



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

February 10, 1988

React-5

The Honorable Phil Gramm

United States Senate
c/o Joan Moore
Suite 570
900 Jackson Street
Dallas, Texas 75202

Dear Senator Gramm:

This responds to your January 25, 1988 letter requesting information on a matter your constituent, Mr. Daniel R. Lighter, discussed in a December 7, 1987 letter to you.

Mr. Lighter expresses concern about drug testing in the absence of probable cause at the South Texas Nuclear Project.

Recent court decisions under certain circumstances have upheld drug testing in the absence of probable cause or reasonable suspicion. For example, in Shoemaker v. Handel, 795 F.2d 1136 (3rd Cir. 1986), cert. denied, 55 U.S.L.W. 3392 (U.S. Dec. 2, 1986) (No. 86-576), the court upheld random drug testing of jockeys in the heavily regulated industry of racing in the absence of reasonable suspicion. Similarly, in National Treasury Employees' Union v. Von Raab, 816 F.2d 170 (5th Cir. 1987), stay denied, 55 U.S.L.W. 3807 (U.S. June 2, 1987) (No. A-847), the court upheld a U.S. Customs Service drug testing program for employees seeking transfer to sensitive positions involving interdiction of illegal drugs, requiring carrying a firearm, and involving access to classified information. Also, the court in Jones v. McKenzie, 833 F.2d 335 (D.C. Cir. 1987), held that a drug test for bus drivers could be reasonable in the absence of probable cause, if an employee's duties involve direct contact with young children and their safety, if the test is part of a routine employment related physical, and if there is a nexus between the test and the employer's safety concern. Also see Committee for G.I. Rights v. Callaway, 518 F.2d 466 (D.C. Cir. 1975); McDonnell v. Hunter, 809 F.2d 1302 (8th Cir. 1987).

Thus, in my opinion probable cause or reasonable suspicion is not always a requirement in order for a utility drug test to be constitutional, even assuming that the utility ordered drug test is governmental action subject to the Fourth Amendment.

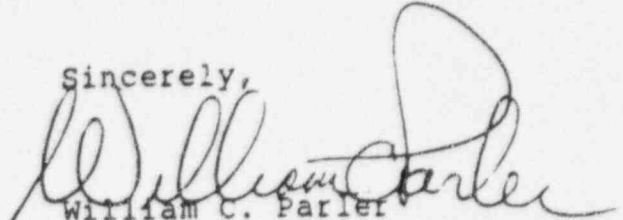
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This letter, however, expresses no agency opinion on the constitutionality of the South Texas drug testing program which I have not reviewed. While NRC encourages utilities to have drug testing programs, as a strict legal matter it has not required them.

Sincerely,

A handwritten signature in cursive script, appearing to read "William C. Parler". The signature is written in dark ink and is positioned above the typed name and title.

William C. Parler
General Counsel