

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AERONAUTICAL REPAIR STATION ASSOCIATION, INC., et al.,)	
)	
Petitioners,)	No. 06-1091
)	
v.)	consolidated
)	with case
FEDERAL AVIATION ADMINISTRATION,)	No. 06-1092
)	
Respondent.)	
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RESPONDENT'S OPPOSITION TO EMERGENCY STAY MOTION

The respondent, Federal Aviation Administration (FAA), hereby opposes a stay of the agency's final rule pending review.

INTRODUCTION

In November 1988, the FAA established its drug-testing program for the aviation industry, in large part out of a concern that even a single drug-related error by an aviation employee could be disastrous. Congress endorsed this program in 1991 and ordered the FAA to add an alcohol-testing program, which it did in 1994. These two programs required aviation industry employers to ensure that both employees and contractor personnel who performed safety-sensitive functions for the employer, including maintenance and preventive maintenance, would be subject to drug- and alcohol-testing. Initially, the FAA issued informal guidance that maintenance subcontractors were covered by these testing programs only if they exercised airworthiness responsibility, but this guidance ended in the mid-1990s, when the FAA

began to advise employers that all contractors performing safety-sensitive maintenance were subject to testing.

To clarify its testing-program regulations regarding contractors and subcontractors, the FAA acted by notice and comment to add language stating that all contractor personnel performing safety-sensitive functions, including by subcontract at any tier, had to be tested. Just three weeks ago, almost nine months after the final rule was published in January, the petitioners for the first time asserted that they would suffer irreparable harm from the addition of that language. They sought a stay from the FAA, principally on the ground that what constitutes "maintenance" and "preventive maintenance" is confusing, despite the fact that the new language has no effect on the definitions of those terms, which have been defined by regulation for more than 40 years. The FAA denied a stay on September 28.

In this Court, the petitioners again seek a stay, but the harm they allege is not irreparable. They contend that the alleged confusion about the definition of maintenance would increase costs for subcontractors or encourage them to abandon aviation work, and would make it more difficult or expensive for covered aviation employers to outsource their maintenance functions. Even assuming the truth of their contention, increased costs (short of economic calamity) do not constitute irreparable harm. And any harm to the petitioners absent a stay is dramatically outweighed by the harm to the government and to the public interest in aviation safety that could occur if the stay is granted. Congress, the FAA, and this Court – all three branches of govern-

ment – have declared that substance-abuse testing is critical to aviation safety. Furthermore, the petitioners are not likely to succeed on the merits.

STATEMENT

1. The FAA has the statutory authority to issue regulations to carry out the duties and powers of the Secretary of Transportation related to aviation safety, 49 U.S.C. 106(g)(1)(A), and to issue regulations that it "finds necessary for safety in air commerce and national security." 49 U.S.C. 44701(a)(5). More specifically, it may require "air carriers and foreign air carriers to conduct preemployment, reasonable suspicion, random, and post-accident testing of airmen, crew members, airport security screening personnel, and other air carrier employees responsible for safety-sensitive functions (as decided by the Administrator) for the use of a controlled substance in violation of law or a United States Government regulation" and may issue similar regulations governing testing for the use of alcohol. 49 U.S.C. 45102(a)(1) (Opp. Exh. 1).

The FAA's drug-testing and alcohol-testing regulations are found in 14 C.F.R. part 121, Appendices I and J, respectively. These regulations require that an employee who is engaged in a safety-sensitive function for an employer must be tested for illegal drugs and alcohol. Before the final rule at issue in this matter was promulgated, both the drug- and alcohol-testing regulations required testing of "[e]ach employee, including any assistant, helper, or individual in a training status, who performs a safety-sensitive function listed in this section directly or by contract

for an employer as defined in this appendix." App. I, § III; App. J, § II. The rule added the phrase "(including by subcontract at any tier)" after the word "contract," 71 Fed. Reg. 1666, 1677 (Jan. 10, 2006), in order to clarify what the FAA had initially attempted to clarify through informal guidance: that subcontractors who performed safety-sensitive functions were covered by the drug- and alcohol-testing requirements. Motion, Exh. B, at 2.

The FAA testing programs define an employer as "a part 121 certificate holder, a part 135 certificate holder, an operator as defined in § 135.1(c) of this chapter, or an air traffic control facility not operated by the FAA or by or under contract to the U.S. military." App. I, § II; App. J, § I.D. The drug- and alcohol-testing requirements directly operate on covered employers but operate only indirectly on contractors, whose employees are subject to testing if they engage in safety-sensitive functions under contract with an employer.

The regulations define "safety-sensitive functions" as including "[a]ircraft maintenance and preventive maintenance duties." App. I, § III.E.; App. J, § II.A.5. The FAA's definitions of "maintenance" and "preventive maintenance" have been in effect for over 40 years. "Maintenance" means "inspection, overhaul, repair, preservation, and the replacement of parts, but excludes preventive maintenance," and "preventative maintenance" means "simple or minor preservation operations and the replacement of small standard parts not involving complex assembly operations." 14 C.F.R. 1.1.

2. The language added by the final rule dates back to a notice of proposed rulemaking (NPRM) published on February 28, 2002. 67 Fed. Reg. 9366 (Opp. Exh. 2). This NPRM covered a wide range of subjects, the rest of which are not pertinent here. Several commenters objected that the proposed clarifying language about subcontractors would be too costly. Motion, Exh. B, at 2. In response, the FAA decided to reserve decision on the proposed language for the moment, gather more information about the perceived economic impact, and proceed by supplemental NPRM (SNPRM). 69 Fed. Reg. 1840, 1841 (Jan. 12, 2004) (Opp. Exh. 3).

In its SNPRM, published on May 17, 2004, the FAA proposed to add the phrase "(including by subcontract at any tier)" to its description of employees who must be tested. 69 Fed. Reg. 27,980, 27,986-87 (Opp. Exh. 4). The FAA accompanied this SNPRM with a regulatory evaluation of the proposed language. 69 Fed. Reg. at 27,984-86.

Following an additional comment period, the FAA issued its final rule on January 10, 2006. 71 Fed. Reg. 1666 (Motion, Exh. C). The final rule adopted the proposed parenthetical phrase "(including by subcontract at any tier)." 71 Fed. Reg. 1666, 1677. The FAA explained that, consistent with the guidance it had provided since the mid-1990s, many regulated employers already understood that all contractors and subcontractors who performed a safety-sensitive function were subject to testing under the regulations and that it would not be consistent with aviation safety to eliminate the requirement of testing of such individuals "by contract." Id.

at 1667. The final rule announced an effective date of April 10, 2006. 71 Fed. Reg. at 1666.

3. ARSA filed its petition for review on March 10, 2006, 59 days after the final rule was published. Neither before the filing of its petition for review nor before the effective date did ARSA seek a stay of the final rule pending review. On April 5, 2006, the FAA itself announced that it would extend the compliance date until October 10, 2006, citing a request for an extension filed by third parties. 71 Fed. Reg. 17,000, 17,001. The FAA explained that the extra time would "give these entities an opportunity to decide whether to conduct their own testing programs or to make arrangements to have their employees covered under the testing programs of the employers with whom they contract." Id. The FAA also agreed to provide additional guidance about maintenance and preventive maintenance on a range of subjects. Id.

4. On September 22, 2006, ARSA sought a nine-month extension or, alternatively, a stay from the FAA, citing "confusion" in the industry in interpreting the final rule. Motion, Exh. A, at 6. The FAA denied the extension and stay on September 28, noting that the interpretive issues raised by ARSA related not to the final rule but to the 1962 regulations defining maintenance and preventive maintenance, which were not changed by the final rule. Id., Exh. B, at 7.

ARSA now seeks a stay in this Court, arguing that its members will suffer irreparable harm from the economic costs of the rule. Motion at 18. ARSA also asserts a likelihood of success on the merits, arguing that the rule violates its

authorizing statute, the Due Process Clause, the Regulatory Flexibility Act (RFA), and the Administrative Procedure Act (APA).

ARGUMENT

THE EMERGENCY APPLICATION FOR A STAY SHOULD BE DENIED.

"The factors to be considered in determining whether a stay is warranted are: (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay." Wisconsin Gas Co. v. FERC, 758 F.2d 669, 673-74 (D.C. Cir. 1985) (per curiam); see Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir.1977).

Here, the petitioners fail to show irreparable harm, and any harm that exists is significantly outweighed by the potential harm to the government and the public interest from the grant of a stay. There is no likelihood of success on the merits.

A. The Petitioners Have Not Shown Irreparable Harm.

This Court's standard for issuing a stay includes "the likelihood that the moving party will be irreparably harmed absent a stay." Wisconsin Gas Co., 758 F.2d at 674. The petitioners' alleged harms are either not irreparable or not harms at all, and their delay in seeking a stay confirms that the harm they allege is not irreparable.

1. The stay motion focuses on alleged economic harm. Allegedly, some

non-certificated entities will stop performing maintenance work for certificated repair stations, and others that choose to continue performing maintenance work will have to bear the cost of implementing drug- and alcohol-testing programs. Motion at 18. These harms are nowhere near irreparable. As a general matter, "[m]ere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough." Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958). "Recoverable monetary loss may constitute irreparable harm only where the loss threatens the very existence of the movant's business." Wisconsin Gas Co., 758 F.2d at 674; see Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d at 843 ("destruction in its current form").

The declarations relied on by the petitioners confirm that the economic costs do not come close to "threaten[ing] the very existence" of the declarants' businesses. First, the worst David Owen says about the harm is that if the rule takes effect, his company "will be in a difficult situation" if it is offered air carrier work that involves parts with specialized processes for which his company has not yet found a vendor with an approved testing program. Motion, Exh. J, ¶ 8. Owen gives no financial data to suggest that his company would risk going out of business, nor does he even suggest as much. See Wisconsin Gas Co., 759 F.2d at 674 (movant must "substantiate the claim that irreparable injury is 'likely' to occur").

Second, the so-called "ARSA Declaration" asserts that there will be irreparable

harm to non-certificated maintenance sources, which will leave aviation work to avoid the costs of testing employees. Motion, Exh. E, ¶ 24. But the declaration simply suggests that repair stations will have to find new maintenance sources, id. ¶ 25; it does not suggest that they will be going out of business in large numbers. The declaration does state that the non-certificated maintenance sources will "leav[e] the industry," id. ¶ 26, but nothing in the declaration indicates that, when they leave the aviation industry, they will risk going out of business.

2. The fact that there is no irreparable harm to the petitioners is confirmed by their tardy filing of the stay motion, nearly nine months after the final rule was published. See Beame v. Friends of the Earth, 434 U.S. 1310, 1313 (1977) (Marshall, J., in chambers) ("The applicants' delay in filing their petition and seeking a stay vitiates much of the force of their allegations of irreparable harm.").

To begin with, the stay motion is untimely under this Court's March 20 docketing order, which required all procedural motions by the petitioners to be filed by April 19. A stay motion counts as a procedural motion. See D.C. Circuit, Handbook of Practice and Internal Procedures, at 28 (2005) ("Procedural motions are those that may affect the progress of the case through the Court, e.g., * * * motions for stay * * *").

The petitioners' delay in seeking a stay also casts doubt upon their claim of irreparable harm. The final rule was published on January 10, 2006, with an effective date of April 10. The petitioners first waited 59 days before filing their petition for

review on March 10, and even when they filed that petition for review, they did not seek a stay. Almost four weeks went by after the petition for review was filed, and still no stay motion. Then, on April 5, in response to a request from entities other than the petitioners, the FAA extended the April 10 effective date until October 10. 71 Fed. Reg. 17,000, 17,001. ARSA and the other petitioners here played no part in that decision but were simply the gratuitous beneficiaries of an agency action solicited by third parties. After the FAA announced an extended effective date, ARSA waited over three months, until July 18, Motion, Exh. A, at 4, before seeking guidance to address what it now claims is "confusion" about certain issues arising under the final rule. Motion at 1. Six more weeks after that, ARSA's own publication "the hotline" advised members that they would have to comply with the final rule: "While we continue to pursue the case, we don't expect the court to act before the rule's Oct. 10 compliance date. We'll keep fighting, but **be prepared to comply by Oct. 10.**" ARSA, "the hotline," at 5 (Aug. 31, 2006) (emphasis in original) (Opp. Exh. 5). ARSA gave no indication to its members that there was any basis for asking the FAA or a court to order a stay of the effective date.

Eventually, on September 22, ARSA finally asked the FAA for a stay, but three days later – 8-1/2 months after the final rule was published and roughly two weeks before the extended effective date – ARSA was still trying to determine whether (and the extent to which) the rule was creating problems in the industry. To do so, it posted on its website a survey in which it sought information from its members "to

understand and address both the nature and scope of specific problems with which industry is grappling as it works to comply by the current October 10 deadline." ARSA letter to FAA, Sept. 27, 2006, at 1 (Opp. Exh. 6).

ARSA's dilatory behavior fatally undermines its claim that its members are at risk of irreparable harm in the absence of a stay. Quite simply, if there were irreparable harm, ARSA would not have acted at such a leisurely pace in seeking a stay.

B. Granting A Stay Would Significantly Harm The Government And The Public Interest.

While there has been no showing of irreparable harm in the absence of a stay, granting a stay would significantly harm the government and the public interest.

As this Court has stated, "[i]n litigation involving the administration of regulatory statutes designed to promote the public interest, this factor necessarily becomes crucial. The interests of private litigants must give way to the realization of public purposes." Virginia Petroleum Jobbers, 259 F.2d at 925. The public interest here is aviation safety, as all three branches of government have recognized.

First, Congress has declared the important interest in aviation safety by statute. Section 44701(a)(5) authorizes the FAA to issue regulations in the interest of aviation safety, and section 45102(a)(1) authorizes it to issue regulations governing drug- and alcohol-testing for employees engaged in "safety-sensitive functions." Congress also found that drug and alcohol abuse pose "significant dangers to the safety and welfare of the Nation." Omnibus Transportation Employee Testing Act of 1991, Pub. L. No.

102-143, tit. V, § 2(1), 105 Stat. 917, 952.

Second, the SNPRM in this case made clear that aviation safety was the FAA's concern in clarifying that all levels of subcontractors were covered by the drug- and alcohol-testing programs. See, e.g., 69 Fed. Reg. at 27,980 ("In Notice 02–04, the FAA proposed to make it clear that each person who performs a safety-sensitive function directly or by contract (including by subcontract at any tier) for an employer is subject to testing.") (emphasis added). The additional regulatory language included in the final rule also referred to safety-sensitive functions. 71 Fed. Reg. at 1677; see id. at 1667 ("Employees affect aviation safety whenever they perform a safety-sensitive function listed in appendices I and J."). In reviewing a final rule of the FAA, the Court grants "utmost deference" to the safety judgments of the agency, which are based on its predictions of the likely future effects of the policies it has mandated. Public Citizen, Inc. v. FAA, 988 F.2d 186, 196 (D.C. Cir. 1993).

Finally, this Court has found a "compelling safety interest" in ensuring that employees who fly and service aircraft, including aviation mechanics – who "perform tasks that are fr[a]ught with extraordinary peril" – are not impaired by drugs. NFFE v. Cheney, 884 F.2d 603, 610 (D.C. Cir. 1989), cert. denied, 493 U.S. 1056 (1990) (Army civilian aviation employees). This is because a "single drug-related lapse by any covered employee could have irreversible and calamitous consequences." Id.; see also AFGE v. Skinner, 885 F.2d 884, 892 (D.C. Cir. 1989), cert. denied, 495 U.S. 923 (1990) (upholding, on same basis, random drug-testing of FAA aircraft mechanics

who maintain FAA aircraft).

When, as here, the government is addressing a "compelling safety interest," NFFE v. Cheney, 884 F.2d at 610, it is not required to show that the implementation of the regulations will prevent a particular, quantifiable number of accidents. The purpose of air safety regulations is to reduce the risk of accidents as much as possible. The government does not have to wait to guard against drug abuse or misuse of alcohol until a calamitous accident occurs.

Staying the implementation of this rule will therefore gravely harm the government and the public interest. In fact, the balance of harms so strongly favors denying the stay that this balance is dispositive. Wisconsin Gas, 758 F.2d at 674.

C. The Petitioners Have No Chance Of Success On The Merits.

Even if the balance of harms were not dispositive of the stay motion, the motion must be denied, because the petitioners' arguments on the merits are baseless.

1. Statutory authority. The petitioners first argue that requiring drug- and alcohol-testing of subcontractor employees violates the authorizing statute. Motion at 7-8. Their argument that the statute bars such testing is wrong.

The FAA established its drug-testing program in 1988, pursuant to former 49 U.S.C. App. 1421(a)(6), which empowered the FAA to issue regulations necessary "to provide adequately for national security and safety in air commerce."¹ That

¹ The current version, at 49 U.S.C. 44701(a)(5), is slightly reworded without
(continued...)

program imposed drug-testing obligations on employers – including air carriers – but it required employers to ensure that persons performing safety-sensitive functions by contract also be tested. App. I, § II ("Employee" means a "person who performs, either directly or by contract, a function listed in section III of this appendix" for an employer) (emphasis added). In 1991, Congress enacted the Omnibus Transportation Employee Testing Act of 1991, section 3(a) of which added what is now 49 U.S.C. 45102, requiring drug- and alcohol-testing of carrier employees, including "other air carrier employees responsible for safety-sensitive functions (as determined by the Administrator)."

The petitioners' argument that the phrase "air carrier employees" in section 45102 does not extend to subcontractor employees, Motion at 8, ignores the history of the regulations. When the drug-testing program was first applied to contractor employees in 1988, section 45102 had not yet been enacted. The FAA was relying on its general authority to provide for national security and safety in air commerce. Former section 1421(a)(6) did not even arguably limit its scope to air carrier employees. In 1991, when Congress enacted what is now section 45102, it also enacted a provision that kept in place all existing regulations on drug-testing:

Nothing in this section shall be construed to restrict the discretion of the Administrator to continue in force, amend,

¹(...continued)
change in meaning; it provides that the FAA may prescribe regulations it "finds necessary for safety in air commerce and national security."

or further supplement any regulations issued before the date of enactment of this section that govern the use of alcohol and controlled substances by airmen, crewmembers, airport security screening contract personnel, air carrier employees responsible for safety-sensitive functions (as determined by the Administrator), or employees of the [FAA] with responsibility for safety-sensitive functions.

105 Stat. at 955. In this language, Congress expressly declared that all regulations under the existing drug-testing program could "continue in force." That would include the extension of the program to contractor employees, which had been in place since the program began.

When Congress enacts a statute that refers to existing regulations and permits the agency to continue those regulations in effect, it gives its blessing to the interpretations implicit in those regulations. See Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 193-94 (2002). That is precisely what happened in this matter.

If there were any remaining doubt about the effect of the 1991 statute, it would be answered by floor statements of Senator Hollings, one of the sponsors, which confirm this understanding. See 137 Cong. Rec. 26,434 (Oct. 16, 1991) (provision "would reaffirm the validity and scope of current regulations governing the use of alcohol and controlled substances by aviation personnel in safety-sensitive positions"); cf. id. at 26,435 (referring to parallel transit provision) (bill will ensure effective testing programs for "all providers of mass transportation services, whether they are employed by the transit authority directly, or under contract to them").

The petitioners do not seriously pursue their statutory argument, apparently

aware that, if correct, it would prohibit the drug- and alcohol-testing of employees of direct contractors as well. ARSA does not challenge testing of direct contractor employees, and it offers no textual or other basis for distinguishing between direct contractors and subcontractors.

2. Unconstitutional vagueness. The petitioners' principal claim, to which they devote about six pages of argument, Motion at 8-14, is that the regulation is so vague that it violates due process. This verges on the frivolous.

The petitioners cite a single case – City of Chicago v. Morales, 527 U.S. 41, 55 (1999), Motion at 8 – to support their constitutional challenge, but that case involved a criminal law that implicated First Amendment rights. But civil regulations like the final rule here that lack a criminal penalty and do not implicate First Amendment rights are judged with a more deferential standard:

[E]conomic regulation is subject to a less strict vagueness test because its subject matter is often more narrow, and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action. Indeed, the regulated enterprise may have the ability to clarify the meaning of the regulation by its own inquiry, or by resort to an administrative process.

Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 499 (1982) (footnotes omitted).

Here, not only is there no criminal penalty or First Amendment concern but as the history of this case shows, the regulated businesses are able to "clarify the

meaning of the regulation by [their] own inquiry." Id. ARSA itself has sent the FAA two requests for interpretation, Motion, Exh. A, at 4, and Pratt & Whitney, a large manufacturer of aircraft parts, including jet engines, has sent one. Id. at 3. The FAA provided written guidance in response to Pratt & Whitney's request, id., and is working on responses to ARSA's. Id., Exh. B, at 4.

In any event, the petitioners grossly overstate the potential need for advice regarding the final rule. As the FAA explained, this final rule is predicated on the longstanding regulatory definitions of maintenance and preventive maintenance, which were unchanged in the final rule: "Carriers and repair stations have managed to determine whether a particular activity constitutes maintenance for over 40 years. They have also managed to determine whether the same activities require drug and alcohol testing for roughly 18 and 12 years, respectively." Motion, Exh. B, at 4.

Even if the application of the final rule to certain activities might require additional advice from the FAA, the rule is not so hopelessly vague that it violates due process. The petitioners' argument to the contrary is completely without basis.

3. Regulatory Flexibility Act. The petitioners also argue, Motion at 14-16, that the final rule violates the RFA by not taking into account the impact of the rule on "small, non-certificated sources." Id. at 15. This is mistaken for two reasons.

First, as this Court has held, the RFA requires an agency to take into account the effects of the rule only on entities that it directly regulates, and in this case, only the air carriers and not the "small, non-certificated sources" are directly regulated.

The FAA addressed this point at some length in the final rule. 71 Fed. Reg. at 1673-74. As the FAA explained, the drug- and alcohol-testing programs define which employers are directly regulated: air carriers and certain other specific entities. Those employers are responsible for ensuring that their employees engaged in safety-sensitive functions, as well as employees of contractors and subcontractors, are subject to drug- and alcohol-testing. The FAA then quoted several of this Court's decisions, which stand for the proposition that the RFA does not apply to small businesses that are indirectly affected by rules applicable to regulated entities. *Id.* at 1674 (citing, *inter alia*, Cement Kiln Recycling Coalition v. EPA, 255 F.3d 855, 869 (D.C. Cir. 2001)).

The petitioners never address this case law. Rather than differentiate between directly regulated entities (air carriers) and indirectly affected entities (contractors), they invent a third category called "directly affected." Motion at 15, 16. Under the case law, however, whether the RFA applies turns on whether the entities are directly regulated; entities that are affected but not regulated are considered to be indirectly affected. There is no middle classification.

Second, the FAA in fact undertook a regulatory evaluation that considered the costs to the indirectly affected entities. Although this regulatory evaluation was not an RFA analysis, it was, as the FAA explained, "in the spirit of the RFA." 71 Fed. Reg. at 1674 (quoting Cement Kiln, 255 F.3d at 768).

4. Administrative Procedure Act. Finally, the petitioners contend,

Motion at 16-17, that the final rule violates the APA because the FAA allegedly mischaracterized the proposed change as a clarification, when (they claim) it actually made a substantive change. This procedural objection is unfounded.

As a general rule, an agency's construction of its own regulations is entitled to substantial deference. Thomas Jefferson Univ. v. Shalala, 512 U.S. 540, 512 (1994). It was – and is – the FAA's view that the subcontractor language that it added after notice-and-comment rulemaking was merely a clarification of its earlier regulation governing the application of drug- and alcohol-testing to contractor employees.² The FAA stated as much in the initial NPRM. 67 Fed. Reg. 9366, 9369 ("The FAA is proposing to clarify that each person who performs a safety-sensitive function directly or by any tier of a contract for an employer is subject to testing. This is not a substantive change * * *"). In the SNPRM two years later, the FAA reiterated its view that this was a clarifying change but noted that, because some commenters believed it was substantive and would cause an economic burden, the FAA was reopening the matter for comment. 69 Fed. Reg. at 27,980. The FAA offered its own initial regulatory evaluation, given the commenters' assumption that there would be an economic cost, id. at 27,984-86, but it continued to explain that there was no substantive change.

² In the FAA's experience "many regulated employers and contractor companies" understood that both contractors and subcontractors were subject to testing, 71 Fed. Reg. at 1667, and that the majority were already complying, including, specifically, ChevronTexaco. Id. at 1671. Moreover, the FAA wrote "numerous letters" clarifying that subcontractors were subject to testing under existing regulations. Motion, Exh. B, at 2.

But even if this were in fact a substantive change, the FAA satisfied the APA in every respect. It laid everything on the table during the rulemaking – its own view of the rule and the commenters' contrary view – and it engaged in a cost-benefit analysis on the assumption that the commenters were correct. Thus, the petitioners are factually off base in their claim that the FAA "mischaracterized" the rule and "skewed all phases of the decision-making process." Motion at 17. This is not a case in which an agency tried to clarify its guidance simply by publishing the clarification; here, the FAA engaged in notice-and-comment rulemaking, giving interested persons the ability to weigh in on the matter before the final rule was promulgated.

CONCLUSION

For the foregoing reasons, the emergency stay motion should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 13, 2006, I served the foregoing Respondent's Opposition to Emergency Motion for Stay on the following by causing a copy to be hand-delivered, with a courtesy copy by electronic mail, to:

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