Regulatory Enforcement Fairness Act. This rule:

a. Does not have an annual effect on the economy of $100 million.

b. Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions.

c. Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

This determination is based upon the fact that the State submittal which is the subject of this rule is based upon counterpart Federal regulations for which an analysis was prepared and a determination made that the Federal regulation was not considered a major rule.

Unfunded Mandates

This rule will not impose an unfunded mandate on State, local, or tribal governments or the private sector of $100 million or more in any given year. This determination is based upon the fact that the State submittal, which is the subject of this rule, is based upon counterpart Federal regulations for which an analysis was prepared and a determination made that the Federal regulation did not impose an unfunded mandate.

List of Subjects in 30 CFR Part 931

Intergovernmental relations, Surface mining, Underground mining.

Dated: November 9, 2006.

C. Stephen Allred,

Assistant Secretary, Land and Minerals Management.

■ For the reasons set out in the preamble, 30 CFR part 931 is amended as set forth below:

PART 931—NEW MEXICO

■ 1. The authority citation for part 931 continues to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*

§ 931.11 [Amended]

■ 2. Section 931.11 is amended by removing and reserving paragraph (e).

■ 3. Section 931.15 is amended in the table by adding a new entry in chronological order by ''Date of final publication'' to read as follows:

§ 931.15 Approval of New Mexico regulatory program amendments

* * * * *

Original amendment submission date	Date of final publication	Citation/description
* * * * * * *		
November 18, 2005	November 30, 2006	NMSA, sections 69–25A–29.F, concerning award of legal costs and expenses; and NMAC, sections 19.8.12.1204.A through G, concerning award of legal costs and expenses, including attorney fees.

[FR Doc. 06–9461 Filed 11–29–06; 8:45 am]
BILLING CODE 4310–05–M

DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

49 CFR Part 655

[Docket No. FTA–2006–24592]

RIN 2132–AA86

Controlled Substances and Alcohol Misuse Testing

AGENCY: Federal Transit Administration (FTA), United States Department of Transportation.

ACTION: Final rule.

SUMMARY: This rule codifies existing FTA administrative guidance for safety-sensitive employees of ferryboat operations that are subject to the drug and alcohol (D&A) testing regulations of both FTA and the United States Coast Guard (USCG). This rule will provide regulatory relief to ferryboat operators who were previously subject to duplicative D&A testing regulations, and improve ferryboat operator compliance with FTA D&A testing regulations.

This rule does not adopt the proposed rule with respect to certain motor carrier operators who are subject to the D&A testing regulations of both FTA and the Federal Motor Carrier Safety Administration (FMCSA). FTA will retain its current guidance and interpretation with respect to these motor carrier operators.

EFFECTIVE DATE: This rule is effective January 2, 2007.

FOR FURTHER INFORMATION CONTACT: For program issues, Gerald Powers, Office of Safety and Security, (617) 494–2395 (telephone); (202) 366–7951 (fax); or *Gerald.Powers@dot.gov* (e-mail). For legal issues, Shauna Coleman, Office of the Chief Counsel, (202) 366–4011 (telephone); (202) 366–3809 (fax); or *Shauna.Coleman@dot.gov* (e-mail).

SUPPLEMENTARY INFORMATION:

Availability of the Final Rule

A copy of this rule and comments and material received from the public, as well as any documents indicated in the preamble as being available in the docket, are part of docket FTA–2006–24592, and are available for inspection or copying at the Docket Management Facility, U.S. Department of Transportation, Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

An electronic copy of this rule and comments are available online through the Document Management System (DMS) at: *http://dms.dot.gov*. Enter docket number 24592 in the search field. The DMS is available 24 hours each day, 365 days each year. Electronic submission and retrieval help and guidelines are available under the help section of the Web site.

Internet users may also download an electronic copy of this document by using a computer, modem and suitable communications software from the Government Printing Office's Electronic Bulletin Board Service at (202) 512–1661. Additionally, internet users may reach the Office of the Federal Register's home page at: *http://www.nara.gov/fedreg* and the Government Printing Office's Web page at: *http://www.gpoaccess.gov/fr/index.html.*

I. Background

In 2001, FMCSA issued a rule that eliminated duplicative D&A testing regulations for holders of Commercial Drivers Licenses (CDLs) who provide public transportation services. This rule

provided that transit agencies with safety-sensitive employees holding CDLs are covered by FTA D&A testing regulations, and FMCSA testing requirements would not apply. (See 49 CFR 382.103(d)). However, FMCSA determined individual CDL holders would remain subject to FMCSA sanctions and other ramifications for FMCSA rule violations that were not included in the FTA D&A testing regulations.

Subsequently, FTA agreed with FMCSA's position with regard to holders of CDLs who provide public transportation services in its ''Implementation Guidelines for Drug and Alcohol Regulations in Mass Transit'' (Revised November, 2003) (Implementation Guidelines). The Implementation Guidelines provided that the FTA D&A testing regulations would cover transit agencies with safety-sensitive employees holding CDLs. In line with 49 CFR 382.103(d), FTA's Implementation Guidelines maintained FMCSA's determination that that these individual CDL holders be subject to FMCSA sanctions and other ramifications for FMCSA D&A testing regulation violations that were not included in FTA D&A testing regulations.

FTA undertook similar administrative steps to eliminate duplicative testing requirements for ferryboat operators by revising our policy for these operators in a Notice of Interpretation published in the **Federal Register** on April 22, 2002 (67 FR 19615). Specifically, FTA determined that it would deem ferryboat operators that are subject to both FTA D&A testing regulations and USCG chemical and alcohol testing regulations, as in concurrent compliance with the testing requirements of FTA D&A regulations when they comply with the USCG chemical and alcohol testing requirements. FTA determined, however, that those ferryboat operators would remain subject to FTA's random alcohol testing requirement because USCG does not have a similar requirement.

In response to Section 3030 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: a Legacy for Users (SAFETEA–LU, Pub. L. 109–59, August 10, 2005), FTA published a **Federal Register** notice seeking comments on a proposal to exclude certain motor carrier operators who provide public transportation services from FTA testing requirements, and to codify the above notice of interpretation for ferryboat operators. (71 FR 32298, June 5, 2006.)

Based on comments received and the safety requirements of FTA D&A testing regulations, we are partially adopting our proposal to amend the applicability section of 49 CFR 655.3 in this final rule.

II. Response to comments received

FTA received five comments in response to the NPRM. FTA reviewed and considered all comments submitted. The following discussion summarizes our responses.

A. Overview of the Proposed Rule

FTA proposed to eliminate duplicative testing requirements for ferryboat operators, and certain classes of motor carrier operators by amending the applicability section of FTA's D&A regulation at 49 CFR part 655.

One commenter supported FTA's efforts to eliminate duplicative requirements, and suggested that FTA also provide a graph or chart to guide the reader through the various D&A regulations for FTA, USCG, and FMCSA.

FTA response: Because the final rule is limited to codifying existing FTA interpretation, we conclude that a graph or chart is unnecessary to implement this final rule. As resources allow, however, we will work with USCG and the Office of the Secretary of Transportation (OST) to develop a chart or table to assist the regulated community with determining which regulations apply.

B. Motor carrier operators

FTA proposed that private or nonprofit motor carrier operators regulated by both the FTA and FMCSA, who determines that a majority (more than 50 percent) its employees are regulated by FMCSA, may opt to only comply with FMCSA D&A testing regulations for that class of employees.

However, FTA proposed that its post-accident requirements in 49 CFR § 655.44 would continue to apply when an accident, as defined in 49 CFR § 655.4, occurred in the performance of public transportation activities. Further, the administrative requirements of subpart G, H, and I of 49 CFR part 655 would continue to apply to motor carrier operators receiving Federal transit funds.

FTA proposed that an employer exercising this option would have discretion to determine the timeframe and the manner in which it apportions the employees' safety-sensitive functions (i.e., daily, monthly, or annually). FTA proposed that the employer would make this determination annually, at the beginning of the calendar year, and that this determination would remain applicable throughout that calendar year.

One commenter, a State recipient responsible for administering the program for subrecipients, suggested that FTA provide further clarification regarding the applicability of FTA's proposed motor carrier exemption to contractor providers or recipients that receive Federal transit funds directly from the State.

This commenter also expressed concern as to how national contractors that provide local public transportation services would determine whether FMCSA regulated a majority of these employees. The commenter suggested that the employer make this determination on a location-by-location basis as opposed to on a national basis. This commenter further suggested that the employer determine which D&A regulations to follow based on the full-time equivalent number of employees as opposed to the total number of employees either at the national level or in the specific location.

Another commenter, representing an association, suggested that our proposal to retain oversight of ''post-accident'' testing would cause industry confusion and administrative errors. This commenter suggested that post accident testing under the same mode would eliminate potential risks of confusion and administrative error.

FTA Response: We agree with the commenter who indicated that the proposed regulatory construction had the potential to cause more confusion for those responsible for administering the program rather than achieving the intended goal of reducing the administrative burden. We also note that the implementation issues presented when the State is the pass-through recipient has the potential of adding complexity rather than providing administrative relief.

In addition to determining that codifying a similar exception in our regulation would cause confusion as to which testing scheme to apply, FTA has further determined, after further review of 49 CFR part 382 and consultation with FMCSA and the Office of Drug and Alcohol Control Compliance and Policy, that the existing regulatory framework of 49 CFR part 382 provides sufficient administrative relief by eliminating duplicative testing requirements for motor carrier operators. Specifically, 49 CFR 382.103(d) exempts from FMCSA testing those motor carrier operators who are also subject to the FTA D&A testing regulations. Therefore, we withdraw the proposals set out in the

Federal Register notice with regard to motor carrier operators, and we will not amend the regulation to exclude private or nonprofit motor carrier operators from FTA D&A regulations.

C. Ferryboat Operators

FTA proposed to deem ferryboat operators who are subject to both FTA D&A regulations and USCG chemical and alcohol testing requirements, as in concurrent compliance with the testing requirements of FTA D&A regulations when they comply with the USCG chemical and alcohol testing requirements. FTA proposed, however, that those ferryboat operators would remain subject to FTA's random alcohol testing requirement because USCG does not have a similar requirement. Further, because FTA remains statutorily responsible for ensuring that recipients of public transportation funds comply with Federal regulations, it proposed that ferryboat operators remain subject to the administrative and oversight requirements of 49 CFR part 655.

FTA received four comments from representatives of associations on this issue.

One commenter indicated that there are differences between FTA and USCG testing requirements. It recommended that FTA identify and address each of the differences between FTA and USCG testing requirements. For instance, this commenter indicated that there are differences in the Medical Review Officer (MRO) reporting requirements under 49 CFR Part 40 and USCG guidance documents. This commenter also indicated that another difference exists between the USCG guidance and Substance Abuse Professional's duties prescribed in 46 CFR part 16, Subpart B.

Specifically, this commenter suggested that FTA inform all MROs currently processing test results for FTA that the MRO procedures for USCG do not follow 49 CFR part 40, Subpart G for reporting test results. It further suggested that USCG and FTA follow Part 40 reporting requirements ''to the letter.''

Another commenter indicated that the proposed rule does not sufficiently address how it affects Management Information System (MIS) reports for each mode. It recommended that FTA provide clarification regarding MIS reports required by each mode.

The third commenter applauded FTA's efforts to codify the existing interpretation regarding ferryboat operators, and felt that this codification would streamline the D&A testing regulations. This commenter also indicated that this change would provide the same level of safety and oversight as the existing regime while saving time and money at the operational level.

The fourth commenter further welcomed FTA's decision to continue the administrative oversight of ferryboat operators. This commenter indicated that the continuation of administrative oversight of such operators standardizes and creates a stronger D&A program.

FTA Response: We consulted with administrators of the USCG chemical and alcohol program, and they verified that USCG continues to follow 49 CFR Part 40. Furthermore, MROs are already required to be familiar with USCG testing and reporting procedures, including Part 40 and Part 16 irrespective of FTA D&A testing regulations.

USCG did note that mariners are subject to additional testing requirements, such as the requirements for obtaining mariner credentials. As mariners, therefore, ferryboat operators are already subject to these additional requirements irrespective of FTA D&A testing regulations.

Moreover, we emphasize that this rule permits ferryboat operators to primarily follow the testing requirements of USCG, and thereby concurrently comply with FTA testing requirements. It does not impose additional requirements on MROs. The only testing exception this rule imposes is that ferryboat operators will remain subject to FTA random alcohol testing because USCG does not have a similar requirement. Since USCG follows Part 40 for D&A testing purposes, we have not amended the proposed rule language to address this comment.

With regard to the MIS report, the Department is working with USCG to mitigate potential confusion with MIS reporting for ferryboat operators. The Department has reconfigured its web-based reporting format. Specifically, FTA will identify FTA funded ferryboat employers, and provide a separate method for the rest of the transit systems that have no ferryboat operators, within the Drug & Alcohol Management Information System (DAMIS), the Department's internet-based reporting system. The industry already utilizes this system.

In DAMIS, these identified employers will receive a message upon clicking on the ''Covered Employees'' tab. This message will instruct them to separate the testing results of USCG/FTA covered employees from FTA-only covered employees. To separate the results, an additional employee category (Crewmembers) will appear on the screen. The message will instruct the employer to report the drug and alcohol testing results for USCG/FTA employees only within the Crewmember employee category, and not to duplicate the data within FTA defined employee categories.

Once the reporting process is complete and approved, USCG covered tests (all but random alcohol) will be provided electronically to the administrators of USCG testing program.

III. Regulatory Analyses and Notices

Statutory/Legal Authority for This Proposed Rulemaking

This rule is authorized under Section 3030 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: a Legacy for Users (SAFETEA–LU) (Pub. L. 109–59, August 10, 2005). This section amended Title 49 U.S.C. 5331(a)(3). This amendment provides for departmental discretion in determining whether public transportation safety-sensitive employees are adequately covered for drug and alcohol testing purposes by one agency, when those employees are subject to the drug and alcohol regulations of more than one agency within the Department of Transportation (DOT) or the Coast Guard.

Executive Order 12866

Under Executive Order 12866, the Department must examine whether this rule is a ''significant regulatory action.'' A significant regulatory action is subject to OMB review and the requirements of the Executive Order. A ''significant regulatory action'' as one that is likely to result in a rule that may: (1) Have an annual effect on the economy of $120 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

This final rule codifies an existing agency interpretation, and, therefore, will not impose costs to the industry of $120 million or more annually, will not create an inconsistency, will not materially alter the Federal financial assistance from FTA, and does not raise new or novel legal or policy issues.

Accordingly, this final rule is a nonsignificant regulatory action under section 3(f) of Executive Order 12866 and has not been reviewed by OMB.

Executive Order 13132

FTA has analyzed this final rule in accordance with the principles and criteria contained in Executive Order 13132 (Federalism). This final rule does not include any provisions that have substantial direct effect on the States, the relationship between the national government and the States, or the distribution of power and responsibilities among the various levels of government. Therefore, the consultation and funding requirements of Executive Order 13132 do not apply.

Executive Order 13175

FTA finalized this rule in accordance with the principles and criteria of Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments). This rule does not have tribal implications, and does not impose direct compliance costs. Therefore, the funding and consultation requirements of Executive Order 13175 do not apply.

Executive Order 13272 and the Regulatory Flexibility Act

Section 603 of the Regulatory Flexibility Act requires a Federal agency to conduct an initial regulatory flexibility analysis describing impacts to small entities when developing a Notice of Proposed Rulemaking in accordance with 5 U.S.C. 553. Currently, approximately 3000 employers are subject to FTA D&A testing regulations. Of this number, a small percentage is also subject to the D&A testing regulations of FMSCA or the USCG. This final rule would have the effect of eliminating the administrative burden on those few employers who are subject to multiple testing requirements by permitting them to comply with the testing requirements of only one Federal agency.

FTA analyzed this rule to assess its impact on small businesses and other small entities to determine whether this rule will have a significant economic impact on a substantial number of small entities. This rule imposes no new costs because it merely permits jointly regulated entities to comport with the drug and alcohol testing procedures of only one agency. FTA hereby certifies that this final rule will not have a significant economic impact on a substantial number of small entities.

Paperwork Reduction Act

Under the provisions of the Paperwork Reduction Act, FTA may not conduct or sponsor, and a person is not required to respond to or may not be penalized for failing to comply with, a collection of information unless it displays currently valid OMB control number.

This rule has information collection requirements that are covered by the Office of the Secretary of Transportation (OST) paperwork collection number 2105–0529. OST applied to renew that collection number on August 4, 2006. (71 FR 44345, August 4, 2006).

Unfunded Mandates Reform Act of 1995

This rule it will not result in costs of $100 million or more (adjusted annually for inflation), in the aggregate, to any of the following: State, local, or Native American tribal governments, or the private sector.

National Environmental Policy Act

The National Environmental Policy Act of 1969, (42 U.S.C. 4321–4347) as amended), requires Federal agencies to consider the consequences of major federal actions and prepare a detailed statement on actions significantly affecting the quality of the human environment. There are no significant environmental impacts associated with this rule.

List of Subjects in 49 CFR Part 655

Alcohol abuse, Drug abuse, Drug testing, Grant programs—transportation, Mass transportation, Reporting and recordkeeping requirements, Safety, Transportation.

■ For the reasons described in the preamble, FTA amends part 655 to read as follows:

PART 655—PREVENTION OF ALCOHOL MISUSE AND PROHIBITED DRUG USE IN TRANSIT OPERATIONS

■ 1. The authority citation for part 655 continues to read as follows:

Authority: 49 U.S.C. 5331; 49 CFR 1.51.

■ 2. Amend § 655.3 by revising the introductory text of paragraph (a) and adding new paragraph (c) to read as follows:

§ 655.3 Applicability.

(a) Except as specifically excluded in paragraphs (b), and (c) of this section, this part applies to:

* * * * *

(c) A recipient operating a ferryboat regulated by the United States Coast Guard (USCG) that satisfactorily complies with the testing requirements of 46 CFR Parts 4 and 16, and 33 CFR Part 95 shall be in concurrent compliance with the testing requirements of this part. This exception shall not apply to the provisions of section 655.45, or subparts G, or H of this part.

■ 3. Amend § 655.83 by adding new paragraph (d) to read as follows:

§ 655.83 Requirement to Certify Compliance.

* * * * *

(d) FTA may determine that a recipient, who fails to comply with the USCG chemical and alcohol testing requirements, shall be in noncompliance with the alcohol misuse and controlled substances testing requirements of this part. A finding of noncompliance by FTA may lead to the suspension of eligibility for Federal public transportation funding.

Issued in Washington, DC this 27th day of November 2006.

James S. Simpson,

Administrator, Federal Transit Administration.

[FR Doc. E6–20278 Filed 11–29–06; 8:45 am]

BILLING CODE 4910–57–P