

John D. Rockefeller IV
Governor



L. Clark Hansbarger, M.D.
Director

State of West Virginia

DEPARTMENT OF HEALTH

CHARLESTON 25305

NOTICE OF PUBLIC HEARING

FILED IN THE OFFICE OF
A. JAMES MANCHIN
SECRETARY OF STATE
THIS DATE 12-16-81
Administrative Law Division

Pursuant to Section eight, Article three, Chapter twenty-nine-A of the Code of West Virginia, one thousand nine hundred thirty-one, as amended, the Regulatory Services Program of the West Virginia Department of Health shall convene a public hearing at 10:00 A.M. on Thursday, February 18, 1982 in Conference Room 522, Building 3, West Virginia Department of Health, 1800 Washington Street, East, Charleston, West Virginia for the purpose of taking evidence pertaining to the filing of proposed Regulations for Methods and Standards Relating to Implied Consent for Chemical Test for Intoxication, Chapter 16-1, Series X (1981).

Any citizen or other interested party may appear in person to present evidence. Any citizen or other interested party may submit written evidence to the West Virginia Department of Health, Regulatory Services Program, Room 416, 1800 Washington Street, East, Charleston, West Virginia 25305 not later than 5:00 P.M. Thursday, February 18, 1982.

The issues to be heard shall be limited to the actual information contained in the above mentioned regulations. Copies of the regulations may be obtained from the Regulatory Services Program, address heretofore appearing or by telephoning 304-348-2411.

L. Clark Hansbarger, M.D.
Director

Entered December 15, 1981

FILED IN THE OFFICE OF
A. JAMES MANCHIN
SECRETARY OF STATE
THIS DATE _____
1981

PROPOSED

WEST VIRGINIA ADMINISTRATIVE REGULATIONS
BOARD OF HEALTH

Methods and Standards Relating to Implied Consent for
Chemical Test For Intoxication

Chapter 16-1
Series X
(1981)

November, 1981

For Public Hearing February 18, 1982

Methods and Standards Relating to Implied Consent for
Chemical Test for Intoxication

Chapter 16-1
Series X
(1981)

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WEST VIRGINIA ADMINISTRATIVE REGULATIONS
BOARD OF HEALTH

Chapter 16-1
Series X
(1981)

Subject: Methods and Standards Relating to Implied Consent for Chemical Test for Intoxication

Section 1. General

1.01. Scope - These regulations establish 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 of 1931, as amended.

1.02. Authority - These regulations are issued under the authority of Chapter 16, Article 1, Section 7(6), of the West Virginia Code of 1931, as amended and as required by Chapter 17C, Article 5, Sections 5 and 8 of the West Virginia Code of 1931, as amended.

1.03. Filing Date - These regulations are promulgated on the _____ day of _____, 1981 and are filed on the _____ day of _____, 1981 in the Secretary of State's office.

1.04. Effective Date - These regulations become effective on the _____ day of _____, 1981.

Section 2. Supersession and Repeal of Former Regulations - These regulations supersede and repeal State Department of Health, Chapter 16-1, Series VI (1968) entitled, Methods Standards Relating to Chemical Test for Blood Alcohol Consent Law effective July 1, 1975.

Section 3. Application and Enforcement

3.01. These regulations shall apply to law enforcement officers herein defined and shall be limited to a member of the department of public

safety; any sheriff or deputy sheriff of any county; or a member of a municipal police department in any Class I, Class II, or Class III city and those persons suspected to be driving a motor vehicle while intoxicated as hereinafter defined. The classification of municipal corporations shall be in accordance with the provisions of Chapter 8, Article 1, Section 3, of the West Virginia Code of 1931, as amended.

3.02. The enforcement of these regulations is vested with the director of the West Virginia department of health or his lawful designee.

Section 4. Designation of Testing Device - Compliance with Methods and Standards Required - Preliminary Breath Analysis

4.01. Each law enforcement agency shall designate a testing device for the purpose of administering a preliminary breath analysis pursuant to Chapter 17C, Article 5, Section 5 of the West Virginia Code of 1931, as amended. Such designation of testing device shall be filed with the West Virginia department of health in a format prescribed by the department.

4.02. Each law enforcement agency shall comply with the methods and the standards established by these regulations.

4.03. The West Virginia department of health shall maintain a registry of approved testing devices

Section 5. Breath Analysis - Preliminary Breath Test - Standards and Methods

5.01. Instruments utilized for preliminary breath tests shall meet the following standards:

(a). The instrument and any related accessories shall be capable of the collection and the analysis of breath specimens which are essentially alveolar in composition.

(b). The instrument shall be capable of the analysis of a reference sample of known alcohol concentration within accuracy and precision limits of plus or minus 0.02 grams percent of the true value of such reference sample. These limits shall be applied to alcohol concentrations which are 0.01 grams percent or higher. The instrument shall be calibrated at least once a month to insure accuracy. Each law enforcement agency shall maintain a record of such calibration including the type of test employed, the date and the time of such calibration.

(c) The 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 the same time as a breath sample.

(d) The instrument shall be capable of breath alcohol analysis which results in a concentration less than 0.01 grams of alcohol per one hundred (100) milliliters of blood when alcohol free persons are tested.

(e) Any instrument utilized for the purpose of preliminary breath analysis shall be approved in writing by the West Virginia department of health. Such instrument shall meet or exceed the standards contained herein.

5.02. 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 has a reasonable belief that the person has been driving while under the influence of alcohol.

(b) The law enforcement officer conducting the preliminary breath test shall utilize an individually wrapped sterile mouthpiece for each person tested.

(c) The preliminary breath test shall be administered by a qualified law enforcement officer. Such qualification shall include as a minimum the completion of a two (2) hour course embracing the legal aspects of breath testing, the theoretical and the practical aspects of breath testing, and actual practical use of the testing device.

5.03. 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

6.01. Each law enforcement agency as defined herein 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 on the public streets or highways of this state while under the influence of alcohol. Such designation of the test shall be filed with the West Virginia department of health in a format prescribed by the department.

6.02. Each law enforcement agency shall comply with the methods and the standards established by these regulations.

6.03. The West Virginia department of health shall maintain a registry of approved tests for administration inclusive of methods and standards for proper conduct of the tests.

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

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

6.06. 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.

6.07. Each law enforcement officer desiring certification to administer the secondary breath analysis shall apply to the West Virginia department of health in a format prescribed by the department.

Section 7. Breath Analysis - Secondary Breath Test - Standards and Methods

7.01. 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 are essentially alveolar in composition.

(b) The designated instrument shall be capable of analyzing a blank sample and of analyzing a suitable reference sample, 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 reference of known alcohol concentration within accuracy and precision limits of plus or minus 0.01 grams per centum 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 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 (100) milliliters of blood when alcohol free persons are tested.

(f) The designated instrument shall be periodically calibrated pursuant to the standards of these regulations and the manufacturer's recommended calibration schedule.

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

7.02. Methods - The following general methods shall apply in extracting breath for secondary breath analysis.

(a) The law enforcement officer effectuating the arrest shall observe the individual for twenty (20) minutes before administering the test to insure that the individual has nothing in his mouth at the time of the test and that he has had no food or drink or foreign matter in his mouth during the observation period.

(b) The individual administering the test shall examine the designated instrument to insure that it 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 these regulations.

(d) The law enforcement officer conducting the secondary breath test shall utilize an individually wrapped sterile mouthpiece for each person tested.

Section 8. Blood Analysis - Standards and Methods

8.01. 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 centum of the true value. These limits shall be applied to alcohol concentrations which are 0.01 grams per centum 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 (100) milliliters of blood when alcohol free persons are tested.

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

8.02. The methods of extracting blood for alcohol analysis shall be as follows:

(a) The blood shall be drawn 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 capable of extracting ten (10) milliliters of blood shall be used. Sterile disposable units are recommended.

(c) The skin shall not be disinfected with alcohol. The use of 1-1000 aqueous solution of mercuric chloride, aqueous benzalkonium chloride (zephiran), aqueous merthiolate, or other suitable aqueous disinfectants are acceptable.

(d) The container (tube or vial) must be clean and dry, and have an inert, airtight stopper and hold at least ten (10) milliliters.

(e) An anti-coagulant, such as sodium fluoride citrate, or oxalate shall be used.

Section 9. Urine Analysis - Methods and Standards

9.01. 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.

(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 (100) 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.

9.02. The methods of extracting urine for alcohol analysis shall be as follows:

(a) The container must be clean and dry and have an inert airtight stopper and hold at least ten (10) milliliters.

(b) The individual shall empty his urinary bladder and discard the first specimen.

(c) The law enforcement officer effectuating the arrest shall personally observe the individual for twenty (20) minutes before the specimen for alcohol analysis is taken to insure that the individual has nothing in his mouth at the time that the specimen is taken and that he has no food or drink or other foreign matter in his mouth during the observation period.

(d) Following the twenty (20) minute observation period the individual shall void a sample of his urine in the container provided.

Section 10. Severability - If any provisions of these regulations or the application thereof to any person or circumstance shall be held invalid, such invalidity thereof shall not affect the provisions or application of these regulations which can be given effect without the invalid provisions or application and to this end the provisions of these regulations are declared to be severable.

PROPOSED

WEST VIRGINIA ADMINISTRATIVE REGULATIONS
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Chapter 16-1
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Section 3. Application and Enforcement

3.01. These regulations shall apply to law enforcement officers herein defined and shall be limited to a member of the department of public

safety; any sheriff or deputy sheriff of any county; or a member of a municipal police department in any Class I, Class II, or Class III city and those persons suspected to be driving a motor vehicle while intoxicated as hereinafter defined. The classification of municipal corporations shall be in accordance with the provisions of Chapter 8, Article 1, Section 3, of the West Virginia Code of 1931, as amended.

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5.01. Instruments utilized for preliminary breath tests shall meet the following standards:

(a). The instrument and any related accessories shall be capable of the collection and the analysis of breath specimens which are essentially alveolar in composition.

(b). The instrument shall be capable of the analysis of a reference sample of known alcohol concentration within accuracy and precision limits of plus or minus 0.02 grams percent of the true value of such reference sample. These limits shall be applied to alcohol concentrations which are 0.01 grams percent or higher. The instrument shall be calibrated at least once a month to insure accuracy. Each law enforcement agency shall maintain a record of such calibration including the type of test employed, the date and the time of such calibration.

(c) The 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 the same time as a breath sample.

(d) The instrument shall be capable of breath alcohol analysis which results in a concentration less than 0.01 grams of alcohol per one hundred (100) milliliters of blood when alcohol free persons are tested.

(e) Any instrument utilized for the purpose of preliminary breath analysis shall be approved in writing by the West Virginia department of health. Such instrument shall meet or exceed the standards contained herein.

5.02. 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 has a reasonable belief that the person has been driving while under the influence of alcohol.

(b) The law enforcement officer conducting the preliminary breath test shall utilize an individually wrapped sterile mouthpiece for each person tested.

(c) The preliminary breath test shall be administered by a qualified law enforcement officer. Such qualification shall include as a minimum the completion of a two (2) hour course embracing the legal aspects of breath testing, the theoretical and the practical aspects of breath testing, and actual practical use of the testing device.

5.03. 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

6.01. Each law enforcement agency as defined herein 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 on the public streets or highways of this state while under the influence of alcohol. Such designation of the test shall be filed with the West Virginia department of health in a format prescribed by the department.

6.02. Each law enforcement agency shall comply with the methods and the standards established by these regulations.

6.03. The West Virginia department of health shall maintain a registry of approved tests for administration inclusive of methods and standards for proper conduct of the tests.

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

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

6.06. 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.

6.07. Each law enforcement officer desiring certification to administer the secondary breath analysis shall apply to the West Virginia department of health in a format prescribed by the department.

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(b) The designated instrument shall be capable of analyzing a blank sample and of analyzing a suitable reference sample, 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 reference of known alcohol concentration within accuracy and precision limits of plus or minus 0.01 grams per centum 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 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 (100) milliliters of blood when alcohol free persons are tested.

(f) The designated instrument shall be periodically calibrated pursuant to the standards of these regulations and the manufacturer's recommended calibration schedule.

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

7.02. Methods - The following general methods shall apply in extracting breath for secondary breath analysis.

(a) The law enforcement officer effectuating the arrest shall observe the individual for twenty (20) minutes before administering the test to insure that the individual has nothing in his mouth at the time of the test and that he has had no food or drink or foreign matter in his mouth during the observation period.

(b) The individual administering the test shall examine the designated instrument to insure that it 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 these regulations.

(d) The law enforcement officer conducting the secondary breath test shall utilize an individually wrapped sterile mouthpiece for each person tested.

Section 8. Blood Analysis - Standards and Methods

8.01. 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 centum of the true value. These limits shall be applied to alcohol concentrations which are 0.01 grams per centum 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 (100) milliliters of blood when alcohol free persons are tested.

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

8.02. The methods of extracting blood for alcohol analysis shall be as follows:

(a) The blood shall be drawn 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 capable of extracting ten (10) milliliters of blood shall be used. Sterile disposable units are recommended.

(c) The skin shall not be disinfected with alcohol. The use of 1-1000 aqueous solution of mercuric chloride, aqueous benzalkonium chloride (zephiran), aqueous merthiolate, or other suitable aqueous disinfectants are acceptable.

(d) The container (tube or vial) must be clean and dry, and have an inert, airtight stopper and hold at least ten (10) milliliters.

(e) An anti-coagulant, such as sodium fluoride citrate, or oxalate shall be used.

Section 9. Urine Analysis - Methods and Standards

9.01. 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.

(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 (100) 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.

9.02. The methods of extracting urine for alcohol analysis shall be as follows:

(a) The container must be clean and dry and have an inert airtight stopper and hold at least ten (10) milliliters.

(b) The individual shall empty his urinary bladder and discard the first specimen.

(c) The law enforcement officer effectuating the arrest shall personally observe the individual for twenty (20) minutes before the specimen for alcohol analysis is taken to insure that the individual has nothing in his mouth at the time that the specimen is taken and that he has no food or drink or other foreign matter in his mouth during the observation period.

(d) Following the twenty (20) minute observation period the individual shall void a sample of his urine in the container provided.

Section 10. Severability - If any provisions of these regulations or the application thereof to any person or circumstance shall be held invalid, such invalidity thereof shall not affect the provisions or application of these regulations which can be given effect without the invalid provisions or application and to this end the provisions of these regulations are declared to be severable.