

NO. 41198-9-II

STATE OF WASHINGTON
BY  DEPUTY

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

EVERGREEN FREEDOM FOUNDATION,
a Washington nonprofit corporation,

Plaintiff/Appellant,

v.

WASHINGTON STATE DEPARTMENT OF TRANSPORTATION,
division of Washington State Ferries,

Defendant/Respondent.

**RESPONDENT WASHINGTON STATE DEPARTMENT OF
TRANSPORTATION'S RESPONSE BRIEF**

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I. INTRODUCTION

Appellant Evergreen Freedom Foundation (Foundation) asks this court to impose sanctions against Respondent, Washington State Department of Transportation (WSDOT), under our State's Public Records Act (PRA) for refusing to release confidential drug and alcohol test results obtained by the Washington State Ferries Division (WSF)¹ while performing United States Coast Guard (USCG) required employee chemical testing.

The USCG has broad congressional authority to regulate maritime safety, including authority to adopt rules governing investigation of marine casualties; for operating a vessel while under the influence of alcohol or dangerous drugs; and for mandatory chemical testing by marine employers.

USCG regulations require marine employers to determine if there is any evidence of drug or alcohol use by any of their employees directly involved in a serious marine incident. The drug and alcohol test results sought by the Foundation in this case are those obtained from WSF employees by the WSF in its capacity as a marine employer following a collision of a state ferry with the Coleman Dock in Seattle in the summer of 2009.

¹ The Washington State Ferries (WSF) is a division of the Washington State Department of Transportation (WSDOT).

The drug and alcohol testing procedures that prohibit an employer from releasing employee test results were initially adopted by the United States Department of Transportation (USDOT) to apply to certain federal agencies under the USDOT. The USCG is a separate agency from the USDOT, but independently adopted the USDOT testing procedures in 49 C.F.R. pt. 40, including the confidentiality provision in 49 C.F.R. § 40.321, to apply to marine employers pursuant to the USCG's separate Congressional scheme.

The WSF withheld individual drug and alcohol test results from the documents released to the Foundation to avoid violating 49 C.F.R. § 40.321 which provides as follows:

Except as otherwise provided in this subpart, as a service agent or employer participating in the DOT drug or alcohol testing process, you are prohibited from releasing individual test results or medical information about an employee to third parties without the employee's specific written consent.

As a valid federal regulation, 49 C.F.R. § 40.321 is incorporated into our State's PRA under the "other statute" exemption in RCW 42.56.070(1). In the alternative, the state law requirements to release drug and alcohol test results under the PRA are in direct conflict with the prohibition in 49 C.F.R. § 40.321 resulting in federal preemption.

II. STATEMENT OF THE ISSUES

Whether our State's PRA requires the WSDOT to disclose confidential drug and alcohol test results when to do so would violate federal law?

III. STATEMENT OF THE CASE

A. Factual Background

On August 30, 2009, the Washington state ferry, M/V *Wenatchee*, impacted the Coleman Dock at Pier 52 in Seattle with enough force to cause moderate damage to both dock and vessel. Clerk's Papers (CP) at 92. As a marine employer subject to USCG regulations, WSF initiated mandatory chemical testing of the employees directly involved. CP at 92-93. Drug and alcohol test results were documented on the appropriate USCG and USDOT forms in accordance with USCG regulations. CP at 92. The Foundation made two separate public records requests for records related to the ferry collision, resulting in the release of the 10 test-related form documents that are at issue in this case with drug and alcohol test results redacted from those forms. CP at 74-76.

B. First Records Request (PDR-09-0968)

The WSDOT received the Foundation's first public records request on August 31, 2009. CP at 74. The WSDOT acknowledged the request within five days on September 1, 2009, and assigned it matter number PDR-09-0968 (the Foundation's First Request). The WSDOT identified

potentially responsive records and reviewed them for confidential or otherwise exempt information with assistance of legal counsel prior to release to the Foundation on November 9, 2009. CP at 74-75.

Among the numerous records produced in response to the Foundation's First Request was a copy of USCG form 2692B (USCG 2692B) used by marine employers when reporting drug and alcohol test results after a serious marine incident. 46 C.F.R. § 4.06-60 (2010). The USCG 2692B was redacted in accordance with the WSDOT's understanding of USCG requirements before releasing it.² (USCG 2692B as initially redacted and produced on November 9, 2009 is CP at 14, and is also attached hereto as Appendix A-1.)

The Foundation objected to the redactions to USCG 2692B by letter which the WSDOT received on November 19, 2009. CP at 75. The WSDOT again consulted with legal counsel and notified the Foundation of its decision not to release the redacted information by letter on November 24, 2009. CP at 75; CP at 34-35.

On December 2, 2009, pursuant to RCW 42.56.530, the Foundation asked the Office of the Attorney General to review the WSDOT's redactions to USCG 2692B. CP at 33.

² Pursuant to RCW 42.56.210(3), WSDOT sent the Foundation a denial letter and exemption log to explain the redactions to the USCG 2692B, including legal citation and explanation for withholding the redacted information on November 5, 2009. CP at 15-17.

Sometime in January of 2010, the WSDOT learned that an inquiry had been made to the USCG, and that the USCG had confirmed drug and alcohol test information had to be redacted from USCG 2692B prior to release to the public. CP at 76. Nevertheless, after further consultation and additional advice from WSDOT's legal counsel, WSDOT elected to revisit and revise the specific information withheld. CP at 76.

On February 5, 2010, WSDOT released a revised version of the USCG 2692B. Redactions related to the type of tissue or urine sample that was provided and how soon after the incident those samples were provided were removed. Redactions to the alcohol test results remained. CP at 76, 79. (The corrected USCG 2692B form as released on February 5, 2010 is attached as Appendix B-1.)

WSDOT now concedes that its initial reactions to USCG 2692B released November 9, 2009, while made in good faith and on advice of counsel, nevertheless included drug and alcohol related information that is neither a test result nor medical information as that term is used in 49 C.F.R. § 40.321, and therefore were overbroad. That error was corrected, however, on February 5, 2010.

On March 22, 2010, Steve Dietrich, Senior Counsel in the Office of the Attorney General informed the Foundation that WSDOT's decision to withhold drug and alcohol test results was proper under the PRA, as required by federal regulations. CP at 36-41.

C. Second Records Request (PDR-09-1322)

Meanwhile, on November 19, 2009, the Foundation made a second request for records which WSF identified as PDR-09-1322 (the Foundation's Second Request). CP at 75-76. WSDOT responded to the Foundation's Second Request on December 22, 2009. CP at 76. Records released on December 22, 2009, included the same USCG 2692B form that had already been provided to the Foundation in response to its first request with the same information redacted as described above. (Appendix A-1 and B-1). Additionally, WSF released seven USDOT alcohol test forms and two pages from HealthForce Partners containing drug and alcohol test-related information acquired by WSF as part of the USCG's post-incident investigation. The initial redactions to these records were similar to the initial redactions made to USCG 2692B. CP at 76; CP at 19-28. (These 10 forms as originally redacted are attached as Appendix A 1-10.)

Unlike what occurred in the Foundation's First Records Request, the Foundation did not object or otherwise ask WSDOT to reconsider the redactions made to the 10 forms released in response to the Foundation's Second Request. Nor did the Foundation seek review by the Office of Attorney General prior to filing suit. While all of the redactions addressed information that appeared to be either test results or medical information, which WSF understood to be confidential under 49 C.F.R. § 40.321,

WSDOT now concedes some of the initial redactions of records made in response to the Foundation's Second Request were overbroad. Although upheld by the superior court, WSDOT removed the overbroad redactions and produced the records in their corrected form to the Foundation on September 30, 2010. (These 10 forms as corrected and attached as Appendix B 2-10 are not part of the record. They are the subject of WSDOT's Motion to Supplement the Record filed with this court along with Respondent's response brief.)

D. Procedural History

The Foundation brought this action in Thurston County Superior Court on April 16, 2010. The case was argued on cross-motions for summary judgment before the Honorable Judge Paula Casey on July 23, 2010. On August 20, 2010, Judge Casey denied the Foundation's motion for summary judgment and granted summary judgment in favor of WSDOT, holding that 49 C.F.R. § 40.321 prohibits WSF from releasing drug and alcohol information, and that the federal regulation constitutes another statute as that term is used in RCW 42.56.070(1). CP at 255-257. Therefore, Judge Casey did not reach WSDOT's alternative legal argument based on federal preemption. The record consists entirely of affidavits, memoranda of law, and other documentary evidence.

The Foundation timely filed this appeal September 17, 2010. CP at 253 -257.

IV. ARGUMENT

This court should affirm the superior court's determination that drug and alcohol test results made confidential by a regulation adopted by the USCG are exempt under the PRA because a federal regulation is considered an "other statute" as that term is used in RCW 42.56.070(1). Alternatively, this court should affirm the superior court because a state law requirement to release drug and alcohol test results under the PRA would direct conflict with the prohibition in 49 C.F.R. § 40.321 resulting in federal preemption.

The USCG was the agency responsible for investigating the incident involving the M/V *Wenatchee*. As a marine employer, the WSF was required to determine if there was any evidence of drug or alcohol use by any individuals directly involved in the incident. The drug and alcohol test results sought by the Foundation in this case are reported on forms that the WSF was required to complete as part of the USCG investigation. Release of drug and alcohol test results as reported on these forms is prohibited by 49 C.F.R. § 40.321.

This federal confidentiality regulation barring release was validly adopted by both the USDOT and the USCG in accordance with their separate and independent congressional authority. It was initially adopted by the USDOT according to the USDOT's congressional mandate, and applies to those employers subject to USDOT regulation. With respect to

marine employers like the WSF not subject to USDOT, this same confidentiality regulation was independently adopted by the USCG consistent with the USCG's separate congressional authority to regulate drug and alcohol use aboard marine vessels.

A. WSDOT Withheld Individual Drug and Alcohol Test Results as Required by 49.C.F.R. § 40.321

WSDOT released corrected versions of the forms at issue in this case on February 5, and on September 30, 2010. The only information that has not been released is the individual drug and alcohol test results that WSDOT withheld pursuant to the applicable USCG regulation.

That regulation provides that drug and alcohol testing results may not be released without written consent from the employee tested:

Except as otherwise provided in this subpart, as a service agent or employer participating in the DOT drug or alcohol testing process, *you are prohibited from releasing individual test results* or medical information about an employee to third parties without the employee's specific written consent.

49 C.F.R. § 40.321; (emphasis added). As addressed in greater detail below, even though the USCG is not a sub-agency of the USDOT or otherwise under USDOT's authority, it has nevertheless elected to incorporate 49 C.F.R. pt. 40, including the above confidentiality provision, into its post-casualty drug and alcohol testing requirements for marine employers.

B. A Federal Regulation Barring Release of Confidential Information can be an “Other Statute” Exemption Incorporated Under the PRA

Under Chapter 42.56 RCW, Washington State’s PRA, WSDOT correctly withheld the drug and alcohol testing information because the USCG regulation specifically prohibits its release and it falls within the PRA’s “other statute” exemption. The PRA provides that most public agency records are open to public inspection unless there is an exemption allowing the agency to withhold the record or a portion of a record from disclosure. Specifically, each agency “shall make available for public inspection and copying all public records, unless the record falls within the specific exemptions of subsection (6) of this section, this chapter, or other statute which exempts or prohibits disclosure of specific information or records.” RCW 42.56.070(1).

In *Ameriquist Mortgage Co. v. Washington State Office of Atty. Gen.*, 241 P.3d.1245, 1255 (2010), the court held that a federal regulation that prohibits a state agency from releasing information is incorporated as an “other statute” as that term is used in RCW 42.46.070(1). The court separately examined the application of the federal Gramm-Leach-Bliley Act of 1999, which includes privacy protections for customers of financial institutions, and the regulations adopted by the Federal Trade Commission to implement the Act, in determining how they interact with the State’s

PRA. The court held that both the statute and the regulations operated as an “other statute” under RCW 42.56.070(1).

The Foundation cites a number of cases for the incorrect proposition that administrative regulations can never support an exemption under our PRA. Brief of Appellant, pp. 20-22. Each case the Foundation cites for this proposition, however, involves a rule or policy adopted by the same state or local agency that is asserting it as an exemption.³ To permit a state or local agency to create its own exemptions is not permitted because to do so would allow an agency to circumvent and undermine the PRA. *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 580 P.2d 246 (1978). However, that concern is not present when, as occurs here, a state agency complies with a regulation properly adopted by a federal agency because a state or local agency has no ability to adopt a federal regulation.

C. 49 C.F.R. § 40.321 was Properly Adopted Pursuant to the Omnibus Transportation Employee Testing Act of 1991

The Foundation attempts to distinguish the Federal Trade Commission’s (FTC) confidentiality regulation in *Ameriquest* from the confidentiality regulation at issue here. The distinction, according to the

³ *Brouillet v. Cowles Pub. Co.*, 114 Wn.2d 788, 791 P.2d 526 (1990) (SPI rule guaranteeing confidentiality of records without statutory authority); *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 580 P.2d 246 (1978) (no judicial deference afforded county assessor’s determination regarding disclosure of tax records); *Servais v. Port of Bellingham*, 127 Wn.2d 820, 904 P.2d 1124 (1995) (port not to decide what records should be exempt); *Amren v. City of Kalama*, 131 Wn.2d 25, 929 P.2d 389 (1997) (city could make a statutory exemption for state police officers applicable to city police officers by adoption of an ordinance in municipal code without statutory authority).

Foundation, is that the FTC's rule is consistent with authority granted by Congress in the Gramm-Leach-Bliley Act of 1999, and therefore has its basis in statute. In contrast, the Foundation argues that the USCG regulation at issue in this case violates the authority granted to the USDOT by Congress in the Omnibus Transportation Employee Testing Act of 1991, Pub. L. 102-143, 105 Stat. 952 (Oct. 28, 1991) (OTETA).

The Foundation asks this court to find that the USDOT misconstrued the confidentiality provisions in 49 U.S.C. § 5331(d)(7) when it adopted 49 C.F.R. § 40.321, such that the rule has no basis in statute because it is invalid.

As discussed below, the Foundation's analysis of the USDOT's statutory authority to adopt this regulation is misplaced, because it is the adoption of this regulation by the USCG that applies to the WSF as a marine employer.

Furthermore, even if the USDOT's statutory authority is somehow relevant to the USCG's authority to adopt the regulation, the Foundation's invalidity argument disregards the deference due a federal agency's interpretation of a statute it administers, and it fails to consider applicable rules of statutory construction.

When a court reviews an administrative agency's interpretation of a statute which the agency administers, the court first must decide whether the intent of Congress is clear and unambiguous, in which case the court is

to give effect to that unambiguous intent. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43, 104 S. Ct. 2778, 2781-82, 81 L. Ed. 2d 694 (1984). If, however, the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's interpretation is based on a permissible construction of the statute. *Id.*

When OTETA is read as a whole, the intent of Congress to make drug and alcohol test results confidential is clear. OTETA is codified at 49 U.S.C. § 5331, and authorizes the Secretary of the USDOT to adopt Procedures for Transportation Workplace Drug and Alcohol Testing Programs. The Secretary is authorized to establish a drug and alcohol testing program requiring covered employers to conduct pre-employment, reasonable suspicion, random, and post-accident testing for drug and alcohol use. Congress instructed the Secretary of the USDOT to develop testing and lab requirements that include rules to “promote, to the maximum extent practicable, individual privacy in the collection of specimens” 49 U.S.C. § 5331(d)(1). And, with respect to the confidentiality of drug and alcohol test results, OTETA directs the Secretary to develop requirements that:

provide for the confidentiality of test results and medical information (except information about alcohol or a controlled substance) of employees, except that this clause does not prevent the use of test results for the orderly imposition of appropriate sanctions under this section.

49 U.S.C. § 5331(d)(7).

The Foundation's invalidity argument focuses on the language in the parenthetical, out of context of the rest of the Act, to suggest that the USDOT misconstrued the plain meaning of this section when it adopted 49 C.F.R. § 40.321.

Legislative intent, however, must be construed from the language of a statute in the context of the entire Act in which it appears. *See, e.g., Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 43 P.3d 4 (2002); *Skamania Cy. v. Columbia River Gorge Comm'n*, 144 Wn.2d 30, 43, 26 P.3d 241 (2001) (when reviewing an agency's construction of a federal statute, "we must look to the statute in its entirety . . . not just at the particular language in isolation," citing *Dole v. United Steelworkers of America*, 494 U.S. 26, 35, 110 S. Ct. 929, 108 L. Ed. 2d 23 (1990)). The meaning of 49 U.S.C. § 5331(d)(7) can only be understood in the larger context of OTETA.

OTETA was enacted based on a finding by Congress that "alcohol abuse and illegal drug use pose significant dangers to the safety and welfare of the nation." PL 102-152 § 2. The entire purpose and focus of OTETA is to establish workplace drug and alcohol testing programs, and the only "test results" that the USDOT is authorized to adopt rules to regulate under OTETA are those for employee workplace drug and

alcohol use. *See, e.g.* 49 U.S.C. § 5331(1). The text in 49 U.S.C. § 5331(d)(7) directing the Secretary to adopt procedures which “provide for the confidentiality of test results” can only reasonably be read to refer to adoption of regulations providing for the confidentiality of drug and alcohol test results obtained under the Act.

Rules of statutory construction reinforce this conclusion. Statutes are to be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous. *Sleasman v. City of Lacey*, 159 Wn.2d 639, 643, 151 P.3d 990 (2007). Since the only test results to which this section can reasonably refer are drug and alcohol test results, to construe the parenthetical 49 U.S.C. § 5331(d)(7) to exclude drug and alcohol test results from its protection, as suggested by the Foundation, would render the confidentiality protection afforded to “test results” in the context of OTETA entirely meaningless.

The first part of the sentence of 49 U.S.C. § 5331(d)(7) protects both “test results” and “medical information” from release. The parenthetical provision excepting “information about alcohol or a controlled substance” immediately follows and qualifies “medical information” not “test results.” Test results obtained as part of a workplace drug and alcohol testing process, and not for the purpose of a

medical diagnosis or treatment are not medical information.⁴ Procedures governing confidentiality of medical information, including medical information about alcohol and controlled substances, are generally addressed in regulations adopted by the Secretary of Health and Human Services pursuant to the Drug Abuse Prevention, Treatment, and Rehabilitation Act of 1980, or the Health Insurance Portability and Accountability Act of 1996 (HIPAA). Thus, it makes sense that Congress would exempt the USDOT in 49 U.S.C. § 5331(d)(7) from responsibility to adopt procedures protecting medical information about alcohol or a controlled substance from the scope of USDOT's rule making responsibility under OTETA. However, to read the parenthetical in 49 U.S.C. § 5331(d)(7) as exempting the very test results that are collected under OTETA, does not make sense.

Moreover, to the extent that the Foundation presents an alternative interpretation of 49 U.S.C. § 5331(d)(7) from that adopted by the USDOT in 49 C.F.R. § 40.321, the Foundation's argument merely demonstrates that the language used in this subsection of the statute is capable of more than one meaning. It does not demonstrate error. In the face of ambiguity, the USDOT's interpretation of a statute it administers is entitled to deference unless the interpretation is "arbitrary, capricious, or

⁴ "Medical" means "of, relating to, or concerned with physicians or with the practice of medicine often as distinguished from surgery." *Webster's Third New International Dictionary* 1402 (2002).

manifestly contrary to the statute.” *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). *See also Blue Sky Advocates v. State*, 107 Wn.2d 112, 118, 727 P.2d 644 (1986) (action is not arbitrary or capricious “when exercised honestly and upon due consideration where there is room for two opinions, however much it may be believed that an erroneous conclusion was reached”).

D. The USCG's Statutory Authority to Investigate Potential Drug and Alcohol Use Following a Serious Marine Incident is Separate From OTETA

In any event, the USCG does not rely on OTETA as the source for its rule making authority to regulate marine employees’ drug and alcohol use.

The parties are in substantial agreement with respect to the statutory source of the USCG’s regulatory oversight of the WSF as a marine employer.⁵

The USCG is a military service within the United States Department of Homeland Security which regulates the safety of marine vessels operating in waters subject to the jurisdiction of the United States, including the ferry vessels operated by the WSF. 14 U.S.C. §§ 1 and 2. CP at 80-94. The USCG is not part of the USDOT and OTETA does not apply to the USCG or amend any USCG statutes.

⁵ Brief of Appellant, pp. 8-10

Congress grants the USCG independent, statutory authority to prescribe regulations to promote “maritime safety and seamen’s welfare” at 46 U.S.C. § 2103. The USCG is directed to prescribe regulations on reporting marine casualties, including whether the use of alcohol contributed to the incident. 46 U.S.C. § 6101. And, Congress specifically required the USCG to prescribe standards for individuals who operate a vessel under the influence of alcohol or a dangerous drug. 46 U.S.C. § 2302(c).

The USCG’s regulations adopted to carry out this congressional mandate include 33 C.F.R. pt. 95 (Operating a Vessel While Under the Influence of Alcohol or a Dangerous Drug), 46 C.F.R. pt. 4 (Marine Casualties and Investigations), and 46 C.F.R. pt. 16 (Chemical Testing).

Although drug and alcohol testing procedures are not specifically prescribed in the USCG’s statutes requiring such testing, the USCG could not carry out its congressional mandate to require chemical testing in the absence of such procedures.

The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress. If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984); (internal citations omitted).

The USCG could have filled the gap left by Congress's failure to legislate chemical testing procedures applicable to the USCG by adopting procedures different from those adopted by the USDOT. Instead, as discussed in greater detail below, the USCG elected to incorporate the USDOT procedures for workplace testing at 49 C.F.R. pt. 40 into the USGG chemical testing regulations applicable to marine employers in 46 C.F.R. pt. 16.

E. The USCG Incorporated 49 C.F.R. pt. 40 to Apply to both Drug and Alcohol Test Results

1. This court should not consider issues raised for the first time on appeal

The Foundation argues, for the first time on appeal, that the USCG incorporated the procedures in 49 C.F.R. pt. 40 to apply to drug testing, but not to alcohol testing.⁶ Because the Foundation failed to present this issue to the trial court and the issue is not one that may be raised for the first time upon appeal, this court should not consider it. RAP 2.5(a); *Jones v. Stebbins*, 122 Wn.2d 471, 479, 860 P.2d 1009 (1993).

⁶ Brief of Appellant, pp. 17-19.

2. The Foundation's reliance on 46 C.F.R. § 16.500 is misplaced as it is limited to an employer's responsibility to collect and report Management Information System Data

Moreover, the Foundation's new issue relies on a subpart of the regulation that does not address procedures governing alcohol testing, and the Foundation's argument disregards the plain language in the specific subpart of the regulation that does apply. If the court chooses to consider this newly raised issue, it should find that the USCG regulation, 46 C.F.R. § 16.500, does not authorize WSDOT to disclose alcohol testing results by somehow circumscribing the confidentiality requirements of 49 C.F.R. pt. 40.

46 C.F.R § 16.500 is found within subpart E of the USCG's regulation on chemical testing. Subpart E is titled "Management Information System Requirements" and is limited to that topic. It provides in pertinent part as follows:

(a.) Data collection, (1) All marine employers must submit drug testing program data required by 49 CFR § 40.26 and Appendix H to 49 CFR part 40. (2) The provisions in 49 CFR part 40 for alcohol testing do not apply to the Coast Guard or to marine employers, and alcohol testing data is not required or permitted to be submitted by this section.

The Foundation's argument focuses solely on that portion of the regulation at subsection (2) before the comma for the proposition that the 49 C.F.R. pt. 40 procedures do not apply to employee specimen testing for alcohol use. However, when one properly reads 46 C.F.R. § 16.500 (a)(1)

and (2) as a whole, it is apparent the statement in subsection (2) is limited in applicability to employee data collection for Management Information System Requirements.

Because 49 C.F.R. pt. 40 is a USDOT regulation and the USCG is a separate agency, the statement in subsection (2) that 49 C.F.R. pt. 40 does not apply to the USCG, or to marine employers is accurate in this context, because the USDOT procedures only apply to the extent they have been independently incorporated by the USCG. In subsection (1), the USCG adopts the *drug testing program data* collection and reporting requirements found at 49 C.F.R. § 40.26 and Appendix H. By way of contrast, however, in subsection (2), the USCG states that it is not adopting those provisions of 49 C.F.R. pt. 40 for marine employers with respect to USDOT data collection requirements for *alcohol program testing data*. The language in subsection (2) before the comma explaining that 49 C.F.R. pt. 40 does not apply to the USCG or marine employers is simply a confirmation that 49 C.F.R. pt. 40 is a USDOT regulation which does not apply to the USCG except to the extent the USCG has independently acted to incorporate it into the USCG's regulatory scheme. As discussed below, the USCG has adopted 49 C.F.R. pt. 40 as its procedures for both drug and alcohol specimen testing.

3. The USCG has adopted 49 C.F.R. pt. 40 for its chemical testing procedures which include both drug and alcohol testing

If the Foundation's interpretation of 46 C.F.R. § 16.500 (a)(2) were correct, and 49 C.F.R. pt. 40 did not apply to alcohol testing for any purpose, that would leave a gap in the USCG testing scheme, and it would be without any regulations governing alcohol specimen testing procedures at all. A more careful reading of the relevant sections of the USCG's chemical testing regulations, with a focus on the definition and use of the term "chemical testing" shows otherwise.

USCG regulations specifically require a marine employer to ensure that all persons directly involved in a serious marine incident are "chemically tested for evidence of dangerous drugs and alcohol in accordance with the requirements of 46 C.F.R. § 4.06."⁷ 46 C.F.R. § 16.240. A chemical test is defined in 46 C.F.R. § 16.105 as "a scientifically recognized test which analyzes an individual's breath, blood, urine, saliva, bodily fluids, or tissues for evidence of *dangerous drug or alcohol use*." (Emphasis added.) Subpart B of 46 C.F.R. pt. 16, titled "Required Chemical Testing" specifically provides that, "Chemical testing of personnel must be conducted as required by this subpart and in *accordance with the procedures detailed in 49 CFR pt. 40*." (Emphasis added.)

⁷ 46 C.F.R. § 4.06 refers to the USCG's regulations for mandatory chemical testing following serious marine incidents involving vessels in commercial waters.

Chemical testing thus is defined to include specimen testing for both drug and alcohol use; and, the USCG specifically incorporates the procedures in 49 C.F.R. pt. 40 for marine employers conducting chemical testing after a serious marine incident. Therefore, the USDOT workplace testing procedures in 49 C.F.R. pt. 40 have been incorporated to apply to both drug and alcohol tests, making both drug and alcohol test results subject to the confidentiality provisions in 49 C.F.R. § 40.321.

F. The USCG's Federal Regulations Preempt Any Conflicting Provisions Within a State's PRA

As discussed above, 49 C.F.R. § 40.321 is a federal regulation properly incorporated by the USCG pursuant to its independent rule making authority. Any potential conflict between that regulation and the PRA is avoided by the proper application of the "other statute" provision of RCW 42.56.070(1) as determined in *Ameriquest*. To conclude otherwise would violate federal preemption doctrine.

In general, federal preemption of state law may occur if Congress passes a statute that expressly preempts state law, if federal law occupies an entire field of regulation, or if the state law conflicts with federal law due to impossibility of complying with state and federal law or when state law acts as an obstacle to the accomplishment of the federal purpose. *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 326, 858 P.2d 1054 (1993).

The Supreme Court in *Hillsborough Cy., Fla. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 105 S. Ct. 2371, 85 L. Ed. 2d 714, (1985)

discussed the principle of federal conflict preemption as follows:

It is a familiar and well-established principle that the Supremacy Clause, U.S. Const. art. VI, cl. 2, invalidates state laws that ‘interfere with, or are contrary to,’ federal law. Under the Supremacy Clause, federal law may supersede state law in several different ways . . . [W]here Congress has not completely displaced state regulation in a specific area, *state law is nullified to the extent that it actually conflicts with federal law*. Such a conflict arises when ‘compliance with both federal and state regulations is a physical impossibility,’ or when state law ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. [Citations omitted.]’

471 U.S. 707, 712–713, 105 S. Ct. 2371, 2374–2375 (1985); (emphasis added); (citations omitted).

The express requirement of 49 C.F.R. § 40.321 to withhold drug and alcohol test results conflicts with any interpretation of the PRA that would require their disclosure to the Foundation.

That the confidentiality provision at issue here is a federal regulation rather than a federal statute does not change the outcome. Federally enacted regulations within the scope of a federal agency’s authority have the same preemptive effect as federal statutes, and so must stand on the same footing as a statute with respect to state law. *See e.g., Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 699, 104 S. Ct. 2694,

2700, 81 L. Ed. 2d 580 (1984); *Inlandboatmen's Union of the Pacific v. Dep't of Transp.*, 119 Wn.2d 697, 836 P.2d 823 (1992).

Compliance with both state and federal law is a “physical impossibility” when compliance with the state law would result in a violation of the federal law. 49 C.F.R. § 40.321 *prohibits* releasing individual test results or medical information about an employee to any person or organization to whom the regulations do not explicitly authorize or require the transmission of information without the individual’s consent. 49 C.F.R. § 40.321. “State law is nullified to the extent that it actually conflicts with federal law.” *Hillsborough*, 471 U.S. at 713.

Here, the Foundation has requested drug and alcohol test results that are within the protected scope of the USCG’s regulations. If the PRA cannot be read to exempt this information from public disclosure, the PRA is in conflict with the federal regulation that makes this information confidential, and the PRA is preempted. As in *Ameriquest*, this court can avoid preemption of the PRA by treating the federal confidentiality regulation as an “other statute” under RCW 42.56.070(1).

G. The Court Should Remand Only for the Limited Purpose of Determining the Appropriate Penalty for WSF’s Initially Overbroad Redactions

Regardless of the reason, a financial penalty is mandatory when an agency erroneously withholds a requested public record. *Yousoufian v. Office of Ron Sims*, 152 Wn.2d 421, 98 P.3d 463 (2004) (*Yousoufian II*).

The amount of the penalty to be awarded between a minimum \$5.00 and maximum \$100.00 per day rests in the sound discretion of the trial court, and is reviewed on appeal for an abuse of that discretion. *Id.*

Because the trial court found no violation in this case, and WSDOT now concedes that its initial redactions were overbroad, this case should be remanded to the trial court to determine an appropriate daily penalty for that time period from initial release, and the date that corrected versions were provided. With respect to the Foundation's First Request, that includes information withheld on USCG 2692B from November 5, 2009 until February 5, 2010. (Compare Appendix A-1 with Appendix B-1.) With respect to the Foundation's Second Request, some information was erroneously withheld on the nine additional forms released on December 22, 2009 until corrected on September 30, 2010. (Compare Appendix A 2-10 with Appendix B 2-10.)

1. Costs and attorney fees

Likewise, a party who prevails against an agency in an action seeking a public record is entitled to an award of costs, including attorney's fees. RCW 42.56.550(4). Upon remand for determination of appropriate penalties for information WSDOT concedes should have been released, the trial court should also determine and award appropriate costs and attorney fees associated with those records. However, a proper award of attorney fees relates only to that which is disclosed and not to any

portion of the requested documents found to be exempt. *Limstrom v. Ladenburg*, 136 Wn.2d 595, 963 P.2d 869 (1998). Therefore, costs and attorney fees incurred in this appeal should be awarded only if this court finds that the drug and alcohol test result information WSF continues to withhold are not exempt.

V. CONCLUSION

This court should affirm the superior court's determination that the drug and alcohol test results withheld in this case are exempt from disclosure. As a marine employer, the WSF is bound by the USCG regulation prohibiting release. Our Supreme Court, in *Ameriquest*, held that a federal regulation that prohibits a state agency from releasing information is incorporated as an "other statute" as that term is used in RCW 42.46.070(1). If the PRA cannot be read to exempt this information from public disclosure, the PRA is in conflict with the federal regulation, and the PRA is preempted.

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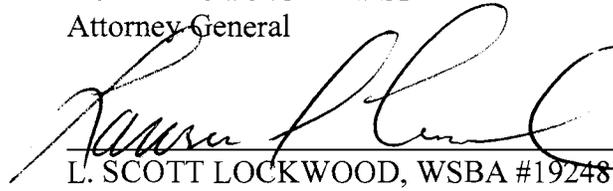
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This court should remand the case to the superior court to determine the appropriate penalty, cost and attorney fees associated with that information WSDOT now concedes was erroneously withheld from November 9, 2009 until September 30, 2010.

RESPECTFULLY SUBMITTED this 28th day of March, 2011.

ROBERT M. MCKENNA
Attorney General

A handwritten signature in black ink, appearing to read "L. Scott Lockwood", is written over a horizontal line.

L. SCOTT LOCKWOOD, WSBA #19248
Assistant Attorney General
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P.O. Box 40113
Olympia, WA 98504-0113
(360) 753-1620; FAX (360) 586-6847
ATTORNEYS FOR
RESPONDENT/DEFENDANT

WASHINGTON STATE FERRIES

75

DEPARTMENT OF TRANSPORTATION U.S. COAST GUARD CG-2692B (Rev. 4-06)	Report of Required Chemical Drug and Alcohol Testing Following a Serious Marine Incident (See instructions on reverse)	Approved OMB No. 1625-0001 Expiration Date: 08/31/2008 USCG MISLE Activity Number
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Section I - Vessel Information

1. Name of Vessel M/V WENATCHEE	2. Official Number 10161209	3. Call Sign WCY378	4. Nationality US.
5. Vessel Type (Freight, Towing, Fishing, MODU, Etc.) FERRY	6. Length 440'	7. Gross Tons R 3928 12629	8. Year Built 1998
9. Operating Company Name: WASHINGTON STATE FERRIES Address: Telephone Number:		10. Master or Person in Charge Name: TOM WEBSTER Address: Telephone Number:	

Section II - Incident Information

11. Type of Serious Marine Incident (Check Appropriate Box(es)). (See instructions on Reverse)

<input type="checkbox"/> a. Death (Append to Form CG-2692) <input type="checkbox"/> b. Injury requiring medical treatment (Append to Form CG-2692) <input checked="" type="checkbox"/> c. Property damage in excess of \$100,000 (Append to Form CG-2692) <input type="checkbox"/> d. Loss of inspected vessel (Append to Form CG-2692)	<input type="checkbox"/> e. Loss of uninspected, self-propelled vessel of over 100 gross tons (Append to Form CG-2692) <input type="checkbox"/> f. Discharge of oil of 10,000 gallons or more into U. S. waters <input type="checkbox"/> g. Discharge of a reportable quantity of hazardous substance into U.S. waters <input type="checkbox"/> h. Release of a reportable quantity of hazardous substance into U.S. environment
--	---

12. Date of Incident: **08/30/09** 13. Time (local) of Incident: **1100** 14. Location of Incident (latitude and Longitude or River and Milepost): **SLIP #3 PIER 52, SEATTLE, WA.**

Section III - Personnel / Testing Information

15. Personnel Directly Involved in Serious Marine Incident				16. Drug and Alcohol Testing (See instructions on Reverse)							
16a. Name (Last, First, Middle Initial)	16b. Licensing/Certification (Check Appropriate Box(es))			16a. Drug Test Urine Specimen provided within 32 hours?		16b. Alcohol Test Specimen provided within 2 hours?		Alcohol Test Specimen Source			Alcohol Test Results
	USCG License	USCG MMD	Neither	Yes	No	Yes	No	Saliva	Blood	Breath	
TOM WEBSTER	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>								
PAUL BELLESEN	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>								
GREG FAUST	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>								
JOHN CONRAD	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>								
JENNIFER HAUSDORF	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>								

17. SAMHSA Accredited Laboratory Conducting Chemical Drug Tests Name: [Redacted] Address: Telephone Number:	18. Laboratory conducting blood alcohol test(s) or individual conducting saliva or breath alcohol test(s) Name: [Redacted] Address: Telephone Number:
--	--

19. Person Making This Report (Please Print) Name: TOM WEBSTER Address: Telephone Number:	20. Signature Tom Webster Title: MASTER	21. Date 8-30-09
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22. Remarks (See instructions on Reverse)

Alcohol Testing Form

(The instructions for completing this form are on the back of Copy 3)

STEP 1: TO BE COMPLETED BY ALCOHOL TECHNICIAN

A: Employee Name: [Redacted]
 (Print) (First, M.I., Last)

SSN or Employee ID No. [Redacted]

C: Employer Name: Washington State Ferries
 Street: 2901 3rd Ave.
Seattle, Wa. 98121

City, ST ZIP

DER Name and Telephone No. Lee Schmidt 206-515-3428
 DER Name DER (Area Code & Phone Number)

D: Reason for Test: Random Reasonable Susp. Post-Accident Return to Duty Follow-up Pre-employment

STEP 2: TO BE COMPLETED BY EMPLOYEE

I certify that I am about to submit to alcohol testing required by U.S. Department of Transportation regulations and that the identifying information provided on the form is true and correct.

[Redacted Signature] 8 30 09
 Signature of Employee Date Month / Day / Year

STEP 3: TO BE COMPLETED BY ALCOHOL TECHNICIAN

(If the technician conducting the screening test is not the same technician who will be conducting the confirmation test, each technician must complete their own form.) I certify that I have conducted alcohol testing on the above named individual in accordance with the procedures established in the U.S. Department of Transportation regulation, 49 CFR Part 40, that I am qualified to operate the testing device(s) identified, and that the results are as recorded.

TECHNICIAN: BAT STT DEVICE: SALIVA BREATH* 15-Minute Wait: Yes No

SCREENING TEST: (For BREATH DEVICE* write in the space below only if the testing device is not designed to print.)

Test #	Testing Device Name	Device Serial # OR Lot # & Exp. Date	Activation Time	Reading Time	Result
CONFIRMATION TEST: Results MUST be affixed to each copy of this form or printed directly onto the form.					
REMARKS:					

Washington State Ferries 2901 3rd Ave.
 Alcohol Technician's Company Company Street Address
 Joe Malono T/S Seattle, Wa.
 (PRINT) Alcohol Technician's Name (First, M.I., Last) Company City, State, Zip
 206 - 515-3428
 Phone Number (Area Code & Number)
 [Signature] 8/30/09
 Signature of Alcohol Technician Date Month / Day / Year

STEP 4: TO BE COMPLETED BY EMPLOYEE IF TEST RESULT IS 0.02 OR HIGHER

I certify that I have submitted to the alcohol test, the results of which are accurately recorded on this form. I understand that I must not drive, perform safety-sensitive duties, or operate heavy equipment because the results are 0.02 or greater.

[Redacted Signature] [Redacted Date]
 Signature of Employee Date Month / Day / Year

COPY 1 - ORIGINAL - FORWARD TO THE EMPLOYER

OMB No. 2105-0529
570-FS-C3 (Rev. 7/01) 8849

Affix Or Print Screening Results Here
 Evident Tape
 Affix Or Print Confirming Results Here
 Affix With Tamper Evident Tape
 Affix Or Print Additional Test Results Here

RECEIVED
 HUMAN RESOURCES
 09 AUG 31 PM 12:16

Affix With Tamper Evident Tape
 Exhibit 5, Page 2 of 000020

U.S. Department of Transportation (DOT)

Alcohol Testing Form

(The instructions for completing this form are on the back of Copy 3)

STEP 1: TO BE COMPLETED BY ALCOHOL TECHNICIAN

A: Employee Name _____
 (Print) (First, M.I., Last)

SSN or Employee ID No. _____

C: Employer Name Wash. State Ferries
 Street 2901 3rd Ave.
Seattle, WA 98121

City, ST ZIP _____
 DER Name and Telephone No. Leo Schmidt 206-515-3428
 DER Name DER (Area Code & Phone Number)

D: Reason for Test: Random Reasonable Susp. Post-Accident Return to Duty Follow-up Pre-employment

STEP 2: TO BE COMPLETED BY EMPLOYEE

I certify that I am about to submit to alcohol testing required by U.S. Department of Transportation regulations and that the identifying information provided on the form is true and correct.

Signature of Employee _____ Date 8 30 09
 Month / Day / Year

STEP 3: TO BE COMPLETED BY ALCOHOL TECHNICIAN

(If the technician conducting the screening test is not the same technician who will be conducting the confirmation test, each technician must complete their own form.) I certify that I have conducted alcohol testing on the above named individual in accordance with the procedures established in the U.S. Department of Transportation regulation, 49 CFR Part 40, that I am qualified to operate the testing device(s) identified, and that the results are as recorded.

TECHNICIAN: BAT STT DEVICE: SALIVA BREATH* 15-Minute Wait: Yes No

SCREENING TEST: (For BREATH DEVICE* write in the space below only if the testing device is not designed to print.)

Test #	Testing Device Name	Device Serial # QR Lot # & Exp. Date	Activation Time	Reading Time	Result

CONFIRMATION TEST: Results **MUST** be affixed to each copy of this form or printed directly onto the form.

REMARKS: _____

Wash. State Ferries 2901 3rd Ave.
 Alcohol Technician's Company Company Street Address
Joe Maloro TIS Seattle, WA 98121
 (PRINT) Alcohol Technician's Name (First, M.I., Last) Company City, State, Zip
Joe Maloro 206-515-3428
 Signature of Alcohol Technician Phone Number (Area Code & Number)
 Date 8/30/09
 Month / Day / Year

STEP 4: TO BE COMPLETED BY EMPLOYEE IF TEST RESULT IS 0.02 OR HIGHER

I certify that I have submitted to the alcohol test, the results of which are accurately recorded on this form. I understand that I must not drive, perform safety-sensitive duties, or operate heavy equipment because the results are 0.02 or greater.

Signature of Employee _____ Date _____
 Month / Day / Year

Affix Or Print Screening Results Here
 Affix Or Print Evident Tape
 Affix Or Print Confirming Results Here
 Affix With Tamper Evident Tape
 Affix Or Print Additional Test Results Here



▲ Affix With Tamper Evident Tape Exhibit 5, Page 3 of 000021

U.S. Department of Transportation (DOT)

Alcohol Testing Form

(The instructions for completing this form are on the back of Copy 3)

STEP 1: TO BE COMPLETED BY ALCOHOL TECHNICIAN

A: Employee Name (Print) (First, M.I., Last)
SSN or Employee ID No.
C: Employer Name Wash. State Ferries
Street 2901 3rd Ave
Seattle, Wa, 98121
City, ST ZIP
DER Name and Telephone No. Lisa Schmidt 206-515-3428
DER Name DER (Area Code & Phone Number)
D: Reason for Test: [] Random [] Reasonable Susp. [X] Post-Accident [] Return to Duty [] Follow-up [] Pre-employment

STEP 2: TO BE COMPLETED BY EMPLOYEE

I certify that I am about to submit to alcohol testing required by U.S. Department of Transportation regulations and that the identifying information provided on the form is true and correct.
Signature of Employee [Redacted] Date 08 / 30 / 09

STEP 3: TO BE COMPLETED BY ALCOHOL TECHNICIAN

(If the technician conducting the screening test is not the same technician who will be conducting the confirmation test, each technician must complete their own form.) I certify that I have conducted alcohol testing on the above named individual in accordance with the procedures established in the U.S. Department of Transportation regulation, 49 CFR Part 40, that I am qualified to operate the testing device(s) identified, and that the results are as recorded.

TECHNICIAN: [X] SAT [] STT DEVICE: [] SALIVA [] BREATH* 15-Minute Wait: [] Yes [] No
SCREENING TEST: (For BREATH DEVICE* write in the space below only if the testing device is not designed to print.)

Table with 6 columns: Test #, Testing Device Name, Device Serial # QR Loc # & Exp. Date, Activation Time, Reading Time, Result

CONFIRMATION TEST: Results MUST be affixed to each copy of this form or printed directly onto the form.

REMARKS:

Wash. St. Ferries 2901 3rd Ave
Alcohol Technician's Company Company Street Address
Joe Malono T/S Seattle, Wa, 98121
(PRINT) Alcohol Technician's Name (First, M.I., Last) Company City, State, Zip
Joe Malono 206-515-3428
Signature of Alcohol Technician Date 8/30/09
Phone Number (Area Code & Number)

STEP 4: TO BE COMPLETED BY EMPLOYEE IF TEST RESULT IS 0.02 OR HIGHER

I certify that I have submitted to the alcohol test, the results of which are accurately recorded on this form. I understand that I must not drive, perform safety-sensitive duties, or operate heavy equipment because the results are 0.02 or greater.
Signature of Employee [Redacted] Date [Redacted]

Affix Or Print Screening Results Here
Tampers Evident Tape
Affix Or Print Confirming Results Here
Affix With Tamper Evident Tape
Affix Or Print Additional Test Results Here

Exhibit 5, Page 4 of 5 OMB No. 2105-0529 570-FS-C3 (Rev. 7/01) 6849

COPY 1 - ORIGINAL - FORWARD TO THE EMPLOYER

Alcohol Testing Form

(The instructions for completing this form are on the back of Copy 3)

STEP 1: TO BE COMPLETED BY ALCOHOL TECHNICIAN

A: Employee Name _____
(Print) (First, M.I., Last)

SSN or Employee ID No. _____

C: Employer Name WASHINGTON STATE FERRIES
 Street 2901 THIRD AVE #500

City, ST ZIP SEATTLE, WA 98121
 DER Name and Telephone No. LEA SCHMIDT (206) 515-3428
DER Name DER (Area Code & Phone Number)

D: Reason for Test: Random Reasonable Susp. Post-Accident Return to Duty Follow-up Pre-employment

STEP 2: TO BE COMPLETED BY EMPLOYEE

I certify that I am about to submit to alcohol testing required by U.S. Department of Transportation regulations and that the identifying information provided on the form is true and correct.

Signature of Employee _____ Date 8/30/09
Month / Day / Year

STEP 3: TO BE COMPLETED BY ALCOHOL TECHNICIAN

(If the technician conducting the screening test is not the same technician who will be conducting the confirmation test, each technician must complete their own form.) I certify that I have conducted alcohol testing on the above named individual in accordance with the procedures established in the U.S. Department of Transportation regulation, 49 CFR Part 40, that I am qualified to operate the testing device(s) identified, and that the results are as recorded.

TECHNICIAN: BAT STT DEVICE: SALIVA BREATH* 15-Minute Wait: Yes No

SCREENING TEST: (For BREATH DEVICE* write in the space below only if the testing device is not designed to print.)

Test #	Testing Device Name	Device Serial # QR Lot # & Exp. Date	Activation Time	Reading Time	Result
CONFIRMATION TEST: Results MUST be affixed to each copy of this form or printed directly onto the form.					

REMARKS: _____

Wash. State FERRIES 2901 3rd AVE
 Alcohol Technician's Company Company Street Address

JOE Malono T/S Seattle, Wa, 98121
(PRINT) Alcohol Technician's name (First, M.I., Last) Company City, State, Zip

J Malono 200-515-3428
Signature of Alcohol Technician Phone Number (Area Code & Number)

8/30/09
Signature of Alcohol Technician Date Month / Day / Year

STEP 4: TO BE COMPLETED BY EMPLOYEE IF TEST RESULT IS 0.02 OR HIGHER

I certify that I have submitted to the alcohol test, the results of which are accurately recorded on this form. I understand that I must not drive, perform safety-sensitive duties, or operate heavy equipment because the results are 0.02 or greater.

Signature of Employee _____ Date _____
Signature of Employee Date Month / Day / Year

Affix Or Print Screening Results Here
 Affix With Tamper Evident Tape
 Affix Or Print Confirming Results Here
 Affix With Tamper Evident Tape
 Affix Or Print Additional Test Results Here

Alcohol Testing Form

(The instructions for completing this form are on the back of Copy 3)

STEP 1: TO BE COMPLETED BY ALCOHOL TECHNICIAN

A: Employee Name _____
(Print) (First, M.I., Last)

SSN or Employee ID No. _____

C: Employer Name Wash. State Ferries

Street 2901 3rd Ave.

Seattle, Wa, 98121

City, ST ZIP

DER Name and Telephone No. Lea Schmidt - 206-515-3428

DER Name DER (Area Code & Phone Number)

D: Reason for Test: Random Reasonable Susp. Post-Accident Return to Duty Follow-up Pre-employment

STEP 2: TO BE COMPLETED BY EMPLOYEE

I certify that I am about to submit to alcohol testing required by U.S. Department of Transportation regulation and that the identifying information provided on the form is true and correct.

Signature of Employee _____ Date 8-30-09
Month / Day / Year

STEP 3: TO BE COMPLETED BY ALCOHOL TECHNICIAN

(If the technician conducting the screening test is not the same technician who will be conducting the confirmation test, each technician must complete their own form.) I certify that I have conducted alcohol testing on the above named individual in accordance with the procedures established in the U.S. Department of Transportation regulation, 49 CFR Part 40, that I am qualified to operate the testing device(s) identified, and that the results are as recorded.

TECHNICIAN: BAT STT DEVICE: SALIVA BREATH* 15-Minute Wait: Yes No

SCREENING TEST: (For BREATH DEVICE* write in the space below and: if the testing device is not designed to print.)

Test #	Testing Device Name	Device Serial # QR Lot # & Exp. Date	Activation Time	Reading Time	Result

CONFIRMATION TEST: Results **MUST** be affixed to each copy of this form or printed directly onto the form.

REMARKS: _____

Alcohol Technician's Company Wash. State Ferries Company Street Address 2901 3rd Ave.

Joe Malono T/S Company City, State, Zip Seattle, Wa, 98121

(PRINT) Alcohol Technician's Name (First, M.I., Last) Joe Malono Phone Number (Area Code & Number) 206-515-3428

Signature of Alcohol Technician _____ Date 8-30-09
Month / Day / Year

STEP 4: TO BE COMPLETED BY EMPLOYEE IF TEST RESULT IS 0.02 OR HIGHER

I certify that I have submitted to the alcohol test, the results of which are accurately recorded on this form. I understand that I must not drive, perform safety-sensitive duties, or operate heavy equipment because the results are 0.02 or greater.

Signature of Employee _____ Date _____
Month / Day / Year

Affix Or Print
Screening Results Here

Affix

Affix Or Print
Confirming Results Here

Affix With Tamper Evident Tape

Affix Or Print
Additional Test Results Here

Affix With Tamper Evident Tape
EXHIBIT 5, Page 6
000024

U.S. Department of Transportation (DOT)

Alcohol Testing Form

(The instructions for completing this form are on the back of Copy 3)

STEP 1: TO BE COMPLETED BY ALCOHOL TECHNICIAN

A: Employee Name (Print) (First, M.I., Last)
SSN or Employee ID No.
C: Employer Name Wash. State Ferries
Street 2901 3rd Ave
Seattle, Wa. 98121
City, ST ZIP
DER Name and Telephone No. Coe Schmidt 206-515-3420
D: Reason for Test: [] Random [] Reasonable Susp. [x] Post-Accident [] Return to Duty [] Follow-up [] Pre-employment

STEP 2: TO BE COMPLETED BY EMPLOYEE

I certify that I am about to submit to alcohol testing required by U.S. Department of Transportation regulations and that the identifying information provided on the form is true and correct.

Signature of Employee [Redacted] Date 8-30-09

STEP 3: TO BE COMPLETED BY ALCOHOL TECHNICIAN

(If the technician conducting the screening test is not the same technician who will be conducting the confirmation test, each technician must complete their own form.) I certify that I have conducted alcohol testing on the above named individual in accordance with the procedures established in the U.S. Department of Transportation regulation, 49 CFR Part 40, that I am qualified to operate the testing device(s) identified, and at the results are as recorded.

TECHNICIAN: [x] BAT [] STT DEVICE: [] SALIVA [] BREATH* 15-Minute Wait; [] Yes [] No
SCREENING TEST: (For BREATH DEVICE* write in the space below only if the testing device is not designed to print.)

Table with columns: Test #, Testing Device Name, Device Serial # QR Lot # & Exp. Date, Activation Time, Reading Time, Result

CONFIRMATION TEST: Results MUST be affixed to each copy of this form or printed directly onto the form.

REMARKS:

Wash. State Ferries 2901 3rd Ave.
Joe Malono T/S Seattle, Wa. 98121
Signature of Alcohol Technician Joe Malono Date 8-30-09

STEP 4: TO BE COMPLETED BY EMPLOYEE IF TEST RESULT IS 0.02 OR HIGHER

I certify that I have submitted to the alcohol test, the results of which are accurately recorded on this form. I understand that I must not drive, perform safety-sensitive duties, or operate heavy equipment because the results are 0.02 or greater.

Signature of Employee [Redacted] Date [Redacted]

Affix Or Print Screening Results Here

Affix

Evident Tape

Affix Or Print Confirming Results Here

Affix With Tamper Evident Tape

Affix Or Print Additional Test Results Here

Affix With Tamper Evident Tape OMB No. 2105-0529 570-FS-C3 (Rev. 7/01) 6849 Exhibit 5, Page 7

Department of Transportation (DOT)
Alcohol Testing Form ▶

(The instructions for completing this form are on the back of Copy 3)

TO BE COMPLETED BY ALCOHOL TECHNICIAN

Employee Name [REDACTED]
(Print) (First, M.I., Last)

B: SSN or Employee ID No. [REDACTED]

C: Employer Name Wash. State Ferries

Street [REDACTED]

City, ST ZIP [REDACTED]

DER Name and Telephone No. Lee Schmidt 206-515-3428
DER Name DER (Area Code & Phone Number)

D: Reason for Test: Random Reasonable Susp. Post-Accident Return to Duty Follow-up Pre-employment

STEP 2: TO BE COMPLETED BY EMPLOYEE

I certify that I am about to submit to alcohol testing required by U.S. Department of Transportation regulations and that the identifying information provided on the form is true and correct.

[REDACTED] 8 30 09
Signature of Employee Date Month / Day / Year

STEP 3: TO BE COMPLETED BY ALCOHOL TECHNICIAN

(If the technician conducting the screening test is not the same technician who will be conducting the confirmation test, each technician must complete their own form.) I certify that I have conducted alcohol testing on the above named individual in accordance with the procedures established in the U.S. Department of Transportation regulation, 49 CFR Part 40, that I am qualified to operate the testing device(s) identified, and that the results are as recorded.

TECHNICIAN: BAT STT DEVICE: SALIVA BREATH* 15-Minute Wait: Yes No

SCREENING TEST: (For BREATH DEVICE* write in the space below only if the testing device is not designed to print.)

Test #	Testing Device Name	Device Serial # QR Lot # & Exp. Date	Activation Time	Reading Time	Result
CONFIRMATION TEST: Results MUST be affixed to each copy of this form or printed directly onto the form.					
REMARKS:					

Wash. State Ferries 2901 3rd AVE
Alcohol Technician's Company Company Street Address

Joe Malono J/S Seattle, Wa. 98121
(PRINT) Alcohol Technician's Name (First, M.I., Last) Company City, State, Zip

Joe Malono 206-515-3428
Signature of Alcohol Technician Phone Number (Area Code & Number)

8/30/09
Date Month / Day / Year

STEP 4: TO BE COMPLETED BY EMPLOYEE IF TEST RESULT IS 0.02 OR HIGHER

I certify that I have submitted to the alcohol test, the results of which are accurately recorded on this form. I understand that I must not drive, perform safety-sensitive duties, or operate heavy equipment because the results are 0.02 or greater.

[REDACTED] [REDACTED]
Signature of Employee Date Month / Day / Year

Affix Or Print
Screening Results Here

Affix With Tamper Evident Tape

Affix Or Print
Confirming Results Here

Affix With Tamper Evident Tape

Affix Or Print
Additional Test Results Here

Exhibit 5, Page 8 of 26

▲ Affix With Tamper Evident Tape

HEALTHFORCE
WORKPLACE HEALTH SOLUTIONS

16

From: HealthForce Partners
18323 Bothell-Everett Hwy
Suite 220
Bothell, WA 98012

To: Lea Schmidt
WA State Ferries
2901 3Rd Avenue, Suite 500
Seattle, WA 98121

Date Verified: 9/1/2009

Results Summary * UPDATED

WA State Ferries (002136)

Test Type: Post-Accident

Participant	Batch ID	Drug/Alc	Specimen ID	Disp	Coll Site	Lab	Occ	Status	Collect Date
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

Test Type: Post-Accident Total: 8

WA State Ferries (002136) Grand Total: 8

HEALTHFORCE

WORKPLACE HEALTH SOLUTIONS

From: HealthForce Partners
18323 Bothell-Everett Hwy
Suite 220
Bothell, WA 98012

Handwritten initials/signature

To: Lea Schmidt
WA State Ferries
2901 3rd Avenue, Suite 500
Seattle, WA 98121

Date Verified: 9/1/2009

Results Summary

** UPDATED*

WA State Ferries (002136)

Test Type: Post-Accident

Participant	Batch ID	Drug/Alc Specimen ID	Disp	Coll Site	Lab	Occ	Status	Collect Date
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

** Handwritten asterisk*

Test Type: Post-Accident Total: 6

WA State Ferries (002136) Grand Total: 6

WASHINGTON STATE FERRIES

DEPARTMENT OF
TRANSPORTATION
U.S. COAST GUARD
CG-2692B (Rev. 4-06)

**Report of Required Chemical Drug and Alcohol
Testing Following a Serious Marine Incident**

Approved OMB No. 1625-0001
Expiration Date: 06/31/2008
USCG MISLE Activity Number

(See Instructions on reverse)

Section I - Vessel Information

1. Name of Vessel M/V WENATCHEE		2. Official Number 10161209	3. Call Sign WCY378	4. Nationality U.S.
5. Vessel Type (Freight, Towing, Fishing, MODU, Etc.) FERRY		6. Length 440'	7. Gross Tons R 3928 112629	8. Year Built 1998
9. Operating Company Name: WASHINGTON STATE FERRIES Address: Telephone Number:		10. Master or Person in Charge Name: TOM WEBSTER Address: Telephone Number:		

Section II - Incident Information

11. Type of Serious Marine Incident (Check Appropriate Box(es)). (See Instructions on Reverse)

<input type="checkbox"/> a. Death (Append to Form CG-2692)	<input type="checkbox"/> c. Loss of unimpacted, self-propelled vessel of over 100 gross tons (Append to Form CG-2692)
<input type="checkbox"/> b. Injury requiring medical treatment (Append to Form CG-2692)	<input type="checkbox"/> f. Discharge of oil of 10,000 gallons or more into U. S. waters
<input checked="" type="checkbox"/> d. Property damage in excess of \$100,000 (Append to Form CG-2692)	<input type="checkbox"/> g. Discharge of a reportable quantity of hazardous substance into U.S. waters
<input type="checkbox"/> e. Loss of inspected vessel (Append to Form CG-2692)	<input type="checkbox"/> h. Release of a reportable quantity of hazardous substance into U.S. environment

12. Date of Incident: **08/30/09** 13. Time (local) of Incident: **1100** 14. Location of Incident (Latitude and Longitude or River and Milepost): **SLIP #3 PIER 52, SEATTLE, WA.**

Section III - Personnel / Testing Information

15a. Name (Last, First, Middle Initial)	15b. Licensing/Certification (Check Appropriate Box(es))			16a. Drug Test Urine Specimen provided within 32 hours?		16b. Alcohol Test Specimen provided within 2 hours?		Alcohol Test Specimen Source			Alcohol Test Results
	USCG License	USCG MMD	Neither	Yes	No	Yes	No	Saliva	Blood	Breath	
TOM WEBSTER	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	[REDACTED]
PAUL BELLESEN	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	
GREG FAUST	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	
JOHN CONRAD	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	
JENNIFER HAUSDORF	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	

17. SAMHSA Accredited Laboratory Conducting Chemical Drug Tests
Name: **UNK**
Address:
Telephone Number:

18. Laboratory conducting blood alcohol test(s) or individual conducting saliva or breath alcohol test(s)
Name: **UNK**
Address:
Telephone Number:

19. Person Making This Report (Please Print)
Name: **TOM WEBSTER**
Address:
Telephone:

20. Signature
Tom Webster
Title: **MASTER**

21. Date: **8-30-09**

22. Remarks (See Instructions on Reverse)

DOT Form 690-016 EF (Rev. 10/2008) (CG-2692B (Rev. 4/2006))

U.S. Department of Transportation (DOT)

Alcohol Testing Form

(The instructions for completing this form are on the back of Copy 3)

STEP 1: TO BE COMPLETED BY ALCOHOL TECHNICIAN

A: Employee Name Tom Webster
(Print) (First, M.I., Last)
SSN or Employee ID No. 167257
C: Employer Name Washington State Ferries
Street 2901 3rd Ave.
Seattle, Wa. 98121
City, ST ZIP
DER Name Lea Schmidt 206-515-3428
DER (Area Code & Phone Number)
D: Reason for Test: [] Random [] Reasonable Susp. [X] Post-Accident [] Return to Duty [] Follow-up [] Pre-employment

STEP 2: TO BE COMPLETED BY EMPLOYEE

I certify that I am about to submit to alcohol testing required by U.S. Department of Transportation regulations and that the identifying information provided on the form is true and correct.

Signature of Employee Tom Webster
Date 8 30 09
Month / Day / Year

STEP 3: TO BE COMPLETED BY ALCOHOL TECHNICIAN

(If the technician conducting the screening test is not the same technician who will be conducting the confirmation test, each technician must complete their own form.) I certify that I have conducted alcohol testing on the above named individual in accordance with the procedures established in the U.S. Department of Transportation regulation, 49 CFR Part 40, that I am qualified to operate the testing device(s) identified, and that the results are as recorded.

TECHNICIAN: [X] BAT [] STT DEVICE: [] SALIVA [] BREATH* 15-Minute Wait: [] Yes [] No

SCREENING TEST: (For BREATH DEVICE* write in the space below only if the testing device is not designed to print.)

Table with 7 columns: Test #, Testing Device Name, Device Serial # QR Lot # & Exp. Date, Activation Time, Reading Time, Result

CONFIRMATION TEST: Results MUST be affixed to each copy of this form or printed directly onto the form.

REMARKS:

Washington State Ferries 2901 3rd Ave.
Alcohol Technician's Company Company Street Address
Joe Malono T/S Seattle, Wa.
(Print) Alcohol Technician's Name (First, M.I., Last) Company City, State, Zip
206-515-3428
Phone Number (Area Code & Number)
Signature of Alcohol Technician Date 8/30/09
Month / Day / Year

STEP 4: TO BE COMPLETED BY EMPLOYEE IF TEST RESULT IS 0.02 OR HIGHER

I certify that I have submitted to the alcohol test, the results of which are accurately recorded on this form. I understand that I must not drive, perform safety-sensitive duties, or operate heavy equipment because the results are 0.02 or greater.

Signature of Employee Date Month / Day / Year

RBT ID# 019977
DATE 08-30-09
TEST NO. 0155
ID# 167257
AS ID# 072872
SCREENING
G/210L TIME
AUTO 13:12

RECEIVED
HUMAN RESOURCES
09 AUG 31 PM 12:16

Vertical text on the right side: Affix Or Print, Screening Results Here, Evident Tape, Confirming Results Here, Affix With Tamper Evident Tape, Additional Test Results Here, Affix Or Print

U.S. Department of Transportation (DOT)

Alcohol Testing Form

(The instructions for completing this form are on the back of Copy 3)

STEP 1: TO BE COMPLETED BY ALCOHOL TECHNICIAN

A: Employee Name Paul Bellesen (Print) (First, M.L., Last)
SSN or Employee ID No. 386746
C: Employer Name Wash. State Ferries
Street 2901 3rd Ave.
Seattle, WA 98121
City, ST ZIP
DER Name and Telephone No. Lea Schmidt 206-515-3428
DER Name DER (Area Code & Phone Number)
D: Reason for Test: [] Random [] Reasonable Susp. [X] Post-Accident [] Return to Duty [] Follow-up [] Pre-employment

RBT ID# 019977
DATE 08-30-09
TEST NO. 0158
ID#
386746
AS ID# 072872
SCREENING
G/210L TIME
AUTO 13:33

Affix Or Print Screening Results Here
Affix Evident Tape
Affix Or Print Confirming Results Here
Affix With Tamper Evident Tape
Affix Or Print Additional Test Results Here
Affix With Tamper Evident Tape

STEP 2: TO BE COMPLETED BY EMPLOYEE

I certify that I am about to submit to alcohol testing required by U.S. Department of Transportation regulations and that the identifying information provided on the form is true and correct.

Signature of Employee [Signature] Date 8/30/09

STEP 3: TO BE COMPLETED BY ALCOHOL TECHNICIAN

(If the technician conducting the screening test is not the same technician who will be conducting the confirmation test, each technician must complete their own form.) I certify that I have conducted alcohol testing on the above named individual in accordance with the procedures established in the U.S. Department of Transportation regulation, 49 CFR Part 40, that I am qualified to operate the testing device(s) identified, and that the results are as recorded.

TECHNICIAN: [X] BAT [] STT DEVICE: [] SALIVA [] BREATH* 15-Minute Wait: [] Yes [] No

SCREENING TEST: (For BREATH DEVICE* write in the space below only if the testing device is not designed to print.)

Table with columns: Test #, Testing Device Name, Device Serial # OR Lot # & Exp. Date, Activation Time, Reading Time, Result

CONFIRMATION TEST: Results MUST be affixed to each copy of this form or printed directly onto the form.

REMARKS:

Wash. State Ferries 2901 3rd Ave.
Alcohol Technician's Company Company Street Address
Joe Malono T/S Seattle, WA 98121
(PRINT) Alcohol Technician's Name (First, M.L., Last) Company City, State, Zip
Joe Malono 206-515-3428
Signature of Alcohol Technician Phone Number (Area Code & Number)
Date 8/30/09

STEP 4: TO BE COMPLETED BY EMPLOYEE IF TEST RESULT IS 0.02 OR HIGHER

I certify that I have submitted to the alcohol test, the results of which are accurately recorded on this form. I understand that I must not drive, perform safety-sensitive duties, or operate heavy equipment because the results are 0.02 or greater.

Signature of Employee Date Month / Day / Year

U.S. Department of Transportation (DOT)

Alcohol Testing Form

(The instructions for completing this form are on the back of Copy 3)

STEP 1: TO BE COMPLETED BY ALCOHOL TECHNICIAN

A: Employee Name Greg Faust
(Print) (First, M.I., Last)

SSN or Employee ID No. 386384

C: Employer Name Wash. State Ferries
 Street 2901 3rd Ave.
Seattle, Wa, 98121

City, ST ZIP _____
 DER Name and Telephone No. Clea Schmidt 206-515-3428
DER Name DER (Area Code & Phone Number)

D: Reason for Test: Random Reasonable Susp. Post-Accident Return to Duty Follow-up Pre-employment

RBT IV# 019977
 DATE 08-30-09
 TEST NO. 0156
 ID#
 386384
 AS IV# 072872
 SCREENING
 2/210L TIM
 AUTO 13

▲ Affix Or Print Screening Results Here

▲ Tamper Evident Tape

STEP 2: TO BE COMPLETED BY EMPLOYEE

I certify that I am about to submit to alcohol testing required by U.S. Department of Transportation regulations and that the identifying information provided on the form is true and correct.

[Signature] Date 08 / 30 / 09
Signature of Employee Date Month / Day / Year

STEP 3: TO BE COMPLETED BY ALCOHOL TECHNICIAN

(If the technician conducting the screening test is not the same technician who will be conducting the confirmation test, each technician must complete their own form.) I certify that I have conducted alcohol testing on the above named individual in accordance with the procedures established in the U.S. Department of Transportation regulation, 49 CFR Part 40, that I am qualified to operate the testing device(s) identified, and that the results are as recorded.

TECHNICIAN: BAT STT DEVICE: SALIVA BREATH* 15-Minute Wait: Yes No
 SCREENING TEST: (For BREATH DEVICE* write in the space below only if the testing device is not designed to print.)

Test #	Testing Device Name	Device Serial # OR Lot # & Exp. Date	Activation Time	Reading Time	Result
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CONFIRMATION TEST: Results MUST be affixed to each copy of this form or printed directly onto the form.

REMARKS: _____

Wash. St. Ferries 2901 3rd Ave
Alcohol Technician's Company Company Street Address

Joe Malono T/S Seattle, Wa, 98121
(PRINT) Alcohol Technician's Name (First, M.I., Last) Company City, State, Zip

[Signature] 206-515-3428
Signature of Alcohol Technician Phone Number (Area Code & Number)

Date 8/30/09
Date Month / Day / Year

STEP 4: TO BE COMPLETED BY EMPLOYEE IF TEST RESULT IS 0.02 OR HIGHER

I certify that I have submitted to the alcohol test, the results of which are accurately recorded on this form. I understand that I must not drive, perform safety-sensitive duties, or operate heavy equipment because the results are 0.02 or greater.

Signature of Employee _____ Date _____
Signature of Employee Date Month / Day / Year

▲ Affix Or Print Confirming Results Here

▲ Affix With Tamper Evident Tape

▲ Affix Or Print Additional Test Results Here

▲ Affix With Tamper Evident Tape

U.S. Department of Transportation (DOT)

Alcohol Testing Form

(The instructions for completing this form are on the back of Copy 3)

STEP 1: TO BE COMPLETED BY ALCOHOL TECHNICIAN

A: Employee Name DAVID E. LINDEMAN
(First, M.I., Last)
SSN or Employee ID No. 54230
C: Employer Name WASHINGTON STATE FERRIES
Street 2901 THIRD AVE #500
City, ST ZIP SEATTLE, WA 98121
DER Name and Telephone No. LEA SCHMIDT (206) 515-3428
DER Name DER (Area Code & Phone Number)
D: Reason for Test: [] Random [] Reasonable Susp. [X] Post-Accident [] Return to Duty [] Follow-up [] Pre-employment

RBT IV# 019977
DATE 08-30-09
TEST NO. 0151
ID#
54230
AS IV# 072872
SCREENING
G/210L TIME
AUTO 14:21

STEP 2: TO BE COMPLETED BY EMPLOYEE

I certify that I am about to submit to alcohol testing required by U.S. Department of Transportation regulations and that the identifying information provided on the form is true and correct.

Signature of Employee David Lindeman
Date 8/30/09
Month / Day / Year

STEP 3: TO BE COMPLETED BY ALCOHOL TECHNICIAN

(If the technician conducting the screening test is not the same technician who will be conducting the confirmation test, each technician must complete their own form.) I certify that I have conducted alcohol testing on the above named individual in accordance with the procedures established in the U.S. Department of Transportation regulation, 49 CFR Part 40, that I am qualified to operate the testing device(s) identified, and that the results are as recorded.

TECHNICIAN: [X] BAT [] STT DEVICE: [] SALIVA [] BREATH* 15-Minute Wait: [] Yes [] No
SCREENING TEST: (For BREATH DEVICE* write in the space below only if the testing device is not designed to print.)

Table with 7 columns: Test #, Testing Device Name, Device Serial # OR Lot # & Exp. Date, Activation Time, Reading Time, Result

CONFIRMATION TEST: Results MUST be affixed to each copy of this form or printed directly onto the form.

REMARKS:

Wash. State FERRIES 2901 3rd AVE
Alcohol Technician's Company Company Street Address
JOE Malono T/S Seattle, Wa, 98121
(PRINT) Alcohol Technician's Name (First, M.I., Last) Company City, State, Zip
Signature of Alcohol Technician Phone Number (Area Code & Number)
Date 8/30/09
Month / Day / Year

STEP 4: TO BE COMPLETED BY EMPLOYEE IF TEST RESULT IS 0.02 OR HIGHER

I certify that I have submitted to the alcohol test, the results of which are accurately recorded on this form. I understand that I must not drive, perform safety-sensitive duties, or operate heavy equipment because the results are 0.02 or greater.

Signature of Employee
Date Month / Day / Year

Affix Or Print
Screening Results Here
Affix With Tamper Evident Tape
Affix Or Print
Confirming Results Here
Affix With Tamper Evident Tape
Affix Or Print
Additional Test Results Here

Affix With Tamper Evident Tape

U.S. Department of Transportation (DOT)

Alcohol Testing Form

(The instructions for completing this form are on the back of Copy 3)

STEP 1: TO BE COMPLETED BY ALCOHOL TECHNICIAN

A: Employee Name Mike Stewart (Print) (First, M.I., Last)
SSN or Employee ID No. 703141
C: Employer Name Wash. State Ferries
Street 2901 3rd Ave, Seattle, Wa, 98121
City, ST ZIP
DER Name and Telephone No. Lea Schmidt - 206-515-3428
DER Name DER (Area Code & Phone Number)
D: Reason for Test: [] Random [] Reasonable Susp. [x] Post-Accident [] Return to Duty [] Follow-up [] Pre-employment

STEP 2: TO BE COMPLETED BY EMPLOYEE

I certify that I am about to submit to alcohol testing required by U.S. Department of Transportation regulation and that the identifying information provided on the form is true and correct.
Signature of Employee [Signature] Date 8-30-09 Month / Day / Year

STEP 3: TO BE COMPLETED BY ALCOHOL TECHNICIAN

(If the technician conducting the screening test is not the same technician who will be conducting the confirmation test, each technician must complete their own form.) I certify that I have conducted alcohol testing on the above named individual in accordance with the procedures established in the U.S. Department of Transportation regulation, 49 CFR Part 40, that I am qualified to operate the testing device(s) identified, and that the results are as recorded.

TECHNICIAN: [x] BAT [] STT DEVICE: [] SALIVA [] BREATH* 15-Minute Wait: [] Yes [] No
SCREENING TEST: (For BREATH DEVICE* write in the space below only if the testing device is not designed to print.)

Table with columns: Test #, Testing Device Name, Device Serial # QR Lot # & Exp. Date, Activation Time, Reading Time, Result

CONFIRMATION TEST: Results MUST be affixed to each copy of this form or printed directly onto the form.

REMARKS:

Wash. State Ferries 2901 3rd Ave.
Alcohol Technician's Company Company Street Address
Joe Malono T/S Seattle, Wa, 98121
(Print) Alcohol Technician's Name (First, M.I., Last) Company City, State, Zip
Signature of Alcohol Technician 206-515-3428
Date 8-30-09 Month / Day / Year

STEP 4: TO BE COMPLETED BY EMPLOYEE IF TEST RESULT IS 0.02 OR HIGHER

I certify that I have submitted to the alcohol test, the results of which are accurately recorded on this form. I understand that I must not drive, perform safety-sensitive duties, or operate heavy equipment because the results are 0.02 or greater.

Signature of Employee Date Month / Day / Year

RBT ID# 01997
DATE 08-30-09
TEST NO. 0159
ID# 703141
AS ID# 072872
SCREENING
5/210L TIME
AUTO 13:39

Affix Or Print Screening Results Here
Affix Or Print Confirming Results Here
Affix With Tamper Evident Tape
Affix Or Print Additional Test Results Here

Affix With Tamper Evident Tape

**U.S. Department of Transportation (DOT)
Alcohol Testing Form**

(The instructions for completing this form are on the back of Copy 3)

STEP 1: TO BE COMPLETED BY ALCOHOL TECHNICIAN

A: Employee Name Emmifer Hausdorf
(Print) (First, M.I., Last)

SSN or Employee ID No. 641216

C: Employer Name Wash. State Ferries
 Street 2901 3rd Ave
Seattle, Wa. 98121

City, ST ZIP _____
 DER Name and Telephone No. Cee Schmidt 206-515-3420
DER Name DER (Area Code & Phone Number)

D: Reason for Test: Random Reasonable Susp. Post-Accident Return to Duty Follow-up Pre-employment

STEP 2: TO BE COMPLETED BY EMPLOYEE

I certify that I am about to submit to alcohol testing required by U.S. Department of Transportation regulations and that the identifying information provided on the form is true and correct.

X Emmifer Hausdorf 8-30-09
Signature of Employee Date Month / Day / Year

STEP 3: TO BE COMPLETED BY ALCOHOL TECHNICIAN

(If the technician conducting the screening test is not the same technician who will be conducting the confirmation test, each technician must complete their own form.) I certify that I have conducted alcohol testing on the above named individual in accordance with the procedures established in the U.S. Department of Transportation regulation, 49 CFR Part 40, that I am qualified to operate the testing device(s) identified, and that the results are as recorded.

TECHNICIAN: SAT STT DEVICE: SALIVA BREATH* 15-Minute Wait: Yes No
 SCREENING TEST: (For BREATH DEVICE* write in the space below only if the testing device is not designed to print.)

Test #	Testing Device Name	Device Serial # QR Lot # & Exp. Date	Activation Time	Reading Time	Result

CONFIRMATION TEST: Results MUST be affixed to each copy of this form or printed directly onto the form.

REMARKS: _____

Wash. State Ferries 2901 3rd Ave.
Alcohol Technician's Company Company Street Address

Joe Malono T/S Seattle, Wa. 98121
(PRINT) Alcohol Technician's Name (First, M.I., Last) Company City, State, Zip

Joe Malono 206-515-3420
Signature of Alcohol Technician Phone Number (Area Code & Number)

8-30-09
Date Month / Day / Year

STEP 4: TO BE COMPLETED BY EMPLOYEE IF TEST RESULT IS 0.02 OR HIGHER

I certify that I have submitted to the alcohol test, the results of which are accurately recorded on this form. I understand that I must not drive, perform safety-sensitive duties, or operate heavy equipment because the results are 0.02 or greater.

Signature of Employee Date Month / Day / Year

RBT ID# 019977
 DATE 08-30-09
 TEST NO. 0160
 ID#
 641216
 AS ID# 072872
 SCREENING
 G/210L TIME

AUTO 13:58

Affix Or Print Screening Results Here
 Affix With Tamper Evident Tape
 Affix Or Print Confirming Results Here
 Affix With Tamper Evident Tape
 Affix Or Print Additional Test Results Here
 Affix With Tamper Evident Tape

Department of Transportation (DOT)

Alcohol Testing Form

(The instructions for completing this form are on the back of Copy 3)

TO BE COMPLETED BY ALCOHOL TECHNICIAN

Employee Name Butch Conrad (Print) (First, M.I., Last)

B: SSN or Employee ID No. 454044

C: Employer Name Wash. State Ferries

Street

City, ST ZIP

DER Name and Telephone No. Lea Schmidt 206-515-3420

DER (Area Code & Phone Number)

D: Reason for Test: [] Random [] Reasonable Susp. [X] Post-Accident [] Return to Duty [] Follow-up [] Pre-employment

Affix Or Print Screening Results Here. Includes stamp: RBT IV# 019977, DATE 08-30-09, TEST NO. 0157, ID# 454044, AS IV# 072872, SCREENING G/21@L TIME, AUTO 13:24

STEP 2: TO BE COMPLETED BY EMPLOYEE

I certify that I am about to submit to alcohol testing required by U.S. Department of Transportation regulations and that the identifying information provided on the form is true and correct.

Signature of Employee Butch Conrad Date 8 30 09

STEP 3: TO BE COMPLETED BY ALCOHOL TECHNICIAN

(If the technician conducting the screening test is not the same technician who will be conducting the confirmation test, each technician must complete their own form.) I certify that I have conducted alcohol testing -- the above named individual in accordance with the procedures established in the U.S. Department of Transportation regulation, 49 CFR Part 40, that I am qualified to operate the testing device(s) identified, and that the results are as recorded.

TECHNICIAN: [X] BAT [] STT DEVICE: [] SALIVA [] BREATH* 15-Minute Wait: [] Yes [] No

SCREENING TEST: (For BREATH DEVICE* write in the space below only if the testing device is not designed to print.)

Table with columns: Test #, Testing Device Name, Device Serial # QR Lot # & Exp. Date, Activation Time, Reading Time, Result

CONFIRMATION TEST: Results MUST be affixed to each copy of this form or printed directly onto the form.

REMARKS:

Wash. State Ferries Alcohol Technician's Company

Joe Malono T/S (PRINT) Alcohol Technician's Name (First, M.I., Last)

2901 3rd AVE Company Street Address

Seattle, Wa. 98121 Company City, State, Zip

206-515-3420 Phone Number (Area Code & Number)

Signature of Alcohol Technician Date 8/30/09

STEP 4: TO BE COMPLETED BY EMPLOYEE IF TEST RESULT IS 0.02 OR HIGHER

I certify that I have submitted to the alcohol test, the results of which are accurately recorded on this form. I understand that I must not drive, perform safety-sensitive duties, or operate heavy equipment because the results are 0.02 or greater.

Signature of Employee Date Month / Day / Year

Affix Or Print Confirming Results Here. Affix With Tamper Evident Tape

Affix Or Print Additional Test Results Here

Affix With Tamper Evident Tape

HEALTHFORCE

WORKPLACE HEALTH SOLUTIONS

From: HealthForce Partners
 18323 Bothell-Everett Hwy
 Suite 220
 Bothell, WA 98012

To: Lea Schmidt
 WA State Ferries
 2901 3Rd Avenue, Suite 500
 Seattle, WA 98121

Date Verified: 9/1/2009

Results Summary

* UPDATED

WA State Ferries (002136)

Test Type: Post-Accident

Participant	Batch ID	Drug/Alc	Specimen ID	Disp	Coll Site	Lab	Occ	Status	Collect Date
20014728 Catherine Sherman	20090901	Drugs	0957044099	ONSITE	LC-RTP	LC-RTP			08/29/2009
386746 Paul L. Bellesen Jr	20090901	Drugs	0437804290		ONSITE	LC-RTP			08/30/2009
530508868 John Butch Conrad	20090901	Drugs	0644215784		ONSITE	LC-RTP			08/30/2009
* 386384 Gregory J Faust	20090901	Drugs	0968034410		ONSITE	LC-RTP			08/30/2009
641216 Jennifer Hansdorf	20090901	Drugs	0968034465		ONSITE	LC-RTP			08/30/2009
54230 David Lindeman	20090901	Drugs	0968034406		ONSITE	LC-RTP			08/30/2009
* 703141 Michael Stewart	20090901	Drugs	0968034384		ONSITE	LC-RTP			08/30/2009
167257 Tom Webster	20090901	Drugs	0437804264		ONSITE	LC-RTP			08/30/2009

Test Type: Post-Accident Total: 8

WA State Ferries (002136) Grand Total: 8

HEALTHFORCE

WORKPLACE HEALTH SOLUTIONS

From: HealthForce Partners
 18323 Bothell-Everett Hwy
 Suite 220
 Bothell, WA 98012

Handwritten initials/signature

To: Lea Schmidt
 WA State Ferries
 2901 3Rd Avenue, Suite 500
 Seattle, WA 98121

Date Verified: 9/1/2009

Results Summary

** UPDATED*

WA State Ferries (002136)

Test Type: Post-Accident

Participant	Batch ID	Drug/Alc	Specimen ID	Disp	Coll Site	Lab	Occ	Status	Collect Date
20011728 Catherine Sherman	20090901	Drugs	0657244022		ONSITE	LC-RTP			08/24/2009
* 386748 Paul L. Belesen Jr	20090901	Drugs	0437804290		ONSITE	LC-RTP			08/30/2009
* 530508868 John Butch Conrad	20090901	Drugs	0844215784		ONSITE	LC-RTP			08/30/2009
841218 Jennifer Hansdorf	20090901	Drugs	0968034465		ONSITE	LC-RTP			08/30/2009
54230 David Lindeman	20090901	Drugs	0968034406		ONSITE	LC-RTP			08/30/2009
157257 Tom Webster	20090901	Drugs	0437804264		ONSITE	LC-RTP			08/30/2009

Test Type: Post-Accident Total: 6

WA State Ferries (002136) Grand Total: 6

11 MAR 29 PM 2:01
STATE OF WASHINGTON
BY _____
DEPUTY

NO. 41198-9-II

**COURT OF APPEALS FOR DIVISION II
STATE OF WASHINGTON**

EVERGREEN FREEDOM
FOUNDATION,
a Washington nonprofit corporation,

Plaintiff/Appellant,

v.

WASHINGTON STATE
DEPARTMENT OF
TRANSPORTATION, division of
Washington State Ferries,

Defendant/Respondent.

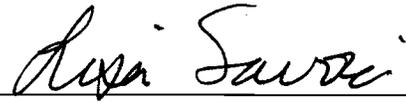
**PROOF OF SERVICE
OF WASHINGTON
STATE
DEPARTMENT OF
TRANSPORTATION'S
RESPONSE BRIEF**

I, Lisa M. Savoia, do hereby certify that I am a citizen of the United States of America, over 18 years of age and am competent to be a witness herein.

On March 28, 2011, I transmitted a true and correct copy of Washington State Department of Transportation's Response Brief and this Proof of Service via ABC Legal Messengers to the following:

Michael J. Reitz
Evergreen Freedom Foundation
2403 Pacific Avenue SE
Olympia, WA 98501

DATED this 28th day of March, 2011 at Olympia, WA.

A handwritten signature in cursive script, reading "Lisa Savoia", written in black ink. The signature is positioned above a horizontal line.

Lisa Savoia, Legal Assistant