. In reaching its determination that “[s]ubstantial additional evidence supports the Department’s conclusion that returning employees are particularly likely to cheat.” *Id.*, the court relied heavily upon the expertise of the Substance Abuse Professionals (SAPs) who commented upon 49 CFR 40.67(b). “Given the experience possessed by these substance abuse professionals, such assessments provide substantial evidence supporting the Department’s conclusion that returning employees are particularly likely to cheat on drug tests.” *Id.*

In addition to the SAP comments and other evidence it referenced, the Court noted with interest that return-to-duty employees pose a high risk to transportation safety. Specifically, the Court noted with interest that “the Department supplemented its conclusion about returning employees’ motivations with evidence of their actual behavior. To rebut the argument—offered by several commenters and echoed here by petitioners—that returning employees are lower risk because they have successfully completed drug treatment programs, the Department emphasized data showing that ‘the violation rate for return-to-duty and follow-up testing is two to four times higher than that of random testing.’” *Id.* at 205. The Court stated “[w]e can hardly fault the Department for inferring that the reason for higher failure rates is not that returning employees are more honest, but that they are more likely to use drugs. And given that employees who never use drugs are—to say the least—much less likely to cheat on drug tests than those who do, we think it quite reasonable for the Department to see a higher underlying rate of drug use as evidence of a higher risk of cheating.” *Id.*

The Court considered and rejected alternatives proposed by the petitioners, including maintaining the status quo of continuing to allow employers the

option of conducting direct observation collections on return-to-duty employees. The Court supported the Department's determination that employers, concerned about the effects on "labor management agreements" and fearing "upsetting employees," rarely exercise this option. The Court referred to a statement in the amicus brief from the Association of American Railroads that direct observation tests "generate resentment and ill will towards management," as further supporting the Department's conclusion that the status quo was untenable. *Id.*

The Court concluded "the Department acted neither arbitrarily nor capriciously in concluding that the growth of an industry devoted to circumventing drug tests, coupled with returning employees' higher rate of drug use and heightened motivation to cheat, presented an elevated risk of cheating on return-to-duty and follow-up tests that justified the mandatory use of direct observation." *Id.*

#### *Fourth Amendment Analysis*

The Court carefully considered whether the Department's final rule struck the appropriate Fourth Amendment balancing of the needs of transportation safety with the reasonableness of the search. The Court stated that the Department's "interest in transportation safety is 'compelling' to say the least." Citing *Skinner*, 489 U.S. at 628, 109 S.Ct. 1402. *BNSF* at 206. Further, the Court recognized that "[g]iven the proliferation of cheating devices, we have little difficulty concluding that direct observation furthers the government's interest in effective drug testing." *Id.* Since employees returning-to-duty can anticipate that they will be subject to more frequent testing, "[a]rmed with such foreknowledge, returning employees can easily obtain and conceal cheating devices, keeping them handy even for unannounced follow-up tests." *Id.* The Court concluded that the Department "has a strong interest in conducting direct observation testing to ensure transportation safety." *Id.*

The Court then turned to the second prong of the Fourth Amendment analysis—the reasonableness of the actual search. "Individuals ordinarily have extremely strong interests in freedom from searches as intrusive as direct observation urine testing. In this case, however, those interests are diminished because the airline, railroad, and other transportation employees subject to direct observation perform safety-sensitive duties in an industry that is 'regulated pervasively to ensure safety.'" *Id.* However, the Court noted

that the Department's direct observation provisions were not structured to apply to all safety-sensitive employees. Only violators and suspected cheaters are affected. "By choosing to violate the Department's perfectly legitimate—and hardly onerous—drug regulations, returning employees have placed themselves in a very different position from their coworkers." *Id.* at 207. Thus, the court stated, "we have little trouble concluding that employees who have intentionally violated a valid drug regulation \* \* \* [would] have less of a legitimate interest in resisting a search intended to prevent future violations of that regulation than do employees who never violated the rule." *Id.* The Court explained, "we think that the employees' prior misconduct is particularly salient, especially compared to their choice to work in a pervasively regulated industry. It's one thing to ask individuals seeking to avoid intrusive testing to forgo a certain career entirely; it's a rather lesser thing to ask them to comply with regulations forbidding drug use." *Id.* at 208. The Court acknowledged that "direct observation is extremely invasive, but that intrusion is mitigated by the fact that employees can avoid it altogether by simply complying with the drug regulations." *Id.*

The Court also took into account that the provision making direct observation optional in return-to-duty and follow-up situations came into effect well before present threats to the integrity of urine testing became known. "[T]hat was before the Whizzinator and its like. Given the proliferation of such cheating devices, here we have a very different record, one that fully supports the Department's finding that standard monitoring procedures are inadequate. We thus conclude that here \* \* \* direct observation testing will 'significantly improve testing accuracy.'" *Id.*

In finding that circumstances necessitated the Department's increased requirements for the scope and nature of direct observation collections, the Court stated, "we recognize the intrusiveness of the partial disrobing requirement, but find it only somewhat more invasive than direct observation, which already requires employees to expose their genitals to some degree. Because of this, and because the Department has permissibly found the requirement necessary to detect certain widely-available prosthetic devices, we conclude that it represents a reasonable procedure for situations posing such a heightened risk of cheating as to justify direct observation in the first place." *Id.*

"[T]he Department has reasonably concluded that the proliferation of

cheating devices makes direct observation necessary to render these drug tests—needed to protect the traveling public from lethal hazards—effective. Weighing these factors, we strike the balance in favor of permitting direct observation testing in these circumstances." *Id.* The court concluded, "[g]iven the combination of the vital importance of transportation safety, the employees' participation in a pervasively regulated industry, their prior violations of the drug regulations, and the ease of obtaining cheating devices capable of defeating standard testing procedures, we find the challenged regulations facially valid under the Fourth Amendment." *Id.*

#### **Collective Bargaining Agreements**

We are aware that some employers and labor organizations may have entered into collective bargaining agreements (CBAs) that prohibit or limit the use of direct observation collections in return-to-duty and follow-up testing situations. Employers and employees, of course, do not have the authority to agree to avoid compliance with the requirements of Federal law. When this final rule goes into effect, conducting all follow-up and return-to-duty testing using direct observation collections will be a requirement of Federal law. Employers *must* use direct observation collections for such tests that take place after the effective date of this rule, and any contrary provisions of CBAs in the present or in the future will not be effective.

#### **Conclusion**

The Department wants to ensure that employers, employees, collection sites, collectors, Third-Party Administrators and other service agents know about and are fully prepared for mandatory direct observation for follow-up and return-to-duty testing. We view this to be important in light of the fact that there has been a good deal of conflicting information in the transportation and drug testing industries about the requirements and because of the complexities of the various petitions, court actions, and rule changes on the matter.

#### **Regulatory Analyses and Notices**

This document simply reinstates, without change, following the dissolution of a court stay, a provision issued as part of a final rule on June 25, 2009. The regulatory analyses and notices set forth in that document (73 FR 35968–69) apply to today's rule.

**List of Subjects in 49 CFR Part 40**

Administrative practice and procedures, Alcohol abuse, Alcohol testing, Drug abuse, Drug testing, Laboratories, Reporting and recordkeeping requirements, Safety, Transportation.

Issued this 24th day of July 2009, at Washington, DC.

**Jim L. Swart,**

*Director, Office of Drug and Alcohol Policy Compliance.*

**49 CFR Subtitle A—Authority and Issuance**

■ For reasons discussed in the preamble, the Department of Transportation is amending part 40 of Title 49 Code of Federal Regulations as follows:

**PART 40—PROCEDURES FOR TRANSPORTATION WORKPLACE DRUG AND ALCOHOL TESTING PROGRAMS**

■ 1. The authority citation for 49 CFR Part 40 continues to read as follows:

**Authority:** 40 U.S.C. 102, 301, 322, 5331, 20140, 31306, and 54101 *et seq.*

■ 2. Section 40.67 is amended by revising paragraph (b) to read as follows:

**§ 40.67 When and how is a directly observed collection conducted?**

\* \* \* \* \*

(b) As an employer, you must direct a collection under direct observation of an employee if the drug test is a return-to-duty test or a follow-up test.

[FR Doc. E9-18156 Filed 7-29-09; 8:45 am]

**BILLING CODE 4910-9X-P**

**DEPARTMENT OF COMMERCE****National Oceanic and Atmospheric Administration****50 CFR Part 648**

[Docket No. 090224231-91118-02]

**RIN 0648-AX54**

**Fisheries of the Northeastern United States; Atlantic Sea Scallop Fishery; State Waters Exemption**

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Final rule.

**SUMMARY:** This final rule allows an exemption from the minimum twine-top mesh size for vessels issued Federal scallop permits and fishing exclusively

in State of Maine (ME) waters. In addition, the state waters exemption provides an exemption from scallop days-at-sea (DAS) for limited access DAS scallop vessels, provided the vessel fishes exclusively in ME state waters. The scallop fishery regulations specify that a state may be eligible for a state waters exemption if it has a scallop fishery and a scallop conservation program that does not jeopardize the biomass and fishing mortality/effort limit objectives of the Atlantic Sea Scallop Fishery Management Plan (FMP). The regulations further state that the Regional Administrator, Northeast Region, NMFS (RA), shall determine which states meet those criteria and shall authorize the exemption for such states by publishing a rule in the **Federal Register**.

**DATES:** Effective August 31, 2009.

**ADDRESSES:** Documents supporting this action, including ME's request for the exemption, Amendment 11 to the FMP, and Framework 19 to the FMP, are available upon request from Patricia A. Kurkul, Regional Administrator, NMFS, Northeast Regional Office, 55 Great Republic Drive, Gloucester, MA 01930.

**FOR FURTHER INFORMATION CONTACT:** Peter Christopher, Policy Analyst, 978-281-9288; fax 978-281-9135.

**SUPPLEMENTARY INFORMATION:****Background**

Amendment 11 to the FMP (Amendment 11), implemented on June 1, 2008 (73 FR 20090, April 14, 2008), includes a comprehensive new management program for the general category scallop fleet. Amendment 11 created a Northern Gulf of Maine Scallop Management Area (NGOM Area) that includes a total allowable catch (TAC), gear restrictions, and a possession limit for the NGOM Area that are more restrictive than previous regulations for the area. Under Amendment 11, NMFS determined that the state waters exemptions for ME, New Hampshire (NH), and Massachusetts (MA), should be suspended, pending submission of additional information from those states regarding their state waters fisheries and the potential effects of allowing state waters exemptions under the Amendment 11 scallop regulations. In response, ME requested a state waters exemption and provided background information on the State's current scallop fishery management measures, the potential state waters scallop fishery, and information regarding potential new measures that the State was developing at the time.

The scallop fishery regulations at § 648.54(c) specify that a state may be eligible for the state waters exemption if it has a scallop fishery and a scallop conservation program that do not jeopardize the biomass and fishing mortality/effort limit objectives of the FMP. The regulations further state that the RA shall determine which states meet those criteria and shall publish a rule in the **Federal Register**, in accordance with the Administrative Procedure Act, to provide the exemption for such states.

Based on the information submitted, NMFS determined that ME state waters qualify for the state waters exemption program under the FMP. The majority of ME's scallop fishery restrictions are either equally or more restrictive than Federal scallop fishing regulations. The exception is that ME allows vessels to use a minimum mesh size of 5.5-inch (14-cm) twine tops on scallop dredges, while the Federal regulations require a 10-inch (25.4-cm) minimum twine-top mesh size. The state waters exemption therefore allows an exemption from the 10-inch (25.4-cm) minimum twine-top mesh size. In addition, the state waters exemption provides an exemption from scallop DAS for limited access DAS scallop vessels, but does not exempt such vessels from any other Federal restrictions other than the minimum twine-top mesh size as noted above. To fish under the exemption, owners of scallop vessels are required to declare their intent to fish, and the vessel must fish, exclusively in ME state waters, subject to more restrictive state measures, if applicable. Vessels with Federal Incidental Catch scallop permits are still confined to the 40-lb (18-kg) limit under Federal regulations. The target TAC was set at 50,000 lb (22,680 kg) for these vessels based partly on the very low possession limit. Allowing these vessels to harvest more than 40 lb (18 kg) per trip could therefore compromise the TAC.

As required by the scallop fishery regulations, exemptions can only be granted if the state's scallop fishery would not jeopardize the biomass and fishing mortality/effort limit objectives of the FMP. The exemption from the Federal twine-top restriction and DAS has no impact on the effectiveness of Federal management measures for the scallop fishery overall on the NGOM Area because the remainder of ME's scallop fishery regulations are more restrictive and would limit mortality and effort beyond the Federal management program. The twine top minimum mesh size restrictions are designed to help reduce bycatch in the scallop fishery. In particular, larger