

**WEST VIRGINIA
SECRETARY OF STATE**

KEN HECHLER

ADMINISTRATIVE LAW DIVISION

Form #3

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1989 DEC 28 PM 1:55

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

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

AGENCY: Board of Health TITLE NUMBER: 64

CITE AUTHORITY WV Code §16-1-7

AMENDMENT TO AN EXISTING RULE: YES NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

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

IF NO, SERIES NUMBER OF NEW 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.

George W. Lilley, Jr.
George W. Lilley, Jr., Ed.D.
Acting Administrator
Division of Public Health



STATE OF WEST VIRGINIA
DEPARTMENT OF HEALTH AND HUMAN RESOURCES

Building 6, Capitol Complex
Charleston, WV 25305

Gaston Caperton
Governor

M E M O R A N D U M

DATE: September 29, 1989

TO: George W. Lilley, Jr., Ed.D.
Acting Administrator
Division of Health

FROM: Taunja Willis Miller, Secretary *TW*
Department of Health and Human Resources

SUBJECT: Approval of Proposed Rule for Public Comment

Your August 25, 1989 filing of the proposed rule, Methods and Standards for Chemical Test for Intoxication, for public hearing is hereby ratified and approved.

TWM/kpg

FISCAL NOTE FOR PROPOSED RULES

FILED

Rule Title: Methods and Standards for Chemical Test for Intoxication

1989 AUG 25 PM 2:14

Type of Rule: Legislative Interpretive Procedural

Agency Board of Health Address Building 3, Capitol Complex
Charleston, WV 25305

1. Effect of Proposed Rule	ANNUAL		FISCAL YEAR		
	Increase	Decrease	Current	Next	Thereafter
Estimated Total Cost	\$	\$	\$ 0	\$ 0	\$ 0
Personal Services					
Current Expense					
Repairs and Alterations					
Equipment					
Other					

2. Explanation of above estimates. The addition of the conservation officers of the Department of Natural Resources to the law enforcement officers covered by the legislative rule will require training and certification of the new personnel. The conservation officers will attend the established classes at the WV State Police Academy sponsored by the WV Commission on Drunk Driving Prevention; therefore, minimal additional expense is associated with training. The Office of Laboratory Services of the Division of Health will be able to handle the additional records for the certified officers with minimal additional expenses associated with paperwork and postage.

3. Objectives of these rules:

To expand the definition of law enforcement officers for purposes of serious traffic offenses to include conservation officers of the Department of Natural Resources as established by H.B. 2389, passed April 5, 1989.

4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government. None.

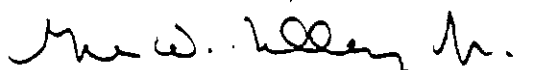
B. Economic Impact on Political Subdivisions; Specific Industries;
Specific groups of citizens. None

C. Economic Impact on Citizens/Public at Large.

The additional law enforcement officers involved in the Drunk Driving Prevention Program should help decrease the loss of property and life, thereby reducing the cost of insurance and health costs due to injury.

Date August 3, 1989

Signature of Agency Head or Authorized Representative



George W. Lilley, Jr., Ed.D.
Administrator, Division of Health

DATE: December 23, 1989

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: Board of Health

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

1. Authorizing statute(s) citation §16-1-7

2. a. Date filed in State Register with Notice of Hearing:

August 25, 1989

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

Notice was mailed to all county prosecutors, county health departments and various State departments and associations.

c. Date of hearing (s): September 29, 1989

d. Attach list of persons who appeared at hearing, comments received, amendments, reasons for amendments.

Attached X No comments received

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

December 23, 1989

f. Name and phone number of agency person to contact for additional information:

Kay Howard 348-3223

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: _____

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

d. Attach findings and determinations and reasons:

Attached _____

WEST VIRGINIA BOARD OF HEALTH
RULE ABSTRACT
July 24, 1989

Title: Methods and Standards for Chemical Test for Intoxication

CSR Title and Series: 64 CSR 10

Type: Legislative

Summary: This amendment adds conservation officers to the application section of the rule in accordance with H.B. 2389 passed by the 1989 Legislature. This new law added conservation officers of the Department of Natural Resources to the definition of law enforcement officers authorized to administer blood, breath and urine tests for driving under the influence of alcohol, controlled substances or drugs. A few minor technical corrections are made.

For further information contact: Regulatory Development Section, telephone 348-3223 or Dr. Timothy Sherrill, Director, Office of Laboratory Services, telephone 348-3530, Division of Health, Capitol Complex, Charleston, West Virginia 25305.

[PROPOSED]

TITLE 64

WEST VIRGINIA LEGISLATIVE RULES
DIVISION OF PUBLIC HEALTH

METHODS AND STANDARDS FOR CHEMICAL TEST FOR INTOXICATION

Series 10

1990

For filing with the Legislative
Rule-Making Review Committee

[PROPOSED]

WEST VIRGINIA LEGISLATIVE RULES
DIVISION OF PUBLIC HEALTH

METHODS AND STANDARDS FOR CHEMICAL TEST FOR INTOXICATION

64 CSR 10

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TITLE 64
WEST VIRGINIA LEGISLATIVE RULES
DIVISION OF PUBLIC HEALTH

SERIES 10
METHODS AND STANDARDS FOR CHEMICAL TEST 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** - §16-1-7. Related - §17C-5-2, et seq.

1.3. **Filing Date** -

1.4. **Effective Date** -

1.5. Notice of Public Hearing - August 25, 1989

1.6. Public Hearing - September 29, 1989

1.7. Approval Date -

~~1.5-1.8~~ **1.8 Supersession and Repeal of Former Regulations** - This rule supersedes and repeals ~~Methods and Standards Relating to Implied Consent for Chemical Test for Intoxication, West Virginia Department of Health Legislative Rules, Series 10, 1983, and replaces Methods and Standards for Chemical Test for Intoxication, West Virginia Department of Health Legislative Rules, filed on an emergency basis July 22, 1986. 64 CSR 10, 1987.~~

§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; or 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.

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

§64-10-3. Definitions

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 Breath Analysis** - Chemical testing of a sample of a person's expired breath, using a breath test instrument designed for this purpose, in order to determine the concentra-

tion of ethyl alcohol in the person's blood.

3.3. **Chemical Test or Testing** - 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 instrumental or chemical analysis techniques to accomplish the determination.

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.

3.6. **Medical Technician** - Shall include persons trained as medical technicians, emergency medical technicians or phlebotomists.

3.7. **Simulator Solution** - 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. **Simulator Test** - A testing of a sample of simulator solution vapor, using a breath test instrument in order to determine the accuracy of the breath test instrument.

3.9. **W/V** - Weight divided by volume.

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

4.1. Each law enforcement agency utilizing a preliminary breath testing instrument or device shall designate such testing instrument or device for the purpose of administering a preliminary breath analysis pursuant to Chapter 17C, Article 5, Section 5 of the West Virginia Code. Such designation of the testing instrument or device shall be filed with the department on a form provided by the department.

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

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

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

4.5. Approvals and designations of preliminary breath test-

ing 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 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.

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

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

5.3. The results of a preliminary 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 incidental to lawful arrest for the offense of driving a motor vehicle in this state while under the influence of alcohol. Such designation of the test shall be filed with the department on a form provided by the department.

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

6.3. The department shall maintain a registry of approved tests inclusive of methods and standards for proper conduct of the tests.

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

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

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

6.7. As a minimum training requirement each law enforcement officer shall have completed 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 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 shall apply to the department on a form provided by the department.

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, 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 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 breath alcohol analysis which results in a determination of a person's blood alcohol concentration which has a correlation with his 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 breath 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.

(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.

(g) Any instrument utilized for the purpose of secondary breath analysis shall be approved in writing by the department. Such instrument shall meet or exceed the standards contained herein.

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 of the effective date.

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 containing simulator solution shall be used.

(c) The results of all five tests shall 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 0.09 per cent W/V or greater than 0.11 per cent W/V; or

(b) The average deviation derived by adding the absolute values of the differences between the results of the five tests and a constant value of .10 per cent 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 regulation 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 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. Methods - The following general methods shall apply in extracting breath for secondary breath analysis.

(a) The individual being tested shall be under constant observation for a period of twenty minutes before the test is administered to insure that the individual 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 shall perform a simulator test to insure that the instrument is in proper working condition at the time the test is being conducted.

(c) The test shall be administered by a certified operator and in accordance with this rule.

(d) The law enforcement officer conducting the secondary breath test shall utilize 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 shall be capable of separating and quantitating ethyl alcohol from the blood specimen.

(b) The method utilized 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 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.

(d) The gas-chromatographic method meets the above standards for testing.

8.2. The methods of ~~extracting~~ collecting blood for alcohol

analysis shall be 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.

(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 container (tube or vial) must 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 shall be capable of separating and quantitating ethyl alcohol from the urine specimen.

(b) The method utilized 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 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 for testing.

(e) The quantity of alcohol found in the urine shall be divided by the factor of 1.3 to determine the quantity of alcohol in the blood.

9.2. The methods of ~~extracting~~ collecting urine for alcohol analysis shall be as follows:

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

(b) Following a twenty minute observation period as described in §9.2(c), the individual 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 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 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 Solution</u>	<u>Reading</u>		<u>Difference (Absolute Value)</u>
.100	.099	=	.001
.100	.104	=	.004
.100	.098	=	.002
.100	.101	=	.001
.100	.102	=	.002
	<u>.010</u>	=	.002
	5		

Average deviation = .002 and .002 is less than .005; therefore the breath test instrument passes the accuracy inspection test.

Proposed Rules
Public Comments Received
Discussion and Response

Title: Methods and Standards for Chemical Test for Intoxication,
West Virginia Division of Health Legislative Rules,
64 CSR 10

A public hearing regarding this rule was held on September 29, 1989. No one appeared at the hearing. One comment was received by mail (copy attached).

(1) Comment (Patricia Stiller, Assistant Prosecutor, Monongalia County): I would like to see some additional language contained in §1.1 of the Rule entitled Scope, which would establish that this Rule specifically relates to implied consent chemical tests for intoxication pursuant to Chapter 17C of the W. Va. Code. Occasionally, when an injured DUI arrestee refuses to consent to a chemical test for intoxication under our Implied Consent law pursuant to this Rule, our office uses hospital blood serum alcohol test results as evidence of intoxication. Hospital blood serum alcohol tests are not covered by the above Rule, however there have been attempts by defense attorneys to insist that they are, and since the officer did not follow the standards set out in the Rule, the hospital test must not be admitted.

Response: The objective of the comment appears to be to permit the admission into court of hospital blood serum alcohol tests conducted other than in accordance with this rule. The intent of the proposed amendments was simply to bring the rule into conformance with a 1989 legislative change which added conservation officers of the Department of Natural Resources to the definition of law enforcement officers authorized to administer blood, breath and urine tests for driving under the influence of alcohol, controlled substances or drugs. The suggested change goes well beyond the intent of the proposed amendment. Additionally, the suggested change would extend the rule into an area in which the Board has no authority, that of determining the use of the results of tests for the presence of alcohol. Such a change would require a legislative act.

Proposed: No change

OFFICE OF THE



PROSECUTING ATTORNEY

SUSAN B. TUCKER

MONONGALIA COUNTY COURT HOUSE
MORGANTOWN, WEST VIRGINIA 26505

CONSUMER PROTECTION DIVISION
(304) 291-7234

MAIN OFFICE TELEPHONE
(304) 291-7250

September 14, 1989

Dr. George W. Lilley, Jr.
Acting Administrator
Division of Health Regulatory Development
Section
Building 3, Room 507
Capitol Complex
Charleston, WV 25305

RE: Proposed amendments for rule
"Methods and Standards for
Chemical Test for Intoxication"

Dear Dr. Lilley:

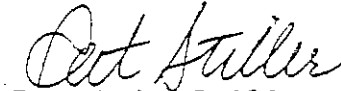
I have received a notice of public hearing on proposed amendments to the above legislative rule concerning chemical testing for intoxication which is used by law enforcement agencies in drunk driving arrests.

My only comment is that I would like to see some additional language contained in §1.1 of the Rule entitled Scope, which would establish that this Rule specifically relates to implied consent chemical tests for intoxication pursuant to Chapter 17C of the W.Va. Code. Occasionally, when an injured DUI arrestee refuses to consent to a chemical test for intoxication under our Implied Consent law pursuant to this Rule, our office uses hospital blood serum alcohol test results as evidence of intoxication. Hospital blood serum alcohol tests are not covered by the above Rule, however there have been attempts by defense attorneys to insist that they are, and since the officer did not follow the standards set out in the Rule, the hospital test must not be admitted.

Page Two
Letter to Lilley
Dated 9/14/89

That is my only comment regarding this Rule and I see the other amendments written into the copy of the Rule I received as appropriate.

Very truly yours,



Patricia Stiller
Assistant Prosecutor

PS/rmc