

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

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OFFICE WEST VIRGINIA  
SECRETARY OF STATE

Form #4

**NOTICE OF RULE MODIFICATION OF A PROPOSED RULE**

AGENCY: DHHR - Bureau for Public Health TITLE NUMBER: 64

CITE AUTHORITY: WV Code §16-1-4 and §§17C-5-4, 17C-5-5, 17C-5-6 and 17C-5-8.

AMENDMENT TO AN EXISTING RULE: YES  NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 10

TITLE OF RULE BEING AMENDED: Methods and Standards for Chemical Tests for Intoxication

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: \_\_\_\_\_

TITLE OF RULE BEING PROPOSED: \_\_\_\_\_

THE ABOVE PROPOSED LEGISLATIVE RULES, FOLLOWING REVIEW BY THE LEGISLATIVE RULE MAKING REVIEW COMMITTEE, IS HEREBY MODIFIED AS A RESULT OF REVIEW AND COMMENT BY THE LEGISLATIVE RULE MAKING REVIEW COMMITTEE. THE ATTACHED MODIFICATIONS ARE FILED WITH THE SECRETARY OF STATE.

*Martha Yague Walker*  
Authorized Signature

## Summary of Proposed Rule

It has been fourteen years since the last update to 64 C.S.R. 10. This emergency rule, as proposed, serves to update the methods and standards for chemical testing to allow for the advances in technology in the devices used for the testing of breath for alcohol content which is required in order to replace the aging equipment currently used by law enforcement.

APPENDIX B

**FISCAL NOTE FOR PROPOSED RULES**

Rule Title: Methods and Standards for Chemical Tests for Intoxication, 64CSR10

Type of Rule:  Legislative  Interpretive  Procedural

Agency: DHHR - Bureau for Public Health & WV State Police

Address: 350 Capitol Street, Room 702  
Charleston, WV 25301  
Ann Spaner, Director, Public Health Regulations  
Steve Compton - Attorney w/ State Police @ 746-2425  
scompton@wvsp.state.wv.us

Phone Number: 558-0035 or 558-2971 Email: annspaner@wvdhhr.org

**Fiscal Note Summary**

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

This rule will have no impact on costs or revenues of state government. The rule modification is primarily an update to permit the use of new technology for performing chemical tests for intoxication. The equipment has been purchased and the new devices are currently in use.

**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.

<b>FISCAL YEAR</b>			
Effect of Proposal	2005 Increase/Decrease (use "--")	2006 Increase/Decrease (use "--")	Fiscal Year (Upon Full Implementation)
<b>1. Estimated Total Cost</b>	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
Equipment	0.00	0.00	0.00
Other	0.00	0.00	0.00
<b>2. Estimated Total Revenues</b>	0.00	0.00	0.00

Rule Title: Methods and Standards for Chemical Tests for Intoxication, 64CSR10

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

There will be no additional costs incurred. The rule modifies the existing methods and standards and it does not require any additional manpower or expenses.

**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 modification of the rule does not have a fiscal impact.

Date: \_\_\_\_\_

Signature of Agency Head or Authorized Representative  
Martha Yeager Walker

**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: April 16, 2003

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: *(Agency Name, Address & Phone No.)* Department of Health and Human Resources,  
Bureau for Public Health

LEGISLATIVE RULE TITLE: Methods and Standards for Chemical Tests for Intoxication

1. Authorizing statute(s) citation §16-1-4 and §§17C-5-4, 17C-5-5, 17C-5-6 and 17C-5-8

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

January 28th, 2004

b. What other notice, including advertising, did you give of the hearing?

c. Date of Public Hearing(s) *or* Public Comment Period ended:

March 10, 2004

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)

April 16, 2004

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

Ann Spaner, Director, Public Health Regulations, Bureau for Public Health, Room 702, 350 Capitol St., Charleston, WV 25301-3712; AND ALSO, Ellie Marshall, Administrative Assisstant, BPH Office of Laboratory Services, 167 11th Ave., So. Charleston, WV 25303-1137

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- 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)

2nd Lt. Douglas Parsons, State Police, 725 Jefferson Road, So. Charleston, WV 25309-1698

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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

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b. Date of hearing or comment period:

Comment period ran from Jan. 28, 2004 to March 10, 2004

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

**TITLE 64**  
**LEGISLATIVE RULE**  
**DIVISION OF HEALTH**  
**BUREAU FOR PUBLIC HEALTH**

**SERIES 10**  
**METHODS AND STANDARDS FOR CHEMICAL**  
**TESTS FOR INTOXICATION**

**§64-10-1. General.**

1.1. Scope. -- This legislative rule establishes the methods and standards relating to implied consent for chemical test for intoxication pursuant to appropriate articles of Chapter 17C of the West Virginia Code.

1.2. Authority. -- W. Va. Code §§~~16-1-7, 17C-5-2, et seq.~~ §16-1-4 and §§17C-5-4, 17C-5-5, 17C-5-6 and 17C-5-8.

1.3. Filing Date. -- ~~April 6, 1990.~~

1.4. Effective Date. -- ~~April 6, 1990.~~

~~0.5. Repeal of Former Rule. -- This rule supersedes and repeals Methods and Standards for Chemical Test for Intoxication, West Virginia Department of Bureau for Public Health Legislative Rules, 64 CSR 10, 1987-1990.~~

**§64-10-2. Application and Enforcement.**

2.1. Application. ~~This legislative rule shall apply to law enforcement officers as follows: a member of the State department of public safety; any sheriff or deputy sheriff of any county; any member of a police department in any municipality as defined in Chapter 8, Article 1, Section 2 of the West Virginia Code; and any conservation officer of the department of natural resources; and to those persons suspected to be driving a motor vehicle while intoxicated. The provisions of this rule are applicable to all law enforcement agencies and personnel engaging in breath, blood, urine, alcohol and/or drug analysis in this state; and to those persons suspected of driving under the influence of alcohol and/or drugs.~~

~~2.2. Enforcement. The enforcement of this legislative rule is vested with the director.~~

**§64-10-3. Definitions.**

3.1. Agency means a law enforcement agency in the state engaging in breath, blood, and/or urine alcohol testing.

~~3.1 Accuracy Inspection Test a test conducted by a certified breath test operator to determine the~~

~~performance of each breath testing instrument in accordance with the procedures set forth in Section 7.2 of this rule.~~

3.2. Alcohol means ethyl alcohol and may include methyl alcohol and isopropyl alcohol.

~~3.2.~~ 3.3. Alcohol breath analysis means Chemical chemical testing of a sample of a person's expired breath, using a breath test instrument designed for this that purpose, in order to determine the concentration of ethyl alcohol in the person's blood.

3.4. Bureau means the West Virginia Bureau for Public Health.

3.5. Calibrating unit means a device designed to produce a predictable alcohol concentration reading on a breath alcohol test instrument.

3.6. Certified instrument operator means a person who has successfully completed a specialized training program and has been certified by the Bureau to perform breath alcohol testing using instruments approved for that purpose.

3.7. Chemical Test or Testing means an analysis performed on a biological material, including, but not limited to breath, blood, or urine, to determine the identity or concentration, or both, of particular constituents such as alcohol or controlled substances. Test procedures may rely on one or more physical or chemical properties of the constituents and utilize use instrumental or chemical analysis techniques to accomplish the determination.

3.8. Commissioner means the commissioner of the West Virginia Bureau for Public Health or his or her lawful designee.

~~3.4. Department the West Virginia department of health.~~

~~3.5. Director the director of the West Virginia department of health or his or her lawful designee.~~

3.9. Dry gas standard means a sealed pressurized sample of gas that contains a predictable alcohol concentration that can be used to verify the accuracy of breath test instruments.

3.10. Evidential test sequence means one adequate reference standard analysis, one adequate breath sample analysis, and a second adequate reference standard analysis.

3.11. Instrument means an item or combination of items of equipment designed to make a measurement of alcohol concentration.

3.12. Instrument blank analysis means a test of an ambient air sample to insure that the instrument produces a zero result.

3.13. Lot means an entire quantity batch of a reference standard.

3.14. Qualitative breath alcohol analysis means a test of a person=s breath, the results of which indicate the presence or absence of alcohol.

3.15. Quantitative breath alcohol analysis means a chemical test of a person's breath that yields a specific result in grams of alcohol per 210 liters of breath.

3.16. Reference standard means an aqueous ethanol solution compounded for use in a calibrating unit which, when equilibrated with air yields a predictable alcohol concentration or a sealed pressurized sample of gas that contains a predictable alcohol concentration that can be used to inspect or verify the accuracy of breath test instruments.

~~3.7.~~ 3.17. Simulator Solution B means an aqueous standard ethanol solution which, when equilibrated with air in a breath simulator instrument produces an air-alcohol mixture of 0.10 grams W/V that can be used to inspect or verify the accuracy of breath test instruments.

~~3.8~~ 3.18. Simulator Test means the testing of a sample of simulator solution vapor, using a breath test instrument in order to ~~determine~~ verify the accuracy of the breath test instrument.

~~3.9.~~ 3.19. W/V means weight divided by volume.

**§64-10-4. Preliminary Breath Analysis; Designation of Testing Instrument; Compliance with Methods and Standards Required.**

4.1. Each law enforcement agency ~~utilizing~~ using a preliminary breath testing instrument ~~or device~~ shall designate ~~such~~ the testing instrument ~~or device~~ for the purpose of administering a preliminary breath analysis pursuant to WV Code §17C-5-5. ~~Such~~ The designation of the testing instrument ~~or device~~ shall be filed with the department Bureau on a form provided by the department Bureau.

4.2. Each law enforcement agency shall comply with the methods and the standards established by this rule.

4.3. The department Bureau shall maintain a registry of approved testing instruments ~~or devices~~.

4.4. All instruments ~~or devices~~ utilized used for the purpose of preliminary ~~breath tests~~ alcohol breath analysis shall be approved in writing by the ~~director~~ Commissioner.

4.5. Approvals and designations of preliminary breath testing instruments ~~or devices~~ in effect at the time this rule becomes effective ~~shall~~ continue in effect.

**§64-10-5. Breath Analysis; Preliminary Breath Test; Standards and Methods.**

5.1. The use of the approved instrument ~~or device~~ shall adhere to the manufacturer's specifications for operation and shall include any maintenance specified by the manufacturer.

5.2. The following general methods ~~shall~~ apply in extracting breath for preliminary breath analysis:

(a) The preliminary ~~breath test~~ alcohol breath analysis shall be administered ~~as soon as possible~~ after the law enforcement officer ~~or police officer~~ has a reasonable belief that the person has been driving while under the influence of alcohol. The law enforcement officer shall prohibit the person from drinking alcohol or smoking for at least fifteen minutes before conducting the test.

(b) ~~Where~~ If the testing instrument ~~or device~~ requires contact with the mouth of the tested ~~individual,~~ person the law enforcement officer ~~or police officer~~ conducting the preliminary ~~breath test~~ alcohol breath analysis shall ~~utilize~~ use an individual disposable mouthpiece for each person tested.

(c) The preliminary ~~breath test~~ alcohol breath analysis may be administered by a law enforcement officer ~~or police officer trained and certified as a secondary breath test operator with~~ who is a certified instrument officer and who has additional training, theory and practical exercise as recommended by the manufacturer.

5.3. The results of a preliminary alcohol breath analysis shall be used solely for the purpose of guiding the officer in deciding whether an arrest should be made.

**§64-10-6. Designation of Secondary Test; Compliance with Methods and Standards Required; Certification of Law Enforcement Officers Required.**

6.1. Each law enforcement agency shall designate a type of test, either breath, blood or urine for the purpose of administering a secondary test alcohol breath analysis incidental to lawful arrest for the offense of driving a motor vehicle in this state while under the influence of alcohol. ~~Such~~ The designation of the test alcohol breath analysis shall be filed with the ~~department~~ Bureau on a form provided by the ~~department~~ Bureau.

6.2. Each law enforcement agency shall comply with the methods and the standards established by this rule.

6.3. The ~~department~~ Bureau shall maintain a registry of approved tests alcohol breath analysis instruments inclusive of methods and standards for the proper conduct of the tests alcohol breath analysis.

6.4. Secondary test alcohol breath analysis designations in effect at the time this rule becomes effective shall continue in effect.

6.5. Each law enforcement officer administering a secondary alcohol breath analysis shall be ~~trained and certified in the procedures of operation for such testing instrument~~ a certified instrument operator.

6.6. The ~~department~~ Bureau shall certify each operator properly trained in the procedures of operation and shall issue a certificate to each trained individual ~~so-trained~~.

6.7. As a minimum training requirement each law enforcement officer shall ~~have completed~~ complete the Basic Training Program for Breath Examiner Specialist Course as prescribed by the United States Department of Transportation or an equivalent course prior to certification. ~~Such~~ This course shall consist of classroom and laboratory training including review sessions and examinations.

6.8. Each law enforcement officer desiring ~~certification to administer the secondary breath analysis to~~ be a certified instrument operator shall apply to the ~~department~~ Bureau on a form provided by the ~~department~~ Bureau.

6.9. Certifications of law enforcement officers in effect at the time this rule becomes effective shall

continue in effect.

**§64-10-7. Breath Analysis; Secondary Breath Test; Standards; Accuracy Inspection Tests; Methods.**

7.1. Instrument Standards - Instruments for breath alcohol analysis shall meet the following standards:

(a) The designated instrument and any related accessories shall be capable of the collection and the analysis of breath specimens which approach alveolar composition;

(b) The designated instrument shall be capable of analyzing a blank sample and of analyzing a suitable ~~simulator solution~~ reference standard; ~~such as air equilibrated with a reference solution of known alcohol content at a known temperature.~~

(c) The designated instrument shall be capable of the analysis of a ~~simulator solution~~ reference standard within accuracy and precision limits of plus or minus 0.01 grams percent W/V or higher;

(d) The designated instrument shall be capable, in a controlled experiment, of alcohol breath analysis which results in a determination of a person's blood alcohol concentration which has a correlation with his or her actual blood alcohol concentration as measured on a blood sample taken at approximately the same time as the breath sample;

(e) The instrument shall be capable of alcohol breath analysis which results in a concentration less than 0.01 grams of alcohol per 210 liters of breath ~~one hundred milliliters of blood~~ when alcohol-free persons are tested; and

~~(f) The designated instrument shall have its accuracy checked in accordance with subsection 7.2 of this rule. Each law enforcement agency shall maintain a record of such accuracy checks including the type of test employed and the date of such accuracy checks. A certified copy of the record of the accuracy inspection test shall be admissible as evidence in any criminal or administrative proceeding as though: 1) the original record had been offered; 2) the custodian had been present to testify to the record keeping process; and, 3) the individual conducting the test had been present to certify the test result.~~

(f) ~~(g)~~ Any model of instrument ~~utilized~~ used for the purpose of secondary breath analysis shall be approved in writing by the ~~department~~ Bureau. Such The instrument shall meet or exceed the standards contained ~~herein~~ in this subsection.

~~7.2. Accuracy Inspection Test~~

~~7.2.1. Frequency - An accuracy inspection test shall be conducted on every test instrument by a certified breath test operator at least once every six months, provided, however, that all instruments in use at the time this rule becomes effective shall be tested within forty-five days from June 12, 1987.~~

~~7.2.2. Procedures~~

~~7.2.2.1. An average deviation test to determine the accuracy of the instrument shall be conducted in the following manner:~~

~~(a) A total of five tests shall be conducted.~~

~~(b) A simulator calibrating unit containing simulator solution a reference standard shall be used.~~

~~(c) The results of all five tests shall be retained be recorded in a master log, which shall be kept for each certified instrument.~~

~~(d) Test results shall be recorded to the third decimal place, if the third decimal place is available.~~

~~7.2.2.2. The breath testing instrument does not pass the accuracy inspection test and shall be removed from service if:~~

~~(a) One or more of the five tests yields a result less than 0.090 0.01 per cent W/V or greater than 0.110 0.01 per cent W/V of the target value; when a calibrating unit containing a aqueous ethanol reference solution is used. One or more of the five tests yields a result less than .005 or more than .005 of the target value when a sealed pressurized sample of gas containing a predictable alcohol concentration is used.~~

~~(b) The average deviation derived by adding the absolute values of the differences between the results of the five tests and the target value a constant value of .10 percent W/V and dividing the total of these absolute values by five exceeds 0.005 per cent W/V.~~

~~(c) Example of accuracy inspection test: (See Table 64-10A at the end of this rule.)~~

~~7.2.2.3. A breath testing instrument which has been removed from service for failure to pass an accuracy inspection test shall be adjusted or repaired and pass undergo an accuracy inspection test prior to being placed back into service.~~

~~7.2.2.4. The certified breath test operator shall perform the procedures set forth in Subsection 7.2.2.1 in accordance with accepted standard procedures for operation specified by the manufacturer of the device.~~

~~7.3. 7.2. Methods - The following general methods shall apply in extracting breath for secondary breath analysis:~~

~~(a) The law enforcement officer shall keep the person individual being tested shall be under constant observation for a period of twenty minutes before the test is administered to insure that the individual person has nothing in his or her mouth at the time of the test and that he or she has had no food or drink or foreign matter in his or her mouth during the observation period.~~

~~(b) The individual administering the test certified instrument officer conducting the alcohol breath analysis shall perform the evidential test sequence a simulator test to insure ensure that the instrument is in proper working condition at the time the person's alcohol breath analysis test is being conducted.~~

~~(c) The test alcohol breath analysis shall be administered by a certified instrument operator and in accordance with this rule.~~

(d) ~~The law enforcement officer~~ certified instrument operator conducting the secondary alcohol breath analysis test shall ~~utilize~~ use an individual disposable mouthpiece for each person tested.

**§64-10-8. Blood Analysis; Standards and Methods.**

8.1. Methods of analyzing blood specimens for ethyl alcohol shall meet the following standards:

(a) The method ~~utilized~~ used shall be capable of separating and quantifying ethyl alcohol from the blood specimen;

(b) The method ~~utilized~~ used shall be capable of the analysis of a reference sample of known alcohol concentration within accuracy and precision limits of plus or minus 0.01 grams per cent W/V of the true value. These limits shall be applied to alcohol concentrations which are 0.01 grams per cent W/V or higher;

(c) The method ~~utilized~~ used shall be capable of blood alcohol analysis which results in a concentration less than 0.01 grams of alcohol per one hundred milliliters of blood when alcohol free persons are tested; and

(d) The gas-chromatographic method meets the ~~above~~ standards in this subsection for testing.

8.2. ~~The methods of collecting~~ Blood for alcohol analysis shall be collected as follows:

(a) The blood shall be drawn only by a licensed doctor of medicine or osteopathy, ~~or by a registered professional nurse, or by a trained medical technician at the place of their employment or any medical professional trained in phlebotomy;~~

(b) Sterile hypodermic needles and syringes shall be used. Sterile disposable units are recommended;

(c) The skin shall not be disinfected with ethyl alcohol. The use of non-alcoholic antiseptics, those which do not contain ethyl alcohol, including 1-1000 aqueous solution of mercuric chloride, aqueous benzalkonium chloride (zephiran), aqueous merthiolate, or other suitable aqueous disinfectants is acceptable;

(d) The quantity of alcohol found in serum shall be divided by a factor of 1.16 to determine the quantity of alcohol in the blood; and

~~(d)~~ (e) The container (tube or vial) ~~must~~ shall be clean and dry, and have an inert, airtight stopper.

**§64-10-9. Urine Analysis; Methods and Standards.**

9.1. The methods of analyzing urine specimens for ethyl alcohol shall meet the following standards:

(a) The method ~~utilized~~ used shall be capable of separating and quantifying ethyl alcohol from the urine specimen;

(b) The method ~~utilized~~ used shall be capable of the analysis of a reference sample of known alcohol concentration within accuracy limits of plus or minus 0.01 grams per cent W/V of the true value. These limits shall be applied to alcohol concentrations which are 0.01 grams per cent W/V or higher;

(c) The method ~~utilized~~ used shall be capable of urine alcohol analysis, which results in a concentration less than 0.01 grams of alcohol per one hundred milliliters of alcohol when alcohol free persons are tested;

(d) The gas-chromatographic method meets the ~~above~~ standards in this subsection for testing; and

(e) The quantity of alcohol found in the urine shall be divided by the factor of ~~4.3~~ 1.5 to determine the quantity of alcohol in the blood.

9.2. ~~The methods of collecting~~ Urine for alcohol analysis shall be collected as follows:

(a) The ~~individual~~ person shall empty his or her ~~urinary~~ bladder and discard the first specimen;

(b) Following a twenty-minute observation period as described in subsection 9.2(c) of this rule, the ~~individual~~ person shall void a sample of his or her urine into a clean dry container with an inert cap. The container shall be capable of holding at least ten milliliters of urine;

(c) The law enforcement officer shall keep the person ~~individual~~ being tested ~~shall be~~ under constant observation for a period of twenty minutes before the specimen for alcohol analysis is taken to insure that the ~~individual~~ person has nothing in his or her mouth at the time that the specimen is taken and that he or she has no food or drink or other foreign matter in his or her mouth during the observation period.

**~~§64-10-10. Severability.~~**

~~The provisions of this rule are declared to be severable. If any provision of this rule shall be held invalid, the remaining provisions shall remain in effect.~~

Table 64-10A.

## EXAMPLE OF ACCURACY INSPECTION TEST

<u>Simulator</u>	<u>Reading</u>	<u>Difference</u>
<u>Solution</u>		<u>(Absolute Value)</u>
.100	.099	.001
.100	.104	.004
.100	.098	.002
.100	.101	.001
.100	.102	.002
<u>.010</u>		<u>.002</u>
5		

Average deviation =  $\frac{.010}{5} = .002$  and  $.002$  is less than  $.005$ ; therefore the breath test instrument passes the accuracy inspection test.