

**WEST VIRGINIA
SECRETARY OF STATE
BETTY IRELAND
ADMINISTRATIVE LAW DIVISION**

Form #3

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2006 JUL 28 P 4: 07

OFFICE WEST VIRGINIA
SECRETARY OF STATE

**NOTICE OF AGENCY APPROVAL OF A PROPOSED RULE
AND
FILING WITH THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE**

AGENCY: West Virginia State Police TITLE NUMBER: 81

CITE AUTHORITY: 15-2-24; 15-2B-4

AMENDMENT TO AN EXISTING RULE: YES NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 9

TITLE OF RULE BEING AMENDED: West Virginia DNA Databank

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: _____

TITLE OF RULE BEING PROPOSED: _____

THE ABOVE PROPOSED LEGISLATIVE RULE HAVING GONE TO A PUBLIC HEARING OR A PUBLIC COMMENT PERIOD IS HEREBY APPROVED BY THE PROMULGATING AGENCY FOR FILING WITH THE SECRETARY OF STATE AND THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE FOR THEIR REVIEW.


Authorized Signature

\$5.20

QUESTIONNAIRE

(Please include a copy of this form with each filing of your rule: Notice of Public Hearing or Comment Period; Proposed Rule, and if needed, Emergency and Modified Rule.)

DATE: July 28, 2006

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: (Agency Name, Address & Phone No) West Virginia State Police
725 Jefferson Road
South Charleston, WV 25309
Lt. H. B. Myers - 746-2439

LEGISLATIVE RULE TITLE: West Virginia DNA Databank

1. Authorizing statute(s) citation 15-2-24; 15-2B-4

2. a. Date filed in State Register with Notice of Hearing or Public Comment Period:
June 22, 2006

b. What other notice, including advertising, did you give of the hearing?
None.

c. Date of Public Hearing(s) *or* Public Comment Period ended:
July 28, 2006

d. Attach list of persons who appeared at hearing, comments received, amendments, reasons for amendments.
Attached _____ No comments received X

- e. Date you filed in State Register the agency approved proposed Legislative Rule following public hearing: (be exact)

July 28, 2006

- f. Name, title, address and **phone/fax/e-mail numbers** of agency person(s) to receive all *written correspondence* regarding this rule: (Please type)

Lt. H. B. Myers
Biochemistry Section
West Virginia State Police

725 Jefferson Road
South Charleston, WV 25309

PH: 746-2439 FAX: 746-2427

- g. **IF DIFFERENT FROM ITEM 'f'**, please give Name, title, address and phone number(s) of agency person(s) who wrote and/or has responsibility for the contents of this rule: (Please type)

3. If the statute under which you promulgated the submitted rules requires certain findings and determinations to be made as a condition precedent to their promulgation:

- a. Give the date upon which you filed in the State Register a notice of the time and place of a hearing for the taking of evidence and a general description of the issues to be decided.

N/A

b. Date of hearing or comment period:

N/A

c. On what date did you file in the State Register the findings and determinations required together with the reasons therefor?

N/A

d. Attach findings and determinations and reasons:

Attached N/A

**West Virginia State Police
Title 81
Series 9**

Summary of Proposed Rule

This rule provides for the identification and collection of DNA samples from individuals convicted of selected crimes for use in developing a DNA database to provide investigative leads for the law enforcement community. This rule describes how the samples and the DNA information generated from the samples are to be handled. This rule also details the steps required to expunge a sample from the database. The amendments to this rule primarily deal with the expansion of the database to cover additional crimes and allowing samples other than blood to be collected and used for testing.

**West Virginia State Police
Title 81
Series 9**

Circumstances Requiring Filing of Rule

The changes made in the DNA Databank Law involving expansion of the crimes that require collection and the option of collecting a sample other than blood necessitated the amendments to the current rules.

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: West Virginia DNA Databank

Type of Rule: Legislative Interpretive Procedural

Agency: West Virginia State Police

Address: 725 Jefferson Road
South Charleston

Phone Number: 746-2439 Email: bmyers@wvsp.state.wv.us

Fiscal Note Summary

Summarize in a clear and concise manner what impact this measure will have on costs and revenues of state government.

No funds are being requested to cover the amendments to the current rules.

Fiscal Note Detail

Show over-all effect in Item 1 and 2 and, in Item 3, give an explanation of Breakdown by fiscal year, including long-range effect.

FISCAL YEAR			
Effect of Proposal	Current Increase/Decrease (use "-")	Next Increase/Decrease (use "-")	Fiscal Year (Upon Full Implementation)
1. Estimated Total Cost	0.00	0.00	0.00
Personal Services	0.00	0.00	0.00
Current Expenses	0.00	0.00	0.00
Repairs & Alterations	0.00	0.00	0.00
Assets	0.00	0.00	0.00
Other	0.00	0.00	0.00
2. Estimated Total Revenues	0.00	0.00	0.00

Rule Title: _____

Rule Title:

West Virginia DNA Databank

3. Explanation of above estimates (including long-range effect):

Please include any increase or decrease in fees in your estimated total revenues.

The cost of the amendments are being covered by existing funds and federal funds.

MEMORANDUM

Please identify any areas of vagueness, technical defects, reasons the proposed rule would not have a fiscal impact, and/or any special issues not captured elsewhere on this form.

The cost of these amendments are being covered by existing funds and federal funds.

Date: 6/15/2006

Signature of Agency Head or Authorized Representative

W. H. Lemmon, Sr.

TITLE 81
LEGISLATIVE RULE
WEST VIRGINIA STATE POLICE

SERIES 9
WEST VIRGINIA DNA DATABANK

FILED

2006 JUL 28 P 4 07

OFFICE WEST VIRGINIA
SECRETARY OF STATE

§81-9-1. General.

1.1. Scope. -- This legislative rule establishes the methods and standards necessary to establish and administer a DNA database/databank as they relate to the ~~withdrawal of blood~~ collection of DNA samples, the submission of samples, the analysis of samples, the storage of samples and results, and the exchange and expungement of information concerning ~~blood-DNA~~ specimens collected for DNA analysis.

1.2. Authority. --W. Va. Code §15-2-24a, §15-2B-4.

1.3. Filing Date. --~~March 27, 1996~~.

1.4. Effective Date. --~~April 1, 1996~~.

§81-9-2. Application and Enforcement.

2.1. Application - This legislative rule applies to any person or entity ~~drawing~~ collecting, or causing to be ~~drawn~~ collected, samples of human ~~blood-DNA~~ for the purposes stated in this rule.

2.2. Enforcement - The enforcement of this legislative rule is vested with the Superintendent of the West Virginia State Police.

§81-9-3. Definitions.

As used in this rule, unless used in a context that clearly requires a different meaning, the term:

3.1. Biochemistry Section - means the section of the State Police laboratory that administers the DNA Databank and conducts analysis of biological materials, including blood and saliva, to determine a genetic profile gleaned from DNA.

3.2. DNA - means deoxyribonucleic acid and refers to the basic biological molecule that carries and transmits genetic information.

3.3. DNA sample - human biological material including, but not limited to, blood and saliva from which DNA can be extracted and analyzed.

3.4. DNA Analysis - means the analysis performed on biological materials, including blood and saliva, to determine the genetic profile of the individual tested.

3.4.3.5. FBI - means the Federal Bureau of Investigation.

3.5-3.6. Marshall - means the DNA testing facility at the Marshall University School of Medicine known as Marshall University Forensic Science Center (MUFSC).

~~3.6~~ 3.7. Medical Technician - includes persons trained as medical technicians, emergency medical technicians, persons certified as phlebotomists by the College of American Pathology, or any other qualified phlebotomists.

~~3.7 State Penitentiary -- any and all state correctional facilities.~~

3.8. Approved individual -- a probation officer, law enforcement officer or an individual previously qualified to collect DNA samples for the DNA Databank program.

~~3.8-3.9.~~ WVSP DNA Databank Blood Kit (WVSP Kit) - means the kit provided by the West Virginia State Police for the purposes of collecting Databank samples.

3.10. WVSP DNA Databank Collection Kit (WVSP Kit II) -- means the kit provided by the West Virginia State Police for the purposes of collecting Databank samples other than blood.

§81-9-4. Procedures for the ~~Withdrawal of Blood~~ Collection of Samples for DNA Analysis.

4.1. The following standards shall be met when ~~drawing blood~~ collecting samples for the purposes of DNA analysis:

(a). All individuals convicted of a felony or convicted under the following sections of the West Virginia Code shall have a DNA sample collected of blood withdrawn by representatives of the West Virginia Division of Corrections and/or Regional Jail Authority, Sheriff's Departments or other authorized agency of the criminal justice system, working in conjunction with the West Virginia State Police:

61-2-1, 61-2-2, 61-2-3; First and second degree murder

61-2-4; Voluntary manslaughter

61-2-5; Involuntary manslaughter

61-2-7; Attempt to kill or injure by _____ poison

61-2-9; Malicious or unlawful assault, unlawful assault/wounding

61-2-10; Assault during the commission of a felony

61-2-10a; Violent crimes against the elderly

61-2-10b; Malicious assault on specified government employees

61-2-12; Robbery or attempted robbery

61-2-14; Abduction or kidnapping

61-3-4; Attempt to commit arson; fourth degree arson

61-8D-5; Sexual abuse by parent/guardian

- 61-8B-7; Sexual abuse in the first degree
- 61-8B-8; Sexual abuse in the second degree
- 61-8B-9; Sexual abuse in the third degree
- 61-8B-6; Sexual assault of a spouse
- 61-8B-3; Sexual assault in the first degree
- 61-8B-4; Sexual assault in the second degree
- 61-8B-5; Sexual assault in the third degree
- 61-8D-2; Child neglect resulting in death of child
- 61-8D-2a; Child abuse resulting in death of child
- 61-8D-3; Child abuse resulting in injury to child
- 61-8D-4; Child neglect resulting in injury to child
- 61-8-12; Incest
- 61-8-14; Disinterment/displacement of dead bodies

(b). Where not otherwise mandated, any person convicted of a felony offense under the provisions of this code, provided that the person is under the supervision of the criminal justice system at the time the request for the sample is made. Supervision includes prison, the regional jail system, parole, probation, home confinement, community corrections program, and work release.

~~(b)~~(c). The blood shall be drawn only by a licensed registered professional nurse, doctor of medicine or osteopathy, or by a trained medical technician. The WVSP Kit shall be used only for the withdrawal of blood for the purpose of DNA analysis.

~~(e)~~(d). The blood shall be drawn using the sterile, previously unused, needles and storage vessels provided in the WVSP Databank Blood Kit. The blood shall be drawn according to accepted medical procedures and according to the universal safety precautions outlined by the National Centers for Disease Control. The provided vessels shall be filled to capacity, if possible, and sealed according to the instructions included in the WVSP Kit.

(e). The buccal (saliva) sample shall be collected using the multiple sterile swabs provided in the WVSP Databank Collection Kit. Approved individuals, following the guidelines outlined in the kit, shall collect the DNA sample.

(f). The DNA sample shall be collected using the necessary materials provided in the WVSP databank Collection Kit. Approved individuals, following the guidelines outlined in the kit, shall collect the DNA samples.

(g). If necessary, the blood tube or other collection material may be replaced by the collecting agency with sterile collection material via communication with the State Police.

~~(e)~~(h). The identity of the individual whose sample is collected shall be confirmed through an identification card bearing a photograph or through another means that would positively identify the ~~blood~~ DNA donor. Only one donor shall be processed at a time to avoid potential mislabeling or misidentification of the samples.

~~(e)~~(i). The Kit will include one information card intended to be used by the Biochemistry Section. The information card shall be completed in full at the time of sample collection according to the instructions included in the Kit. Also, the

fingerprint identification block on the identification card shall be completed at the time of sample collection. A right thumb print is the print of choice. If a right thumb print is not possible, then a left thumb print shall be used. If a thumb print is not possible an index finger (right then left) shall be used for identity confirmation. If an index finger print cannot be collected, the middle finger (right then left), or ring finger print (right then left), or little finger print (right then left) shall be used to confirm identity. In the event that no finger print is possible due to the absence of fingers or hands, the fingerprint block shall be left blank. The identity of the digit used to make the fingerprint shall be noted on the identification card.

~~(f)~~(j). The verification of the ~~information~~ data on the ~~identification~~ information card shall be confirmed by a second individual. when possible. The witness shall sign the ~~identification~~ information card on the appropriate signature line.

~~(g)~~(k). The collected ~~blood-DNA~~ sample and the completed information card shall be placed in a WVSP DNA Databank Kit according to the instructions included, sealed, and mailed immediately to:

West Virginia State Police,
Biochemistry Section,
725 Jefferson Road,
South Charleston, WV, 25309-1698.

(h). A log book, provided by the State Police, shall be maintained by the collection facility ~~drawing the blood sample obtaining the DNA sample~~. The log shall contain the following information: the WVSP kit number, the name of the donor, the date and time of sample collection, the name of the witness, and the name of the collecting technician. The log shall be completed in full at the time of sample collection.

(i). The collection facility shall provide the Biochemistry Section with a copy of the log book. On ~~January 15, April 15, July 15, and October 15~~ of a quarterly basis each calendar year, a copy of the log book entries from the prior three month period shall be ~~mailed~~ sent to:

West Virginia State Police,
Biochemistry Section,
725 Jefferson Road,
South Charleston, WV, 25309-1698.

The collecting facility shall ~~mail~~ send the log sheets even if no log entries occur in the three months prior to the mailing dates.

§81-9-5. Receipt of Blood Samples at State Police Headquarters.

5.1. The receipt of the samples shall be under the supervision of authorized personnel assigned to the Biochemistry Section, and shall meet the following standards:

(a). The Biochemistry Section shall ~~maintain a log of all samples received, upon receiving a WVSP DNA Databank Kit, record the following on the information card contained in the kit: -The log shall record the date of reception, the submitting agency, the individual receiving the kit and the submitting facility if needed, the WVSP kit number, the donor, and a unique identification number.~~

(b). Personnel assigned to the Biochemistry Section shall enter information from the WVSP Kit's ~~identification information~~ card into the appropriate computer file. The card shall be labeled with a unique identifier and shall be filed in a secure, fireproof location. Upon confirmation that a sample is a duplicate of a sample currently in the Databank the duplicate may be destroyed or entered in to the Databank as a quality control sample.

(c). Each ~~blood- DNA~~ sample received shall be processed according to the existing Biochemistry Section safety and quality assurance guidelines. A minimum of two stain cards shall be prepared from the sample contained in the WVSP Kit. Each prepared stain card shall be labeled with unique identifiers. Samples shall be prepared for long term storage ~~in a temperature monitored -70°C storage device, based on the sample medium.~~ All prepared stains shall be stored, upon drying, in sequential order in the long term storage device. ~~One blood stain card shall be forwarded to DNA testing facility at Marshall. A stain and/or liquid sample shall be forwarded to MUFSC. In the case of DNA samples other than blood, up to one half of the total sample shall be forwarded to MUFSC.~~

(d). ~~A freezer stain use log shall be maintained by the Biochemistry Section. The removal of a stain card from the long term storage device shall be noted on the log in the following manner: the date and time of removal, the purpose of removal, and the date and time of return, if applicable. All transfers of stain cards to the DNA testing facility at Marshall shall be noted on the log.~~

§81-9-6. Transport and Receipt of ~~Dried Blood Stains~~ DNA samples to Marshall University MUFSC for DNA Analysis.

6.1. The transport and receipt of the samples shall be under the supervision of authorized personnel assigned to the Biochemistry Section and shall meet the following standards:

(a). ~~Stain cards prepared for transport shall contain only the following data: the sex, race, and unique identifier of the donor. Samples prepared for transport shall only be labeled with the assigned unique identifier.~~

(b). The ~~stain cards- samples~~ shall be transported to Marshall University by authorized personnel assigned to the Biochemistry Section. A ~~stain card- sample~~ transport and receipt form shall be completed and signed by the transporting and receiving individuals. A copy of the transport and receipt form will be maintained in the records of both agencies.

(c). ~~Upon receipt of the stain cards at Marshall University, the information from each stain card shall be logged into the appropriate computer file. A backup file shall be maintained by Marshall in a secure, destruction proof location. Upon receipt of the DNA samples at MUFSC, the date of receipt for each sample shall be logged into the appropriate file in the West Virginia DNA Databank software. MUFSC will only have access to the race, gender, unique identifier and transfer dates of each file.~~

(d). Upon receipt, ~~stain cards shall be stored in a secure temperature monitored -70°C~~ samples shall be stored in a secure, medium appropriate storage device. ~~The freezer~~ A refrigerated storage device shall be connected to an auxiliary power source in the event of power failures.

(e). ~~A freezer stain use log shall be maintained by Marshall. The removal of a stain card from the long term storage device shall be noted on the log in the following manner. A chain of custody form shall be completed detailing the date and time of removal, the purpose of removal, and the date and time of return, if applicable. All transfers of stain cards samples to the Biochemistry Section or destruction of samples under the authority of the State Police shall be documented, noted on the log. Any liquid samples will be destroyed upon successful upload of the DNA profile to the national database (NDIS).~~

(f). Entry and removal of ~~stain cards samples~~ shall be performed by the ~~primary analyst, as assigned by MUFSC Marshall, and witnessed by a second analyst. The handling of all stain cards shall be confirmed in this manner to verify stains are being identified properly prior to analysis. Both the primary and secondary~~ The analyst shall initial the log form at each entry or withdrawal of stain cards samples.

§81-9-7. Handling, Processing and Analyzing Blood Samples at MUFSC, Marshall.

7.1. The handling, processing and analysis of ~~stains samples~~ at ~~MUFSC Marshall~~ shall be performed according to the nationally accepted guidelines for DNA analysis promulgated by the FBI Director, the guidelines promulgated by the American Society of Crime Laboratory Directors Laboratory Accreditation Board, and the National DNA Index System (CODIS) Standards for the Acceptance of DNA Data. In addition to the preceding requirements the handling, processing, and analysis of samples shall meet the following standards:

(a). DNA analysis shall be conducted only by personnel who have successfully completed proficiency tests approved by the State Police.

(b). DNA analysis shall be conducted only by personnel who have their personal DNA profiles on file for all DNA tests conducted by ~~the DNA testing facility at Marshall~~ MUFSC.

(c). DNA analysis shall be conducted according to a State Police approved quality assurance program. Periodic quality control inspections and/or audit reviews shall be conducted by the State Police.

(d). All DNA analysis data shall be forwarded to the Biochemistry Section for inspection and approval.

(e). All DNA data generated by Marshall shall be stored in a format compatible with the Combined DNA Index National DNA Index System (CODIS) ~~(CODIS)~~ employed by the State Police and the FBI. Data generated at Marshall shall be stored in a location and in a way that is secure from alteration and destruction. All samples and data shall be returned upon the request of the West Virginia State Police.

§81-9-8. The Monitoring, Inspection, and Prohibition on the Exchange of Information.

8.1. In order to safeguard the donor's personal privacy, the following standards shall be met in the gathering and exchange of information:

(a). The information ~~contained in the West Virginia Databank~~ entered into CODIS shall be limited to that required to generate investigative leads. Names, addresses, criminal histories or other personally identifying information shall not be included.

(b). The Biochemistry Section shall restrict access to DNA analysis records to criminal justice DNA

laboratories. The Biochemistry Section shall release a DNA record to other laboratories only when a potential DNA match is discovered. The Biochemistry Section shall release identifying information only upon the verified request of an investigating law enforcement agency. The Biochemistry Section shall ensure that all DNA data communications concerning records are encrypted before transmission with electronic devices available only to the criminal justice community.

(c). User authentication and access control shall be employed by the computer software used in the West Virginia -DNA Databank. Each user shall be uniquely identified by the software and all activity by a user shall be monitored. Transaction activities shall be monitored by the computer system to record when and by whom a deletion is made, who adds a file or who edited a file last, what activity occurred (ex. add/edit/delete) and when the activity occurred. User authority shall be segregated to limit the activities that one user may perform as opposed to other users.

(d). User authentication and access control shall be employed by the computer software used in CODIS. Each user shall be uniquely identified by the software. Transaction activities shall be monitored by the computer software to record additions, deletions or edits. User authority shall be segregated to limit the activities one user may perform as opposed to other users.

~~(d)(e)~~. Confirmation of in-State searches of the DNA Databank - CODIS shall be limited to open criminal cases or cases that are being actively investigated by a law enforcement agency. If a potential DNA match is identified, a match report shall be generated by the Biochemistry Section. The match report shall be used as probable cause by the investigating agency to obtain a court order for the collection of a fresh reference sample.

~~(e)(f)~~. All data entered into the Databank shall comply with the approved quality assurance guidelines of the State Police Crime Laboratory. Data from all points of entry, collection, storage, and testing shall be routinely monitored to insure its integrity.

§81-9-9. The Expungement of Information.

9.1. Authorized personnel assigned to the Biochemistry Section of the West Virginia State Police shall supervise the expungement of DNA analysis records based on the following standards:

(a). The Biochemistry Section shall expunge records upon receipt of a court order and pursuant to a written request. The Biochemistry Section shall contact the ordering court and have the order verified before expungement.

(b). The Biochemistry Section shall maintain a file of all expungement orders received and processed.

(c). The Biochemistry Section, upon confirmation of the court order, shall erase from the main file and all backup files of the DNA Databank, computer all information and records relating to the donor and conviction named in the order. All the computer files of the donor shall be deleted from the state (CODIS) and national (NDIS) databases. ~~The Biochemistry Section shall destroy the corresponding identification information card, and any copies that may exist on file. The Biochemistry Section shall destroy all corresponding blood stains DNA samples collected for the purpose of DNA analysis and in the possession of or under the jurisdiction of the Biochemistry Section unless the donor wishes to take possession of the sample. The Biochemistry Section shall destroy DNA samples blood stains according to accepted safety guidelines for biohazard materials.~~

(d). The Biochemistry Section shall send a letter of expungement to the court of record upon

compliance with the court order.