Website: www.atlashall.com
E-mail: info@atlashall.com

ATLAS & HALL, L.L.P.
ATTORNEYS AT LAW
P.O. BOX 3725 (78502-3725)
816 W. PECAN
MCALLEN, TEXAS 78501
TEL. (956) 682-5501 FAX (956) 686-6109

STARR COUNTY OFFICE
200 N. BRITTON AVE.
RIO GRANDE CITY, TEXAS 78582
TEL. (956) 488-1896
FAX (956) 488-6482

October 1, 2008

Roy Quintanilha
Safety Director for Hidalgo County
Risk Management Department
100 E. Cano, Suite 103
Edinburg, Texas 78539

Via Facsimile (956) 318-2658

RE: Changes to DOT Urine Specimen Collection and Testing

Dear Mr. Quintanilha:

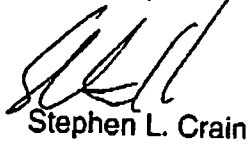
The Department of Transportation has issued a final rule making change to 49 CFR Part 40. The changes require direct observation of Return-to-Duty or Follow-Up test. Effective August 25, 2008 every DOT Return-to-Duty or Follow-Up test collection is to be conducted under direct observation.

Direct observation means the donor must raise his/her shirt or blouse above the waist; just below the navel, lower clothing and underpants to mid thigh; and turn around, to show the observer that the donor does not have a prosthetic devise.

If you have any questions, please do not hesitate to call.

Very truly yours,

ATLAS & HALL, LLP

By: 
Stephen L. Crain

SLC/mt

Foley Services, Inc.

Your Single Source for DOT Compliance

NEW MANDATED CHANGES TO DOT URINE SPECIMEN COLLECTION AND TESTING

ODAPC issued a final ruling making changes to 49 CFR Part 40. These mandated changes include new procedures that have a direct impact on you, as a trained collector.

All DOT Follow-up and Return-to-Duty tests are to be conducted under direct observation.

- Previously, it was the *employer's choice* as to whether to conduct a DOT required Return-to-Duty or Follow-Up test under direct observation. Effective August 25, 2008, every **DOT Return-to-Duty** or **Follow-Up** test collection you perform is to be conducted under direct observation.

Changes to Direct Observation Collection Procedure

- Effective August 25th, the following procedure is to be used when conducting an observed collection. If you are using an observer, because you are not the same gender as the donor, you must inform both the donor and the observer of this procedure.
- The donor is to:
  - Raise his/her shirt, blouse, or dress/skirt, as appropriate, above the waist, just above the navel;
  - Lower clothing and underpants to mid-thigh;
  - Turn around, to show the observer that the donor does not have a prosthetic device.
- After the observer has determined that the donor does not have such a device, the observer may permit the donor to return clothing to its proper position and then conduct the observed collection.

NEWLY DEFINED REFUSAL-TO-TEST SITUATIONS

Failure to wash hands before providing the specimen will now be a Refusal to Test

- 40.191 (a)(8) identifies that the failure to cooperate with any part of the testing process is a Refusal to Test. They added: ***"fail to wash hands after being directed to do so by the collector".***
  - Once you have directed the donor to wash his/her hands before providing his/her specimen, should the donor refuse to do so, you are to inform the donor of the requirement. If he/she still refuses you will stop the collection, note this specific failure to cooperate on the CCF and inform the DER.

Donor admission of adulteration / substitution

- Should the donor admit to you, as the collector, that he/she adulterated or substituted his/her specimen that is now a Refusal to Test.
  - Example: You believe the specimen shows signs of tampering and you explain to the donor that he/she will need to undergo another collection under direct observation. The donor then admits that he/she adulterated the specimen. The collection process will stop, you will document the situation and the donor's admission on the CCF and contact the DER.

FOR MORE INFORMATION: If you'd like more information on all of the requirements, please visit our website, www.FoleyServices.com.

655 Winding Brook Drive • Glastonbury, CT 06033 • 860-633-2660 • 800-253-5506 • Fax 860-652-3259
www.FoleyServices.com

DOT Direct Observation Collection Procedures

(Direct observation collections are only done when needed. Not every DOT collection is observed.)

The observer in a directly observed DOT urine specimen collection must be the same gender as the donor. There are no exceptions, not even for trained medical professionals, such as doctors or nurses.

During a directly observed collection if you discover a device that would allow the donor to cheat on a drug test, stop the collection immediately and report the refusal-to-test situation to the donor's DER.

A Step-by-Step Guide to Conducting Directly Observed Collections

1. Explain the collection procedure to the donor, and the reason for the directly observed collection.

2. If you are the same gender as the donor, you may act as both collector and observer during the collection. If not, you will need to use an observer.

When using an Observer...

Arrange for an individual of the same gender to act as the observer. If you are unable to arrange for an observer, contact the Employer and ask the DER to provide an individual of the same gender to assist by performing the observation.

3. Check the (Observed) box on the CCF and enter the reason for the directly observed collection on the (Remarks) line.

Include the name of the observer on the (Remarks) line.

4. If you are acting as both observer and collector, enter the urination room or stall with the donor.

Explain the direct observation procedure to the collector and observer. Only the donor and observer will enter the urination room together. Tell the donor to provide the specimen to you — not the observer.

5. Once inside the urination room, the donor must lower his or her pants and underpants to mid-thigh, and raise his or her shirt/blouse/skirt to the navel, as appropriate, and turn completely around so that the observer can ensure that the donor does not have a prosthetic or other device that could be used to cheat on the drug test.

6. The donor may then return his or her clothing to the proper position and proceed with the observed urination. The observer is to watch the urine go from the donor's body into the collection container.

7. The donor hands the urine specimen to you, the collector.

The observer watches the donor hand the specimen to you, completing his or her participation in the collection.

8. Follow the remaining steps of the collection process.

A Direct Observation Collection is Required When:

- You see signs of substitution or tampering
- The donor presents a specimen that is [illegible] of prior to the collection
- The donor is going for a DOT Return-to-Duty or Follow-Up test
- The donor's employer has requested it

FOLEY SERVICES, INC.

Your Single Source for DOT Compliance

ODAPC Announcement

On June 25, 2008, the Department issued new rules improving protections against cheating on drug tests, including the mandatory use of specimen validity testing for all DOT specimens. Recently, the Department has received petitions from some transportation labor and management organizations asking that the August 25, 2008, effective date be postponed for two provisions of the rule concerning the direct observation of urine collections.

Provision 1: The first of the two provisions would make direct observation mandatory in all follow-up and return-to-duty collections. Direct observation is currently authorized, but not required, in these circumstances.

Because the notice of proposed rulemaking for the June 25, 2008, final rule had not specifically asked for comment on this provision, the Department has decided to hold a 30-day comment period on this provision. To allow for the comment period and the Department's response, the effective date of mandatory direct observation for follow-up and return-to-duty testing provision has been changed to November 1, 2008.

Provision 2: The second provision would require observers in all direct observation collections to check employees for the presence of prosthetic and other devices used to cheat on tests, by having employees raise and lower their clothing. The effective date of this provision will remain August 25, 2008.

The Department emphasizes that the new direct observation procedure will apply only to direct observation tests authorized or required by the current 49 CFR Part 40, and the rules going into effect on August 25 will not result in any increase in the situations in which direct observation is used. Direct observation occurs in only a very small percentage of DOT test situations, where there is a heightened risk of an attempt to cheat.

The Department's Notice was published in the Federal Register today, August 26, 2008, and is on the ODAPC Website at:

http://www.dot.gov/ost/dapc/frpubs.html

We want all interested parties to realize that the single change in the effective date affects ONLY 40.67(b) – mandatory direct observation for follow-up and return-to-duty testing. The rest of the June 25, 2008, final rule goes into effect on August 25, 2008, as scheduled.

Thank you.

Jim L. Swart
Director
Office of Drug and Alcohol Policy and Compliance
U.S. Department of Transportation
August 26, 2008

technical standards (e.g., specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies. This rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

L. Environment

We have analyzed this rule under Commandant Instruction M16475.lD and Department of Homeland Security Management Directive 5100.1, which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded that there are no factors in this case that would limit the use of a categorical exclusion under section 2.B.2 of the Instruction. Therefore, this rule is categorically excluded, under figure 2–1, paragraphs (34)(a) and (b) of the Instruction, from further environmental documentation because this rule involves editorial, procedural, and internal agency functions. A final "Environmental Analysis Check List" and a final "Categorical Exclusion Determination" are available in the docket where indicated under **ADDRESSES**.

List of Subjects in 46 CFR Part 31

Cargo vessels, Marine safety, Reporting and recordkeeping requirements.

■ For the reasons discussed in the preamble, the Coast Guard amends 46 CFR part 31 as follows:

PART 31—INSPECTION AND CERTIFICATION

■ 1. The authority citation for part 31 continues to read as follows:

Authority: 33 U.S.C. 1321(j); 46 U.S.C. 2103, 3205, 3306, 3307, 3703; 46 U.S.C. Chapter 701; 49 U.S.C. 5103, 5106; E.O. 12234, 45 FR 58801, 3 CFR, 1980 Comp., p. 277; E.O. 12777, 56 FR 54757, 3 CFR, 1991 Comp., p. 351; Department of Homeland Security Delegation No. 0170.1. Section 31.10–21 also issued under the authority of Sect. 4109, Pub. L. 101–380, 104 Stat. 515.

■ 2. In § 31.10–16, revise paragraph (e) to read as follows:

§ 31.10–16 Inspection and certification of cargo gear-TB/ALL.

* * * * *

(e) The authorization for organizations to perform the required inspection is granted by the Chief, Office of Vessel Activities, Commandant (CG–543), and will continue until superseded, canceled, or modified. The following organizations are currently recognized by the Commandant (CG–543) as having the technical competence to handle the required inspection:

(1) National Cargo Bureau, Inc., with home offices at 17 Battery Place, Suite 1232, New York, NY 10004.

(2) The International Cargo Gear Bureau, Inc., with home office at 321 West 44th Street, New York, NY 10036.

Dated: June 19, 2008.

Stefan G. Venckus,

Chief, Office of Regulations and Administrative Law, United States Coast Guard.

[FR Doc. E8–14293 Filed 6–24–08; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

49 CFR Part 40

[Docket No. OST–2003–15245]

RIN 2105–AD55

Procedures for Transportation Workplace Drug and Alcohol Testing Programs

AGENCY: Office of the Secretary, DOT.

ACTION: Final rule.

SUMMARY: The Department of Transportation is amending certain provisions of its drug and alcohol testing procedures to change instructions to collectors, laboratories, medical review officers, and employers regarding adulterated, substituted, diluted, and invalid urine specimen results. These changes are intended to create consistency with specimen validity requirements established by the U.S. Department of Health and Human Services and to clarify and integrate some measures taken in two of our own Interim Final Rules. This Final Rule makes specimen validity testing mandatory within the regulated transportation industries.

DATES: This rule is effective August 25, 2008.

FOR FURTHER INFORMATION CONTACT: Jim L. Swart, Acting Director (S–1), U.S. Department of Transportation, Office of Drug and Alcohol Policy and Compliance, 1200 New Jersey Avenue, SE., Washington, DC 20590; telephone number (202) 366–3784 (voice), (202) 366–3897 (fax), or *jim.swart@dot.gov* (e-mail).

SUPPLEMENTARY INFORMATION:

Background

The Omnibus Transportation Employee Testing Act of 1991, 49 U.S.C. 31300, *et seq.*, 49 U.S.C. 20100, *et seq.*, 49 U.S.C. 5330, *et seq.*, and 49 U.S.C. 45100, *et seq.* (the Omnibus Act), requires the U.S. Department of Transportation (DOT) to use the laboratories certified by, and testing procedures of, the U.S. Department of Health and Human Services (HHS) to ensure "the complete reliability and accuracy of controlled substances tests." Since Congress specifically limited the scientific testing methodology upon which the DOT can rely in making its drug and alcohol testing regulations, we follow the HHS scientific and technical guidelines, including the amendments to their Mandatory Guidelines.

In its final rule of December 2000 [65 FR 79526], the U.S. Department of Transportation (DOT) made specimen validity testing (SVT) mandatory for the transportation industry contingent upon the HHS publishing its Mandatory Guidelines on SVT. DOT anticipated that HHS would, sometime in 2001, amend its Mandatory Guidelines to establish SVT requirements for HHS-certified laboratories. When it appeared that HHS would not establish final SVT requirements in 2001, we amended 49 CFR part 40 (part 40) to remove the mandatory requirement. We believed it advisable to wait until HHS completed its amendment before making SVT mandatory throughout the transportation industries for all DOT specimens.

On August 9, 2001, the DOT amended part 40 [66 FR 41952] to remove the mandatory requirement because HHS had not finalized its Mandatory Guidelines regarding SVT. SVT would remain authorized but not required.

The DOT issued a May 28, 2003 interim final rule (2003 IFR) [68 FR 31626] in response to scientific and medical information suggesting we modify testing criteria for some specimens that had been considered to be substituted and ultimately were treated as refusals to test. The 2003 IFR modified how the medical review officer (MRO) would deal with any substituted result with creatinine concentrations equal to or greater than 2, but less than or equal to 5 mg/dL [hereafter, "2–5 mg/dL range"]. It did not change the HHS substitution criteria that we had used.

On April 13, 2004, the HHS published a **Federal Register** notice revising its Mandatory Guidelines [69 FR 19644] with an effective date of November 1, 2004. Among the revisions contained in the HHS Mandatory Guidelines were requirements that laboratories modify substituted and diluted specimen testing procedures and reporting criteria. The HHS also revised

Dilute specimen. A urine specimen with creatinine and specific gravity values that are lower than expected for human urine.

* * * * *

Initial drug test (also known as a Screening drug test). An immunoassay test to eliminate "negative" urine specimens from further consideration and to identify the presumptively positive specimens that require confirmation or further testing.

Initial validity test. The first test used to determine if a urine specimen is adulterated, diluted, or substituted.

Invalid result. The result reported by a laboratory for a urine specimen that contains an unidentified adulterant, contains an unidentified interfering substance, has an abnormal physical characteristic, or has an endogenous substance at an abnormal concentration that prevents the laboratory from completing testing or obtaining a valid drug test result.

* * * * *

Limit of Detection (LOD). The lowest concentration at which an analyte can be reliably shown to be present under defined conditions.

* * * * *

Non-negative specimen. A urine specimen that is reported as adulterated, substituted, positive (for drug(s) or drug metabolite(s)), and/or invalid.

* * * * *

Oxidizing adulterant. A substance that acts alone or in combination with other substances to oxidize drugs or drug metabolites to prevent the detection of the drug or drug metabolites, or affects the reagents in either the initial or confirmatory drug test.

* * * * *

Screening drug test. See Initial drug test definition above.

* * * * *

Substituted specimen. A urine specimen with creatinine and specific gravity values that are so diminished or so divergent that they are not consistent with normal human urine.

* * * * *

■ 4. Section 40.23 is amended by revising paragraph (f) introductory text and adding paragraph (f)(5), to read as follows:

§ 40.23 What actions do employers take after receiving verified test results?

* * * * *

(f) As an employer who receives a drug test result indicating that the employee's urine specimen test was cancelled because it was invalid and that a second collection must take place under direct observation—

* * * * *

(5) You must ensure that the collector conducts the collection under direct observation.

* * * * *

■ 5. Section 40.67 is amended by revising paragraph b); redesignating paragraphs (i), (j), (k), (l), and (m) as (j), (k), (l), (m), and (n) respectively, and adding a new paragraph (i) 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.

* * * * *

(i) As the observer, you must request the employee to raise his or her shirt, blouse, or dress/skirt, as appropriate, above the waist; and lower clothing and underpants to show you, by turning around, that they do not have a prosthetic device. After you have determined that the employee does not have such a device, you may permit the employee to return clothing to its proper position for observed urination.

* * * * *

■ 6. Section 40.83 is amended by revising paragraph (g)(2) to read as follows:

§ 40.83 How do laboratories process incoming specimens?

* * * * *

(g) * * *

(2) If the problem(s) is not corrected, you must reject the test and report the result in accordance with § 40.97(a)(3).

* * * * *

■ 7–8. Section 40.89 is amended by revising paragraph (b) to read as follows:

§ 40.89 What is validity testing, and are laboratories required to conduct it?

* * * * *

(b) As a laboratory, you must conduct validity testing.

■ 9. Section 40.95 is revised to read as follows:

§ 40.95 What are the adulterant cutoff concentrations for initial and confirmation tests?

(a) As a laboratory, you must use the cutoff concentrations for the initial and confirmation adulterant testing as required by the HHS Mandatory Guidelines and you must use two separate aliquots—one for the initial test and another for the confirmation test.

(b) As a laboratory, you must report results at or above the cutoffs (or for pH, at or above or below the values, as appropriate) as adulterated and provide the numerical value that supports the adulterated result.

■ 10. A new section 40.96 is added to read as follows:

§ 40.96 What criteria do laboratories use to establish that a specimen is invalid?

(a) As a laboratory, you must use the invalid test result criteria for the initial and confirmation testing as required by the HHS Mandatory Guidelines, and you must use two separate aliquots—one for the initial test and another for the confirmation test.

(b) As a laboratory, for a specimen having an invalid result for one of the reasons outlined in the HHS Mandatory Guidelines, you must contact the MRO to discuss whether sending the specimen to another HHS certified laboratory for testing would be useful in being able to report a positive or adulterated result.

(c) As a laboratory, you must report invalid results in accordance with the invalid test result criteria as required by the HHS Guidelines and provide the numerical value that supports the invalid result, where appropriate, such as pH.

(d) As a laboratory, you must report the reason a test result is invalid.

11. Section 40.97 is amended by adding the words, "and Rejected for Testing" between "Non-negative" and "results" in paragraph (b)(2) and by revising paragraph (a) to read as follows:

§ 40.97 What do laboratories report and how do they report it?

(a) As a laboratory, you must report the results for each primary specimen. The result of a primary specimen will fall into one of the following three categories. However, as a laboratory, you must report the actual results (and not the categories):

(1) Category 1: Negative Results. As a laboratory, when you find a specimen to be negative, you must report the test result as being one of the following, as appropriate:

(i) Negative, or

(ii) Negative-dilute, with numerical values for creatinine and specific gravity.

(2) Category 2: Non-negative Results. As a laboratory, when you find a specimen to be non-negative, you must report the test result as being one or more of the following, as appropriate:

(i) Positive, with drug(s)/metabolite(s) noted;

(ii) Positive-dilute, with drug(s)/metabolite(s) noted, with numerical values for creatinine and specific gravity;

■ 6. Section 1.1156 is revised to read as follows:

§ 1.1156 Schedule of regulatory fees and filing locations for international services.

	Fee amount	Address
Radio Facilities:		
1. International (HF) Broadcast	$860	FCC, International, P.O. Box 979084, St. Louis, MO 63197–9000.
2. International Public Fixed	2,025	FCC, International, P.O. Box 979084, St. Louis, MO 63197–9000.
Space Stations (Geostationary Orbit)	119,300	FCC, Space Stations, P.O. Box 979084, St. Louis, MO 63197–9000.
Space Stations (Non-Geostationary Orbit)	125,750	FCC, Space Stations, P.O. Box 979084, St. Louis, MO 63197–9000.
Earth Stations:		
Transmit/Receive & Transmit Only (per authorization or registration)	195	FCC, Earth Station, P.O. Box 979084, St. Louis, MO 63197–9000.
Carriers:		
International Bearer Circuits (per active 64KB circuit or equivalent)	.93	FCC, International, P.O. Box 979084, St. Louis, MO 63197–9000.

Federal Communications Commission.

Marlene Dortch,

Secretary.

[FR Doc. E8–19899 Filed 8–25–08; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 08–1714; MB Docket No. 07–183; RM–11394]

Radio Broadcasting Services; Cotulla and Dilley, TX

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The Audio Division grants a Petition for Rule Making issued at the request of Katherine Pyeatt, proposing the allotment of Channel 291A at Dilley, Texas, as its fourth local FM aural transmission service. The reference coordinates for vacant Channel 291A at Dilley are 28–36–06 NL and 99–06–21 WL. This site is located 9.6 kilometers (6 miles) southeast of Dilley. This site is located within 320 kilometers of the Mexican border. Although concurrence has been requested for Channel 291A at Dilley, notification has not been received. If a construction permit is granted prior to the receipt of formal concurrence in the allotment by the Mexican government, the construction permit will include the following condition: "Operation with the facilities specified for Dilley herein is subject to modification, suspension or, termination without right to hearing, if found by the Commission to be necessary in order to conform to the 1992 USA-Mexico FM Broadcast Agreement."

Additionally, the new reference coordinates for vacant Channel 289A at Cotulla, Texas are modified to 28–22–00 NL and 99–17–00 WL. This site is located 9.1 kilometers (5.7 miles) southwest of Cotulla. This site is located within 320 kilometers of the Mexican border. Although concurrence has been requested for Channel 289A at Cotulla, notification has not been received. If a construction permit is granted prior to the receipt of formal concurrence in the allotment by the Mexican government, the construction permit will include the following condition: "Operation with the facilities specified for Cotulla herein is subject to modification, suspension or, termination without right to hearing, if found by the Commission to be necessary in order to conform to the 1992 USA-Mexico FM Broadcast Agreement."

DATES: Effective September 8, 2008.

ADDRESSES: Secretary, Federal Communications Commission, 445 Twelfth Street, SW., Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Rolanda F. Smith, Media Bureau, (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Report and Order*, MB Docket No. 07–183, adopted July 23, 2008, and released July 25, 2008. The *Notice of Proposed Rule Making* proposed the allotment of Channel 291A at Dilley, Texas. *See* 72 FR 59510, published October 22, 2007. The full text of this Commission decision is available for inspection and copying during normal business hours in the Commission's Reference Information Center, 445 Twelfth Street, SW., Washington, DC 20554. The complete text of this decision may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone 1–800–378–3160 or *http://www.BCPIWEB.com*. The Commission will send a copy of this Report and Order in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

List of Subjects in 47 CFR Part 73

Radio, Radio broadcasting.

■ As stated in the preamble, the Federal Communications Commission amends 47 CFR Part 73 as follows:

PART 73—RADIO BROADCAST SERVICES

■ 1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334, 336.

§ 73.202 [Amended]

■ 2. Section 73.202(b), the Table of FM Allotments under Texas, is amended by adding Channel 291A at Dilley.

Federal Communications Commission.

Robert A. Haynes,

Senior Attorney.

[FR Doc. E8–19544 Filed 8–25–08; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

49 CFR Part 40

[Docket OST–2003–15245]

RIN 2105–AD55

Procedures for Transportation Workplace Drug Testing Programs

AGENCY: Office of the Secretary, DOT.

ACTION: Change in effective date; request for comments.

SUMMARY: In response to petitions from certain transportation industry and labor groups, the Department of Transportation is changing the effective date of 49 CFR 40.67(b) from August 25, 2008, to November 1, 2008. The Department is also requesting comments concerning the content of § 40.67(b) for 30 days. This section of the Department's drug testing procedural rule requires employers to ensure that all follow-up and return-to-duty drug tests are directly observed.

DATES: The effective date of the revision of 49 CFR 40.67(b) published June 25, 2008 (73 FR 35970) is delayed from August 25, 2008, to November 1, 2008. Comments should be submitted by September 25, 2008.

ADDRESSES: You may submit comments identified by the docket number (OST–2003–15245) by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Fax:* 1–202–493–2251.
- *Mail:* Docket Operations, U.S. Department of Transportation, West Building, Ground Floor, Room W12–140, Routing Symbol M–30, 1200 New Jersey Avenue, SE., Washington, DC 20590.
- *Hand Delivery:* To Docket Operations, Room W12–140 on the ground floor of the West Building, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

Instructions: Identify the agency and docket number (OST–2003–15245) at the beginning of your submission. Except for comments that receive confidential treatment, all comments received will be posted without change to the Federal Docket Management System (FDMS), including any personal information provided. Detailed instructions for requesting confidential treatment are provided below, under the Privacy Act heading.

Docket: For access to the dockets to read background documents or comments received, go to *http://www.regulations.gov* or DOT's Docket Operations Office (see **ADDRESSES**).

Privacy Act: Anyone is able to search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the document (or signing the document, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78), which may also be found at *http://www.regulations.gov.*

You may request confidential treatment of comments or portions of comments under the procedures set forth in 49 CFR part 105. While all comments should be sent to the FDMS, OST will consider separately and not place in the public docket those comments or portions of comments OST determines to include trade secrets, other confidential commercial information, or sensitive security information (SSI). In accordance with 49 CFR 105.30, you may ask OST to keep information confidential using the following procedures: (1) Mark "confidential" on each page of the original document you would like to keep confidential; (2) send FDMS both the original document and a second copy of the original document with the confidential information redacted; and (3) explain why the information is confidential (as a trade secret, other confidential commercial information, or SSI). In your explanation, you should provide enough information to enable OST to determine whether the information provided is protected by law and must be handled separately.

FOR FURTHER INFORMATION CONTACT: For program issues, Jim Swart, Director, 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* (e-mail). For legal issues, Robert C. Ashby, Deputy Assistant General Counsel for Regulations and Enforcement, 1200 New Jersey Avenue, SE., Washington, DC 20590; (202) 366–9310 (voice); (202) 366–9313 (fax); or *bob.ashby@dot.gov* (e-mail).

SUPPLEMENTARY INFORMATION: This document responds to petitions and letters from several parties seeking to postpone the effective date of portions of the Department's June 25, 2008, final rule amending 49 CFR part 40 (73 FR 35961) and/or reconsider these provisions. The petitions concern the new section 40.67(b) and (i), described in more detail below. Petitioners include the Association of American Railroads (AAR), joined by the American Short Line and Regional Railroad Association; the Transportation Trades Department (TTD) of the AFCL–CIO; the International Brotherhood of Teamsters; and the Air Transport Association (ATA), joined by the Regional Airline Association (RAA).

Background

On October 31, 2005, the Department of Transportation issued a notice of proposed rulemaking (NPRM) to amend 49 CFR part 40, the Department's drug and alcohol testing procedures rule (70 FR 62276). The primary purpose of the NPRM was to propose making specimen validity testing (SVT) mandatory. Mandatory SVT is an important step in combating the safety problem of cheating on drug tests. The two provisions that are the subject of the petitions concern direct observation (DO), another significant tool the Department uses to combat cheating.

The history of DO testing under part 40 goes back to the beginnings of the Department's drug testing program. The principle that animates this history is that DO, because it is intrusive, is appropriate to use, not in the great mass of testing situations (e.g., all pre-employment and random tests), but only in those situations in which there is a heightened incentive to cheat or circumstances demonstrating the likelihood of cheating. In this way, the Department has maintained the proper balance between the legitimate privacy expectations of employees and the safety and program integrity interests of the Department. As a result, DO tests constitute only a tiny percentage of the drug tests conducted each year under DOT drug testing rules.

In the December 1, 1989, preamble to part 40 (54 FR 49854), we said that the limitations on using observed collections in only four circumstances would be maintained despite the fact that some comments requested that the Department allow greater discretion for observed collections. The Department decided that "existing safeguards in part 40 are adequate to prevent tampering and that direct observation, because of its increased intrusiveness, should be strictly limited." The Department considered that limiting the circumstances that would result in a DO is "one factor in the balance between privacy and safety necessity considered by the courts."

The preamble went on to say that some comments specifically opposed direct observation "as part of follow-up (i.e., post-positive) testing, while other commenters favored this practice." We said that the Department "believes that direct observation may be a useful tool in follow-up testing." There was concern expressed about drug use relapses, especially for cocaine. We went on to say, "An individual who has returned to work after rehabilitation but has suffered such a relapse may have a greater incentive to attempt to beat a

follow-up test, because the employer may not provide a second opportunity for rehabilitation." Regarding directly observed follow-up testing, the preamble concludes, "If the employer or EAP counselor believes that this may be the case, the opportunity for direct observation should exist."

Currently, section 40.67(a) requires that employers direct an immediate collection under direct observations in three circumstances: (1) When the laboratory reported an invalid specimen and the MRO reported that there was not an adequate medical explanation for the result; (2) when the MRO reports to the employer that the original non-negative result had to be cancelled because there was not a split specimen available for testing; and (3) when the MRO reports a negative-dilute specimen with a creatinine concentration greater than or equal to 2 mg/L or less than or equal to 5 mg/L. We added the third provision in 2003 in an interim final rule (68 FR 31624, May 28, 2003) and revised it in an interim final rule (69 FR 64865). Direct observation is also mandated at collection sites if the collector finds materials brought to the collection site to tamper with a specimen (section 40.61(f)(5)(i)), determines that a specimen is out of temperature range (section 40.65(b)(5)) or detects other evidence indicating an attempt to tamper with a specimen (section 40.65 (c)(1)). In addition, employers are currently allowed, but not required, to order a directly observed test under section 40.67(b) for return-to-duty and follow-up tests.

We acknowledge that DO collections are, and always have been, controversial. In the December 19, 2000 preamble to a major update to part 40 (65 FR 79462), about observed collections we said, "Directly observed specimens are controversial because of their greater impact on employee privacy. They can be useful because they reduce the opportunity for tampering. On privacy grounds, some commenters, including unions and some service agents, would prefer not to conduct directly observed collections at all." (65 FR at 79489) These commenters opposed adding any situations in which direct observation was authorized or required.

The 2000 preamble went on to say, "Other commenters said that the benefit of greater protection against specimen tampering warranted direct observation in situations that suggested a heightened risk of tampering." (65 FR at 79489) The Department agreed with these commenters and increased the number of circumstances for which an observed collection was required or authorized. In circumstances that pose a higher risk or greater risk for tampering, "the interests of the integrity of the testing process, with its safety implications, outweigh the additional privacy impact of the direct observation process." (65 FR at 79489–79490)

More recently, there has been a sharply increased emphasis, at the level of national policy, on the problem of cheating and how to deal with it. The Department has been aware for several years of the increasing proliferation of products designed and sold to help workers who use drugs defeat drug tests. Not only was the Department working on the specimen validity testing rulemaking between 2005 and 2008, but the United States Congress was conducting its own inquiries on the issues.

During a May 17, 2005 hearing before the Investigations Committee on Energy and Commerce, the Department of Health and Human Services provided the following testimony regarding prosthetic devices delivering synthetic or drug-free human urine:

The most cumbersome, yet highly effective, way to beat a urine drug test is to use a physical belt-like device hidden under the clothing which contains a reservoir to unobtrusively hold real human urine from another person that is free from drugs, and deliver that bogus specimen into the collection container through a straw-like tube, or through a prosthetic device that looks like real human anatomy, color-matched. This last described device is heavily marketed for workplace drug testing and criminal justice urine collection situations that require directly observed urine specimens to be provided. Synthetic urine can be used in place of real human drug free urine. [Testimony before the Subcommittee on Oversight and Investigations Committee on Energy and Commerce United States House of Representatives Products Used to Thwart Detection in Drug Testing Programs, Statement of Robert L. Stephenson II, M.P.H. Director, Division of Workplace Programs Center for Substance Abuse Prevention, Substance Abuse and Mental Health Services Administration, U.S. Department of Health and Human Services at pages 4–5].

Also at the 2005 hearing, the GAO testified that

In summary, we found that products to defraud drug tests are easily obtained. They are brazenly marketed on Web sites by vendors who boast of periodically reformulating their products so that they will not be detected in the drug test process. In addition to an array of products designed to dilute, cleanse, or substitute urine specimens submitted to testers by drug users, approximately 400 different products are available to adulterate urine samples. The sheer number of these products, and the ease with which they are marketed and distributed through the Internet, present formidable obstacles to the integrity of the drug testing process. [Testimony Statement of Robert J. Cramer, Managing Director, Office of Special Investigations, the United States Government Accountability Office (GAO), before the Chairman, Subcommittee on Oversight and Investigations, Committee on Energy and Commerce, House of Representatives, GAO–05–653T, May 1, 2005].

On November 1, 2007, following media coverage regarding compromised collection integrity and security issues, the Congressional Subcommittee on Transportation and Infrastructure held a hearing on the problem of cheating on DOT-required tests. At the hearing, the GAO testified at the hearing about the threat to the integrity of the testing program posed by the devices being used to substitute urine in DO collections. In the final report the GAO issued in May of 2008, the GAO noted that the ease of subverting the testing process was a factor contributing to failures to detect drug use. Specifically, GAO noted that transportation employees "are successfully adulterating or substituting their urine specimens with products that are widely available and marketed as * * * [ways to beat a test.]" [GAO Report No. GAO–08–600, Motor Carrier Safety: Improvements to Drug Testing Programs Could Better Identify Illegal Drug Users and Keep them off the Road, May 2008 at pages 2–3.] The GAO further found that "Several hundred products designed to dilute, cleanse, or substitute urine specimens can be easily obtained." [GAO Report No. GAO–08–600 at page 20.]

In light of the by-now well-recognized availability of substances and devices for substituting or adulterating specimens, the Department's premise for the changes it made to section 40.67 was that taking additional steps to combat cheating on drug tests was appropriate. Such steps are needed to avoid damage to the safety purposes of the program. Given the greater availability of means to cheat on tests, compared to the late 1980s, the Department took the position in the June 25 final rule that it is appropriate to strike the balance between the Department's interests in safety and program integrity and employees' interest in privacy at a different point than it did two decades ago.

In the Omnibus Transportation Employee Testing Act of 1991, Congress recognized that, while privacy is a very important value in the drug testing process, it is not an absolute value. The Act directs the Department to "promote, *to the maximum extent practicable,* individual privacy in the collection of specimens" (49 U.S.C. 20140(c)(1), emphasis added). In issuing the June 25

final rule, the Department, in effect, took the position that it is no longer "practicable" to operate a drug testing program without adding countermeasures to well-publicized cheating techniques and devices.

New Procedure To Check for Prosthetic Cheating Devices

Based on what the Department viewed as the need for additional safeguards against prosthetic devices used to cheat on DO tests, the Department explicitly sought comment in its October 2005 NPRM (70 FR 62281), on whether collectors should check to make sure that employees providing a specimen under DO are not using a prosthetic device to cheat on the test (e.g., by having an employee lower his pants and underwear so that the collector or observer could determine whether the employee was using such a device).

In the preamble to the Department's final rule based on this NPRM (73 FR 35968), the Department responded to comments on this proposal. This response set forth the Department's rationale for adopting a new provision, found in section 40.67(i), requiring employees to raise and lower their clothing to show the collector or observer that the employee is not using a prosthetic device. The Department reaffirms this rationale, and the Department does not believe that any delay in the effective date of this provision is appropriate. The Department believes that there would be nothing to be gained by delaying this significant anti-cheating, pro-safety initiative.

Consequently, this provision will go into effect, as scheduled, on August 25, 2008. The Department is not soliciting further comment on section 40.67(i). The effect of this decision is that, beginning August 25, 2008, observers in all DO collections will be required to carry out the anti-prosthetic device procedure of section 40.67(i) in all directly observed collections, including FU and RTD tests where employers choose to use DO. There is no requirement to use the section 40.67(i) procedure except in circumstances where DO tests otherwise are taking place.

We do not believe that petitioners have made a persuasive case that a delay is necessary to train collectors in this new procedure, which is simple to carry out and easy to understand. Moreover, it is *observers*—who need not be trained collectors—who are to carry out the task of having employees raise and lower clothing to determine whether prosthetic cheating devices are present. Any individual of the appropriate gender should be able to perform this function with minimal instruction. In addition, having waited until mid-August to file their petitions saying they had insufficient time to train personnel, railroad and aviation employers appear to have missed the opportunity to begin training personnel during the several weeks since the June publication of the final rule, if they believed additional time to be necessary.

It is important for employers to keep in mind, in view of the Department's decision to postpone the effective date of section 40.67(b), that for the period between August 25 and October 31, 2008, there will be no need to recruit or train additional observers, because there will be no additional direct observation tests required beyond those the Department's rules required before August 25. All that will be required during this period is that employers and collection contractors instruct observers to follow the additional procedure to guard against the use of prosthetic devices.

We also note that it is common for DOT operating administrations' enforcement personnel, in the initial months of a new requirement, to focus on information and education rather than the imposition of penalties. Employers who are making good faith efforts to comply with the provision should benefit from this typical enforcement practice.

Mandatory Use of Direct Observation in Return-to-Duty and Follow-up Testing

At the end of the discussion of this provision on page 35968 of the final rule preamble, the Department said, in the context of taking additional steps to address the problem of cheating on drug tests, that DO would be required for all FU and RTD tests. The new requirement was included as section 40.67(b). Under part 40 as it existed before this amendment, employers had the discretion to require direct observation in FU and RTD tests, but were not mandated to do so.

In the Department's view, this new requirement was a logical outgrowth of the development of the Department's increasing efforts to deal with the problem of cheating in drug tests. Even though we did not foresee [and few did] in 1989 the degree to which products designed to beat the drug test would be available, the Department was concerned about specimen tampering and about the heightened motivation of those employees returning to safety sensitive positions after positive tests to tamper with their specimens. That concern has increased in recent years as information about the widespread availability of cheating products has become available.

As a consequence, the Department believed, in adding this provision, that it was important for us to be consistent with the other DO provisions, which make DO testing mandatory in circumstances involving heightened motivation for or evidence suggesting attempts to cheat (see sections 40.61(f)(5)(i); 40.65 (b)(5) and (c)(1); 40.67(a)). In all these cases, use of DO is mandatory. If safety necessitates a DO in one of these circumstances, then, the Department believed, safety likewise necessitates DO as part of FU and RTD tests. The Department was mindful that everyone who has to take an RTD or FU test had already violated the rule (e.g., by testing positive or refusing to test), showing that he or she has behaved in a way that presents an increased risk to transportation safety. Such employees will be acutely aware that that they must test negative on all RTD and FU tests in order to regain or retain their ability to perform safety-sensitive functions. These circumstances, the Department believed, present just the sort of heightened incentive for cheating on a test that DO testing is intended to combat.

It was but a modest, incremental step from the current regulation's *authorization* of DO in FU and RTD situations to the June 25 final rule's *requirement* for DO in these situations. Consequently, the Department believed that taking this step was timely and appropriate.

Postponement of Effective Date of Section 40.67(b) and Request for Comment

Petitioners pointed out that the Department's 2005 NPRM did not specifically raise for comment a proposal to make DO testing mandatory, rather than discretionary, in FU and RTD testing. While the Department believes, as discussed above, that section 40.67(b) is justified as a logical outgrowth of Part 40 rulemaking, even in the absence of a specific request for comment, the Department will seek comment on section 40.67(b) for 30 days.

In order to accommodate this comment period, as well as to allow time for the Department to review and respond to any comments we receive, the Department will change the effective date of section 40.67(b) to November 1, 2008, the date suggested by petitioners. We want all interested parties to realize that this change in the effective date affects ONLY section 40.67(b). The rest

of the June 25, 2008, final rule goes into effect on August 25, 2008, as scheduled.

We will place the petitions we have received into the docket, and we will consider the arguments made in these petitions about the content of section 40.67(b) along with other comments that we receive. On the basis of the comments we receive and any other information available to the Department, the Department will reconsider section 40.67(b) and may retain, eliminate, or modify it.

Because this action and the decision not to take similar action with respect to section 40.67(i) also completely respond to the parallel petitions to the Federal Railroad Administration (FRA) by some of the same parties, which raise the same issues about the same provisions of part 40, FRA is not taking any separate action on the petitions concerning the implementation of the amendments to 40.67 in the railroad industry.

Issued this 21st day of August, 2008, at Washington, DC.

Jim Swart,

Director, Office of Drug and Alcohol Policy and Compliance.

[FR Doc. E8–19816 Filed 8–22–08; 11:15 am]

BILLING CODE 4910–9X–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[FWS–R5–ES–2008–0005; 92220–1113–0000–C6]

RIN 1018–AT37

Endangered and Threatened Wildlife and Plants; Final Rule Removing the Virginia Northern Flying Squirrel (Glaucomys sabrinus fuscus) From the Federal List of Endangered and Threatened Wildlife

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), hereby remove the Virginia northern flying squirrel (*Glaucomys sabrinus fuscus*), now more commonly known as the West Virginia northern flying squirrel (WVNFS), from the List of Threatened and Endangered Wildlife due to recovery. This action is based on a review of the best available scientific and commercial data, which indicate that the subspecies is no longer endangered or threatened with extinction, or likely to become so within the foreseeable future. Habitat regeneration and recovery actions have resulted in a reduction in the threats, which has led to: (1) A significant increase in the number of known WVNFS captures and distinct capture locations; (2) verification of multiple-generation reproduction and persistence throughout the range; (3) proven WVNFS resiliency; and (4) substantial improvement and continued expansion of suitable habitat rangewide.

DATES: This rule becomes effective September 25, 2008.

ADDRESSES: Comments and materials we received, as well as supporting documentation used in preparation of this final rule, are available for inspection, by appointment, during normal business hours, at our West Virginia Field Office, 694 Beverly Pike, Elkins, West Virginia 26241. Call (304) 636–6586 to make arrangements.

FOR FURTHER INFORMATION CONTACT: Diane Lynch, Regional Listing Coordinator, Northeast Regional Office, 300 Westgate Center, Hadley, MA 01035 (telephone: 413–253–8628); or Tom Chapman, Field Office Supervisor, or Laura Hill, Assistant Field Supervisor, West Virginia Field Office (see **ADDRESSES**).

SUPPLEMENTARY INFORMATION:

Background

The northern flying squirrel, *Glaucomys sabrinus,* consists of 25 subspecies, including the Virginia northern flying squirrel, *G. s. fuscus.* Miller (1936, p. 143) first described *G. s. fuscus,* based on specimens collected in the Appalachian Mountains of eastern West Virginia. The Virginia northern flying squirrel was listed as endangered under the Endangered Species Act (Act) of 1973, as amended (16 U.S.C. 1531 *et seq.*) effective on July 31, 1985 (Service 1985 (50 FR 26999)). However, it was subsequently determined that a more suitable common name for *G. s. fuscus* is the West Virginia northern flying squirrel, due to the majority of the subspecies' range occurring in West Virginia; thus, we refer to *G. s. fuscus* as West Virginia northern flying squirrel (WVNFS) throughout the rest of this document. Information about the WVNFS' life history can be found in our final listing rule (50 FR 26999), the Appalachian Northern Flying Squirrels Recovery Plan (Service 1990, pp. 1–11), and the WVNFS 5-year review (Service 2006a, pp. 6–10).

Previous Federal Actions

On December 19, 2006, we published a proposed rule to delist the WVNFS (71 FR 75924). Additional information regarding previous Federal actions for the WVNFS can be obtained by consulting the subspecies' regulatory profile found at: *http://ecos.fws.gov/speciesProfile/SpeciesReport.do?spcode=A09R.*

Recovery

In 1990, the original recovery plan was approved, and at the time, the recovery criteria as they apply to the WVNFS were deemed objective, measurable, and adequate (Service 1990, p. 19). The original recovery criteria were not specifically reviewed or updated in the 2001 recovery plan amendment (Service 2001, pp. 1–6). Instead, the focus of the 2001 amendment was an update to Appendix A, Guidelines for Habitat Identification and Management for the WVNFS. Implementation of the amended Appendix A guidelines by the Monongahela National Forest (MNF) effectively abated the main threat to the squirrel (i.e., habitat loss from timber management) throughout the majority of its range, by eliminating adverse impacts on all suitable habitat on the MNF without having to prove WVNFS presence (Service 2001, pp. 1–6; Service 2006a, pp. 3–4).

Recovery plans are not regulatory documents and are instead intended to provide guidance to the Service, States, and other partners on methods of minimizing threats to listed species and on criteria that may be used to determine when recovery is achieved. There are many paths to accomplishing recovery of a species, and recovery may be achieved without all criteria being fully met. For example, one or more criteria may have been exceeded while other criteria may not have been accomplished. In that instance, the Service may judge that, overall, the threats have been minimized sufficiently and the species is robust enough to reclassify the species from endangered to threatened or to delist the species. In other cases, recovery opportunities may have been recognized that were not known at the time the recovery plan was finalized. These opportunities may be used instead of methods identified in the recovery plan. Likewise, information on the species may be learned that was not known at the time the recovery plan was finalized. This new information may change the extent to which criteria need to be met for recognizing recovery of the species. Overall, recovery of species is a dynamic process requiring adaptive management, and judging the degree of recovery of a species is also an adaptive management process that may, or may