

## DEPARTMENT OF TRANSPORTATION

## Coast Guard

## 46 CFR Parts 10, 12, and 16

[CGD 91-223]

RIN 2115-AE29

**Chemical Testing for Dangerous Drugs of Applicants for Issuance or Renewal of Licenses, Certificates of Registry, or Merchant Mariner's Documents**

AGENCY: Coast Guard, DOT.

ACTION: Final rule.

**SUMMARY:** This rulemaking establishes Coast Guard regulations which implement the provisions of the Oil Pollution Act of 1990 (OPA 90) that require chemical testing for use of dangerous drugs of all applicants for issuance or renewal of licenses, certificates of registry (CORs), or merchant mariner's documents (MMDs). Testing of applicants will provide an additional tool in the effort to promote a drug-free work place in the maritime industry.

**EFFECTIVE DATE:** This rule is effective March 24, 1995.

**ADDRESSES:** Unless otherwise indicated, documents referred to in this preamble are available for inspection or copying at the office of the Executive Secretary, Marine Safety Council (G-LRA/3406) (CGD 91-223), U.S. Coast Guard Headquarters, 2100 Second Street SW., room 3406, Washington, DC 20593-0001 between 8 a.m. and 3 p.m., Monday through Friday, except Federal holidays. The telephone number is (202) 267-1477.

**FOR FURTHER INFORMATION CONTACT:** LCDR K. McKinna, Merchant Vessel Personnel Division (G-MVP), (202) 267-0218, or LCDR M. Grossetti, Marine Investigation Division (G-MMI), (202) 276-0415, Office of Marine Safety, Security and Environmental Protection, between 7 a.m. and 3:30 p.m., Monday through Friday, except Federal holidays.

**SUPPLEMENTARY INFORMATION:****Drafting Information**

The principal persons involved in drafting this document are Mr. James W. Cratty, Project Manager, and Ms. Jacqueline L. Sullivan, Project Counsel, Oil Pollution Act (OPA 90) Staff.

**Regulatory History**

On March 4, 1994, the Coast Guard published a notice of proposed rulemaking (NPRM) entitled "Chemical Testing for Dangerous Drugs of Applicants for Issuance or Renewal of Licenses, Certificates of Registry, or

Merchant Mariner's Documents" in the **Federal Register** (59 FR 10544). The 60-day comment period closed on May 3, 1994. The Coast Guard received seven letters commenting on the proposal from mariners, a shipping company, and marine industry representatives. No public hearing was requested, and none was held.

After careful review of the comments and the NPRM, the Coast Guard has finalized the regulations requiring chemical testing for use of dangerous drugs of all applicants for issuance or renewal of merchant mariner credentials. The Coast Guard finds that the regulations provide the maximum flexibility practicable in establishing requirements for chemical testing for use of dangerous drugs.

**Background and Purpose**

In recent years, several major oil spills from ships have occurred in waters under the jurisdiction of the United States. Among these were the EXXON VALDEZ in Prince William Sound, Alaska, and the AMERICAN TRADER in coastal waters of California. These spills caused extensive damage, including the loss of fish and wildlife. In response to these disasters and others, Congress passed the Oil Pollution Act of 1990 (OPA 90) (Pub. L. 101-380).

Among other things, OPA 90 introduces new safety measures relating to vessel operations. This final rule implements sections 4101(a) and (b) of OPA 90, which amend 46 U.S.C. 7101 and 7302, respectively, to require every person who applies for the issuance or renewal of a license, certificate of registry (COR), or merchant mariner's document (MMD) to be tested for use of dangerous drugs.

Under 46 CFR part 10, the Coast Guard issues licenses to qualified officers such as masters, mates, pilots, engineers, operators, and radio officers, and issues CORs to qualified staff officers such as pursers, medical doctors, and professional nurses.

Under the authority of 46 U.S.C. 7302, any person serving aboard most U.S.-flag merchant vessels of more than 100 gross tons which operate on other than rivers and lakes must hold an MMD issued by the Coast Guard. The MMD serves as a certificate of identification and service, authorizing work in different capacities on deck and in the engine and steward's departments. The MMD, with an appropriate endorsement, is also the credential issued to qualified tankermen.

The statutory language of OPA 90 requires the testing of applicants for issuance or renewal of licenses, CORs, or MMDs for the use of dangerous drugs

in violation of law or Federal regulation. Existing Coast Guard drug-testing regulations use the phrase "chemical test," which is already defined in 46 CFR 16.105. For the purposes of this final rule, the "chemical testing" required of applicants for issuance or renewal of licenses, CORs, or MMDs relates only to the use of dangerous drugs.

Section 4103(a)(2) of OPA 90 amends 46 U.S.C. 2101 by adding "dangerous drug" to the list of general definitions and removes the definition of "dangerous drugs" from 46 U.S.C. 7503(a) and 7704(a). The definition of "dangerous drug" in section 4103(a)(2) of OPA 90 includes the term "controlled substance." Although "marijuana" is not specifically mentioned in the new definition, marijuana is a controlled substance under 21 U.S.C. 802, and is therefore covered by the definition of "dangerous drug." This final rule will revise the definition of "dangerous drug" in 46 CFR 16.105 so that it conforms with the definition in 46 U.S.C. 2101, as amended by section 4103(a)(2) of OPA 90. This change has no substantive effect on the existing chemical testing rules in 46 CFR part 16.

To clarify the meaning of "pass a chemical test for dangerous drugs" a new definition has been added to 46 CFR 10.103, 12.01-6, and 16.105. It means that the result of a chemical test is reported as negative under 49 CFR part 40.

Currently, 46 CFR 16.220(b) provides exceptions to the periodic chemical test requirement when there has been a recent test for use of dangerous drugs or participation in a random test program. These exceptions were revised by a final rule published in the **Federal Register** on May 28, 1993 (58 FR 31104), and apply to the new testing requirements in this final rule.

Sections 4102(b) and (c) of OPA 90 amend 46 U.S.C 7107 and 7302 to limit the terms of CORs and MMDs to 5 years. On September 27, 1994, the Coast Guard published a final rule entitled "Five-year Term of Validity for Certificates of Registry and Merchant Mariner's Documents" (CGD 91-211) in the **Federal Register** (59 FR 49294) to require renewals of MMDs and CORs. Although the final rules for chemical testing and terms of validity both deal with the issuance and renewal of merchant mariner's credentials, separate dockets were maintained for ease of review by the public.

**Discussion of Comments and Changes**

Seven letters were received in response to the NPRM. The Coast Guard has reviewed all of the comments and,

in some instances, revised the proposed regulations as appropriate. The comments have been grouped by issue, and are discussed as follows.

#### 1. Inactive License Renewals Under 46 CFR 10.209(g)

The Coast Guard solicited comments on the desirability of requiring chemical testing of individuals whose licenses are renewed under 46 CFR 10.209(g) as an inactive license with a "continuity endorsement." Two comments were received addressing this issue. Both comments generally supported this proposed requirement but disagreed as to when the requirement should be implemented. One comment stated that the chemical test should be required when the application for renewal is made. The other comment supports not requiring applicants for inactive credentials to undergo a chemical test for dangerous drugs until they request removal of the "continuity endorsement" from the credential. The Coast Guard's position is that a license being renewed "for continuity purposes only" is not valid for operating. Therefore, no purpose is served in requiring a chemical test when the inactive merchant mariner credential is requested. The Coast Guard will require that an applicant meet the chemical testing requirement when the applicant requests removal of the continuity endorsement from the credential.

#### 2. Review of a Chemical Test by a Medical Officer

Under 46 CFR 16.370, which is unchanged by this final rule, individuals must have test results reviewed by a Medical Review Officer (MRO) selected by the employer or sponsoring organization. In the NPRM, the Coast Guard solicited comments on whether mariners who do not hold a maritime related job or belong to a union would have difficulty obtaining the services of an MRO to review the results of their chemical test. No comments on this issue were received. The Coast Guard's experience indicates that the Regional Examination Centers (RECs) are able to identify for applicants testing facilities that can perform the required chemical tests and provide the services of an MRO for the individuals. Therefore, the Coast Guard's position is that the services of MROs are available to those individuals who need them.

#### 3. Definitions

One comment pointed out that the term "fails a chemical test for dangerous drugs" is defined in 46 CFR part 16 but not included in parts 10 and 12. The final rule revises the definition of "fails

a chemical test for dangerous drugs" to more clearly state that both the test and the review by the MRO are to be conducted in accordance with 49 CFR part 40, and adds the term to the definitions section in parts 10 and 12.

#### 4. Other Comments

The other comments received were general in nature and supported this Coast Guard rulemaking effort.

#### 5. Additional Changes

On September 27, 1994, the Coast Guard published a final rule entitled "Five-year Term of Validity for Certificates of Registry and Merchant Mariner's Documents" (CGD 91-211) in the **Federal Register** (59 FR 49294). That final rule includes a provision to permit renewal of MMDs with qualified ratings "for continuity purposes only." This provision follows the same procedures as the renewal policy for license holders. Therefore, although not in the NPRM, this rule provides that holders of merchant mariner credentials applying for a continuity endorsement will not be required to have a chemical test for dangerous drugs until they request removal of the continuity endorsement from their merchant mariner credential.

The NPRM stated that pilots who must undergo an annual physical examination and who are not excepted from taking a chemical drug test as part of their annual physical would be required to provide the chemical test results to the REC where their license was last renewed. The NPRM did not specify when to provide the test results to the REC. The final rule clarifies the language of this requirement to provide the chemical test results to the Coast Guard whenever the pilot's physical examination results would be required under 46 CFR part 10.

The final rule adds the rating of lifeboatman to the list of MMD endorsements requiring a chemical test. This MMD rating has previously not required a chemical test for dangerous drugs because a physical examination has not been required. The Coast Guard, however, has determined that this is a position of authority and that a chemical test should be required. A chemical test is required for renewal of an MMD with this endorsement. Therefore a test should be required for the issuance of this endorsement, as it is for other MMD qualified ratings.

#### Assessment

This rulemaking is a significant regulatory action under section 3(f) of Executive Order 12866 and has been reviewed by the Office of Management and Budget under that order. It requires

an assessment of potential costs and benefits under section 6(a)(3) of that order. It is significant under the regulatory policies and procedures of the Department of Transportation (44 FR 11040; February 26, 1979) because of the controversy surrounding chemical testing, substantial public interest, and the potential for litigation. A final assessment has been prepared for this rulemaking and is available in the docket (CGD 91-223) for inspection or copying where indicated under **ADDRESSES**. The following information is taken from the Assessment.

#### Costs to Government

Federal Government costs attributable to implementation of these regulations will be incurred by the 17 Coast Guard RECs. Each applicant is responsible for submitting chemical test results verified by an MRO during the "evaluation" phase of the merchant mariner credential transaction. The additional costs, for the "evaluation" phase, associated with receiving and handling test results on applicants for merchant mariner credentials will be minimal. The costs incurred as a result of this regulation are a relatively small percentage of the total costs of the "evaluation" phase, and do not warrant revision of the current fees for evaluation related to MMD, COR or licensing transactions.

#### Costs to Public and Respondents

Firms in the maritime industry and some individual respondents (applicants) will bear the incremental costs of this regulation. These costs are addressed in the Assessment.

The cost projections assume that holders of MMDs will not apply for renewals and endorsements at the same time, and that holders of licenses will not apply for renewals and raises in grade at the same time. This approach guards against underestimating costs. However, the projections further assume that holders of licenses who also hold MMDs will renew licenses and MMDs together, and that the few holders of CORs and MMDs will apply for and renew CORs and MMDs together. The cost projections were adjusted to reflect the percentage of merchant mariners that will not have to take a chemical test for the documentation transaction because they already participate in a random chemical testing program for dangerous drugs or they have passed a chemical test within the previous 185 days. Computations show that this regulation would subject an estimated additional 7,258 applicants for credentials each year to chemical testing for dangerous drugs. The cost for each

applicant will be approximately \$60, and the total annual incremental cost to the public will be approximately \$439,000.

**Benefits**

The dollar value of direct and societal benefits derived from the regulation are not quantifiable, but may be substantial.

According to a 1987 report published by the National Institute of Drug Abuse, drug-free individuals—

- (a) Suffer fewer accidents;
(b) File fewer workers' compensation claims;
(c) Use less sick leave; and
(d) Experience lower medical cost than drug users.

Historical data is insufficient to quantify benefits. However, should the results of this regulation manage to save even one life per year at \$2.6 million per statistical life saved (which recent research shows is a reasonable estimate of people's willingness-to-pay for safety), its benefits would exceed its costs. If maritime accidents were reduced even by a small percentage, savings would accrue to the maritime industry through lower vessel repairs and medical costs and to the public through environmental protection.

**Small Entities**

The costs to small entities will not be significant because the costs of the additional chemical testing for dangerous drugs will be borne primarily by maritime firms and some individual applicants. The approximate cost for each applicant will be about \$60. The Coast Guard expects the impact of this regulation on small entities to be minimal. Therefore, the Coast Guard certifies under section 605(b) of the Regulatory Flexibility Act (5 U.S.C. 601 et seq.) that this rule will not have a significant economic impact on a substantial number of small entities.

**Collection of Information**

This rule contains collection-of-information requirements. The Coast Guard has submitted the requirements to the Office of Management and Budget (OMB) for review under section 3504(h) of the Paperwork Reduction Act (44 U.S.C. 3501 et seq.), and OMB has approved them. The section numbers are §§ 10.201, 10.202, 10.205, 10.207, 10.209, 10.805, 12.02-9, 12.02-27, and 16.220. The corresponding OMB Control Number was formerly 2115-0574; it has been consolidated into 2115-0003.

**Federalism**

The Coast Guard has analyzed these regulations under the principles and criteria contained in Executive Order

12612 and has determined that this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

**Environment**

The Coast Guard considered the environmental impact of this rule and concluded that, under paragraph 2.B.2 of Commandant Instruction M16475.1B, the regulations are categorically excluded from further environmental documentation. Section 2.B.2.1 of that instruction excludes administrative actions and procedural regulations and policies which clearly do not have any environmental impacts. A "Categorical Exclusion Determination" is available in the docket for inspection or copying where indicated under ADDRESSES.

**List of Subjects**

*46 CFR Part 10*

Fees, Reporting and recordkeeping requirements, Schools, Seamen.

*46 CFR Part 12*

Fees, Reporting and recordkeeping requirements, Seamen.

*46 CFR Part 16*

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

For the reasons set out in the preamble, the Coast Guard amends 46 CFR parts 10, 12, and 16 as follows:

**PART 10—LICENSING OF MARITIME PERSONNEL**

1. The authority citation for part 10 is revised to read as follows:

Authority: 31 U.S.C. 9701, 46 U.S.C. 2101, 2103, 7101, 7106, 7107; 49 CFR 1.45, 1.46; section 10.107 is also issued under the authority of 44 U.S.C. 3507.

2. Section 10.103 is amended by adding "fails a chemical test for dangerous drugs" and "passes a chemical test for dangerous drugs" in alphabetical order to the list of definitions to read as follows:

**§ 10.103 Definitions of terms used in this part.**

\* \* \* \* \*

Fails a chemical test for dangerous drugs means that the result of a chemical test conducted in accordance with 49 CFR part 40 is reported as "positive" for the presence of dangerous drugs or drug metabolites in an individual's system by a Medical Review Officer in accordance with that part.

\* \* \* \* \*

Passes a chemical test for dangerous drugs means the result of a chemical test

conducted in accordance with 49 CFR part 40 is reported as "negative" by a Medical Review Officer in accordance with that part.

\* \* \* \* \*

3. In section 10.201, paragraph (a) is revised to read as follows:

**§ 10.201 Eligibility for licenses and certificates of registry, general.**

(a) In order to receive a license or certificate of registry, each applicant shall establish to the satisfaction of the Officer in Charge, Marine Inspection (OCMI), that he or she meets all the qualifications (respecting age, experience, training, citizenship, character references, recommendations, physical health, chemical testing for dangerous drugs, and professional competence) required by this part before the OCMI issues a license or certificate of registry.

\* \* \* \* \*

4. Section 10.202 is amended by revising the section heading and adding paragraph (i) to read as follows:

**§ 10.202 Issuance of licenses and certificates of registry.**

\* \* \* \* \*

(i) To obtain an original issuance or a renewal of a license or a certificate of registry, a raise in grade of a license, or a higher grade of certificate of registry each applicant shall produce evidence of having passed a chemical test for dangerous drugs or of qualifying for an exception from testing in § 16.220 of this subchapter. An applicant who fails a chemical test for dangerous drugs will not be issued a license or certificate of registry.

5. Section 10.205 is amended by adding paragraph (j) to read as follows:

**§ 10.205 Requirements for original licenses and certificates of registry.**

\* \* \* \* \*

(j) Chemical testing for dangerous drugs. To obtain a license or certificate of registry each applicant shall produce evidence of having passed a chemical test for dangerous drugs or of qualifying for an exception from testing in § 16.220 of this subchapter. An applicant who fails a chemical test for dangerous drugs will not be issued a license or certificate of registry.

6. Section 10.207 is amended by adding paragraph (g) to read as follows:

**§ 10.207 Requirements for raise of grade of license.**

\* \* \* \* \*

(g) Chemical testing for dangerous drugs. To obtain a raise of grade of a license each applicant shall produce evidence of having passed a chemical

test for dangerous drugs or of qualifying for an exception from testing in § 16.220 of this subchapter.

7. Section 10.209 is amended by revising paragraph (g)(1) and by adding a new paragraph (h) to read as follows:

**§ 10.209 Requirements for renewal of licenses and certificates of registry.**

\* \* \* \* \*

(g) \* \* \*

(1) Applicants for renewal of licenses who are unwilling or otherwise unable to meet the requirements of paragraphs (c) or (d) of this section may renew their licenses, with the following restrictive endorsement placed on the back of the license: "License renewed for continuity purposes only; service under the authority of this license is prohibited." Holders of licenses with this *continuity endorsement* may have the prohibition rescinded at any time by satisfying the renewal requirements in paragraphs (c), (d), and (h) of this section.

\* \* \* \* \*

(h) *Chemical testing for dangerous drugs.* Except for applicants requesting an inactive license renewal under paragraph (g) of this section, each applicant for the renewal of a license or of a certificate of registry shall produce evidence of having passed a chemical test for dangerous drugs or of qualifying for an exception from testing in § 16.220 of this subchapter. An applicant who fails a chemical test for dangerous drugs will not be issued a license or certificate of registry.

8. Section 10.805 is amended by adding paragraph (g) to read as follows:

**§ 10.805 General requirements.**

\* \* \* \* \*

(g) Each applicant for an original certificate of registry or a higher grade of certificate of registry, as described by paragraph (c) of this section, shall produce evidence of having passed a chemical test for dangerous drugs or of qualifying for an exception from testing in § 16.220 of this subchapter. An applicant who fails a chemical test for dangerous drugs will not be issued a certificate of registry.

**PART 12—CERTIFICATION OF SEAMEN**

9. The authority citation for part 12 is revised to read as follows:

**Authority:** 31 U.S.C. 9701, 46 U.S.C. 2101, 2103, 2110, 7301, 7302; 49 CFR 1.46.

10. Section 12.01–6 is amended by adding in alphabetical order "fails a chemical test for dangerous drugs" and "passes a chemical test for dangerous drugs" to the list of definitions to read as follows:

**§ 12.01–6 Definitions of terms used in this part.**

\* \* \* \* \*

*Fails a chemical test for dangerous drugs* means that the result of a chemical test conducted in accordance with 49 CFR part 40 is reported as "positive" for the presence of dangerous drugs or drug metabolites in an individual's system by a Medical Review Officer in accordance with that part.

\* \* \* \* \*

*Passes a chemical test for dangerous drugs* means the result of a chemical test conducted in accordance with 49 CFR part 40 is reported as "negative" by a Medical Review Officer in accordance with that part.

\* \* \* \* \*

11. Section 12.02–4 is amended by adding paragraph (c) to read as follows:

**§ 12.02–4 Basis for denial of documents.**

\* \* \* \* \*

(c) An applicant who fails a chemical test for dangerous drugs required by § 12.02–9 will not be issued a merchant mariner's document.

12. Section 12.02–9 is amended by adding paragraph (f) to read as follows:

**§ 12.02–9 Application for documents.**

\* \* \* \* \*

(f) Except for applicants requesting an inactive merchant mariner's document renewal under § 12.02–27(g) of this part, to obtain an original issuance of a merchant mariner's document, the first endorsement as an able seaman, lifeboatman, qualified member of the engine department, or tankerman, or a reissuance of a merchant mariner's document with a new expiration date, each applicant shall present evidence of having passed a chemical test for dangerous drugs or of qualifying for an exception from testing in § 16.220 of this subchapter.

13. Section 12.02–27 is amended by revising paragraph (g)(1) to read as follows:

**§ 12.02–27 Requirements for renewal of merchant mariner's documents.**

\* \* \* \* \*

(g) \* \* \*

(1) Applicants for renewal of merchant mariner's documents that are endorsed with qualified ratings, who are unwilling or otherwise unable to meet the requirements of paragraphs (c) or (d) of this section may renew the merchant mariner's document, with the following restrictive endorsement placed on the document: "Continuity only; service under document prohibited." Holders of merchant mariner's documents with this *continuity endorsement* may have the

prohibition rescinded at any time by satisfying the renewal requirements in paragraphs (c) and (d) of this section and § 12.02–9(f) of this part.

\* \* \* \* \*

**PART 16—CHEMICAL TESTING**

14. The authority citation for part 16 continues to read as follows:

**Authority:** 46 U.S.C. 2103, 3306, 7101, 7301, and 7701; 49 CFR 1.46.

15. Section 16.105 is amended by revising the definitions of "dangerous drug" and "fails a chemical test for dangerous drugs", and by adding in alphabetical order the definition "passes a chemical test for dangerous drugs" to read as follows:

**§ 16.105 Definitions of terms used in this part.**

\* \* \* \* \*

*Dangerous drug* means a narcotic drug, a controlled substance, or a controlled-substance analog (as defined in section 102 of the Comprehensive Drug Abuse and Control Act of 1970 (21 U.S.C. 802)).

\* \* \* \* \*

*Fails a chemical test for dangerous drugs* means that the result of a chemical test conducted in accordance with 49 CFR part 40 is reported as "positive" for the presence of dangerous drugs or drug metabolites in an individual's system by a Medical Review Officer in accordance with that part.

\* \* \* \* \*

*Passes a chemical test for dangerous drugs* means the result of a chemical test conducted in accordance with 49 CFR part 40 is reported as "negative" by a Medical Review Officer in accordance with that part.

\* \* \* \* \*

16. Section 16.220 is revised to read as follows:

**§ 16.220 Periodic testing requirements.**

(a) Except as provided by paragraph (c) of this section, and §§ 10.209(h) and 12.02–9(f) of this subchapter, an applicant for an original issuance or a renewal of a license or a certificate of registry (COR), a raise in grade of a license, a higher grade of COR, an original issuance of a merchant mariner's document (MMD), the first endorsement as an able seaman, lifeboatman, qualified member of the engine department, or tankerman, or a reissuance of an MMD with a new expiration date shall be required to pass a chemical test for dangerous drugs. The applicant shall provide the results of the test to the Coast Guard Regional

Examination Center (REC) at the time of submitting an application. The test results must be completed and dated not more than 185 days prior to submission of the application.

(b) Unless excepted under paragraph (c) of this section, each pilot required by this subchapter to receive an annual physical examination must pass a chemical test for dangerous drugs as a part of that examination. The individual shall provide the results of each test required by this section to the REC when the pilot applies for a license renewal or when requested by the Coast Guard.

(c) An applicant need not submit evidence of passing a chemical test for

dangerous drugs required by paragraph (a) or (b) of this section if he or she provides satisfactory evidence that he or she has—

(1) Passed a chemical test for dangerous drugs required by this part within the previous six months with no subsequent positive chemical tests during the remainder of the 6-month period; or

(2) During the previous 185 days been subject to a random testing program required by § 16.230 for at least 60 days and did not fail or refuse to participate in a chemical test for dangerous drugs required by this part.

(d) Except as provided by paragraph (b) of this section, an applicant is

required to provide the results of only one chemical test for dangerous drugs when multiple transactions are covered by or requested in a single application.

17. Section 16.260(b)(1) is revised to read as follows:

**§ 16.260 Records.**

\* \* \* \* \*

(b) \* \* \*

(1) Satisfy the requirements of §§ 16.210(b) and 16.220(c) of this part.

\* \* \* \* \*

Dated: January 17, 1995.

**Robert E. Kramek,**

*Admiral, U.S. Coast Guard Commandant.*

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