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DEPARTMENT OF STATE POLICE

Forensic Science Division

Administrative Rules for Tests for Breath Alcohol

Rule Set 2022-34 SP

NOTICE OF PUBLIC HEARING

Tuesday, March 14, 2023

1:00 PM

Centennial Room

Michigan State Police Headquarters

7150 Harris Drive, Dimondale, Michigan 48221



Public hearing held in the above-entitled matter, on
Tuesday, March 14, 2023, at the Michigan State Police
Headquarters, 7150 Harris Drive, Dimondale, Michigan, at
1:00 p.m.

APPEARANCES:

MR. STEVEN G. BEATTY, P54756
Michigan State Police
PO Box 30634
Lansing, Michigan 48909
(517) 284-3236

1 Dimondale, Michigan

2 Tuesday, March 14, 2023

3 1:00 p.m.

4 R E C O R D

5 MR. BEATTY: This is the public hearing on
6 proposed administrative rules titled, "Tests for Breath
7 Alcohol." This hearing is being conducted pursuant to
8 provisions of Public Act 327 of 1945 and Public Act 300
9 of 1949 on behalf of the Michigan Department of State
10 Police, Forensic Science Division.

11 This hearing is being called to order at 1:00
12 p.m., on Tuesday, March 14, 2023, at Michigan State Police
13 Headquarters located in Dimondale, Michigan.

14 Notice of this hearing was published in three
15 newspapers of general circulation as required under MCL
16 691.1051, as well as the Michigan Register, Issue #3-2023
17 published on March 1, 2023.

18 This notice was also made available through the
19 newspapers' websites, the Michigan Public Notices website,
20 the Michigan State Police Public Meetings website, and was
21 posted on the MSP Public Notice board outside of MSP
22 Headquarters.

23 My name is Steven Beatty, and I will be
24 facilitating the hearing today. We are here today to
25 receive your comments on the proposed rules. If you wish

1 to speak, please make sure you have signed in and
2 indicated your willingness to speak.

3 We will call on speakers in the order in which
4 names are listed on the sign-in sheets. When you come
5 forward to speak, please identify yourself with your name
6 and the organization you represent, so that this
7 information may be transcribed in the hearing report.

8 If you have additional comments to submit in
9 writing, you may leave them at the registration desk.

10 There are no people present wishing to speak at
11 this time. We will take a recess.

12 (Recess taken at 1:04 p.m.)

13 (Hearing resumed at 1:05 p.m.)

14 MR. BEATTY: We are back on the record today to
15 receive comments on the proposed rules related to, "Tests
16 for Breath Alcohol." If you wish -- wish to speak,
17 please make sure you have signed in and indicated your
18 willingness to speak.

19 We will call on speakers in the order in which
20 the names are listed on the sign-in sheets. When you
21 come forward, please identify yourself with your name and
22 the organization you represent, so that this information
23 may be transcribed in the hearing report.

24 If you have additional comments to submit in
25 writing, you may leave them at the registration desk.

1 MR. MARTINEZ: Thank you, all, for the
2 opportunity. My name is Aaron Martinez. I am here on
3 behalf of the Nichols Law Firm speaking on my own behalf
4 and on behalf of Mike Nichols and the attorneys at our
5 office.

6 We've had an opportunity to look at the breath
7 alcohol rules, the proposed rules. I won't belabor it
8 because Mr. Nichols did submit his comments in writing
9 today, but a few points that we just wanted to bring up.

10 Number one, this instrument that the department
11 is -- is considering, the Intox 9000, we've learned from
12 other jurisdictions that the instrument has the
13 capability to have the histograms printed on the subject
14 sample tickets.

15 And we would just put forth that -- that we
16 think it's probably a good practice to -- to mandate that
17 those be included. It helps the officers who are
18 administering the tests to know that they are properly
19 being -- or that the sample is properly received by the
20 machine, and as well as provides an opportunity if there
21 is an -- an issue, for the subject to give another sample
22 if need be.

23 And secondly, just to note on calibration, we
24 were a little bit concerned that the -- the timeline
25 seems to be a little bit longer with this particular

1 machine.

2 We had concerns a few years ago about the --
3 the calibrations obviously, that were happening with the
4 DataMaster machines throughout the state, and -- and we
5 think everybody is in a position where we want to avoid
6 any more of those types of controversies.

7 So, we would just simply ask that the
8 calibration happen more frequently and -- rather than
9 less frequently as it seems that the -- the current rule
10 as they are right now would mandate.

11 So, those would just be my comments and we
12 would rely on Mr. Nichols' submitted comments as well.

13 MR. BEATTY: So, if I could ask -- and you
14 don't have to answer my question, but we want to make
15 sure. The record is open until 5:00 today. Are you
16 aware if Mr. Nichols emailed those to the
17 MSPForensics@Michigan.gov --

18 MR. MARTINEZ: Yes.

19 MR. BEATTY: -- or if he mailed them?

20 MR. MARTINEZ: Yeah, he emailed them, I
21 believe, probably around 11:30 this morning.

22 MR. BEATTY: Okay. So, we will look out for
23 those and make sure they came -- they come in. And I
24 don't know if there is a way to check that before, but
25 we'll -- we'll -- we'll keep an eye out for those.

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MR. MARTINEZ: Great. Well, we appreciate the opportunity, and thanks for holding the hearing.

MR. BEATTY: No -- no problem. Thank you very much. You have a good day.

MR. MARTINEZ: You as well. Thank you.

MR. BEATTY: If there are no other people present wishing to speak at this time, we will take a recess.

(Recess taken at 1:07 p.m.)

(Hearing resumed at 1:32 p.m.)

MR. BEATTY: We're back on the record. If there are no further comments at this time, I hereby declare this hearing and record to be closed. Today is 12 -- or 1:30 p.m.

(Hearing concluded at 1:32 p.m.)

1 STATE OF MICHIGAN)

2) Ss

3 COUNTY OF GRATIOT)

4

5

6 I certify that I am a Certified Shorthand Reporter doing
7 business in the State of Michigan; that I reported in
8 shorthand the proceedings of said meeting, and the foregoing
9 transcript, consisting of 7 pages, is a true and correct
10 transcript of my shorthand notes so taken as aforesaid and
11 contains the audible proceedings had at said meeting held on
12 Tuesday, March 14, 2023.

13

14

15

16

Shelly M. Nowak

Shelly M. Nowak, CSR-5976

17

Notary Public

18

Gratiot County, Michigan

19

Commission Expires: 10-13-2024

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@Michigan.gov

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Department of State Police
Forensic Science Division
Administrative Rules for Tests for Breath Alcohol
Rule Set 2022-34 SP

NOTICE OF PUBLIC HEARING

Tuesday, March 14, 2023
01:00 PM

Centennial Room

Michigan State Police Headquarters, 7150 Harris Drive, Dimondale, MI 48221

The Department of State Police will hold a public hearing to receive public comments on proposed changes to the Tests for Breath Alcohol rule set.

The proposed rules are changes to existing rules that have accompanied the current evidential breath alcohol test instrument since the adoption, purchase, and installation of those instruments. The State of Michigan is purchasing new instruments with additional technology, features, and expanded capabilities and will need to amend the existing rules to accommodate both the technology and new features. The amendments to the rules also apply to training users and technicians on the operation of the new instrument.

The rules are promulgated by the authority conferred on the Department of State Police by PA 300 of 1949, MCL 257.625a. These rules will take effect immediately after filing with the Secretary of State.

The proposed rules will take effect immediately after filing with the Secretary of State. The proposed rules are published on the State of Michigan's website at www.michigan.gov/ARD and in the 3/1/2023 issue of the Michigan Register. Copies of these proposed rules may also be obtained by mail or electronic mail at the following email address: mspforensics@Michigan.gov.

Comments on these proposed rules may be made at the hearing, by mail, or by electronic mail at the following addresses until 3/14/2023 at 05:00PM.

Michigan State Police, Forensic Science Division, 7150 Harris Drive, Dimondale, MI 48221

Michigan State Police, Forensic Science Division, 7150 Harris Drive, Dimondale, MI 48221

mspforensics@Michigan.gov

The public hearing will be conducted in compliance with the 1990 Americans with Disabilities Act. If the hearing is held at a physical location, the building will be accessible with handicap parking available. Anyone needing assistance to take part in the hearing due to disability may call 517-281-6660 to make arrangements.

ADMINISTRATIVE RULES PUBLIC HEARING SIGN-IN SHEET

The information reported on this sign-in sheet will be used solely for the purposes of compliance with The Administrative Procedures Act, Public Act 206 of 1969, MCL 24.201, et seq. The Act requires the Department of State Police to report public comments received during a hearing to the Michigan legislature's Joint Committee on Administrative Rules. Information on this sign-in sheet will be used only for that purpose and will not be maintained in any database, file, or department report unrelated to the requirements of the Act.

Rule Set Number 2022-34 SP	Rule Set Title Tests for Breath Alcohol
Hearing Date March 14, 2023	Hearing Location MSP Headquarters - Centennial Room

Name <i>Aaron Martinez</i>			Organization <i>Nichols Law</i>		Do you wish to testify today? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No
Street <i>3452 E. Lake Lansing</i>	City <i>E. Lansing</i>	Zip Code <i>48823</i>	Telephone Number <i>517-432-9000</i>		

Name			Organization		Do you wish to testify today? <input type="checkbox"/> Yes <input type="checkbox"/> No
Street	City	Zip Code	Telephone Number		

Name			Organization		Do you wish to testify today? <input type="checkbox"/> Yes <input type="checkbox"/> No
Street	City	Zip Code	Telephone Number		

Name			Organization		Do you wish to testify today? <input type="checkbox"/> Yes <input type="checkbox"/> No
Street	City	Zip Code	Telephone Number		

Name			Organization		Do you wish to testify today? <input type="checkbox"/> Yes <input type="checkbox"/> No
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Name			Organization		Do you wish to testify today? <input type="checkbox"/> Yes <input type="checkbox"/> No
Street	City	Zip Code	Telephone Number		

Name			Organization		Do you wish to testify today? <input type="checkbox"/> Yes <input type="checkbox"/> No
Street	City	Zip Code	Telephone Number		

Beatty, Steven (MSP)

From: MSPForensics
Sent: Tuesday, March 14, 2023 1:22 PM
To: Beatty, Steven (MSP)
Subject: Fwd: Comments on proposed rules
Attachments: Intox 9000 Proposed Rules MJN.pdf

From: Mike Nichols <mnichols@nicholslaw.net>
Sent: Tuesday, March 14, 2023 11:32:28 AM
To: MSPForensics <MSPForensics@michigan.gov>
Cc: Aaron Martinez <amartinez@nicholslaw.net>; Cindy Kramer <ckramer@nicholslaw.net>
Subject: Comments on proposed rules

CAUTION: This is an External email. Please send suspicious emails to abuse@michigan.gov

Please see attached. Thanks!

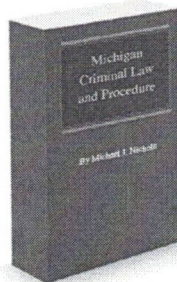


Committed to Results

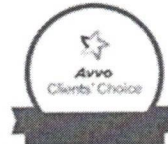


Michael J. Nichols

www.nicholslawyers.com
3452 East Lake Lansing Road
East Lansing MI 48823
517 432 9000



Author: Michigan OWI Manual for West Publications since 2009
Chair: National College DUI Defense Forensic Science Task Force
NCDD Faculty Member
Rules & Laws Committee: Criminal Defense Attorneys of Michigan
American Academy of Forensic Sciences Associate Member
National Association of Criminal Defense Lawyers (NACDL)



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My name is Mike Nichols.

I make these comments and suggestions on my own behalf. For purposes of introduction, I have been practicing law for over 23 years. For the last 15 years I have devoted a substantial amount of my practice to the law and science of Operating While Intoxicated (OWI). I have taught as an adjunct professor of Forensic Science in Criminal Law as well as DUI Law and Practice at WMU Cooley Law School.

I am a member of the Criminal Defense Attorneys of Michigan and serve on the Rules and Laws Committee. I am the co-chair of the Task Force for Forensic Evidence for the National College for DUI Defense and I am a sustaining member of the NCDD and also a faculty member.

With respect to the proposed rules:

General:

- The rules should require that every instrument print the breath alcohol histogram and a flow chart with every subject sample. The point is to assess the flow rate and alcohol curve as a function of time of each and every subject sample. The instrument has this capability. It is vital in order to ascertain if the instrument accepted a sample of breath alcohol when the parameters of volume, flow rate and alcohol curve did not indicate a proper sample. This data also helps ascertain if some other interferent may have been present. Failing to provide this to individuals is tantamount to hiding evidence.

325.2653(2) and (3):

- It is not very clear to my reading, but the 120 calibration checks and weekly accuracy checks should be required whether an air blank is generated during the subject test sequence or not. We are 3 years removed from a complete failure of our breath alcohol measurement system because calibrations were purportedly completed in a fraudulent manner. If I read these proposed sub-rules correctly, a scenario under which no 120 day calibration inspections or weekly accuracy checks are required at all is permissible under these rules. That creates a very high risk of instrument failures without either law enforcement, tested subjects or the criminal justice community to realize an instrument is failing or unreliable.

325.2654:

- This sub-rule appears to be rescinded. It should not be rescinded because it requires that if an instrument is repaired, it must undergo a certification inspection and be verified for accuracy in accordance with a 120 day calibration inspection process.

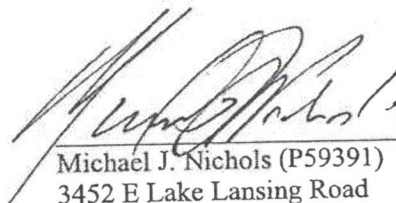
General

- Defense attorneys should have the right under the rules to inspect the instrument at the agency with an expert witness so long as the attorney and expert are accompanied by an employee of the police department. Please write this process into the rule.

Thank you for considering the above.

Date

March 13, 2023



Michael J. Nichols (P59391)
3452 E Lake Lansing Road
East Lansing, MI 48823
517-432 9000
mnichols@nicholslaw.net