

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of Penalty Assessment Against
AGATE PASS TRANSPORTATION, LLC
D/B/A AGATE PASS
TRANSPORTATION in the Amount of
\$600

DOCKET TE-110698

COMMISSION STAFF'S
RESPONSE TO AGATE PASS
TRANSPORTATION, LLC D/B/A
AGATE PASS
TRANSPORTATION'S
APPLICATION FOR MITIGATION

1 Pursuant to WAC 480-07-370(1)(c), Staff of the Washington Utilities and Transportation Commission (Staff) submits this response to Agate Pass Transportation, LLC d/b/a Agate Pass Transportation's (Agate Pass) Application for Mitigation and Request for Hearing.

2 On May 2, 2011, the Washington Utilities and Transportation Commission (Commission) issued Penalty Assessment TE-110698 against Agate Pass in the amount of \$600 for six violations of Washington Administrative Code (WAC) 480-30-221, Vehicle and driver safety requirements, which requires passenger charter carriers to comply with Title 49, Code of Federal Regulations (CFR).

3 The Commission assessed penalties for one violation of CFR Part 382.305(b)(1)¹, failing to conduct random alcohol testing at an annual rate of not less than the applicable annual rate of the average number of driver positions. For 2010, Agate Pass had to ensure that two drivers were randomly tested; however, only one driver was tested. The Commission also assessed penalties for five violations of CFR Part 382.305(b)(2), failing to conduct random controlled substances testing at an annual rate of not less than the applicable annual rate of the average number of driver positions. For 2010, Agate Pass had to ensure that nine drivers were randomly tested; however, only four drivers were tested.

¹ §382.305 at Attachment A.

4

On May 16, 2011, Agate Pass filed with the Commission a Mitigation Request, which included the Company's reasons in support of its request, and asked for a mitigation hearing. Agate Pass did not dispute the alleged violations, but asked that the penalty amount be reduced by an unspecified amount. In its Mitigation Request, the Company states that that the amount of the penalty would cause a substantial hardship for the business. Agate Pass also claims to have difficulty meeting the "intent of the law" related to random alcohol and substance abuse testing because the Company utilizes part-time drivers. For the reasons set forth below, Staff recommends that the Mitigation Request, seeking an unspecified reduction in the penalty amount, be denied.

5

The Federal Motor Carrier Safety Administration (FMCSA) has provided specific guidance on CFR Part 382 as it relates to seasonal drivers² as well as employees off work due to temporary lay-off, illness, injury or vacation.³

6

The FMCSA states that employers who use a consortium or other testing program remain responsible at all times for ensuring compliance with all of the rules, including random testing for all drivers that they use, regardless of any utilization of third parties to administer parts of the program.⁴ Because Agate Pass contracts with a third-party drug and alcohol testing consortium to conduct its testing, Agate Pass is responsible for letting the consortium know which drivers should be in the testing pool at any given time.

7

Alcohol testing may only be conducted just before, during, or just after the performance of safety-sensitive functions.⁵ Agate Pass must wait until just before, during or after the next time an employee is performing a safety-sensitive function to send the

² Interpretation for §382.305, Random Testing Question 3 and Guidance, included at Attachment B.

³ Interpretation for §382.305, Random Testing, Question 10 and Guidance.

⁴ Interpretation for §382.305, Random Testing, Question 5 and Guidance.

⁵ 49 C.F.R. Part §382.305(2)(m).

employee for random alcohol testing.

8 For controlled substances testing, Agate Pass may notify a driver of his selection for a random test while the driver is in an off-duty status, but must ensure that the driver then immediately proceeds to a collection site. If Agate Pass does not want to notify the driver that he has been selected for a random controlled substances test while the driver is in an off-duty status, the Company could set aside the driver's name for notification until the driver returns to work, as long as the driver returns to work before the next selection for random testing is made.⁶

9 Agate Pass's last two compliance reviews, conducted in September 2010 and April 2011, resulted in conditional safety ratings. A conditional safety rating means a motor carrier does not have adequate safety management controls in place to ensure compliance with safety fitness standards.⁷ In addition, the violations of C.F.R. Parts 382.305(b)(1) and 382.305(b)(2) found in the April 2011 review were repeats of violations found in the September 2010 review.⁸

10 The Commission's rules governing safety requirements for passenger transportation, which adopt certain federal safety regulations, are designed to protect the health and safety of the traveling public. It is the policy of the Transportation Safety section to recommend penalties for any violations related to keeping the public safe from unqualified drivers, such as Agate Pass's six drivers who drove without being randomly tested for alcohol or controlled substances as required.

11 Commission Staff is very concerned about Agate Pass's compliance history and believes Agate Pass has received more than adequate information and assistance on how to

⁶ Interpretation of §382.305, Random Testing, Question 17 and Guidance.

⁷ §385—Safety Fitness Procedures – 385.3 – Definitions and acronyms.

⁸ A list of violations documented during each compliance review is included at Attachment C.


comply with Commission rules. Staff sent the Company a letter on April 25, 2011, outlining its concerns with Agate Pass's compliance history. Staff will re-inspect Agate Pass's operations in the near future. If Staff finds repeat critical violations or if Agate Pass receives a conditional or unsatisfactory safety rating at the re-check inspection, Staff will recommend the Commission take additional enforcement action against Agate Pass, up to and including additional penalties and possible suspension of the Company's operating authority.⁹

12 For the reasons set forth above, Staff recommends that Agate Pass's mitigation request, seeking an unspecified reduction in the penalty amount, be denied.

DATED this 26th day of May, 2011.

Respectfully submitted,

ROBERT M. MCKENNA
Attorney General


GREGORY J. TRAUTMAN
Assistant Attorney General
Counsel for Washington Utilities
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⁹ Staff's April 25, 2011, compliance letter at Attachment D.

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Title 49: Transportation

PART 382—CONTROLLED SUBSTANCES AND ALCOHOL USE AND TESTING

Subpart C—Tests Required

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§ 382.305 Random testing.

(a) Every employer shall comply with the requirements of this section. Every driver shall submit to random alcohol and controlled substance testing as required in this section.

(b)(1) Except as provided in paragraphs (c) through (e) of this section, the minimum annual percentage rate for random alcohol testing shall be 10 percent of the average number of driver positions.

(2) Except as provided in paragraphs (f) through (h) of this section, the minimum annual percentage rate for random controlled substances testing shall be 50 percent of the average number of driver positions.

(c) The FMCSA Administrator's decision to increase or decrease the minimum annual percentage rate for alcohol testing is based on the reported violation rate for the entire industry. All information used for this determination is drawn from the alcohol management information system reports required by §382.403. In order to ensure reliability of the data, the FMCSA Administrator considers the quality and completeness of the reported data, may obtain additional information or reports from employers, and may make appropriate modifications in calculating the industry violation rate. In the event of a change in the annual percentage rate, the FMCSA Administrator will publish in the Federal Register the new minimum annual percentage rate for random alcohol testing of drivers. The new minimum annual percentage rate for random alcohol testing will be applicable starting January 1 of the calendar year following publication in the Federal Register.

(d)(1) When the minimum annual percentage rate for random alcohol testing is 25 percent or more, the FMCSA Administrator may lower this rate to 10 percent of all driver positions if the FMCSA Administrator determines that the data received under the reporting requirements of §382.403 for two consecutive calendar years indicate that the violation rate is less than 0.5 percent.

(2) When the minimum annual percentage rate for random alcohol testing is 50 percent, the FMCSA Administrator may lower this rate to 25 percent of all driver positions if the FMCSA Administrator determines that the data received under the reporting requirements of §382.403 for two consecutive calendar years indicate that the violation rate is less than 1.0 percent but equal to or greater than 0.5 percent.

(e)(1) When the minimum annual percentage rate for random alcohol testing is 10 percent, and the data received under the reporting requirements of §382.403 for that calendar year indicate that the violation rate is equal to or greater than 0.5 percent, but less than 1.0 percent, the FMCSA Administrator will increase the minimum annual percentage rate for random alcohol testing to 25 percent for all driver positions.

(2) When the minimum annual percentage rate for random alcohol testing is 25 percent or less, and the data received under the reporting requirements of §382.403 for that calendar year indicate that the violation rate is equal to or greater than 1.0 percent, the FMCSA Administrator will increase the minimum annual percentage rate for random alcohol testing to 50 percent for all driver positions.

(f) The FMCSA Administrator's decision to increase or decrease the minimum annual percentage rate for controlled substances testing is based on the reported positive rate for the entire industry. All information used for this determination is drawn from the controlled substances management information system reports required by §382.403. In order to ensure reliability of the data, the FMCSA Administrator considers the quality and completeness of the reported data, may obtain additional information or reports from employers, and may make appropriate modifications in calculating the industry positive rate. In the event of a change in the annual percentage rate, the FMCSA Administrator will publish in the Federal Register the new minimum annual percentage rate for controlled substances testing of drivers. The new minimum annual percentage rate for random controlled substances testing will be applicable starting January 1 of the calendar year following publication in the Federal Register.

(g) When the minimum annual percentage rate for random controlled substances testing is 50 percent, the FMCSA Administrator may lower this rate to 25 percent of all driver positions if the FMCSA Administrator determines that the data received under the reporting requirements of §382.403 for two consecutive calendar years indicate that the positive rate is less than 1.0 percent.

(h) When the minimum annual percentage rate for random controlled substances testing is 25 percent, and the data received under the reporting requirements of §382.403 for any calendar year indicate that the reported positive rate is equal to or greater than 1.0 percent, the FMCSA Administrator will increase the minimum annual percentage rate for random controlled substances testing to 50 percent of all driver positions.

(i)(1) The selection of drivers for random alcohol and controlled substances testing shall be made by a scientifically valid method, such as a random number table or a computer-based random number generator that is matched with drivers' Social Security numbers, payroll identification numbers, or other comparable identifying numbers.

(2) Each driver selected for random alcohol and controlled substances testing under the selection process used, shall have an equal chance of being tested each time selections are made.

(3) Each driver selected for testing shall be tested during the selection period.

(j)(1) To calculate the total number of covered drivers eligible for random testing throughout the year, as an employer, you must add the total number of covered drivers eligible for testing during each random testing period for the year and divide that total by the number of random testing periods. Covered employees, and only covered employees, are to be in an employer's random testing pool, and all covered drivers must be in the random pool. If you are an employer conducting random testing more often than once per month (e.g., daily, weekly, bi-weekly) you do not need to compute this total number of covered drivers rate more than on a once per month basis.

(2) As an employer, you may use a service agent (e.g., a C/TPA) to perform random selections for you, and your covered drivers may be part of a larger random testing pool of covered employees. However, you must ensure that the service agent you use is testing at the appropriate percentage established for your industry and that only covered employees are in the random testing pool.

(k)(1) Each employer shall ensure that random alcohol and controlled substances tests conducted under this part are unannounced.

(2) Each employer shall ensure that the dates for administering random alcohol and controlled substances tests conducted under this part are spread reasonably throughout the calendar year.

(l) Each employer shall require that each driver who is notified of selection for random alcohol and/or controlled substances testing proceeds to the test site immediately; provided, however, that if the driver is performing a safety-sensitive function, other than driving a commercial motor vehicle, at the time of notification, the employer shall instead ensure that the driver ceases to perform the safety-sensitive function and proceeds to the testing site as soon as possible.

(m) A driver shall only be tested for alcohol while the driver is performing safety-sensitive functions, just before the driver is to perform safety-sensitive functions, or just after the driver has ceased performing such functions.

(n) If a given driver is subject to random alcohol or controlled substances testing under the random alcohol or controlled substances testing rules of more than one DOT agency for the same employer, the driver shall be subject to random alcohol and/or controlled substances testing at the annual percentage rate established for the calendar year by the DOT agency regulating more than 50 percent of the driver's

function.

(c) If an employer is required to conduct random alcohol or controlled substances testing under the alcohol or controlled substances testing rules of more than one DOT agency, the employer may—

(1) Establish separate pools for random selection, with each pool containing the DOT-covered employees who are subject to testing at the same required minimum annual percentage rate; or

(2) Randomly select such employees for testing at the highest minimum annual percentage rate established for the calendar year by any DOT agency to which the employer is subject.

[66 FR 43103, Aug. 17, 2001, as amended at 67 FR 61821, Oct. 2, 2002; 68 FR 75459, Dec. 31, 2003]

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Tests required

§382.305 Random testing.

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Question 1: Is a driver who is on-duty, but has not been assigned a driving task, considered to be ready to perform a safety-sensitive function as defined in §382.107 subjecting the driver to random alcohol testing?

Guidance: A driver must be about to perform, or immediately available to perform, a safety-sensitive function to be considered subject to random alcohol testing. A supervisor, mechanic, or clerk, etc., who is on call to perform safety-sensitive functions may be tested at any time they are on call, ready to be dispatched while on-duty.

Question 2: What are the employer's obligations, in terms of random testing, with regard to an employee who does not drive as part of the employee's usual job functions, but who holds a Commercial Driver's License (CDL) and may be called upon at any time, on an occasional or emergency basis, to drive?

Guidance: Such an employee must be in a random testing pool at all times, like a full-time driver. A drug test must be administered each time the employee's name is selected from the pool.

Alcohol testing, however, may only be conducted just before, during, or just after the performance of safety-sensitive functions. A safety-sensitive function as defined in §382.107 means any of those on-duty functions set forth in §395.2 On-Duty time, paragraphs (1) through (7), (generally, driving and related activities). If the employee's name is selected, the employer must wait until the next time the employee is performing safety-sensitive functions, just before the employee is to perform a safety-sensitive function, or just after the employee has ceased performing such functions to administer the alcohol test. If a random selection period expires before the employee performs a safety-sensitive function, no alcohol test should be given, the employee's name should be returned to the pool, and the number of employees subsequently selected should be adjusted accordingly to achieve the required rate.

Question 3: How should a random testing program be structured to account for the schedules of school bus or other drivers employed on a seasonal basis?

Guidance: If no school bus drivers from an employer's random testing pool are used to perform safety sensitive functions during the summer, the employer could choose to make random selections only during the school year. If the employer nevertheless chooses to make selections in the summer, tests may only be administered when the drivers return to duty.

If some drivers continue to perform safety-sensitive functions during the summer, such as driving buses for summer school, an employer could not choose to forego all random selections each summer. Such a practice would compromise the random, unannounced nature of the random testing program. The employer would test all selected drivers actually driving in the summer. With regard to testing drivers not driving during the summer, the employer has two options. One, names of drivers selected who are on summer vacation may be returned to the pool and another selection made. Two, the selected names could be held by the employer and, if the drivers return to perform safety-sensitive functions before the next random selection, the test administered upon the drivers' return.

Finally, it should be noted that reductions in the number of drivers during summer vacations reduces the average number of driving positions over the course of the year, and thus the number of tests which must be administered to meet the minimum random testing rate.

Question 4: Are driver positions that are vacant for a testing cycle to be included in the determination of how many random tests must be conducted?

Guidance: No. The Federal Highway Administration (FHWA) random testing program tests employed or utilized drivers, not positions that are vacant.

Question 5: May an employer use the results of another program in which a driver participates to satisfy random testing requirements if the driver is used by the employer only occasionally?

Guidance: The rules establish an employer-based testing program. Employers remain responsible at all times for ensuring compliance with all of the rules, including random testing, for all drivers which they use, regardless of any utilization of third parties to administer parts of the program. Therefore, to use another's program, an employer must make the other program, by contract, consortium agreement, or other arrangement, the employer's own program. This would entail, among other things, being held responsible for the other program's compliance, having records forwarded to the employer's principal place of business on 2 days notice, and being notified of and acting upon positive test results.

Question 6: Once an employee is randomly tested during a calendar year, is his/her name removed from the pool of names for the calendar year?

Guidance: No, the names of those tested earlier in the year must be returned to the pool for each new selection. Each driver must be subject to an equal chance of being tested during each selection process.

Question 7: Is it permissible to make random selections by terminals?

Guidance: Yes. If random selection is done based on locations or terminals, a two-stage selection process must be utilized. The first selection would be made by the locations and the second selection would be of those employees at the location(s) selected. The selections must ensure that each employee in the pool has an equal chance of being selected and tested, no matter where the employee is located.

Question 8: When a driver works for two or more employers, in whose random pool must the driver be included?

Guidance: The driver must be in the pool of each employer for which the driver works.

Question 9: After what period of time may an employer remove a casual driver from a random pool?

Guidance: An employer may remove a casual driver, who is not used by the employer, from its random pool when it no longer expects the driver to be used.

Question 10: If an employee is off work due to temporary lay-off, illness, injury or vacation, should that individual's name be

removed from the random pool?

Guidance: No. The individual's name should not be removed from the random pool so long as there is a reasonable expectation of the employee's return.

Question 11: Is it necessary for an owner-operator, who is not leased to a motor carrier, to belong to a consortium for random testing purposes?

Guidance: Yes.

Question 12: If an employer joins a consortium, and the consortium is randomly testing at the appropriate rates, will these rates meet the requirements of the alcohol and controlled substances testing for the employer even though the required percent of the employer's drivers were not randomly tested?

Guidance: Yes.

Question 13: Is it permissible to combine the drivers from the subsidiaries of a parent employer into one pool, with the parent employer acting as a consortium?

Guidance: Yes.

Question 14: How should an employer compute the number of random tests to be given to ensure that the appropriate testing rate is achieved given the fluctuations in driver populations and the high turnover rate of drivers?

Guidance: An employer should take into account fluctuations by estimating the number of random tests needed to be performed over the course of the year. If the carrier's driver workforce is expected to be relatively constant (i.e., the total number of driver positions is approximately the same) then the number of tests to be performed in any given year could be determined by multiplying the average number of driver positions by the testing rate.

If there are large fluctuations in the number of driver positions throughout the year without any clear indication of the average number of driver positions, the employer should make a reasonable estimate of the number of positions. After making the estimate, the employer should then be able to determine the number of tests necessary.

Question 15: May an employer or consortium include non-U.S. Department of Transportation (DOT)-covered employees in a random pool with U.S. Department of Transportation (DOT)-covered employees?

Guidance: No.

Question 16: Canadians believe that their laws require employer actions be tied to the nature of the job and the associated safety risk. Canadian employers believe they will have to issue alcohol and drug testing policies that deal with all drivers in an identical manner, not just drivers that cross the border into the United States. If a motor carrier wanted to add cross border work to an intra-Canadian driver's duties, and the driver was otherwise qualified under the FHWA rules, may the pre-employment test be waived?

Guidance: The Federal Highway Administration (FHWA) has long required, since the beginning of the drug testing program in 1988, that transferring from intrastate work into interstate work requires a "pre-employment" test regardless of what type of testing a State might have required under intrastate laws. This policy also applied to motor carriers that had a pre-employment testing program similar to the Federal Highway Administration (FHWA) requirement. The Federal Highway Administration (FHWA) believes it is reasonable to apply this same interpretation to the first time a Canadian or Mexican driver enters the United States.

This policy was delineated in the *Federal Register* of February 15, 1994 (59 FR 7302, at 7322). The Federal Highway Administration (FHWA) believes motor carriers should separate drivers into intra-Canadian and inter-State groups for their policies and the random selection pools. If a driver in the intra-Canadian group (including the random selection pool) were to take on driving duties into the United States, the driver would be subject to a pre-employment test to take on this driving task. Although the circumstance is not actually a first employment with the motor carrier, such a test would be required because it would be the first time the driver would be subject to part 382.

***Question 17:** May an employer notify a driver of his/her selection for a random controlled substances test while the driver is in an off-duty status?

Guidance: Yes. Part 382 does not prohibit an employer from notifying a driver of his/her selection for a random controlled substances test while the driver is in an off-duty status.

If an employer selects a driver for a random controlled substances test while the driver is in an off-duty status, and then chooses to notify the driver that he/she has been selected while the driver is still off-duty, the employer must ensure that the driver proceeds immediately to a collection site. Immediately, in this context, means that all the driver's actions, after notification, lead to an immediate specimen collection. If the employer's policy or practice is to notify drivers while they are in an off-duty status, the employer should make that policy clear to all drivers so that they are fully informed of their obligation to proceed immediately to a collection site.

If an employer does not want to notify the driver that he/she has been selected for a random controlled substances test while the driver is in an off-duty status, the employer could set aside the driver's name for notification until the driver returns to work, as long as the driver returns to work before the next selection for random testing is made.

Employers should note that regardless of when a driver is notified, the time the driver spends traveling to and from the collection site, and all time associated with providing the specimen, must be recorded as on-duty time for purposes of compliance with the hours-of-service rules.

***Question 18:** Is it permissible to select alternates for the purpose of complying with the Random Testing regulations?

Guidance: Yes, it is permissible to select alternates. However, it is only permissible if the primary driver selected will not be available for testing during the selection period because of long-term absence due to layoff, illness, injury, vacation or other circumstances. In the event the initial driver selected is not available for testing, the employer and/or C/TPA must document the reason why an alternate driver was tested. The documentation must be maintained and readily available when requested by the Secretary of Transportation, any DOT agency, or any State or local officials with regulatory authority over the employer or any of its drivers.

***Question 19:** A motor carrier uses a consortium/third party administrator (C/TPA) to conduct its random selection of driver names. The C/TPA has many motor carriers in its random selection pool. The C/TPA has set up its random selection program to pick driver names and notifies the motor carrier whose driver the C/TPA has selected. The motor carrier notifies the C/TPA the driver is presently on long-term absence due to layoff, illness, injury, or vacation. The motor carrier also notifies the C/TPA it does not expect the driver to return to duty before the C/TPA's next selection of driver names. The C/TPA then randomly orders and selects a driver's name from the motor carrier that employs the driver who is unavailable rather than selecting the next name on the random selection list. Is this a scientifically valid and impartial method for

selecting drivers for random testing in a motor carrier's program?

Guidance: This procedure is a scientifically valid method for selecting driver names. This method is similar to methods used by organizations, including the Department of Labor's Bureau of Labor Statistics, to randomly order, select, and substitute names for sampling with replacement of groups of individual and companies. This procedure has a small degree of theoretical bias for a simple random sampling selection procedure. The theoretical bias, though, is so minimal the FMCSA does not believe the agency should prohibit its use.

This method is useful for operational settings, such as FMCSA's motor carrier random testing program. The method is less impartial toward drivers than other theoretical methods, but maintains a deterrent effect for both motor carriers and drivers. This method should deter motor carriers from claiming drivers are unavailable each time the C/TPA selects one of its drivers, thereby never having its drivers subject to actual random tests.

In addition, employers and C/TPAs should establish operational procedures that will ensure, to the greatest extent possible, that the primary selections for random testing are tested. The operational procedures should include procedures that will ensure the random selection lists are updated in a timely manner. The updates will ensure that drivers who are no longer available to an employer will not be counted in the random selection lists. The operational procedures should also outline the measures for selecting alternates, including documenting the reasons for using an alternate.

***Question 20:** If an employer is subject to random testing for only a partial calendar year, how should the employer determine the number of random tests required during the year to achieve the appropriate testing rate? (Examples: new employers that begin operating midway through the calendar year; employers which merge or split midway through the calendar year; Canadian or Mexican carriers that begin U.S. operations midway through the calendar year.)

Response: The number of random tests required can be computed in the same manner as for any employer that has large fluctuations in the number of driver positions during the year. Use the formulas $T = 50\% \times D/P$ for controlled substance testing and $T = 10\% \times D/P$ for alcohol testing, where T is the number of tests required, D is the total number of drivers subject to testing, and P is the number of selection periods in a full calendar year. For any selection period during which the carrier was not subject to §382.305, simply enter a zero in the driver calculations. Example: A carrier starts operating in August and decides to test quarterly ($P = 4$). It has 16 drivers subject to testing in the third quarter and only 12 drivers subject to testing in the fourth quarter. $D = 0 + 0 + 16 + 12 = 28$. $D/P = 28/4 = 7$. $T = 50\%$ of 7, or 3.5, which must be rounded up to 4. The carrier must test 4 drivers for controlled substances between its first day of operation in August and the end of the year. Following the requirement to spread testing reasonably throughout the year, two drivers should be tested during the third quarter and two during the fourth quarter.

***Question 21:** If a driver has been notified of his/her selection of random drug and/or alcohol testing and the testing cannot be completed because of "unforeseeable obstacles" at the collection site (i.e. collection site closed, collector unavailable when driver shows up, emergency such as a fire, natural disaster, etc...), what is the carrier's responsibility?

Response: In accordance with §382.305(i)(3) and §382.305(l), each driver selected for testing shall be tested during the selection period; and upon notification of selection for random alcohol and/or drug testing proceed to the collection site immediately. In instances of "unforeseeable obstacles" the driver shall immediately contact the employer's DER for instructions to an alternative collection site. These "unforeseeable obstacles" do not negate the employer's responsibility of ensuring that the required test be administered.

***Editor's Note:** This interpretation was issued after the interpretations were published in the *Federal Register* in April 1997.

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ATTACHMENT C

Agate Pass Transportation, LLC d/b/a Agate Pass Transportation Compliance History – 2008-2011

September 2010 – Compliance Review

Violations noted:

Number of violations	Violation
2	<i>382.305(b)(1) – Failing to conduct random alcohol testing at an annual rate of not less than the applicable annual rate of the average number of driver positions. (Critical)</i>
9	<i>382.305(b)(2) – Failing to conduct random controlled substances testing at an annual rate of not less than the applicable annual rate of the average number of driver positions. (Critical)</i>
5	391.51(b) – Failing to maintain driver qualification files in accordance with 391.51(b).
3	396.3(b)(1) – Failing to keep a maintenance record which identifies the vehicle, including make, serial number, year and tire size.
1	396.11(a) – Failing to require driver to prepare driver vehicle inspection report.
3	396.17(a) – Using a commercial motor vehicle not periodically inspected.

Result: Conditional Safety Rating

Actions: Carrier advised of all violations. Re-check scheduled for April 2011.

April 2011 – Follow-up Compliance Review

Violations noted:

Number of violations	Violation
1	382.305(b)(1) – Failing to conduct random alcohol testing at an annual rate of not less than the applicable annual rate of the average number of driver positions.
5	<i>382.305(b)(2) – Failing to conduct random controlled substances testing at an annual rate of not less than the applicable annual rate of the average number of driver positions. (Critical)</i>
2	382.305(i)(2) – Failing to ensure that each driver selected for random alcohol and controlled substances testing has an equal chance of being selected each time selections are made.
3	382.305(i)(3) – Failing to ensure that drivers are tested within the selection period.
4	382.305(k)(1) – Failing to ensure that random tests are unannounced.
1	391.23(a) – Failing to investigate driver's background.
3	<i>391.51(a) – Failing to maintain driver qualification file on each driver employed. (Critical)</i>
1	391.51(b)(1) – Failing to maintain driver's employment application in driver's qualification file.
1	391.51(b)(2) – Failing to maintain inquiries into driver's driving record in driver's qualification file.
2	<i>391.51(b)(7) – Failing to maintain medical examiner's certificate in driver's qualification file. (Critical)</i>

Result: Conditional Safety Rating

Actions: Carrier advised of all violations. Recheck inspection to follow.

ATTACHMENT D



STATE OF WASHINGTON
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION
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(360) 664-1160 • TTY (360) 586-8203

April 25, 2011

Leslie F. Bagley, General Manager
Agate Pass Transportation, LLC
d/b/a Agate Pass Transportation
PO Box 1142
Kingston, WA 98346-1142

RE: Safety Violations – Follow-up Inspection

Dear Mr. Bagley:

On April 14, 2011, Washington Utilities and Transportation Commission (commission) staff conducted a compliance review inspection of Agate Pass Transportation, LLC d/b/a Agate Pass Transportation (Agate Pass). During that inspection, Motor Carrier Safety Inspector John Foster found numerous safety violations, resulting in a conditional safety rating for Agate Pass.

The 23 specific violations of WAC 480-30-221 found during the inspection include the following:

- **One violation of CFR Part 382.305(b)(1) – Failing to conduct random alcohol testing at an annual rate of not less than the applicable annual rate of the average number of driver positions.**
- **Five violations of CFR Part 382.305(b)(2) – Failing to conduct random controlled substances testing at an annual rate of not less than the applicable annual rate of the average number of driver positions. (*Critical violation*)**
- **Two violations of CFR Part 382.305(i)(2) – Failing to ensure that each driver selected for random alcohol and controlled substances testing has an equal chance of being selected each time selections are made.**
- **Three violations of CFR Part 382.305(i)(3) – Failing to ensure that drivers are tested within the selection period.**
- **Four violations of CFR Part 382.305(k)(1) – Failing to ensure that random tests are unannounced.**
- **One violation of CFR Part 391.23(a) – Failing to investigate driver's background.**

- **Three** violations of CFR Part 391.51(a) – Failing to maintain driver qualification file on each driver employed. (*Critical violation*)
- **One** violation of CFR Part 391.51(b)(1) – Failing to maintain driver's employment application in driver's qualification file.
- **One** violation of CFR Part 391.51(b)(2) – Failing to maintain inquiries into driver's driving record in driver's qualification file.
- **Two** violations of CFR Part 391.51(b)(7) – Failing to maintain medical examiner's certificate in driver's qualification file. (*Critical violation*)

We have recommended that the commission penalize Agate Pass for one violation of CFR Part 382.305(b)(1) and five violations of 382.305b(2) where the company failed to conduct random alcohol or controlled substance testing at an annual rate of not less than the applicable annual rate of the average number of driver positions. If the commission decides to issue penalties, you will receive notice under separate cover.

Agate Pass's last two compliance reviews, conducted in September 2010 and April 2011, resulted in conditional safety ratings. A conditional safety rating means a motor carrier does not have adequate safety management controls in place to ensure compliance with safety fitness standards.¹ A list of violations documented during each compliance review is enclosed for your reference. We are very concerned about Agate Pass's compliance history and believe commission staff has provided more than adequate information and assistance to you on how to comply with commission rules.

To ensure that Agate Pass complies with commission rules going forward, please be sure to do the following:

- Maintain all required controlled substance testing records, including yearly summaries, quarterly summaries, test information, test results, records of training, etc., as required by 49 CFR Parts 40 and 382 of the Federal Motor Carrier Safety Regulations.
- Ensure that all drivers subject to pre-employment, random, reasonable cause, post accident, return to duty and/or follow-up controlled substance testing are tested as required by 49 CFR Parts 40 and 382. Ensure that all drug and alcohol tests are unannounced and drivers report for testing immediately upon notification of selection.
- Maintain complete driver qualification files as required by 49 CFR Part 391. Files must contain the driver's employment application, inquiries into the driving record, employment history investigation, certification of annual review of the driving record, annual copy of the driving record, annual list of the driver's traffic convictions, certificate of road test or equivalent and current medical certificate.
- Conduct inquiries into drivers' driving records within 30 days of employment. Maintain records of this inquiry in the drivers file, as required by 49 CFR Part 391.
- Do not allow drivers to drive in inter/intrastate commerce unless they have been physically examined each 24 months, as required by 49 CFR Part 391.

¹ 49 CFR Part 385—Safety Fitness Procedures – 385.3 – Definitions and acronyms.

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Mr. Foster will schedule a follow-up inspection with Agate Pass within the coming weeks. Be advised that if Mr. Foster finds repeat critical violations or if Agate Pass receives a conditional or unsatisfactory safety rating, we will recommend additional enforcement action. This could include additional penalties and a possible suspension of Agate Pass's charter and excursion authority.

If you have any questions, please contact Betty Young, Compliance Investigator, Transportation Safety, at 360-664-1202, or by e-mail at byoung@utc.wa.gov.

Sincerely,

A handwritten signature in black ink that reads "David Pratt". The signature is written in a cursive style with a large initial "D" and a stylized "P".

David Pratt
Assistant Director, Transportation Safety

Enclosure

**Agate Pass Transportation, LLC d/b/a Agate Pass Transportation
Compliance History – 2008-2011**

September 2010 – Compliance Review

Violations noted:

Number of violations	Violation
2	382.305(b)(1) – Failing to conduct random alcohol testing at an annual rate of not less than the applicable annual rate of the average number of driver positions. (Critical)
9	382.305(b)(2) – Failing to conduct random controlled substances testing at an annual rate of not less than the applicable annual rate of the average number of driver positions. (Critical)
5	391.51(b) – Failing to maintain driver qualification files in accordance with 391.51(b).
3	396.3(b)(1) – Failing to keep a maintenance record which identifies the vehicle, including make, serial number, year and tire size.
1	396.11(a) – Failing to require driver to prepare driver vehicle inspection report.
3	396.17(a) – Using a commercial motor vehicle not periodically inspected.

Result: Conditional Safety Rating

Actions: Carrier advised of all violations. Re-check scheduled for April 2011.

April 2011 – Follow-up Compliance Review

Violations noted:

Number of violations	Violation
1	382.305(b)(1) – Failing to conduct random alcohol testing at an annual rate of not less than the applicable annual rate of the average number of driver positions.
5	382.305(b)(2) – Failing to conduct random controlled substances testing at an annual rate of not less than the applicable annual rate of the average number of driver positions. (Critical)
2	382.305(l)(2) – Failing to ensure that each driver selected for random alcohol and controlled substances testing has an equal chance of being selected each time selections are made.
3	382.305(i)(3) – Failing to ensure that drivers are tested within the selection period.
4	382.305(k)(1) – Failing to ensure that random tests are unannounced.
1	391.23(a) – Failing to investigate driver's background.
3	391.51(a) – Failing to maintain driver qualification file on each driver employed. (Critical)
1	391.51(b)(1) – Failing to maintain driver's employment application in driver's qualification file.
1	391.51(b)(2) – Failing to maintain inquiries into driver's driving record in driver's qualification file.
2	391.51(b)(7) – Failing to maintain medical examiner's certificate in driver's qualification file. (Critical)

Result: Conditional Safety Rating

Actions: Carrier advised of all violations. Recheck inspection to follow.