

**WEST VIRGINIA
SECRETARY OF STATE
NATALIE E. TENNANT
ADMINISTRATIVE LAW DIVISION**

Form #2

Do Not Mark In This Box

FILED

2014 JUN 25 P 2:28

CLERK OF COURTS
SECRETARY OF STATE

NOTICE OF A COMMENT PERIOD ON A PROPOSED RULE

AGENCY: West Virginia State Police TITLE NUMBER: 81

RULE TYPE: Legislative CITE AUTHORITY: 15-2-24 and 15-2B-4

AMENDMENT TO AN EXISTING RULE: YES NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 9

TITLE OF RULE BEING AMENDED: Regulations and Procedures Pertaining to the West Virginia DNA Databank

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: _____

TITLE OF RULE BEING PROPOSED: _____

IN LIEU OF A PUBLIC HEARING, A COMMENT PERIOD HAS BEEN ESTABLISHED DURING WHICH ANY INTERESTED PERSON MAY SEND COMMENTS CONCERNING THESE PROPOSED RULES. THIS COMMENT PERIOD WILL END ON July 25, 2014 AT 1600 hours ONLY WRITTEN COMMENTS WILL BE ACCEPTED AND ARE TO BE MAILED TO THE FOLLOWING ADDRESS:

West Virginia State Police

725 Jefferson Road

South Charleston, WV 25309

Attn: Legal Section

THE ISSUES TO BE HEARD SHALL BE LIMITED TO THIS PROPOSED RULE.


Authorized Signature

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL

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

Summary of Proposed Rules

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 deals with the expansion of the database to cover all individuals required to register as a sex offender and those offenders who were required to give a sample but did not while under the supervision of the criminal justice system. A fee from those offenders with sufficient financial resources and the ability to investigate partial matches identified from the database as possibly originating from a relative of the identified offender.

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

Circumstances Requiring Filing of Rules

The changes made in the DNA Databank Law involve expansion to all registered sex offenders as well as those offenders who were required to provide a DNA sample but did not prior to release from the supervision of the criminal justice system. The addition of a fee charged to convicted offenders for testing of the offender DNA sample and how to respond to partial matches that may occur as a result of DNA database searches 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: howard.b.myers@wvsp.gov

Fiscal Note Summary

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

A fee of up to 150 dollars will be charged to each individual convicted of a qualifying offense to help offset the cost of DNA Databank program.

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: _____

3. **Explanation of above estimates (including long-range effect):**
Please include any increase or decrease in fees in your estimated total revenues.

A fee of \$150 dollars can be charged to each individual convicted of a qualifying offense under the DNA Databank Law

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.

Any or all of the 150 dollar fee can be waived by the judge. The number of qualifying individuals cannot be predicted.

Date: June 25, 2014

Signature of Agency Head or Authorized Representative

Colonel @ Lt. Gen. J. Smith

**TITLE 81
LEGISLATIVE RULE
WEST VIRGINIA STATE POLICE**

**SERIES 9
WEST VIRGINIA DNA DATABANK**

§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 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 DNA specimens collected for DNA analysis.

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

1.3. Filing Date. -- June 17, 2014

1.4. Effective Date. -- July 1, 2014

§81-9-2. Application and Enforcement.

2.1. Application - This legislative rule applies to any person or entity collecting, or causing to be collected, samples of human 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 – means 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.

3.5. FBI - means the Federal Bureau of Investigation.

3.6. MUFSC - means the DNA testing facility known as Marshall University Forensic Science Center (MUFSC).

3.7. Medical Technician – means ~~includes~~ persons trained as medical technicians, emergency

medical technicians, persons certified as phlebotomists by the College of American Pathology, or any other qualified phlebotomists.

3.8. Approved individual – means a probation officer, law enforcement officer or medical technician trained to collect DNA samples for the DNA Databank program.

3.9. Kit - means either the blood kit currently provided by the West Virginia State Police for the purposes of collecting Databank samples or any other collection kit provided by the West Virginia State Police for the purpose of collecting a DNA Databank sample.

3.10. CODIS – means Combined DNA Index System

3.11. NDIS – means National DNA Index System

3.12. Collection Facility – means any facility or agency that is responsible for the collection of a DNA Databank sample from qualifying individuals under their supervision.

3.13. CODIS Administrator – means the Biochemistry Section employee designated by the State Police as the person responsible for the administration of the CODIS program in the State.

3.14 Storage device – means any storage unit that can provide acceptable storage conditions for biological stains.

3.15 Criminal Justice Agency – means an agency or institution of a federal, state or local government, other than the office of public defender, which performs as part of its principle function, relating to the apprehension, investigation, prosecution, adjudication, incarceration, supervision or rehabilitation of criminal offenders.

3.16 Division – means West Virginia State Police and the Biochemistry Section of the West Virginia State Police Forensic Laboratory.

3.17 Partial Match – means that two DNA profiles, while not an exact match share a sufficient number of characteristics to indicate the possibility of a biological relationship.

3.18 Interim Plan – means the plan used currently by the Federal Bureau of Investigation for Partial Match Protocol and to be used as adopted in the management rules of this article.

3.19 Registering Agency – means West Virginia State Police.

3.20 Cold Case – means case in which all credible investigative leads have been exhausted.

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

The following standards shall be met when collecting samples for the purposes of DNA analysis:

4.1. Representatives of the West Virginia Division of Corrections and/or Regional Jail Authority, Sheriff's Department or other authorized agency of the criminal justice system, working in conjunction with the West Virginia State Police, shall have a DNA sample collected from:

a. All individuals convicted of any offense specified in West Virginia Code §15-2B-6.

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.

c. If an individual is required to register as a sex offender and has not submitted a sample to the DNA Database, a sample will be collected by the State Police detachment the offender reports to. A WV DNA Collection kit with buccal swabs will be used.

d. When an individual is under the supervision of the criminal justice system as a result of a reciprocal agreement with another state for a felony conviction, that individual shall provide a DNA sample unless documented proof that a DNA sample has already been provided and uploaded to NDIS.

e. Any individual, upon notification, who was convicted of a qualifying offense and was released from supervision by the criminal justice system without giving a DNA sample.

4.2. Only a licensed registered professional nurse, doctor of medicine or osteopathy, or a trained medical technician may draw a blood sample. The WVSP Kit shall be used for the withdrawal of blood only for the purpose of DNA Databank analysis.

4.3. The blood shall be drawn using the sterile, previously unused, needles and storage vessels provided in the 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.

~~4.4. Approved individuals shall collect the DNA sample following the guidelines provided in the kit or per communication with the CODIS Administrator or designee.~~

4.54. The CODIS Administrator or his designee may permit the replacement of the blood tube or other collection material by the collection facility with sterile collection material via communication with the State Police.

4.65. The collection facility shall confirm the identity of the individual whose sample is collected with an identification card bearing a photograph or through another means that would positively identify the DNA donor. Only one donor may be processed at a time to avoid potential mislabeling or misidentification of the samples.

4.76. The kit will include one information card to be used by the Biochemistry Section. The collection facility shall complete the information card in full at the time of collection according to the instructions included in the kit. The collection facility shall also complete the fingerprint identification block on the information card at the time of sample collection. Both the right and left thumb prints shall be placed in the corresponding fingerprint identification block. 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 information card.

4.87. A second individual shall verify the data on the information card when possible. The witness shall sign the information card on the appropriate signature line.

4.98. The collection facility shall ensure that the collected DNA sample and the completed information card are placed in the Kit according to the instructions, sealed, and mailed immediately to:

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

4.109. The collection facility obtaining the DNA sample shall maintain the logbook provided by the State Police containing the following information: the 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.

4.110. The collection facility shall provide the Biochemistry Section with a copy of the log book containing entries from the previous three months on a quarterly basis each calendar year. The copy of the log book shall be sent to:

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

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

4.1211 The agency having custody, control or providing supervision of persons convicted of a qualifying offense may develop rules and policies detailing the time and manner of sample collection as long as they do not conflict with the WV Code, these legislative rules and are made in consultation with the West Virginia State Police Forensic Laboratory CODIS Administrator or designee. A WV DNA Collection kit must be used to obtain the DNA sample and the personal information card must be completed.

4.1312. The court sentencing a person convicted of a qualifying offense to probation shall order, as a condition of probation, that the convicted person report to the local sheriff's department to provide a DNA sample within 30 days. If the Sheriff's Department has already collected a DNA sample from the person, a second sample does not need to be collected.

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

The CODIS Administrator or his designee is responsible for receipt of samples collected under this rule, and shall meet the following standards:

5.1. The CODIS Administrator or his designee shall record the following on the kit information card: the date of reception, the individual receiving the kit and the submitting facility if needed.

5.2. The CODIS Administrator or his designee shall enter information from the Kit's information card into the appropriate computer file. The card shall be labeled with a unique identifier and shall be filed in a secure 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.

5.3. Each 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 Kit. Each prepared stain card shall be labeled with unique identifiers. Samples shall be prepared for long term storage based on the sample medium. All prepared stains shall be stored, upon drying, in sequential order in a long-term storage device. 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.

§81-9-6. Transport and Receipt of DNA Samples to MUFSC for DNA Analysis.

The CODIS Administrator or his designee shall be responsible for transportation to and receipt from MUFSC of DNA samples and shall meet the following standards:

6.1. DNA samples prepared for transport shall only be labeled with the assigned unique identifier.

6.2. The CODIS Administrator or designee shall be responsible for transporting the DNA samples to MUFSC. A 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.

6.3. MUFSC, upon receipt of the DNA samples shall log the date of receipt for each sample 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.

6.4. Upon receipt, DNA samples shall be stored in a secure, medium appropriate storage device. A refrigerated storage device shall be connected to an auxiliary power source in the event of power failures.

6.5. MUFSC shall document all transactions involving the DNA samples including internal transfers, transfers of DNA samples to the Biochemistry Section or destruction of DNA samples under the authority of the CODIS Administrator or his designee. Any liquid samples will be destroyed upon confirmation, in writing, of a successful upload of the DNA profile to the national database (NDIS) by the CODIS Administrator.

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

MUFSC shall perform the handling, processing and analysis of DNA samples 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:

7.1. Only personnel who have successfully completed the required proficiency test(s) approved by the State Police shall conduct DNA analysis on the DNA samples submitted by the State Police.

7.2. Only MUFSC personnel who have their personal DNA profiles on file with the State Police shall conduct DNA analysis on DNA samples submitted by the State Police.

7.3. The State Police shall conduct periodic quality control inspections and/or audit reviews of MUFSC. MUFSC shall conduct DNA analysis according to a State Police approved quality assurance program.

7.4. All DNA analysis data shall be generated using amplification kits approved by the Biochemistry Section and shall be forwarded to the Biochemistry Section for inspection and approval.

7.5. All DNA data generated by MUFSC shall be stored in a format compatible with the Combined DNA Index (CODIS) employed by the State Police and the FBI. Data generated at Marshall MUFSC 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.

In order to safeguard the donor's personal privacy, the following standards shall apply to the gathering and exchange of information:

8.1. Only the information required to generate investigative leads shall be entered into CODIS. Names, addresses, criminal histories or other personally identifiable information shall not be included.

8.2. The Biochemistry Section shall restrict access to DNA analysis records to criminal justice DNA laboratories participating in NDIS. The Biochemistry Section shall release a DNA record to other laboratories only when a potential DNA match is discovered. The Biochemistry Section may release identifying information only upon the verified request of an investigating law enforcement or governmental agency for limited purposes including law enforcement identification, judicial proceedings and identification of human remains or missing persons.

8.3. Samples, stripped of all identifying information, may be used by the West Virginia State Police Forensic Laboratory for identification research, protocol development, quality control purposes and population statistics databases. These samples may also be provided to MUFSC for similar purposes.

8.34. The West Virginia DNA Databank computer software shall employ user authentication and access control. The software shall uniquely identify each user 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. User authority shall be segregated to limit the activities that one user may perform as opposed to other users.

8.45. The computer housing the CODIS software shall employ user authentication and access control. The software shall uniquely identify each user. The CODIS Administrator or his designee shall be responsible for limiting the activities one user may perform as opposed to other users.

8.56. Confirmation of in-state searches of 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, authorized Biochemistry Section personnel shall generate a match report. The match report maybe used to establish probable cause by the investigating agency to obtain a court order for the collection of a fresh reference sample.

8.67. The CODIS Administrator or his designee shall ensure that 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.

8.8. A defendant is entitled only to his or her own DNA sample for the purposes of criminal defense or appeal.

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

Authorized personnel assigned to the Biochemistry Section shall supervise the expungement of DNA analysis records based on the following standards:

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

9.2. The Biochemistry Section shall maintain a file of all expungement orders received and processed.

9.3. 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 of the computer files of the donor shall be deleted from the state (CODIS) and national (NDIS) databases and the Biochemistry Section shall destroy the corresponding information card, and any copies that may exist on file. The Biochemistry Section shall destroy all corresponding 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 DNA sample. The Biochemistry Section shall destroy DNA samples according to accepted safety guidelines for biohazard materials.

9.4. The Biochemistry Section shall send a letter of expungement to the court of record upon compliance with the court order.

§81-9-10. Collection of fees from convicted offenders.

10.1. A fee of \$150 shall be automatically assessed on each person convicted of a qualifying offense unless the sentencing court finds that undue hardship would result. The sentencing court or the agency responsible for collecting the DNA sample shall collect this fee.

10.2. All moneys collected from this fee shall be deposited in a special account within the State Treasury known as the "West Virginia State Police DNA Database Account".

10.3. The Superintendent of the West Virginia State Police shall administer the "Account". A committee comprised of the West Virginia State Police Forensic Laboratory Director, State CODIS Administrator and a representative of the Sheriff's Association will advise the Superintendent on expenditure priorities.

10.4. Expenditures from the fund are authorized from collections for purposes associated with the processing of DNA samples for the DNA database including, but not limited to, collection kits and any expenses incurred collecting, processing, analyzing, reviewing and uploading DNA samples to the DNA Database.

§81-9-11. Procedures for Partial Matches with the DNA Database

Partial matches may occur with the DNA Database when searches are conducted as a normal course of business. Partial matches may indicate the possibility that a relative of the candidate offender may be the source of the DNA identified from the evidence. To eliminate as many adventitious (false) matches as possible, all of the following parameters must be met:

11.1 Partial match evaluations are limited to criminal investigations involving murder, kidnapping and first and second-degree sexual assault as defined in West Virginia Code. All other credible investigative leads must have been exhausted before the partial match evaluation begins.

11.2 All available CODIS loci, especially the CODIS core loci, should be used for searching. The CODIS core loci are necessary if requests for searches are made to contiguous states.

11.3 The DNA profile identified from the evidence must be from a single source or a single source profile must be deconvoluted from a mixture with as many heterozygous loci as possible.

11.4 There must be sufficient DNA material from the original evidentiary sample available to conduct additional testing such as Y-STRs or mtDNA testing as appropriate.

11.5 A kinship statistical analysis should be performed to determine the likelihood that a partial match is with a relative versus a nonrelative. The statistical software should be applicable to this type of analysis. Thresholds as recommended by the Scientific Working Group on DNA Analysis Methods (SWGDM) should be used to determine whether to continue with the evaluation.

11.6 Non-forensic records should be reviewed to determine the possible familial connections to the candidate offender.

11.7 The investigating agency must agree to pursue the investigation if name(s) are released as a result of the partial match evaluation. Any communications with the investigating agency must clearly state that the partial match is not an identification but an investigative lead.

11.8 A West Virginia State Police investigator with experience in cold case investigations may be used by the Laboratory to identify and review non forensic records as a part of the evaluation prior to release of any names to the investigating agency.