

PROMULGATION HISTORY ABSTRACT

AGENCY: Department of Health

RULE TITLE Methods and Standards for Chemical Test for Intoxication

SERIES # 10

RULE TYPE: Legislative

NEW RULE: _____; AMENDMENT OF EXISTING RULE: X

SECTION(S) AMENDED: Sections One through Ten

DATE FILED PROPOSED RULE OR AMENDMENTS FOR PUBLIC HEARING: 11-15-85

DATE(S) OF PUBLIC HEARING: 12-16-85

For Interpretive, Procedural or Exempt Rules ONLY

DATE AGENCY ADOPTED RULE FILED: _____

DATE EFFECTIVE: _____

For Legislative Rules ONLY

DATE AGENCY APPROVED RULE FILED: 7-17-86

DATE OF ACTION BY L.R.M.R.C. : Approved 9-7-86, Amended _____

Approve Part _____, Reject _____

MODIFIED TO MEET L.R.M.R.C. COMMENTS; yes X, no _____

BILL OF AUTHORIZATION # 761, PASSED ON 5/13/87

AMENDED BY THE LEGISLATURE, yes _____, no X

FINAL FILING ON 6-12-87

EFFECTIVE ON 6-12-87

DATE RULE OR AMENDMENT FILED AS AN EMERGENCY RULE: 7-22-86*

* Final filing slightly different from emergency filing

TITLE 64

WEST VIRGINIA LEGISLATIVE RULES
DEPARTMENT OF HEALTH

Methods and Standards for Chemical Test for Intoxication

Series 10

1987

WEST VIRGINIA LEGISLATIVE RULES
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Methods and Standards for Chemical Test for Intoxication

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TITLE 64

WEST VIRGINIA LEGISLATIVE RULES
DEPARTMENT OF HEALTH

Series 10
1987

Title: Methods and Standards for Chemical Test for Intoxication

Section 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 - This rule is issued under the authority of Chapter 16, Article 1, Section 7, and is related to Chapter 17C, Article 5, Section 2 et seq of the West Virginia Code.

1.3. Filing Date - June 12, 1987.

1.4. Effective Date - June 12, 1987.

1.5. 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.

Section 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 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.

Section 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 concentration 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.

Section 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 testing instruments or devices in effect at the time this rule becomes effective shall continue in effect.

Section 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.

Section 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.

Section 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:

<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
	$\frac{.010}{5} =$.002

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

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.

Section 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 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.

Section 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 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.

Section 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.

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H. B. 2574

(By Delegate Knight)
(Introduced February 4, 1987; referred to the
Committee on the Judiciary)

10 A BILL to amend and reenact section sixteen (one)(seven),
11 article two, chapter sixty-four of the code of West Virginia,
12 one thousand nine hundred thirty-one, as amended, relating to
13 authorizing the state board of health to promulgate
14 legislative rules relating to establishing methods and
15 standards for chemical tests for intoxication.

16 Be it enacted by the Legislature of West Virginia:

17 That section sixteen (one)(seven), article two, chapter
18 sixty-four of the code of West Virginia, one thousand nine
19 hundred thirty-one, as amended, be amended and reenacted to read
20 as follows:

21 ARTICLE 2. EXECUTIVE AGENCY AUTHORIZATION TO PROMULGATE
22 LEGISLATIVE RULES.

23 §64-2-16(1)(7). State board of health.

24 (a) The legislative rules filed in the state register on the
25 second day of June, one thousand nine hundred eighty-two,
26 relating to the state board of health (waste water treatment
27 works operations) are authorized.

1 (b) The legislative rules filed in the state register on the
2 second day of June, one thousand nine hundred eighty-two,
3 relating to the state board of health (laboratory reporting of
4 syphllis and gonorrhoea) are authorized.

5 (c) The legislative rules filed in the state register on the
6 second day of June, one thousand nine hundred eighty-two,
7 relating to the state board of health (public water supply
8 operators) with the modification of § 11.02 as presented to the
9 legislative rule-making review committee on the ninth day of
10 November, one thousand nine hundred eighty-two, are authorized.

11 (d) The legislative rules filed in the state register on the
12 twenty-second day of October, one thousand nine hundred eighty-
13 two, relating to the state board of health (sewage systems) with
14 the modification presented to the legislative rule-making review
15 committee on the sixth day of December, one thousand nine hundred
16 eighty-two, are authorized except lines ten through seventeen,
17 page eight of the rules shall be stricken in their entirety and
18 the remaining paragraphs renumbered. These rules were proposed
19 by the state board of health pursuant to sections seven and nine,
20 article one, chapter sixteen of this code.

21 (e) The legislative rules filed in the state register on the
22 second day of June, one thousand nine hundred eighty-two,
23 relating to the state board of health (approval of laboratories)
24 are authorized. These rules were proposed by the state board of
25 health pursuant to section one, article seven, chapter sixteen
26 and section six-a, article one, chapter forty-eight of this code.

1 (f) The legislative rules filed in the state register on the
2 thirteenth day of August, one thousand nine hundred eighty-two,
3 and filed with amendments on the eleventh day of January, one
4 thousand nine hundred eighty-three, relating to the state board
5 of health (nursing home licensure) are authorized with the
6 amendment of §5.15.02 of those rules as set forth below:

7 By striking the word "and" at the end of subdivision (f), by
8 changing the period at the end of subdivision (g) to a semicolon,
9 and by adding the following after subdivision (g): "(h) one (1)
10 member who represents social work services."

11 These rules were proposed by the state board of health
12 pursuant to section seven, article one, chapter sixteen and
13 section three, article five-c, chapter sixteen of this code.

14 (g) The legislative rules filed in the state register on the
15 third day of October, one thousand nine hundred eighty-four,
16 relating to the state board of health (trauma center or facility
17 designation) are authorized.

18 (h) The legislative rules filed in the state register on the
19 seventh day of September, one thousand nine hundred eighty-three,
20 relating to the state board of health (well water regulations)
21 are authorized with the amendments set forth below:

22 § 4.1. In the first sentence delete the word "obtaining" and
23 insert in lieu thereof the words "applying for." In the second
24 sentence after "4.3" add "and 4.5."

25 § 4.2. At the end of the second sentence, strike the period
26 and add the words "unless emergency conditions prevail as noted
27 under § 4.3."

1 With the balance of § 4.2 and create a new § 4.3 with the
2 following changes: In the first sentence delete the word
3 "deadline" and insert in lieu thereof the word "requirements."
4 Add after the first sentence the sentence, "Emergency conditions
5 and unavoidable circumstances are those conditions involving acts
6 of God, water outages or disruption of water service,
7 unsatisfactory water quality or quantity or public health
8 threats." In the third sentence delete the word "exceed" and
9 insert in lieu thereof the words "be made in excess of."

10 Renumber § 4.3 as § 4.4 and add the following two sentences
11 at the end of the section: "Such standards shall constitute the
12 minimum standards for the installation, the alteration or the
13 deepening of water wells. Any plans approved by the director
14 pursuant to these regulations shall be in substantial compliance
15 with the heretofore mentioned standards."

16 Renumber § 4.4 as § 4.5, § 4.5 as § 4.6, § 4.6 as § 4.7, § 4.7
17 as § 4.8 and § 4.8 as § 4.9.

18 § 5.2. Delete the words "four(4)" and insert in lieu thereof
19 the words "two(2)" and delete the words "active, continuous."

20 (i) The legislative rules filed in the state register on the
21 nineteenth day of December, one thousand nine hundred eighty-
22 three, relating to the state board of health (procedures for
23 recovery of corneal tissue for transplant) are authorized.

24 (j) The legislative rules filed in the state register on the
25 twenty-first day of December, one thousand nine hundred eighty-
26 four, relating to the state board of health (reportable diseases)
27 are authorized.

1 (k) The legislative rules filed in the state register on the
2 third day of October, one thousand nine hundred eighty-four,
3 relating to the state board of health (retail food store
4 sanitation) are authorized.

5 (l) The legislative rules filed in the state register on the
6 seventeenth day of July, one thousand nine hundred eighty-six,
7 modified by the state board of health to meet the objections of
8 the legislative rule-making review committee and refiled in the
9 state register on the sixteenth day of October, one thousand nine
10 hundred eighty-six, relating to the state board of health
11 (methods and standards for chemical tests for intoxication) are
12 authorized.

13

14 NOTE: The purpose of this bill is to authorize the State
15 Board of Health to promulgate legislative rules relating to
16 establishing methods and standards for chemical tests for
17 intoxication.

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19 Strike-throughs indicate language that would be stricken from
20 the present law, and underscoring indicates new language that
21 would be added.

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Senate Bill No. 335

(By Senator Tucker)

[Introduced February 4, 1987; referred to the Committee
on _____ ; then to the
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6 second day of June, one thousand nine hundred eighty-two,
7 relating to the state board of health (public water supply
8 operators) with the modification of § 11.02 as presented to the
9 legislative rule-making review committee on the ninth day of
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11 (d) The legislative rules filed in the state register on the
12 twenty-second day of October, one thousand nine hundred eighty-
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6 amendment of §5.15.02 of those rules as set forth below:

7 By striking the word "and" at the end of subdivision (f), by
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10 Renumber § 4.3 as § 4.4 and add the following two sentences
11 at the end of the section: "Such standards shall constitute the
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13 deepening of water wells. Any plans approved by the director
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16 Renumber § 4.4 as § 4.5, § 4.5 as § 4.6, § 4.6 as § 4.7, § 4.7
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